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C.R.P.(PD).No.3555 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.08.2024

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THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD).No.3555 of 2023
and C.M.P.No.22260 of 2023

K.Rajasekar

... Petitioner

-Versus-

S.Kanagasabapathy

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order of dismissal to condone the delay of 734 days in I.A.No.6 of 2022 in O.S.No.3791 of 2018 dated 27.07.2023 passed by the learned XV Assistant City Civil Judge, Chennai.

For the Petitioner : Mr.R.Thanigaiarasu

For the Respondent : Mr.G.B.Sabaridass

ORDER

This Civil Revision Petition arises against the order passed by the learned XV Assistant Judge, City Civil Court, Chennai in I.A.No.6 of 2022 in O.S.No.3791 of 2018 dated 27.07.2023.



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2. The sole defendant is the Civil Revision Petitioner. The plaintiff and the defendant had entered into a mortgage transaction on 18.07.2012. On the strength of the mortgage, a sum of Rs.4 Lakhs had been paid by the plaintiff to the defendant. As security for the said mortgage, the defendant handed over the documents of title of the suit schedule mentioned property. As the defendant defaulted in payment of interest, the plaintiff issued a notice on 11.04.2015. Thereafter, pleading the defendant had left without notice from his address at Saligramam, the plaintiff came forward with the present suit.

3. Summons were issued in the suit to the defendant. The defendant was served with the summons and did not put in his defence. Therefore, the learned Trial Judge proceeded to pass an *ex parte* decree on 19.12.2018.

4. To set aside this *ex parte* decree, applications were taken in I.A.No.6 of 2022 and I.A.No.7 of 2022. Although the delay was more than 1449 days, taking advantage of the Judgment of the Supreme Court, suspending limitation in so far as the Covid – 19 period is concerned, an application was filed to condone the delay of 734 days alone.



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5. The defendant would plead that his second son is suffers from mental retardation and locomotive disability and he had to run around to take care of his son. He would further plead that he had shifted his address from Vadapalani to Erukkancheri and therefore, he was not in a position to defend the suit. He would state that being an Auto driver, he makes Rs.4,000/- per month and with great difficulty, he was servicing the interest under the mortgage.

6. Per contra, the plaintiff would plead that the defendant was aware of the proceedings and he deliberately kept away from Court. He would state that an Advocate Commissioner who was appointed by the Court also visited the property and served the notice at the time of inspection on the defendant's wife, who was available in the premises. He would plead that no reason had been given for condonation of delay of 734 days and therefore, prayed for dismissal of the application.

7. The learned Judge, came to the conclusion that no sufficient cause had been made out and therefore, dismissed the application to condone the delay as well as the set aside petition. Hence this Revision.



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8. Mr.G.B.Sabaridass would submit that by a common order dated 27.07.2023, the application filed under Section 5 of the Limitation act as well as an application under Order IX Rule 13 were dismissed. He would plead that the revision has been filed only against the condonation of delay and not as against the setting aside the *ex parte* decree and therefore, this revision is not maintainable.

9. An order passed under Section 5 of the Limitation Act is revisable, whereas an order passed under Order IX Rule 13 against the defendant is appealable under Order XXXIII. Before the Court can lay its hands on an application under Order IX Rule 13, it has to decide the application under Section 5.

10. Unfortunately, in this case, the learned XIV Assistant Judge, seems to have numbered both Section 5 and Order IX Rule 13 applications together. Such a procedure is unknown. The numbering of Order IX Rule 13 application is dependant on the order that has been passed in the application filed under Section 5 of the Limitation Act. In the normal course of events, the Court should not even number the application for Order IX Rule 13. If the delay is



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condoned, thereafter, the Court should have taken up the application under

Order IX Rule 13. It is only on condonation of delay, the Court would have the opportunity to deal with the merits of the application to set aside the exparte decree. However, the Court below has proceeded to pass a common order. The numbering of Order IX Rule 13 is “dependant” on an order passed under Section 5 of the Limitation Act. Therefore, the submission of Mr.Sabaridass, that since no appeal has been preferred on the dismissal of the petition under Order IX Rule 13, this Civil Revision Petition is barred and is not acceptable to me. If this argument is accepted it could lead to incongruous situation that this Court could dismiss the petition under Section 5 of the Limitation Act and the lower Appellate Court can allow the appeal setting aside the Order IX Rule 13. It will only add confusion in the litigation. Therefore, the argument of Mr.Sabaridass on maintainability is rejected.

11. In so far as the merits of the case, it is not disputed that the defendant is an Auto driver and is having a son who is mentally retarded. A certificate has been issued by the S.R.T.C. Commissionerate for the welfare of the Differently Abled, certifying that the retardation is permanent and that the degree of retardation is above 50 %. A father, who has a special child would obviously



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been interested in taking care of the child rather than rushing to the Court, to defend suit that has been presented against him. The Court below could have considered the fact that the defendant had been attending to his son and taken a slightly liberal approach. However, I cannot be insensitive to the fact that the plaintiff had advanced a sum of Rs.4 lakhs in a case of admitted mortgage. He has been knocking on the doors of the Court for more than six years and has not seen the colour of the coin. Therefore, to balance the interest of both the parties, I am inclined to pass the following order,

(i) The order passed by the Court below in I.A.No.6 of 2022 in O.S.No.3791 of 2018 dated 27.07.2023 is set aside;

(ii) The petition shall stand allowed, on the condition that the Civil Revision Petitioner deposits a sum of Rs.10 lakhs to the credit of the O.S.No.3791 of 2018 within a period of 12 weeks from today, i.e., on or before 20.11.2024.

(iii) On such confirmation of deposit that has been made by the defendant, the learned XV Assistant Judge, City Civil Court, Chennai, shall set aside the *ex parte* decree passed on 19.12.2018;

(iv) in case, the deposit is made, the plaintiff is entitled to withdraw a sum of Rs.5 Lakhs, by filing a necessary application before the Court below;



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(v) in case, the defendant does not deposit the amount, this Civil Revision Petition stands automatically dismissed, without further reference to this Court.

12. In the result, this Civil Revision Petition stands allowed. No costs. Consequently, the connected miscellaneous petition is closed.

20.08.2024

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Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No
Speaking / Non Speaking Order

To

The XV Assistant Judge, City Civil Court, Chennai.



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V.LAKSHMINARAYANAN, J.,

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