



C.R.P. No. 4261 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.07.2024

CORAM

THE HONOURABLE Mr. JUSTICE P.DHANABAL

C.R.P. No. 4261 of 2022

and

C.M.P. No. 22369 of 2022

1. Munuswamy

2. Kasthuri

... Petitioners / Petitioners / Defendants

Vs.

B.Harilal

... Respondent / Respondent / Plaintiff

PRAYER: Civil Revision Petition is filed under section 227 of the Constitution of India, to set aside the Fair and Decretal Order dated 01.08.2022 made in I.A. No. 1 of 2021 in O.S. No. 5183 of 2021 passed by the XIX Assistant City Civil Court at Chennai.

For Petitioners : Mr. M.Ravi Bharathi

For Respondent : Mr. K.Chandrasekaran

ORDER

This Civil Revision Petition has been preferred as against the order passed in I.A. No. 1 of 2021 in O.S. No. 5183 of 2021 on the file of the XIX



Assistant City Civil Court at Chennai, wherein the petitioners herein have filed the petition before the Trial Court seeking leave to defend the suit and the same was dismissed. Against which, the present Civil Revision Petition is filed.

2. The petitioners are the defendants in the suit and the respondent herein has filed the suit for recovery of money before the Trial Court as a summary procedure suit, wherein the petitioners have filed petition seeking leave to defend the suit. The respondent-plaintiff, on 30.07.2006, approached the 1st petitioner herein to start the business in the name of M/s. Maha Yoga, for which he needed a commercial place for rent. He also agreed to rent out his first floor building for an amount of Rs. 17,100/- per month and advance amount of Rs. 2,50,000/-. After 11 months, the respondent-plaintiff again wanted to renew the rental agreement and it was orally extended for another 11 months. Thereafter, there was a misunderstanding between them. The matter went up to police station and there the petitioners returned the advance amount and the respondent-plaintiff agreed to vacate the premises. The petitioners never executed any promissory note in favour of the respondent-plaintiff. The alleged pro-note is forged. The documents filed by the respondent are all forged. The petitioners have got valuable defence in the suit



to contest on merits and several triable issues arise for consideration before the Court. The respondent conveniently suppressed the relationship between him and the petitioners/defendants as tenant and landlord. But the Trial Court dismissed the petition.

3. According to the respondent, the petitioners borrowed a sum of Rs. 3,50,000/- as a loan and executed a promissory note and agreed to pay the interest of 18% per annum and thereafter they did not repay the amount and thereby issued legal notice dated 20.11.2019 and the same was received by the petitioners-defendants, but they failed to pay the amount, thereby he filed suit. Before the Trial Court, the petitioners filed petition for leave to defend the case and the same was dismissed for lack of triable issues.

4. Before the Trial Court, no oral or documentary evidences were adduced by either side. The Trial Court after hearing both sides, dismissed the petition.

5. The learned counsel appearing for the petitioners would contend that the respondent herein has filed a suit as against these petitioners for recovery of money based on the promissory note, but the petitioners never executed any



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such promissory note. They filed petition before the Trial Court under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908, seeking leave to defend the suit and the same was dismissed. In fact, the respondent has not served proper summon and the summon does not disclose about the provisions under Order XXXVII and the summon was not served under App.B. Form No. 4 of the Code of Civil Procedure, 1908, but only ordinary summon was served. Since the petitioners denied the execution of pro-note, the Trial Court ought to have allowed the petition. The respondent suppressed that there is a dispute between them in respect of vacating the premises which was rented to the respondent by the petitioners. In the pro-note also there is no reference about the father's name and the address of the parties and thereby the pro-note not at all comes under the definition of negotiable instrument. Therefore, there are triable issues, but the Trial Court failed to consider the same and dismissed the petition.

6. *Per contra*, the learned counsel appearing for the respondent would contend that the petitioners served summon only by mentioning the Order XXXVII of the Code of Civil Procedure, 1908, and the petitioners have not pleaded in the affidavit which is filed for leave to defend the suit and they only denied the execution of the promissory note and also they do not make any



bonafide defence or a triable issue. Thereby, the Trial Court has dismissed the petition. Therefore the order passed by the Trial Court is in order and the same is liable to be confirmed.

7. This Court heard both sides and perused the records available on record.

8. This petition is filed by the petitioners challenging the order passed by the Court to reconsider the petition filed by the petitioners to grant leave to defend the suit. On a careful perusal of the affidavit filed by the petitioners before the Trial Court, it is seen that they denied the execution of promissory note and also stated that the promissory note does not contain the addresses of the parties, the respondent suppressed that he was tenant under the defendants premises and subsequently he was vacated. Apart from that, there are no other pleadings/defence raised by the petitioners. Therefore, the Trial Court has dismissed the petition. As far as the contention of the petitioners that summons were not served in a prescribed format is concerned, this Court perused the summons served to the petitioners. On a perusal, it is seen that the heading is mentioned as under Order XXXVII of the Code of Civil Procedure, 1908, but the contents are not in consonance with App. B.Form No. 4.



However, she has not stated the above said fact before the Trial Court and now in the revision petition only, she has pleaded that issue. In the meantime, the Trial Court has decreed the suit and that decree has not been challenged by the petitioners. If at all they are aggrieved by the order of the Trial Court, they ought to have challenged the decree also. However, they have not challenged the decree. Now, the Civil Revision Petition is only as against the order passed by the Trial Court denying to leave to defend the case.

9. The learned counsel appearing for the petitioners relied on the judgment in *M/s. TVC Skyshop Ltd. -vs- M/s. Reliance Communication and Infrastructure Ltd.* reported in *CDJ 2013 SC 783* and also relied on the judgment in the case of *Rajni Kumar -vs- Suresh Kumar Malhotra & Anr.* in the Appeal (Civil) No. 2538 of 2003 on the file of the Hon'ble Supreme Court of India. On a careful perusal of the judgments, it is seen that they are pertaining to Order XXXVII of Rule 4 of the Code of Civil Procedure, 1908, in respect of the power to set aside the ex-parte decree passed by the Court on summary procedures. In the case on hand, the petitioners challenged the order passed by the Trial Court in the petition filed under Order XXXVII Rule 3(5) of CPC, which is filed for leave to defend the suit. Since the petitioners have not challenged the ex-parte decree passed against them, it is not appropriate to



allow this application and to pass orders in this application. Even if this Court allows this application, the decree which was passed after this order will not automatically be set aside. Therefore, the proper remedy to the petitioners is that they can file appeal as against the decree and judgment or they can approach the Trial Court under Order XXXVII Rule 4 of the CPC.

10. At this juncture, it is relevant to refer the judgment of the Hon'ble Supreme Court of India in **Ajay Bansal -vs- Anup Mehta & Others** reported in **2007 2 SCC 275**, wherein the Hon'ble Supreme Court of India in Para No. 14 and 16 has held as follows:-

"14. A decree passed subsequent to the refusal of leave to defend could either be under Order 37 Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave



to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order 37 of the Code to reopen the decree.

*15. The theory of “dependant order” may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order 37 Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. (See *V.S. Saini v. D.C.M. Ltd.* [AIR 2004 Del 219] .)*

16. The defendant in such a case can also be left to appeal against the decree and therein challenge the order



C.R.P. No. 4261 of 2024

refusing leave to defend in terms of Section 105(1) of the Code."

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On a careful perusal of the above said judgment, it is clear that even if this Court set asides the order of the Trial Court and gives the defendant leave to defend the suit, the decree that was passed may not go automatically and the same has to be set aside. Further, the petitioners can always go to the Court which passed the decree and move under Rule 4 of Order XXXVI of CPC to reopen the decree. Therefore, it is for the petitioners to opt the choice of filing petition under Order XXXVII Rule 4 of CPC to set aside the ex-parte decree or to file appeal as against the decree passed in the main suit and in the appeal they can challenge the order refusing leave to defend in terms of Section 105(i) of the Code of Civil Procedure, 1908. The petitioners are entitled to benefit of Section 14 of the Limitation Act, 1963 for the pendency period of this petition.

9. With the above said observations, the Civil Revision Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is also closed.

05.07.2024

Index : Yes/No



C.R.P. No. 4261 of 2022

Speaking order : Yes/No
NCC : Yes/No
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To

The XIX Assistant City Civil Court at Chennai



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C.R.P. No. 4261 of 2022

P.DHANABAL, J.,

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C.R.P. No. 4261 of 2022

05.07.2024