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-BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.10.2024

CORAM

THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.R.P(MD)No.1967 of 2024
and
C.M.P(MD)No.11172 of 2024

A.Lee Prince Konsal

...Petitioner

Vs.

A.Dominic Prabhu

... Respondent

PRAYER: Civil Revision Petition is filed under Section 115 of Civil Procedure Code, to call for the records petition and order, dated 25.04.2024 passed in I.A.No.04 of 2024 in O.S.No.57 of 2014, by the II Additional District Court, Thoothukudi, set aside and allow the above Civil Revision Petition.

For Petitioner : Mr.V.S.Kumara Guru

For Respondent : Mr.Ali Hassan Khan

ORDER

This Civil Revision Petition is filed against the Fair and Decreetal order, dated 25.04.2024 passed in I.A.No.04 of 2024 in O.S.No.57 of 2014, by the II Additional District Court, Thoothukudi.



2. The plaintiff is the respondent herein and the 1st defendant is the appellant herein. For the sake of convenience, the parties shall be referred to as plaintiff and the 1st defendant.

3. The plaintiff has filed a suit in O.S.No.57 of 2014 to divide the suit schedule property by dividing 11/21 shares by metes and bounds and also for passing of preliminary decree. The 1st defendant has contested the case. The defendants 2 & 6 had executed release deed dated 09.06.2014 in favour of the plaintiff and hence the plaintiff is entitled to 11/21 shares. The defendants 3,4,5 and 7 had executed release deed in favour of the 1st defendant and hence the 1st defendant is entitled to 10/21 shares. Thereafter, defendants 1 to 7 were remained exparte. Therefore, the Trial Court has passed an exparte preliminary decree, dated 25.04.2024.

4. Against the said exparte Judgment and Decree, the 1st defendant had filed petition to set aside the exparte decree along with I.A.No.04 of 2024 under Section 5 of Limitation Act, to condone the delay of 1438 days in filing the set aside petition. The contention of the 1st defendant is that the delay was caused due to COVID-2019, further he went abroad for his daughter's education and hence prayed to condone the delay of 1438 days. In the said IA,



the plaintiff had filed a counter stating that the alleged foreign trip is incorrect, since the said foreign trip was not during the said 1438 days. Further the case was posted on 23.01.2020 for to cross examine the plaintiff and the 1st defendant failed to appear on that day. On 23.01.2020 there was no COVID-2019. Hence the plaintiff pleaded to dismiss the revision petition. After considering the rival claims the Trail Court had allowed the aforesaid I.A. on payment of Rs.25,000/- as costs and the same was payable to the plaintiff on or before 24.04.2024. But the 1st defendant has failed to pay within the stipulated time, hence the said IA was dismissed. Aggrieved over the said dismissal, the present Civil Revision Petition is filed by the 1st defendant.

5. The Learned Counsel appearing for the plaintiff has raised the preliminary issue of maintainability. The I.A. was filed to said aside the exparte decree along with condone delay. When the condone delay petition is dismissed, consequently the petition filed to set aside exparte decree is also dismissed, then it is an appealable order, hence only appeal lies before the appellate court. The Learned Counsel appearing for the relied on the various judgments. However, the Learned Counsel appearing for the 1st defendant submitted that, admittedly if application is filed under Rule IX Rule 13 of Civil Procedure Code, then the appeal will lie. But in the present case, the 1st



defendant has filed an application under Section 5 of Limitation Act. Therefore, the said Judgments cited is not applicable to the present case.

6. The Learned Counsel appearing for the plaintiff had relied on the Judgment reported in **2023 SCC Online SC 1662, in the case of Koushik Mutually Aided Co-operative Housing Society Vs. Ameena Begum and Another**, wherein the Hon'ble Court has held as against the exparte decree, the defendant has three remedies available to him, firstly, is by way of filing an application under Order IX Rule 13 of Civil Procedure Code seeking for setting aside the ex-parte decree. The second is, by way of filing an appeal against the ex-parte decree under Section 96 (2) of the Civil Procedure Code, and the third, is by way of review before the same Court against the exparte-decree. If filed under Order IX Rule 13 of Civil Procedure Code, then appeal would lie.

7. The Learned Counsel appearing for the plaintiff further relied on the Judgment rendered by the **Hon'ble High Court of Himachal Pradesh, Shimla in O.S.A.No.5 of 2016**, wherein it is held as under:

'The Appellants were facing a judgment/decreed in exparte, constraining them to file an application under Order IX Rule 13 of CPC along with an application for condonation of delay. The learned Single Judge dismissed



the limitation petition and consequently, the application under Order IX Rule 13 CPC was also dismissed. The appellants have remedy available with them in terms of Order XLIII Rule 1 of CPC'.

8. In another Judgment reported in **2012 SCC Online Cal 1800 in the case of Md. Ali Sardar and others Vs. Hossain Ali Mondal**, the Hon'ble Court held as under:

“While reading all the judgments quoted including that in Shyam Sundar Sarma's case, and Full Bench of this Court in case of Mamuda Khateen Vs. Beniyan Bibi, we think that the effect of dismissal of the application under Section 5 of the Limitation Act would depend upon the nature of the proceeding in connection to which it is filed. The proceeding under Section 5 itself has no relevance but it gets relevancy and importance the moment it is sought to be applied in connection with the proceedings brought underneath it.

According to us the provision of Section 5 of the Limitation Act is like what is called in Sanskrit language 'mrityo sanjiboni' (which brings back the life). If Section 5 is allowed then obviously a dead matter gets life if not then matter remains at rest.

Therefore, the task of the Court is to find whether the order or decree sought to be impugned invoking Section 5 of the Limitation Act is appealable or not. If it is so, obviously on dismissal of application under Section 5 of the Limitation Act, consequent upon dismissal of the proceeding underneath, by which order or decree is sought to be impugned becomes



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appealable automatically, applying the principle of merger most appropriately termed as doctrine of fictional merger.

Order of dismissal of proceedings under Order 9 Rule 13 of Code of Civil Procedure Code is an appealable order under Order 43 of Code of Civil Procedure, therefore application for dismissal of Section 5 in connection thereto will obviously be an appealable but order of dismissal of Section 5 application simpliciter is of no effect”.

9. Therefore it is settled that any petition filed under Order IX Rule 13 of Civil Procedure Code to set aside the exparte decree, then appeal would lie. In the present case the 1st defendant / revision petitioner had filed the petition to set aside the exparte decree under Order IX Rule 13 of Civil Procedure Code. But there was delay in filing the application under Order IX Rule 13. If the delay petition under section 5 of Limitation Act is allowed, then Order IX Rule 13 would get life and the same ought to be considered. If the delay petition is dismissed, then the petition filed under Order IX Rule 13 would never get any life and die automatically and the matter remained at rest would never get life at all. In other words, the proceeding under Section 5 itself has no relevance but it gets relevancy and importance the moment it is sought to be applied in connection with the proceedings brought underneath it. When the section 5 application is dismissed, then the proceedings underneath it would



remain in rest. In the present case, the section 5 application was allowed on cost on payment of Rs.25,000/- and the same was payable to the plaintiff on or before 24.04.2024. But the 1st defendant has failed to pay within the stipulated time, hence the said IA was dismissed. When the delay petition was dismissed, then the proceedings underneath it i.e. the Fair and Decreetal order passed under Order IX Rule 13 would remain in rest. Then the appeal alone would lie. Therefore, this Court is of the considered opinion that the 1st defendant ought to file appeal and not revision hence the present Civil Revision Petition is not maintainable.

10. Accordingly, this Civil Revision Petition stands dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

03.10.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

1. The II Additional District Court, Thoothukudi,
2. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

KSA

Order made in
C.R.P(MD)No.1967 of 2024

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