

(2014) 01 MAD CK 0018

In the Madras High Court

Case No : C.R.P.(PD). No. 2598 of 2010 and M.P. No. 1 of 2010 & M.P.Nos.1 & 2 of 2013

P.S. Raman

APPELLANT

Vs

Shakti Durga Engineering, Chennai-7

RESPONDENT

Date of Decision : 03-01-2014

Acts Referred:

Citation : (2014) 1 MadWN(Civil) 225

Hon'ble Judges : Mr. K. Kalyanasundaram, J.

Bench : Single Bench

Advocate : Mr. V.Balasubramanian, Advocate, for the Petitioner; Mr. R.Parthasarathy, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr K.Kalyanasundaram, J.—This civil revision petition is directed against the order dated 17.10.2001 passed by the VIII Asst. Judge, City Civil Court, Madras, in I.A.No.14528 of 2000.

2. The parties, for the sake of convenience, are referred to according to their litigative status in the C.R.P.

3. The petitioner is the defendant in O.S.No.6235 of 1997 on the file of the VIII Assistant Judge, City Civil Court, Madras. The respondent filed the summary suit for recovery of money of Rs.87,045/- on the basis of a promissory note. The petitioner filed an application in I.A.No.14528 of 2000, seeking leave of the Court to defend the suit. The respondent filed his counter and after considering the objections, the learned VIII Assistant Judge, dismissed the petition. Aggrieved by the said order, the present revision has been filed.

4. The petitioner filed M.P.No.1 of 2008 in C.R.P.SR.25586 of 2008 to condone the delay of 2261 days in filing the above revision. This Court, ordered notice to the respondent and condoned the delay on 16.7.2010. Thereafter, the C.R.P. was numbered and listed for admission. This Court ordered notice to the respondents

and also granted stay, on 22.8.2011.

5. The respondent has filed M.P.No.2 of 2010, to recall the order dated 16.7.2010, passed in M.P.No.1 of 2008 in C.R.P.Sr.No.25586 of 2008. The contention of the respondent was that the respondent firm was originally functioning at No.26, Hunters Road, Veperi, Chennai-7 and from March 2001, it stopped functioning in the said address and the business was also closed down; that the petitioner had knowledge about the closure of the office, but in M.P.No.1 of 2008, the petitioner had given the address of the respondent as No.26, Hunter's Road, Veperi, Chennai-7 and the notice was returned; the private notice sent by the petitioner was also returned in July 2009, with an endorsement "no such company". Thereafter, a fresh notice was again taken to the respondent in June 2010 to the address at No.41, Ground Floor, Kaveri complex, Nungambakkam High Road, Chennai-34. The contention of the respondent was that the respondent firm was never functioning at the address and it could not be served.

6. Thereafter, the petitioner got the permission of this Court to serve the counsel for the respondent, who appeared in the trial Court. However, the learned counsel did not contact the respondent, since they had taken away all the papers from the previous counsel. The allegation of the respondent is that this fact is also known to the petitioner. This Court had allowed M.P.No.1 of 2008, after taking note of the fact that the counsel for the respondent, who represented them in the trial Court, was served with a copy of the petition and this Court proceeded to treat the same as sufficient service on the respondent.

7. On the above averments, the respondent filed the application to recall the order passed in M.P.No.1 of 2008.

8. When the revision was taken up for hearing, the petitioner filed a petition M.P.No.1 of 2013 seeking permission of the Court to raise additional grounds.

9. Heard Mr. V.Balasubramanian learned counsel for the petitioner and Mr. R.Parthasarathy, learned counsel for the respondent.

10. The learned counsel for the respondent submitted that since the respondent had filed M.P.No.2 of 2010 to recall the order passed in M.P.No.1 of 2008, the same can be disposed of, before hearing the main revision.

11. The learned counsel for the respondent submitted that there is inordinately delay of 2261 days in filing the revision petition and the petitioner has not given any reason for condoning the delay.

12. While considering the application to recall the order, I have to see as to whether notice in the condone delay petition was served on the respondent and whether it was a proper service.

13. The main contention of the respondent is that the respondent company was functioning at No.26, Hunters Road, Veperi, Chennai, and it closed down the

business from May 2001. In the plaint, in O.S.No.6235 of 1997, the respondent firm had given its address as No.26, Hunters Road, Veperi, Chennai-7. The same address is given in M.P.No.1 of 2008. This Court has ordered notice to the respondent and the notice was returned as "No such company at the address". The petitioner had filed affidavit of service on 8.12.2008 with a returned cover, stating that the notice sent to the respondent was returned unserved. The petitioner had paid the batta and the Court notice was also sent to the address. Subsequently, the petitioner took notice to the address at No.41, Ground Floor, Kaveri Complex, Nungambakkam High Court, Chennai-34. The private notice taken to the Nungambakkam address was served on 26.6.2010 and the affidavit of service was also filed by the counsel for the petitioner. Notice was served on the counsel for the respondent, who appeared in the trial Court.

14. When M.P.No.1 of 2008 was listed again for hearing on 16.7.2010, the name of the respondent was printed in the cause list. Since there was no opposition by the respondent, this Court condoned the delay.

15. In view of the above factual position, the contention of the respondent that notice was not served on them and hence, the order passed in M.P.No.1 of 2008 has to be recalled, does not merit acceptance.

16. The respondent though makes allegations that the petitioner was aware of the closure of the business at No.24, Hunters Road, Veperi, and the office functioned at Nungambakkam, Kaveri Complex was also subsequently closed, there is no material to substantiate the said contention. On the other hand, the petitioner had taken all steps to serve notice on the respondent to the address, in which the respondent was functioning. Hence, the petition M.P.No.2 of 2010 is dismissed.

17. The learned counsel for the petitioner submitted that the petitioner had filed the application seeking unconditional leave to defend the suit, disputing the execution of the promissory note dated 7.4.1994 and passing of consideration of Rs.42,000/- from the plaintiff. The learned counsel further submitted that the petitioner filed another suit before this Court in C.S.No.839 of 1999, against the respondent's sister concern, contending that the company has played a fraud and that he has very good defence in the suit and sought leave of the Court to defend the suit. The petitioner had raised additional grounds in M.P.No.1 of 2013 stating that the respondent/plaintiff is an unregistered firm and Section 69(2) of the Indian Partnership Act bars institution of suit by the unregistered firm; when the suit was filed, the plaintiff did not file the original promissory note within the period of limitation and only after expiry of limitation, the promissory note was filed; the respondent has not stated any reason in the plaint for non-filing of the original promissory note and so, the suit is not maintainable in law. The learned counsel relied on the judgments of the Honourable Apex Court as well as this Court and other High Courts reported in (2012) 8 Supreme Court Cases 706 : 2012 (4) CTC 308 (SC) - (i) Church of Christ Charitable Trust and Educational Charitable Society, rep. by its Chairman v. Ponnamman Educational Trust, rep.

by its Chairperson/Managing Trustee; (ii)1999 (II) CTC 540 - M/s. K.R.M.Money Lenders rep. by its Power Agent Karuppiiah v. A.Manoharan @ Doss; (iii)AIR 1937 Lahore 464 - Firm Buja Mal-Gainda Mal v. Mukta Parshad and another and (iv) AIR 1958 Kerala 124 - K.K.Koran v. T.Tata Bai.

18. The learned counsel for the petitioner further submitted that the petitioner is ready to deposit the suit claim of Rs.86,000/- and submitted that even a conditional leave can be granted to the petitioner to defend the suit, by directing him to deposit the suit claim of Rs.86,000/-. It is further argued by the learned counsel for the petitioner that the petitioner had made out his case that triable issues are involved, which can be decided only after letting in oral and documentary evidence, in the suit.

19. Per contra, the learned counsel for the respondent submitted that the suit was filed in the year 1997. Though originally when the suit was filed, the respondent was an unregistered firm, subsequently, the firm of the respondent was registered with the Registrar of Companies. The learned counsel further submitted that the transaction between the petitioner and the respondent is not relating to the business of the respondent and therefore, the bar under Section 69(2) of the Act, will not attract to the facts of this case. The respondent is having statutory remedy as well as common law remedy. Since the petitioner, after execution of the promissory note, had failed to pay the amount borrowed under the promissory note. The learned counsel had relied on the judgments of the Honourable Apex Court reported in (i) (1998) 7 SCC 184 : 1999 (1) CTC 175 (SC) -Raptakos Brett & Co. Ltd., v. Ganesh Property (ii) (2000)3 SCC 250-Haldiram Bhujawala and another v. Anandkumar Deepak Kumar and another, and (iii) (2006) 2 SCC 777 - Vidyawatirupta and others v. Bhakti Hari Nayak and Others.

20. Both the counsel had argued elaborately on the merits of the case. But while considering the application for leave to defend, the scope is very limited. Once, the defendant has established that triable issues are involved in the suit, leave has to be granted. In view of the limited scope, I am not considering the merits of the case.

21. The petitioner has denied the execution of the promissory note and passing of consideration. The petitioner/defendant has established that triable issues are involved in the suit and also undertakes to deposit the entire suit claim. Hence, the petitioner is granted leave to defend the suit.

22. In the result, the order passed in I.A.No.14528 of 2000 is set aside and the C.R.P. is allowed, however, subject to the condition that the petitioner shall deposit the amount of Rs.87,045/- (Rupees eighty seven thousand forty five only) to the credit of O.S.No.6235 of 2010 on the file of the City Civil Court, Madras, within a period of four weeks from the date of receipt of a copy of this order. Since the suit is of the year 1997, the learned VIII Assistant Judge, City Civil Court, Chennai, is directed to dispose of the suit within a period of six

months from the date of receipt of a copy of this order. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.