Mohamed Ali vs V. Jaya on 11 July, 2022

Author: M.R. Shah

Bench: B.V. Nagarathna, M.R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 4113 OF 2022

Mohamed Ali …Appellant(s)

Versus

V. Jaya & Ors. …Respondent(s)

With

CIVIL APPEAL NO. 4114 OF 2022

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 19.11.2021 passed by the High Court of Madras at Madurai Bench in Civil Revision Petition (NPD) No. 1054/2021 and Civil Revision Petition (PD) No. 1301/2021, by which, in exercise of powers under Article 227 of the Constitution of India the High Court has set aside the ex□parte judgment and decree passed by the learned Trial Court, the original plaintiff has preferred the present appeals.

2. The facts leading to the present appeals in a nutshell are as under: □2.1 That the appellant herein – original plaintiff instituted a suit being O.S. No. 15/2010 on the file of I Additional District Judge (PCR), Trichy for specific performance of an agreement to sell dated 17.07.2009. The said suit was filed against four defendants. The defendants were placed ex□parte. The learned Trial Court passed an ex□parte judgment and decree dated 31.10.2012. That original defendant Nos. 2 to 4 filed an application to set aside the ex□parte judgment and decree. There was a delay of 2345 days in filing the petition to set aside the ex□parte judgment and decree. Therefore, original defendant Nos. 2 to 4 filed an application requesting to condone the delay of 2345 days. The original defendant No. 1 also filed an application to set aside the ex□parte judgment and decree. There was a delay of 1522 days in filing the petition to set aside the ex□parte judgment and decree. Therefore, original defendant No. 1 also filed an application to condone the delay of 1522 days in filing the petition to set aside the ex□ parte judgment and decree. The learned Trial Court dismissed both the applications, one filed by original defendant No. 1 and another filed by original defendant Nos. 2 to 4.

2.2 Feeling aggrieved and dissatisfied with the order passed by the learned Trial Court refusing to condone the delay of 2345 days in filing the petition to set aside the ex□parte judgment and decree, original defendant Nos. 2 to 4 preferred Civil Revision Petition No. 1054/2021 before the High Court. Though, original defendant No. 1 did not challenge the order passed by the learned Trial Court dismissing his application to condone the delay of 1522 days in filing the petition to set aside the ex□parte judgment and decree, filed revision petition before the High Court under Article 227 of the Constitution of India being Civil Revision Petition No. 1301/2021 to set aside the ex□parte judgment and decree. By the impugned common judgment and order, the High Court has allowed the aforesaid two revision petitions and has set aside the judgment and decree passed by the learned Trial Court by observing that the judgment and decree passed by the learned Trial Court is on a total non□application of mind as before passing the decree for specific performance, the learned Trial Court has not considered the aspect of readiness and willingness on the part of the plaintiff. Thus, by the impugned common judgment and order in exercise of powers under Article 227 of the Constitution of India, the High Court has set aside the ex□parte judgment and decree passed by the learned Trial Court, without expressing anything on merits, whether the learned Trial Court was justified in refusing to condone the delay of 2345 days in filing the petition to set aside the ex□parte judgment and decree. Thus, the High Court has allowed Civil Revision Petition (CRP) No. 1045/2021 filed by original defendant Nos. 2 to 4. Being aggrieved by the impugned judgment(s) and order(s) passed by the High Court in CRP No. 1301/2021 (filed by original defendant No. 1 to set aside the ex□parte judgment and decree) and CRP No. 1045/2021 (filed by original defendant Nos. 2 to

4) challenging the order passed by the learned Trial Court refusing to condone the delay of 2345 days in filing the petition to set aside the ex□parte judgment and decree, the original plaintiff has preferred the present appeals.

3. Shri R. Balasubramanian, learned Senior Advocate, appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case the High Court has committed a grave error in setting aside the ex□parte judgment and decree in revision petition in exercise of powers under Article 227 of the Constitution of India.

3.1 It is vehemently submitted by learned Senior Advocate appearing on behalf of the appellant that the ex□parte judgment and decree passed by the learned Trial Court was an appealable order and therefore, defendant No. 1 ought to have preferred an appeal rather than filing the revision petition under Article 227 of the Constitution of India. It is submitted that therefore, when a statutory appeal was provided against the judgment and decree passed by learned Trial Court, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India and ought not to have set aside the judgment and decree in exercise of powers under Article 227 of the Constitution of India.

3.2 It is further contended that even otherwise the impugned judgment and order passed by the High Court setting aside the ex□parte judgment and decree is unsustainable. It is submitted that the High Court has recorded the findings on legality and validity of the judgment and decree passed by the learned Trial Court as if the High Court was considering the appeal against the judgment and

decree passed by the learned Trial Court. It is further submitted that the High Court has not at all considered and/or given any findings on whether the learned Trial Court was justified in passing the ex-parte judgment and decree or not. It is submitted that only in a case where the ex-parte judgment and decree is set aside after giving the specific findings that the learned Trial Court was not justified and/or right in passing the ex-parte judgment and decree that the merits of the judgment and decree was required to be considered.

3.3 It is further submitted by learned Senior Advocate appearing on behalf of the appellant – original plaintiff that even otherwise the High Court has not properly considered the fact that there was a delay of 1522 days in filing the petition by original defendant No. 1 seeking to set aside the ex-parte judgment and decree. It is submitted that the learned Trial Court dismissed the application and refused to condone the delay of 1522 days. That the order passed by the learned Trial Court refusing to condone the delay of 1522 days in filing the petition seeking to set aside the judgment and decree, had attained finality as the same was not challenged by original defendant No. 1. It is contended that therefore in the absence of any challenge to the order passed by the learned Trial Court refusing to condone the delay of 1522 days, the revision petition/application filed by defendant No. 1 challenging the ex-parte judgment and decree was not required to be entertained.

3.4 It is further submitted that even otherwise while setting aside the ex-parte judgment and decree in exercise of powers under Article 227 of the Constitution of India, the High Court has not exercised its discretion judiciously and has acted beyond the scope and ambit of exercise of powers under Article 227 of the Constitution of India. 3.5 It is further urged by learned Senior Advocate appearing on behalf of the appellant – original plaintiff that even otherwise there are no findings recorded by the High Court on whether the learned Trial Court was justified in not condoning the delay of 2345 and 1522 days in filing the petition for setting aside the ex-parte judgment and decree. That when there was a huge delay of 2345 and 1522 days in filing the petition for setting aside the ex-parte judgment and decree filed by original defendants No. 2 to 4 and defendant No. 1, respectively and when the learned Trial Court by a detailed order refused to condone the delay, the same ought not to have been set aside by the High Court, that too, without considering the legality and validity of the order refusing to condone the delay.

3.6 It is further submitted by learned Senior Advocate appearing on behalf of the original plaintiff that the High Court has set aside the ex-parte judgment and decree in exercise of powers under Article 227 of the Constitution of India as if the High Court was exercising the appellate jurisdiction.

3.7 Making the above submissions, it is prayed to allow the present appeals.

4. Present appeals are vehemently opposed by Shri M. Karpagavinayagam, learned Senior Advocate, appearing on behalf of the respondents – original defendants. 4.1 It is vehemently submitted by learned Senior Advocate appearing on behalf of original defendants that the High Court has rightly set aside the ex-parte judgment and decree on the ground that the ex-parte judgment and decree for specific performance of the agreement to sell was not in consonance with the procedure enunciated under Order XII of the Code of Civil Procedure (CPC). It is submitted that the High Court has set aside the ex-parte judgment and decree by observing that while passing the decree for

specific performance, the requirement of proving readiness and willingness was not considered by the learned Trial Court. It is submitted that even the respondents – original defendants filed written submission before the learned Trial Court. However, the learned Trial Court did not consider the said aspect while passing the ex-parte judgment and decree.

4.2 Now so far as the submissions made by the learned Senior Advocate appearing on behalf of the appellant on the maintainability of the revision petition under Article 227 of the Constitution of India, the learned Senior Advocate appearing on behalf of the respondents – original defendants, has heavily relied upon the decisions of this Court in the case of Radhey Shyam and Anr. Vs. Chhabi Nath and Ors.; (2015) 5 SCC 423 as well as in the case of K.P. Natarajan and Anr. Vs. Muthalammal and Ors; (2021) SCC Online SC 467. Relying upon the said decisions, it is submitted that as held by this Court in the aforesaid decisions, challenge to the judicial orders could lie by way of statutory appeal or revision or under Article 227 but not by way of writ under Article 226 or 32. It is submitted that in the present case, the defendants invoked the jurisdiction of the High Court under Section 115 of CPC as well as Article 227 of the Constitution of India by way of two different revision petitions and on different grounds. That therefore, having found the ex-parte judgment and decree of specific performance of agreement to sell passed by the learned Trial Court was not in consonance with the procedure to be followed under the CPC and the relevant aspects, which were required to be considered under the provisions of the Specific Relief Act, were not considered, the High Court has not committed any error in setting aside the ex-parte judgment and decree.

4.3 Making the above submissions and relying upon the above decisions of this Court, it is prayed to dismiss the present appeals.

5. We have heard learned Senior Advocates appearing on behalf of the respective parties at length. We have also gone through the impugned common judgment and order passed by the High Court.

6. At the outset, it is required to be noted that the learned Trial Court passed the ex-parte judgment and decree in the year 2012. That after a period of 1522 and 2345 days, original defendant No. 1 and defendants No. 2 to 4, respectively, filed the applications to set aside the ex-parte judgment and decree. The learned Trial Court by a detailed order refused to condone the delay of 1522 and 2345 days by specifically observing that no sufficient cause has been shown in explaining the huge delay in filing the applications to set aside the ex-parte judgment and decree. The defendant Nos. 2 to 4 alone filed the revision application before the High Court challenging the order passed by the learned Trial Court refusing to condone the delay of 2345 days. Defendant No. 1 did not file any revision application before the High Court challenging the order passed by the learned Trial Court refusing to condone the delay in filing the application to set aside the ex-parte judgment and decree. Instead, defendant No. 1 directly filed the revision application before the High Court under Article 227 of the Constitution of India challenging the ex-parte judgment and decree and without considering the legality and validity of the order/orders passed by the learned Trial Court refusing to condone the huge delay of 1522/2345 days, by the impugned common judgment and order, the High Court has set aside the ex-parte judgment and decree in exercise of powers under Article 227 of the Constitution of India.

6.1 Having gone through the impugned common judgment and order passed by the High Court, it can be seen that as such the High Court has not at all considered whether the learned Trial Court was justified in refusing to condone such a huge delay of 2345 days. The High Court has also not appreciated and considered the fact that as such the order passed by the learned Trial Court refusing to condone the delay of 1522 days in so far as original defendant No. 1, had attained the finality. Original defendant No. 1 straightway challenged the ex□parte judgment and decree passed by the learned Trial Court by way of revision application under Article 227 of the Constitution of India. Whether the revision application before the High Court under Article 227 of the Constitution of India can be said to be maintainable or not has not at all been considered. Even otherwise, the remedy against an ex□parte judgment and decree available to the defendants was, either to file an application under Order IX Rule 13 of CPC or to prefer an appeal before the First Appellate Court. The defendants availed the first remedy by way of filing the applications under Order IX Rule 13 of CPC. However, there was a huge delay of 1522 and 2345 days, which was not condoned by the learned Trial Court. Without expressing anything on whether the learned Trial Court was justified in refusing to condone the delay, the High Court has simply set aside the order passed by the learned Trial Court refusing to condone the delay in so far as original defendant Nos. 2 to 4 are concerned. The High Court ought to have dealt with and considered the question, whether, the learned Trial Court was justified in refusing to condone the delay or not. There is no discussion at all on the order passed by the learned Trial Court refusing to condone the delay.

6.2 Even otherwise and as observed hereinabove, against the ex□parte judgment and decree, the remedy by way of an appeal before the First Appellate Court was available. Therefore, the High Court ought not to have entertained the revision application under Section 115 of CPC and under Article 227 of the Constitution of India. The High Court ought not to have entertained such a revision application challenging the ex□parte judgment and decree.

Once there was a statutory alternative remedy by way of an appeal available to the defendants, the High Court ought not to have entertained a writ petition or revision application under Article 227 of the Constitution of India.

7. At this stage, the decision of this Court in the case of Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Ors. Vs. Tuticorin Educational Society and Ors.; (2019) 9 SCC 538, is required to be referred to. In the said decision, it is observed and held by this Court that wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under CPC, will deter the High Court and therefore, the High Court shall not entertain the revision under Article 227 of the Constitution of India especially in a case where a specific remedy of appeal is provided under the CPC itself. While holding so, it is observed and held in paragraphs 11 to 13 as under: □"11. Secondly, the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu v. S. Chellappan [A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695] , this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well□recognised principle which

gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in Surya Dev Rai v. Ram Chander Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , pointed out in Radhey Shyam v. Chhabi Nath [Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423 : (2015) 3 SCC (Civ) 67] that "orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".

13. Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself." 7.1 Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India against the ex-parte judgment and decree passed by the learned Trial Court in view of a specific remedy of appeal as provided under the Code of Civil Procedure itself. Therefore, the High Court has committed a grave error in entertaining the revision petition under Article 227 challenging the ex-parte judgment and decree passed by the learned Trial Court and in quashing and setting aside the same in exercise of powers under Article 227 of the Constitution of India. 7.2 Even otherwise considering the impugned common judgment and order passed by the High Court, it appears that while setting aside the ex-parte judgment and decree, the High Court has commented upon the legality and validity of the judgment and decree passed by the learned Trial Court as if the High Court was exercising the appellate jurisdiction against the judgment and decree passed by the learned Trial Court. Before considering the judgment and decree on merits and/or expressing anything on merits on the legality and validity of the judgment and decree (ex-parte), the High Court was required to consider whether the learned Trial Court was justified in passing the ex-parte judgment and decree or not. The High Court was also required to consider whether the learned Trial Court was justified in refusing to condone the delay of 1522 and 2345 days in filing the petition challenging the ex-parte judgment and decree. Therefore, in the facts and circumstances of the case, the impugned common judgment and order passed by the High Court is unsustainable, both, on law as well as on facts. The High Court has exceeded in its jurisdiction while setting aside the ex-parte judgment and decree in exercise of powers under Article 227 of the Constriction of India. The impugned common judgment and order passed by the High Court is on irrelevant considerations and the relevant aspects as

observed hereinabove have not been considered and dealt with by the High Court. Under the circumstances, the impugned common judgment and order passed by the High Court deserve to be quashed and set aside.

8. In view of the above and for the reasons stated above, the present Appeals Succeed. The impugned common judgment and order dated 19.11.2021 passed by the High Court in Civil Revision Petition (NPD) No. 1054/2021 and Civil Revision Petition (PD) No. 1301/2021, is hereby quashed and set aside. The ex-parte judgment and decree passed by the learned Trial Court as well as the order(s) passed by the learned Trial Court refusing to condone the delay of 2345 days in preferring the revision petition(s) challenging the ex-parte judgment and decree filed by original defendant Nos. 2 to 4 is/are hereby restored. Present appeals are allowed accordingly. In the facts of the case, there shall be no order as to costs.

.....J.
[M.R. SHAH]

NEW DELHI; .....J.
July, 11th 2022 [B.V. NAGARATHNA]