

In the Court of the Principal District Judge, Thoothukudi.

Present : Thiru.R.Gurumurthy, B.Sc., B.L.,
Principal District Judge, Thoothukudi.

Tuesday, the 29th day of November 2022

EA No.1/2002

in

E.P No.57/2021

in

OS No.44/2019

- 1) M/s.Ram Meenakshi Fir, through its partners
- 2) R.Vetriselvan
- 3) V.Anbu Chezhiyan

The petitioners 1 to 3 are having their office at No.238, Mela Anuppanadi Road, Madurai.

... Petitioners/Respondents/Defendants

// versus //

M/s.Annai Logistics through its proprietor, S.Antony Cruz, 20/11-A, Roche Colony, 1st street, Thoothukudi – 628 003.

...Respondent/Petitioner/Plaintiff

This petition coming before this court on 04.11.2022 for final hearing in the presence of Thiru.M.Muruganantham, Advocate for the petitioners, Thiru.W.Xavier, Advocate for the respondent and upon hearing both side arguments and on perusing the records available and having stood over for consideration till this day, this court delivers the following:

ORDER

This petition has been filed by the petitioners under Order 21 Rule 26 and section 151 of The Code of Civil Procedure prays to stay further proceedings in E.P. No.57/2021 in OS No.44/2019 on the file of the Principal District court, Thoothukudi.

2) The averments made in the affidavit filed in support of the petition are briefly as follows:-

The 3rd petitioner, who is the 3rd defendant in the main suit has filed this affidavit on behalf of the other petitioners. The respondent herein has instituted the main suit in O.S. No.44/2019 before this Court for recovery of Rs.70,95,039/- from the petitioners with the future interest at the rate of 12% for Rs.53,66,898/- from the date of plaint till the date of realization. In that suit, the petitioners entered appearance through their counsel on 18.07.2019. The suit was pending for the purpose of filing written statement of the petitioners/defendants. In fact, the suit itself is not maintainable against the petitioners for the reason that the respondent/plaintiff suppressed various facts. The amount mentioned in the plaint was not payable by the petitioners and the transactions only between the respondent and one Saravana Traders. The suit is also bad for non-joinder of necessary parties. The petitioners were set exparte in the suit in

O.S. No.44/19 for non filing of the written statement. Immediately, on 27.02.2000 set aside petition was filed along with written statement. The respondent/plaintiff while served with copies of the I.As and written statement, made objection on the docket of the said I.A, stating that the written statement cannot be filed beyond the period of 120 days as per the Commercial Courts Act. Therefore, this Court returned the I.As raising query of maintainability. The petitioners represented the I.As by answering the queries. However, again the I.As were returned without numbering. As against the same, the petitioners have filed C.R.P (MD) No.1113 and 1114/2002 before the Hon'ble Madurai Bench of Madras High Court to number the set aside petition as well as the I.A to receive the written statement. The said Civil Revision petitions are pending. The respondent/plaintiff has obtained the exparte decree before this Court by representing that the suit in O.S. No.44/19 was a Commercial Suit. In fact, the suit in OS No.44/19 was not taken on file as commercial suit and none of the procedures contemplated under the Commercial Courts Act, as well as procedures laid down in the Amended C.P.C, regarding Commercial Courts Act was followed in the present suit. The suit in O.S. No.44/19 was registered only as regular suit. The petitioners have not put on notice that the suit was converted as a commercial suit for summary disposal. The notice is mandatory as per the Commercial Courts Act as well as CPC.

Further Section 26 (2) of CPC and Order 6 Rule 3-A which stipulates forms of pleading in Commercial Court was not followed in the suit. Case management hearing under Order 15A of CPC was not followed. To be precise, none of the procedures contemplated for hearing a Commercial Suit was followed in the instant suit. The objection of the respondent/plaintiff to number the set aside petition on the ground that the suit was a Commercial Suit and decided under the Commercial Courts Act is not substantiated by any procedures or documents. The petitioners have been denied fair trial due to the non-numbering of the set aside petition. The set aside petition was filed within time. The respondent/plaintiff wanted to enjoy the decree without facing the trial. The respondent/plaintiff wanted to execute the decree against the wrong person, namely, the petitioners' name who are no way liable towards the respondent/plaintiff. The respondent/plaintiff is objecting for numbering set aside petition without valid reason and on the other hand they are insisting for execution of the exparte decree. If the execution petition is disposed of without giving opportunity to the petitioners to defend the suit through fair trial, the petitioners would be put to irreparable loss, hardship and agony. The petitioners have filed Civil Revision petitions and they are pending. The petitioners are having a good case on merits in the suit. The CRPs filed by the petitioners for numbering the set aside petition is pending before the

Hon'ble Madras Bench of Madras High Court in C.R.P (MD) No.1113 and 1114 of 2022. Therefore, in the interest of justice the E.P may be stayed. Further, in the interest of justice, this Court can very well decide whether the suit is decided as a Commercial Suit by following the procedure laid down under the Commercial Courts Act and CPC or not, before venturing to decide the execution petition. Unless the execution proceedings is stayed, the petitioners will be put to great hardship. Hence the petition has to be allowed as prayed for.

3) **The contentions raised by the respondent in his are briefly as follows :-**

The petition for stay filed by the petitioners is not maintainable either in law or on facts. It is to be dismissed in limine. All the averments except those that are admitted herein are denied as false. The averments found in paragraph Nos. 1 and 2 of the petitioners' affidavit are admitted. But the averments found in paragraph 3 of the affidavit are utter false. The said averments cannot be raised in the EP. As the petitioners has lost their right to defend the case filed by the respondent as per law, they cannot raise the said plea by way of this petition. As per the judgment of the Hon'ble Apex Court interpreting the Commercial Court's Act in 2019-2 CTC page 294, the petitioners have lost their right to file their written statement after

90 days. As per Article 141 of the Constitution, the said judgment is binding on this Court. Therefore, based upon the said judgment only, this Court has passed the judgment in the suit and also returned the petition filed by the petitioners as it is not maintainable. The filing of CRP before the Hon'ble Madurai Bench of Madras High Court would not be a ground to overcome the law declared by the Hon'ble Apex Court. The non passing of any by the Hon'ble High Court in the CRP itself speaks many thing. The averments found in para 5 of the affidavit shows the desperate attempt of the petitioners to overcome the rigor of the Commercial Court Act. For their mere asking it cannot be tinkered with. The suit was not converted into summary suit. The suit was filed as Commercial Suit before the Commercial Court. If the petitioners wanted to question the order passed by this Court, they should agitate only before the Hon'ble High Court and not before this very same Court. This Court had given fair opportunity as per law to the petitioners to put forth their defence. But, the petitioners did not use the opportunity and simply while away the time. Hence, this Court closed the right to defend and after analysing the entire facts of the case along with document, came to the clear conclusion that the respondent's claim is true and genuine had decreed the suit. In that circumstance the petitioners have no right to file this petition. When the petitioners have lost the right to defend the suit by efflux of time, it cannot be revived. As days

passes, the limitation will not revive. Further, it is settled law that even though the defence of limitation is not taken in the pleading, this Court is having a bounden duty to see whether any proceedings before this Court is within limitation. The petitioners cannot question the same. The petitioners neither filed any stay petition before the Hon'ble High Court, nor bringing the CRP for enquiry. Simply filed it only to prolong this EP. Further, stay cannot be asked in trot. Before the executing Court, stay can be filed only till preferring CRP. Now even as per the petitioners' version CRP filed. In that circumstances, this stay petition is not at all maintainable. Further, as per judgment of the Hon'ble Supreme Court in 2021 SCC Online SC page 3411 an EP has to be disposed off within six months. Against that principle the petitioners are using this petition. Hence this petition is not maintainable. Hence the petition has to be dismissed with cost.

4) Neither witness was examined nor exhibits were marked on both sides.

5) **The point for consideration in this petition is :-**

Whether the further proceedings in E.P. No.57/2021 in O.S. No.44/2019 on the file of Principal District Court, Thoothukudi has to be stayed or not?

Answer to the point :-

6) The petitioners who are the defendants in the suit have filed this petition to stay the further proceedings in E.P. No.57/2021 in O.S. No.44/2019 on the file of this Court.

7) It is the contention of the petitioners/defendants that in the above suit the petitioners/defendants were set exparte for non-filing of written statement and immediately on 27.02.2020 the petitioners filed a set aside petition along with the written statement, in which, the respondent's counsel made an endorsement that the written statement cannot be filed beyond 120 days as per the Commercial Courts Act and based on the said endorsement, the said IA was returned as not maintainable and against the order of return, the petitioners have filed C.R.P (MD) No.113 and 1114 of 2022 before the Hon'ble Madurai Bench of Madras High Court and the same are pending and that based on the exparte decree, the respondent/plaintiff has filed the E.P. No.57/2021 and that if the execution petition is disposed off without giving opportunity to the petitioners to defend the suit, the petitioners would be put to irreparable loss, hardship and agony, hence the proceedings in E.P. No.57/2021 has to be necessarily stayed till the disposal of the C.R.P (MD) No.113 and 1114 of 2022 pending before the Hon'ble Madurai Bench of Madras High Court

and therefore, it is prayed that this petition has to be allowed by staying the execution proceedings, otherwise, the petitioner will be put to great loss and hardship.

8) The learned counsel for the respondent/plaintiff would submit that as per the Commercial Courts Act, the petitioners ought to have filed the written statement within 120 days from the date of service of summons and that since the petitioners/defendants have failed to file the written statement within 120 days from the date of service of summons, they have waived their right to file written statement and to defend the suit by efflux of time and that the exparte decree was passed in favour of the respondent upon considering the oral and documentary evidences adduced on the side of respondent and that they have filed this petition only to prolong the execution petition and that the petition for stay can be filed till preferring C.R.P against the order passed in the petition to set aside the exparte decree and that the petitioners have already filed C.R.P and the same is pending before the Hon'ble Madurai Bench of Madras High Court and therefore, the only remedy for the petitioners is to seek an order of stay before the Hon'ble Madurai Bench of Madras High Court in C.R.P and this petition for stay before this Court is not at all maintainable and that as per the judgment of the Hon'ble Supreme Court of India in 2021 SCC Online SC Page 3411, the execution petitions have to be disposed off within 6

months and therefore, it is submitted that the petitioners are not entitled for stay of execution proceedings and this petition deserves for dismissal as devoid of merit.

9) Admittedly exparte decree was passed against the petitioners/defendants in the commercial suit in OS No.44/2019 and therefore, provisions under the Commercial Act are applicable to the suit. Subsequently, the petition filed by the petitioners/defendants to set aside the exparte decree was returned by this Court based on the endorsement made by the respondent that the petitioners/defendants have waived their right to file written statement on expiry of 120 days from the date of service of summons and the said order of return was challenged by the petitioners/defendants by preferring revision before the Hon'ble Madurai Bench of Madras High Court and C.R.P (MD) No.113 and 1114 of 2022 are pending. It is settled law that the execution Court cannot go behind the decree and therefore, this Court at the execution stage need not go into the merit of the case and the legality of the exparte decree passed in the suit which was converted as Commercial suit.

10) As per Order 21 Rule 26 of The Code of Civil Procedure, it is clear that the Execution Court shall stay the execution of decree for a reasonable time to enable the judgment debtor to apply the Court which

passed the decree or the appellate Court for an order to stay execution. Admittedly, in the instant case, the petitioners/defendants have filed Civil Revision challenging the order returning the interlocutory application filed to set aside the exparte decree passed in the suit and the same is pending. Hence, as rightly pointed out by the learned counsel for the respondent, this Court is of the view that, the stay petition can be filed by the petitioners/defendants before this Court till preferring C.R.P and the remedy of the petitioners/defendants to seek an order of stay is only before the Hon'ble Madurai Bench of Madras High Court in the pending Civil Revision petitions. Further, as per the judgment of the Hon'ble Supreme Court of India in 2021 SCC Online SC page 3411, the EP has to be disposed off within 6 months. Therefore, this Court is of the view that unless order of stay is granted by the Hon'ble Madurai Bench of Madras High Court, the further proceedings in the E.P cannot be stayed by this Court, especially when Civil Revision petition filed by the petitioners/defendants are pending before the Hon'ble Madurai Bench of Madras High Court.

11) For all the reasons stated above, this Court is of the view that the petitioners/defendants have no right to file this petition for stay after preferring C.R.P before the Hon'ble Madurai Bench of Madras High Court challenging the order returning the I.A which was filed by the petitioners/defendants to set aside the exparte decree passed in the

Commercial suit and the stay petition filed by the petitioners/defendants is not at all maintainable and therefore, it is held that the petitioners/defendants are not entitled to get an order of stay of the further proceedings in E.P. No.57/2021 before this Court and this petition for stay deserves for dismissal and thus, this point is answered accordingly.

12) In the result, this petition is dismissed. No cost.

Dictated by me to the stenographer and transcribed and typed by her into computer and corrected and pronounced by me, in the open court, on this the 29th day of November 2022.

Principal District Judge,
Thoothukudi.

Witness examined and exhibits marked on the side of Petitioners :-

Nil

Witness examined and exhibits marked on the side of respondents:-

Nil

Principal District Judge,
Thoothukudi.