

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
C.P No 3573/2013

ORDER WITH SIGNATURE OF JUDGE

For katcha peshi.

28.10.2014

Mr. Muhammad Shafiq Mughal Advocate for the petitioner
Mr. Saifuddin AAG

O R D E R

Through instant petition, the petitioner has impugned the order dated 28.05.2013 passed by the learned VII Additional District and Sessions Judge, South, Karachi, whereby the application filed by the Petitioner under section 114 R/w Order 47 and Section 151 CPC for review of order/judgment dated 19.02.2013 passed in Civil Appeal No 65 of 2011 has been dismissed. The learned Counsel for the Petitioner has contended that the Respondent No.1 had filed a Suit bearing No 926 of 2006 before the learned XIV Civil Judge, Karachi (South) for recovery of certain amount against the Petitioner and Respondent No 2 & 3, which was decreed Ex-parte against the Petitioner, and on merits against Respondent No. 2 & 3. The Respondent No. 2 & 3 had challenged the said judgment and decree before the learned Additional District & Sessions Judge, Karachi, (South) by filing a Civil Appeal bearing No. 65/2011, wherein the petitioner was arrayed as a respondent and was

served for the first time, whereafter it came to the knowledge of the Petitioner that the Suit filed by Respondent No.1 had been decreed against the Petitioner. It has been further contended that the Petitioner immediately filed an application under Order IX Rule 13 CPC for setting aside the Ex-parte decree, which application is still pending before the learned Trial Court. According to the learned Counsel the appeal filed by the Respondent No. 2 & 3 has been dismissed vide judgment/decreed dated 19.02.2013 and while passing the judgment the learned Appellate Court has made some observations regarding the contention of the Petitioner and has also observed that the decree passed against the Petitioner was not Ex-parte. Per learned Counsel such remarks and or observations were likely to affect the merits of the application under Order IX Rule 13 filed by the Petitioner which is still pending, hence the Petitioner had filed an application for review of the order / judgment dated 19.02.2013, which application has been dismissed vide the impugned order. Per learned Counsel the learned lower appellate court was not justified to observe in its judgment that the Petitioner had controverted the claim of Respondent No.1 as the Petitioner was declared Ex-parte in the Suit and could not have controverted the claim under any circumstances. Learned Counsel further submits that the learned lower appellate court has also erred in observing that the trial court had rightly held that Petitioner was liable to pay the alleged amount to Respondent No.1.

At the very outset the learned Counsel for the Petitioner was confronted that as to how a Constitutional Petition under Article 199 of the Constitution is maintainable against an order passed in Civil Appeal

by the lower appellate Court against which a further appeal or revision could have been filed before a Single Judge of this Court in terms of CPC, to which the learned Counsel has not been able to satisfactorily reply, and has rather conceded that though a 2nd Appeal or a Revision could have been filed against the order of learned lower appellate court passed in Civil Appeal, however, instead, a review was preferred by the Petitioner which has been dismissed against which the present petition has been filed by the Petitioner, as now the limitation period for filing of a 2nd Appeal or Revision before this Court has expired.

We are of the view that such contention of the learned Counsel for the Petitioner cannot be appreciated by this Court as it is not a matter of choice and discretion of a party to file a Petition before this Court under Article 199 of the Constitution merely for the reason, that though alternate remedy was available, but has not been availed or for the reason that the limitation for availing such alternate remedy has expired, a petition would be maintainable on the ground that there does remain any other alternate remedy. When the statute provides for an alternate and efficacious remedy, the Petitioner ought to have availed the same in accordance with law and within the period of limitation and there cannot be any exception to this. In view of such position we are of the view that instant petition is frivolous and misconceived and is hereby dismissed.

However before parting we may observe that even otherwise, there was no occasion for the Petitioner to seek any further remedy against the impugned order as the apprehension of the Petitioner that any such observation and or remarks as recorded in the order dated

19.02.2013 passed by the Additional District & Sessions Judge, South, Karachi, while dismissing the appeal filed by Respondent No.2 & 3, would have any effect on the case of the Petitioner is also misconceived, as such remarks were made on the basis of material and evidence of the parties before the Appellate and Trial Court while dismissing the appeal of Respondent No 2 & 3, and not in respect of the Petitioner who had been declared Ex-parte and had not filed any appeal. It may be observed that when a case of a party is not before the Court, any such observations would naturally not be of any consequence insofar as the merits of the case of that party is concerned. We have been informed that the application of the Petitioner filed under Order IX Rule 13 CPC is still pending before the Trial Court; therefore the same may be decided in the light of the above observations and strictly in accordance with law.

JUDGE

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