



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.12.2016

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THE HONOURABLE MR. JUSTICE D. KRISHNAKUMAR

CIVIL REVISION PETITION (MD) (PD) No. 2473 of 2016
and C.M.P. (MD) No. 11673 of 2016

S. Santha

.. Petitioner

VS

1. M. S. M. K. Packiam

2. M. S. M. K. Ramesh

.. Respondents

The Civil Revision Petition filed under Section 115 of Code of Civil Procedure to set aside the order and decretal order dated 17.12.2015 passed in I.A.No.166 of 2015 in O.S.No.11 of 2011 by the learned I Additional District Judge, Madurai.

For Petitioner

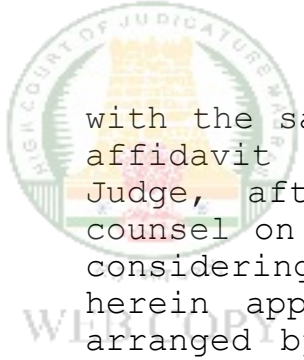
... Mr. R. Devaraj

O R D E R

The Civil Revision Petition has been filed against the order and decretal order dated 17.12.2015 passed in I.A.No.166 of 2015 in O.S.No.11 of 2011 by the learned I Additional District Judge, Madurai.

2. The brief facts of the case is as follows:

The petitioner/plaintiff filed a suit in O.S.No.11 of 2011 on the file of the learned I Additional District Judge, Madurai for declaration and permanent injunction. The eighth defendant filed a written statement and the same was adopted by defendants 5, 9, 12 and 13. Despite sufficient time granted to defendants 1 to 4, 6, 14, 15 and 22, they have not come forward to file a written statement. Hence, defendants 1 to 4, 6, 14, 15 and 22 were set ex-parte on 19.09.2011. Therefore, the respondents herein/defendants 2 and 4 filed I.A.No.166 of 2015 in O.S.No.11 of 2011 under Order IX Rule 7 and Section 151 of the Code of Civil Procedure before the learned I Additional District Judge, Madurai to set aside the ex-parte order dated 19.09.2011. The respondents herein have also filed written statement and counter claim along



with the said application. The petitioner herein filed the counter affidavit objecting to allow the said application. The learned Judge, after considering the arguments advanced by the learned counsel on either side, the documents available on record and also considering the fact that on receipt of summons, the respondents herein appeared in person before the Court through the counsel arranged by the eighth defendant, who is the sister of the first respondent herein and thereafter, the eighth defendant had told the respondents herein that they would settle the matter out of Court and hence, the respondents herein, did not pursue the matter, had arrived at a finding that the suit is pending for trial and even if the ex parte proceeding is set aside, no prejudice would be caused to the plaintiff therein and allowed the application, on condition, directing the respondents herein to pay a sum of Rs.2,000/- as costs on or before 21.12.2015. Against which, the present civil revision petition has been filed by the petitioner.

3.The learned counsel for the revision petitioner submitted that for the past four years, the respondents did not care about the case and even as per their affidavit, they had come to know about the ex parte order dated 19.09.2011 in the month of August 2015. But, they had filed the application only on 19.10.2015 and further in the affidavit filed in support of the application, the respondents had not adduced proper reasons for such delay.

4.The learned counsel for the revision petitioner further submitted that it is false to say that the eighth defendant, who is the sister of the first respondent herein undertook to follow up the case and that they would settle the matter out of Court. The learned Judge, without considering the facts and circumstances of the case, erroneously, had allowed the application to set aside the ex parte order. Hence, the impugned order passed by the Court below is liable to be set aside and the Civil Revision Petition has to be allowed.

5.The case of the respondents before the trial Court is that on receipt of the summons the respondents have appeared before the Court below. Believing the words of the eighth defendant, who is the sister of the first respondent, that she would look after the case, the respondents did not pursue the matter. Only on 15.08.2015, the respondents came to know that they have been set ex parte on 19.09.2011 and hence, the delay has been occurred in filing the application to set aside the ex parte order dated 19.09.2011.

6.Heard the learned counsel for the petitioner and perused the materials available on record.

7.According to the petitioner, under Article 137 of the Limitation Act, three years period is prescribed for filing an



application and the period of limitation starts from the date when the right to apply accrues and it is a settled proposition that Article 137 of the Limitation Act, 1963 will apply to any petition or application filed under any Act before a civil court.

8. At this juncture, it is useful to refer to the relevant paragraph Nos. 26 to 34 of the decision of this Court in Visalakshi v. Umapathy and Others (CDJ 2015 MHC 4044), which reads as follows:

"26. The learned Single Judge has also held that, thus an order passed in a suit, finally determining the rights of the parties shall be a decree, while final order passed on an application shall simply be an order and not a Decree. Thus the word 'Decree' must be given the meaning assigned to it in the Civil Procedure Code. To put it differently, the prescribed period of limitation for an application under Or.9, R.13 C.P.C., for setting aside an ex parte Decree is 30 days, but not for an application to set aside the ex parte order with the result that an application for setting aside an ex parte order, shall be governed by the residuary clause contained in Article 137 of the Limitation Act.

27. In paragraph 20, the learned Judge has observed as under:-

20. The learned counsel appointed to assist the Court has drawn the attention of the Court to the decision reported in AIR 1988 Calcutta 358. This Court's finding that petition filed under Or.9 R.9 would be governed by Art.137 of the Limitation Act is fortified by the decision of the Full Court of the Calcutta High Court which reads:-

"As regards the limitation for filing the aforesaid application for restoration there is no specific provision in the Limitation Act 1963 and therefore such application for restoration would be governed by Art.137 of the Act and be filed within a period of three years as prescribed therein. Although the period of limitation for making an application for restoration of a suit dismissed for default under Or.9 is thirty days from the date of the order of dismissal, the application for restoration of miscellaneous case arising out of such application under Or.9, when such Misc. Case is dismissed for default, is not governed by the provisions of Art.122 of the Limitation Act in view of the fact that expressly in terms of the said Art.122, the miscellaneous case arising out of an application under Or.9 is not attracted."

28. The ratio applied by the learned Single Judge of this Court in Rajaji's case, has also been applied in C.L Cleetus vs. South Indian Bank Ltd. and another (AIR 2007 Kerala 301), wherein the Kerala High Court has observed that, It is true that there is distinction between applications which are filed under Order 9 Rule 13 and those filed under Order 9 Rule 7, in that while the former seeks cancellation of decree finally disposing of suits, the latter seeks cancellation of only orders setting the applicant ex parte, thus preventing him from participating in further proceedings in the suit. It is also true that unlike the applications under Order 9 Rule 13 there is no article in the Limitation Act providing any specific period of limitation for



applications under Order 9 Rule 7. Such applications will be governed by Article 137, the residuary article which prescribes a period of three years.

29. The decision in Pilla Reddy and others vs. Thimmaraya Reddy and others ((1997) 1 MLJ 37) stands on a different footing and therefore, it need not be discussed in this case.

30. In an unreported judgment decided on 15.2.2013 by the Delhi High Court in Vikas Dedeech vs. Richlook Garments (P) Ltd., the decisions in Palani Nathan vs. Devanai Ammal (1989 (2) L.W.63), Kasturi and others vs. Saravanan @ Sakthi Saravanan ((2010) 7 MLJ 802), Rajaji vs. R. Krishnaji (2006-1-L.W.790) and C.L. Cleetus vs. South Indian Bank Ltd. and another (AIR 2007 Kerala 301) have been referred to.

31. After having gone through the catena of decisions, the learned Single Judge of the Delhi High Court has held that the contention of the learned counsel for the petitioner that the applications under Order IX Rule 7 C.P.C., are governed by Article 137 of the Limitation Act, requires no discussion in view of the legal position as laid down in the above referred decisions.

32. On coming to the instant case on hand, as adumbrated supra, the ex parte order, as against the revision petitioner/D1 was passed on 5.6.2009. But the application in I.A.No.87 of 2013 under Order 9, Rule 7 C.P.C., was filed on 7.6.2013, i.e., after the lapse of four years.

33. Admittedly, for filing the application under Order 9, Rule 7 C.P.C., no limitation is prescribed. It does not mean that an application under Order 9, Rule 7 C.P.C., to set aside the ex parte order can be filed at any point of time, i.e., even after several years as has been done in the present case on hand.

34. Since no limitation is prescribed under Order 9 Rule 7 C.P.C., like that of Order 9 Rule 13 as observed in Rajaji's case as well as in Vikas Dedeech's case (Delhi High Court), the provisions under Article 137 being residuary provision alone would be made applicable and therefore, under Article 137 of the Limitation Act, the period of limitation is prescribed as three years and since the application in I.A.No.87 of 2013 has been filed after the period of three years, it is squarely barred by limitation under Article 137 of the Limitation Act, 1963, as rightly concluded by the learned trial Judge, which according to this Court, does not require any interference and therefore, the revision petition deserves to be dismissed."



9. In another decision of this Court in the case of Baskar v. Jeeva @ Jeevayan (CDJ 2015 MHC 820), it has been held below:

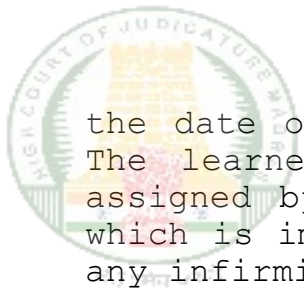
"5. Order 9 Rule 6 (1)(a) C.P.C. provides that the Court may make an order that the suit shall be heard ex parte if it is proved that the summons on the defendant was duly served. Such a decision to hear ex parte is subject to power of the Court to set aside the same. Order 9 Rule 7 C.P.C. does not contemplate the filing of a petition to set aside the order passed in a suit to the effect that the suit be heard an ex parte. It simply states that when the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, the Court may direct upon such terms as to costs or otherwise, that he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. The said proviso has been interpreted in a number of decisions in the following manner.

(i) An application under Order 9 Rule 7 C.P.C. shall be need only if the defendant wants status quo ante in respect of the proceedings to be restored; and

(ii) If he does not want the status quo ante to be restored and he wants to take part from the date on which he enters appearance, even without such an application, he can participate in the proceedings as of right.

6. In this case, though there is enormous delay, the suit has not attained finality till the respondent entered appearance and filed the application under Order 9 Rule 7 C.P.C. Strictly speaking, he cannot be prevented from taking part in the proceedings from the date of appearance, namely, the date of filing the said petition. As the suit had not attained finality either by passing of an interim decree or preliminary decree or final decree, the petition filed by him under Order 9 Rule 7 C.P.C. would not be rejected as belated or one filed beyond the period of limitation. Since summons had not been served directly and only substituted service was effected by paper publication, even after passing of an ex parte decree, the Judgment Debtor can file a petition under Order 9 Rule 13 of C.P.C. to set aside the ex parte decree.

7. It shall be pertinent to note that even after passing of ex parte decree, the defendant can file an application under Order 9 Rule 13 C.P.C. to set aside the ex parte decree besides having a right to file an appeal against the ex parte decree without even seeking an order setting aside the ex parte decree. The fact that summons was not duly served is also said to be one of the valid reasons for setting aside ex parte decree. In this case, as pointed out supra, no decree has been passed and hence, the respondent would not be prevented from taking part in the proceedings from the date on which he entered appearance. However, besides citing the fact that summons was not duly served on him and on the other hand, it was substituted service by effecting publication while he was away from the suit village, he has assigned valid reasons for his non-appearance from the date of first hearing of the suit till



the date of his filing an application under Order 9 Rule 7 C.P.C. The learned trial Judge accepted the genuineness of the reasons assigned by the respondent and allowed the petition, by the order which is impugned in the present revision. This Court does not find any infirmity or illegality in the order passed by the trial court."

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10. This Court also refers to yet another decision of this Court (cited supra) in Palani Nathan V. Devanai Ammal (1989 [2] MLJ 259) wherein, it is held as follows:

"For filing an application under Order 9 Rule 7, of the Code of Civil Procedure, no limitation is prescribed and that it is open to the Court to condone her absence and set aside the ex parte order and permit her to take part in the proceedings at any stage of the proceedings.

It is only for setting aside the ex parte decree under Order 9 Rule 13, C.P.C. the question of condoning the delay under S.5 of the Limitation Act arises in case there is a necessity for condonation of the delay has arisen.

In Sangram Singh v. Election Tribunal Kotah after extracting the relevant provision Order 9, Rule 7, Order 8, Rule 10, Their Lordships observed:

We have seen that if the defendant does not appear at the first hearing, the Court can proceed ex parte, which means that it can proceed without a written statement; and Order 9, Rule 7 makes it clear that unless good cause is shown the defendant cannot put in a written statement unless he is allowed to do so, and if the case is one in which the Court considers a written statement should have been put in, the consequences entailed by Order 8, Rule 10 must be suffered.

What those consequences should be in a given case is for the Court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases, an order awarding costs to the plaintiff would meet the ends of justice; an adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic.

Thus it is clear from the above decisions, there is no limitation for filing a petition under Order 9, Rule 7 of the Code of Civil Procedure. Further, the question of filing written statement also does not arise as the first defendant is only adopting the written statement filed by her daughter and she wants to give evidence in support of her case. The suit is filed only on the basis of an alleged oral agreement between her and the plaintiff and the same is disputed by her even prior to the filing of the suit by issuing a reply notice and as such no prejudice would be caused to the other side. Further, she was in Malaysia at the time when the summons was served on her. In the circumstances, it cannot be said that the discretion used by the Court below in allowing the application under Order 9 Rule 7 of the Code of Civil Procedure is illegal or improper."



11. Further, it is useful to refer to the decision of the Hon'ble Supreme Court of India in the case of Arjun Singh v. Mohindra Kumar (1964 [5] SCR 946) wherein, in paragraph 15, it is observed as follows:

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"The scope of a proceeding under O. IX, r. 7 and its place in the scheme of the provisions of the Code relating to the trial of suits was the subject of consideration in Sangram Singh v. Election Tribunal⁽¹⁾. Dealing with the meaning of the words "The Court may proceed ex parte" in O. IX, r. 6(1)(a) Bose J. speaking for the Court said:

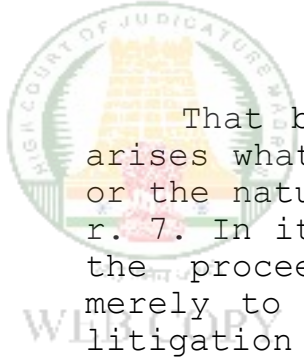
"When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an ex parte order. Of course the fact that it is proceeding ex parte will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an ex parte decree or other ex parte order which the court is authorised to make. All that rule 6(1)(a) does' is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties."

Dealing next with the scheme of the Code, the learned Judge pointed out that the manner in which the Court could thereafter proceed i.e., after r. 6(1)(a) was passed would depend upon the purpose for which the suit stood adjourned, and proceeded :

"If it is for final hearing, an ex parte decree can be passed, and if it is passed, then O. IX, r. 13 comes into play and, before the decree is set aside the Court is required to make an order to set it aside. Contrast this with r. 7 which does not require the setting aside of what is commonly, though erroneously, known as 'the ex parte order'. No order is contemplated by the Code and therefore no order to set aside the order is contemplated either." (*italics ours*) And referring to the effect of the rejection of application made under O. XI, r. 7, he added:

(1) [1955] 2 S.C.R. p. 1.

"If a party does appear on the day to which the hearing of the suit is adjourned, he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order IX. r. 7 makes that clear. Therefore, unless he can show good cause, he must appear on the day to which the hearing is adjourned. He must not say that what has gone before and be content to proceed from the stage at which he comes in."



That being the effect of the proceedings,. the question next arises what is the nature of the order if it can be called an order or the nature of the adjudication which the court makes under O. IX, r. 7. In its essence it is directed to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation. It does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. Besides, it is obvious that the proceeding is of a very summary nature and this is evident from the fact that as contrasted with O. IX, r. 9 or O. IX, r. 13, no appeal is provided against action of the court under O. IX, r. 7. "refusing to set back the clock". It is, therefore, manifest that the Code proceeds upon the view of not importing any finality to the determination of any issues of fact on which the court's action under that provision is based. In this connection reference may be made to a decision of a Division Bench of the Madras High Court in Sankaralinga v. Ratnasabhapatil (1). The question arose on an appeal to the High Court by the defendants against whom an ex parte decree had been passed on March 30, 1895. Previous thereto they had put in petitions supported by affidavits under s. 101 of the Civil Procedure Code of 1882 corresponding to O. IX, r. 7. to set aside "an ex parte order," accept their written statements, and proceed with the suit on the merits. The ground alleged for the relief (1) 21 I.L.R. Mad. 324. sought was that they were not duly served with summons. This application was rejected by the Court. Thereafter, after an ex parte decree was passed, they again filed another application under s. 108 under the then code, corresponding to the present O. IX, r. 13. The ground put forward was again the same, namely that the summons was not properly served. The District Judge having dismissed the application under s. 108 (O. IX, r. 13), the defendants preferred an appeal to the High Court. On behalf of the plaintiffs-respondents the contention was raised by Mr. Bhashyam Ayyangar-learned Counsel-that the application to set aside the ex parte decree under s. 108 was incompetent because the same question has already been decided against the defendant when he filed the application under s. 101. The Court composed of Subramania Iyer & Benson JJ. said, "the contention at first sight may seem to be reasonable, but having regard to the very wide words 'in any case' used in s. 108 we are unable to hold that the defendant was not entitled to make an application under section 108." There have been other decisions in which a similar view has been held and though the provisions of the Code corresponding to O. IX, r. 7 and O. IX, r. 13 have been in force for over a century from 1859, there has not been a single case in which the plea of res judicata such as has been urged in the appeal before us has been upheld. On the other hand, we might point out that an exactly similar objection of res judicata was expressly raised and repelled in Bhao Patel v. Naroo(1) in a decision rendered in 1896 in which reliance was placed on a case reported in 8 Cal. 272.



Procedure, no limitation period is prescribed and that it is open to the Court to condone the absence and set aside the ex parte order or permit the party to take part in the proceedings at any stage of the proceedings.

13. Considering the facts and circumstances of the case and in the light of the decisions of this Court as well as the Hon'ble Supreme Court (cited supra), this Court is inclined to dismiss the Civil Revision Petition.

14. In the result, the Civil Revision Petition is dismissed. The order dated 17.12.2015 passed in I.A.No.166 of 2015 in O.S.No.11 of 2011 by the learned I Additional District Judge, Madurai is confirmed. There is no order as to costs.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

1. The I Additional District Judge,
Madurai.

2. The Record Keeper, (2 copies)
V.R.Section,
Madurai Bench of
Madras High Court,
Madurai.

+One cc to M/s.R.Devaraj, Advocate, SR.No.78564

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RL/5C/9P/CVC/SAR2/1/3/2018

C.R.P. (MD) No.2473 of 2016

Date: 01.12.2016