



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: **15.10.2019**
CORAM :

THE HONOURABLE Ms.JUSTICE P.T.ASHA

C.R.P. (MD) No.613 of 2011

and

M.P. (MD) No.1 of 2011

Pushparaj

... Petitioner

vs.

1.Rajayyan

2.Prabahavathi Princilla Snehabai

3.V.R.Rajkumar

4.V.N.Rjasingh

5.V.R.Rajeshwari

6.V.R.Rajan

7.V.R.Sajjiv

... Respondents

Prayer:- This Petition is filed under Section 115 of the Code of Civil Procedure, to set aside the order dated 04.02.2011 made in CMA.No.11 of 2009 in E.A.No.206 of 2008 in E.P.No.36 of 2007 in O.S.No.412 of 1995 on the file of the Subordinate Judge, Padmanabhapuram.

For Petitioners : Mr.H.Thayumanaswamy

For R1 : Died

For R6 : Mr.R.Vijayakumar

ORDER

This Civil Revision Petition is filed challenging the order passed in CMA.No.11 of 2009 in E.A.No.206 of 2008 in E.P.No.36 of 2007 in O.S.No.412 of 1995 on the file of the Subordinate Judge, Padmanabhapuram dated 04.02.2011.

2.From the records, it is seen that the plaintiff/decreed holder namely, Rajina Bhagavathi Nadachi had filed E.P.No.36 of 2007 for executing the decree passed in O.S.No.412 of 1995. In the said E.P., the petitioner/1st defendant had entered appearance through his counsel and since the counter was not filed, an *ex parte* order came to be passed against him on 08.03.2008.

3.Thereafter, the petitioner/1st defendant had filed E.A.No.206 of 2008 to set aside the *ex parte* order passed in E.P.No.36 of 2007. In the affidavit filed in support of the said appeal, the petitioner/1st defendant would contend that since he was continuously travelling to various places in connection with his business, he was



not in a position to meet his counsel and get the counter ready and since he had substantiate defence, the ex parte order dated 08.03.2008 should be set aside, failing which, he would suffer serious prejudice.

4.To defend the case, the plaintiff has filed a detailed counter by stating that the petitioner/1st defendant has not filed the counter despite several opportunities have been given to him, as a result of which, the ex parte order came to be passed.

5.After hearing the arguments made on either side, the learned Principal District Munsif, Padmabnabhapuram, by his order dated 16.12.2008, was pleased to dismiss the said appeal on the ground that the appeal to set aside the ex parte order dated 08.03.2008, has been filed beyond the period of 30 days as mandated under the provisions of Order XXI Rule 106 CPC. Challenging the same, the petitioner/1st defendant had filed CMA.No.11 of 2009. The learned Subordinate Judge, Padmanabhapuram, had also confirmed the order passed by the learned Principal District Munsif, Padmabnabhapuram. Challenging the same, the petitioner/1st defendant is before this Court.

6.The learned counsel appearing for the petitioner/1st defendant fairly conceded that the orders passed by the Courts below are erroneous in the light of the Madras High Court Amendment inserting the following proviso:

1.In order 21 Rule 105 sub-rule(3) insert the following proviso namely;

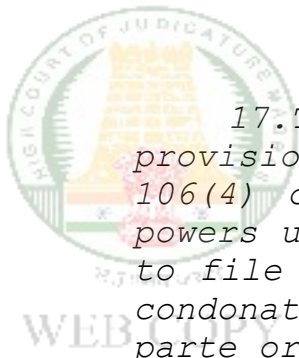
"Provided that an application may be admitted after the said period of thirty days if the applicant satisfied the Court that he had sufficient cause for not making the application within such period"

2.For sub-rule(4) substitute the following sub-rule(4) namely;

"The provisions of Section 5 of the Limitation Act, 1908 shall apply to applications under sub-rule (1)."

7.Heard the learned counsel on either side.

8.From a reading of the said amendment in Order XXI Rule 105 (3) by inserting the proviso, a person, against whom an ex parte order has been passed, can file an application beyond the period of 30 days provided sufficient cause is shown. A Full Bench of the Andhra Pradesh High Court in the case of **Ch.Krishnaiah Vs. Ch.Prasada Rao** reported in **2010 (2) CTC 225** has held as follows:



17. Therefore, we hold that notwithstanding the repeal provisions in 1999 and 2002 Amendments to CPC, Order 21 Rule 106(4) of CPC as inserted by the High Court in exercise of powers under Section 122 of CPC enables a party to proceedings to file application under Section 5 of Limitation Act seeking condonation of delay in filing an application to set aside ex parte order passed under Order 21 Rule 106 (1) of CPC.

9. The above Full Bench judgment has been followed by a learned Single Judge of this Court in the case of **N. Rajendran Vs. Shriram Chits Tamilnadu Private Limited, represented by its Branch Manager/Foreman, Tiruvarur** reported in (2011) 8 MLJ 12, wherein, the learned Single Judge of this Court has observed as follows:

20. The above conflict was resolved by the High Court by another amendment made with effect from 01.11.1972. The amendment made by the Madras High Court with effect from 01.11.1972 did two things. The first was to delete sub-rule (4) of Rule 105 and the second was to insert a proviso under Rule (3) of Rule 105. The proviso inserted under sub-rule (3) of Rule 105 of Order 21 by the Madras High Court Amendment with effect from 01.11.1972 reads as follows:

"Provided that an application may be admitted after the said period of 30 days, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period."

10. In view of the above pronouncements, this Court is of the opinion that the order of the Courts below in refusing to entertain the appeal in E.A.No.206 of 2008 to set aside the ex parte order dated 08.03.2008 on the ground that the same is filed beyond the period of 30 days, is not in accordance with law. Hence, the order passed in CMA.No.11 of 2009 in E.A.No.206 of 2008 in E.P.No.36 of 2007 in O.S.No.412 of 1995 on the file of the Subordinate Judge, Padmanabhapuram dated 04.02.2011, is hereby set aside and the matter is remitted back to the learned Principal District Munsif, Padmanabhapuram to consider the appeal in E.A.No.206 of 2008 afresh and pass appropriate orders on merits thereon.

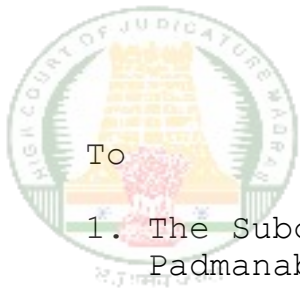
11. This Civil Revision Petition is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar (CS)



To

1. The Subordinate Judge,
Padmanabhapuram.

2. The Principal District Munsif,
Padmanabhapuram.

+1 CC to Mr.R.VIJAYAKUMAR, Advocate (SR-91964[F] dated 15/10/2019)
+1 CC to Mr.H.THAYUMANASWAMY, Advocate (SR-92289[F] dated
16/10/2019)

C.R.P. (MD) No.613 of 2011
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MM

MK (05.11.2019) 4P 5C