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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.01.2019

PRONOUNCED ON : 04.06.2019

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P.(MD)No.2819 of 2018 (PD)

and

C.M.P.(MD).No.12230 of 2018

G.Krishnasamy

.. Petitioner /
Respondent / Plaintiff

Vs.

1.G.Seenivasan

2.S.Saravanakumar

.. Respondents /
Petitioner / Defendants

PRAYER: Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order, dated 02.03.2018, passed in I.A.No.37 of 2016 in O.S.No.17 of 2009 by the learned Subordinate Court, Srivilliputhur.

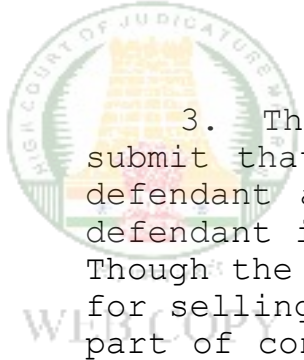
For petitioner : Mr.M.P.Senthil

For respondents : Mr.K.Krishna

ORDER

This civil revision petition has been filed by the revision petitioner / plaintiff, challenging the order, dated 02.03.2018, passed in I.A.No.37 of 2016 in O.S.No.17 of 2009, whereby and whereunder the petition filed by the respondents / defendants seeking to set aside the *ex parte* order, dated 29.07.2009, was allowed subject to the payment of cost of Rs.6,000/- by the Court below.

2. The petitioner/plaintiff filed the suit in O.S.No.17 of 2009 for specific performance based on the sale agreement, dated 16.03.2003, against the respondents/defendants 1 and 2 and one S.Selvaganapathy, who is arrayed as 3rd defendant in the suit. Due to non appearance and not filing of Vakalath and written statement, the respondents / defendants 1 and 2 were set *ex parte* on 29.07.2009. The 3rd defendant has filed his written statement and contested the suit. On 14.12.2015 ie., nearly after six years, the respondents/defendants 1 and 2 filed I.A.No.37 of 2016 seeking to set aside the *ex parte* order dated 29.07.2009 under Order 9 Rule 7 C.P.C. The Court below, after hearing both sides, has allowed the said petition, thereby set aside the *ex parte* order dated 29.07.2009. Challenging the said order, the petitioner/ plaintiff filed this civil revision petition.



3. The learned counsel for the petitioner/plaintiff would submit that the petitioner / plaintiff and the 1st respondent / 1st defendant are brothers. The 2nd respondent/2nd defendant and the 3rd defendant in the suit are sons of the 1st respondent / 1st defendant. Though the first respondent/1st defendant executed the sale agreement for selling the suit property, he subsequently failed to perform his part of contract and therefore, the petitioner/plaintiff filed the suit for specific performance. Since the respondents/defendants 1 and 2 failed to appear before Court and to file written statement, even after receipt of notice and several opportunities, the Court below set them as *ex parte* on 29.07.2009. While so, after about six years, the petitioner has filed a petition to set aside the *ex parte* order under Order 9 Rule 7 of C.P.C., which is clearly barred by limitation under Article 137 of C.P.C.

4. The learned counsel for the petitioner/plaintiff would further submit that knowing fully well about the execution of the sale agreement in the year 2003, the 3rd defendant in the suit, colluding with the respondents herein, filed a suit in O.S.No.29 of 2006 for partition against the respondents/defendants 1 and 2 and the petitioner herein. The respondents herein entered appearance in the suit in O.S.No.29 of 2006. On 01.07.2011, the Court below ordered for joint trial of both the suits and as such the respondents /defendants 1 and 2 had very well known about the *ex parte* order dated 29.07.2009. But, in order to delay the proceedings, they have purposefully kept silent and after about six years, they filed the petition for setting aside the *ex parte* order. Though the Court below has held that the respondents/defendants 1 and 2 have not averred any valid reason for the delay, it has erroneously allowed the petition subject to the payment of cost of Rs.6,000/- to the petitioner/plaintiff, for providing one more opportunity to the respondents/defendants 1 and 2. Thus, he prayed to set aside the impugned order and to allow this revision petition.

5. The learned counsel for the respondents/defendants 1 and 2 would submit that for filing a petition under Order 9 Rule 7 C.P.C. no period of limitation is prescribed and hence, the petition filed by the respondents herein was not barred by limitation. He would further submit that on 29.07.2009, the respondents engaged their friend, who is practicing as an Advocate, and he assured that he would file vakalath for both of them. But, by mistake, the respondents did not sign in the Vakalath and therefore, the Advocate did not appear before the Court on that day. The respondents were under the impression that the Advocate has been conducting the case on behalf of them and due to pressure of work also, they did not contact their counsel. Only after enquiry by some of the relatives with regard to frequent presence of the petitioner and the 3rd defendant in the Court, the respondents came to know about the *ex parte* order passed by the Court below. In order to provide one more opportunity, the Court below has rightly allowed the petition with costs. The said order need not be interfered with. Thus, he prayed to dismiss this revision petition.



6. Heard the learned counsel for both sides and perused the records carefully.

7. In this case, it is not in dispute that the parties are related to each other and the suit for partition in O.S.No.29 of 2006 is also pending between the very same parties. Since the respondents/defendants 1 and 2 failed to appear before the Court below and to contest the suit by filing written statement, they were set *ex parte* on 29.07.2009. After about six years from the date of *ex parte* order, the respondents/defendants 1 and 2 filed a petition to set aside the *ex parte* order under Order 9 Rule 7 of C.P.C. stating that though they have instructed a counsel, that counsel could not represent before the Court as they omitted to sign in the Vakalath on the date of *ex parte* order. The reason stated by the respondents is really unacceptable and unbelievable.

8. As rightly stated by the learned counsel for the respondents/defendants 1 and 2, Order 9 Rule 7 of C.P.C. does not prescribe any limitation for filing a petition to set aside the *ex parte* order, which leads to a question as to whether a petition to set aside the *ex parte* order can be filed by the defendants at any point of time, ie., even after several years without explaining the reason for the delay. But, in order to restrain such petitions, the Civil Procedure Code itself provides a residuary clause for such an Order which does not prescribe any limitation period. Now, it is a settled proposition that Article 137 of the Limitation Act would apply to all the applications filed before the Civil Court under the Code of Civil Procedure, which includes the petition filed under Order 9 Rule 7 of the Civil Procedure Code. The limitation prescribed in Article 137 of the Limitation Act for filing such an application is three years. In this case, admittedly the respondents filed the application to set aside the *ex parte* order under Order 9 Rule 7 C.P.C. nearly after six years and therefore, the said petition is squarely barred by limitation under Article 137 of the Limitation Act. The Court below, without considering the same, has erroneously entertained the petition.

9. The above view was portrayed by a learned Single Judge of this Court in the decision in **Visalakshi Vs. Umapathy** reported in **2015 (5) CTC 67**, wherein at paragraph No.34 it has been held as follows:

"34. Since no limitation is prescribed under Order 9 Rule 7 of C.P.C., like that of the 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.37 of 2013 has been file 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."

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10. As stated earlier, the parties are related to each other. It is not the case of the respondents herein that they did not receive any notice in both the suits. According to the petitioner, the respondents contested the other suit and they knew about the order passed by the Court below about joint trial. When that be so, there is every possibility for the respondents to know about the *ex parte* order passed by the Court below. Hence, the contention of the petitioner that with an intention to drag on the proceedings, the respondents purposefully kept silent and after about six years, they filed the petition for setting aside the *ex parte* order, seems to be reasonable. When the petition itself is barred by limitation, the respondents are not entitled for one more opportunity. In view of the above, this Court is of the view that the order passed by the Court below is liable to be set aside.

11. In the result, this Civil Revision Petition is allowed and the order passed by the Court below is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

To
The Subordinate Judge,
Srivilliputhur.

Copy to:
The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2C)

+1 CC to Mr.M.P.SENTHIL, Advocate SR-66989.
+1 CC to Mr.K.KRISHNA, Advocate SR-66863.

C.R.P. (MD) No.2819 of 2018 (PD)
04.06.2019

CS: (11/06/2019) 4P 6C