

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.07.2021

CORAM

THE HON'BLE Mr. JUSTICE G.K.ILANTHIRAIYAN

**C.R.P. (PD) No. 473 of 2018
and CMP No. 2504 of 2018**

1. Arukkani Ammal
2. Jothi

.....
Petitioners

Vs

1. N.Krishnamurthy
2. Karupayammal
3. Palanisami
4. Kannammal
5. Ammaniammal
7. Duraisamy

.....
Respondents

Prayer :- Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 04.03.2021 made in I.A.No.217 of 2012 in O.S.No.929 of 2002 on the file of the II Additional Subordinate Judge, Erode.

For Petitioners	:	Mr.V.Balamurugane
For R1 to R4	:	No appearance
For R5 & R6	:	Mr.K.Raja

ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 04.03.2021 made in I.A.No.217 of 2012 in O.S.No.929 of

2002 on the file of the II Additional Subordinate Judge, Erode, thereby dismissing the petition to condone the delay in re-presentation.

2. The petitioners are the plaintiffs and the respondents are the defendants. The petitioners filed a suit in O.S.No.929 of 2002 for partition as against the respondents herein. When the suit was ripe for trial, the petitioners did not appear before the Court below and as such, the suit was dismissed for default. Immediately, they filed a petition to restore the suit. The said petition was returned for want of some corrections. It was not re-presented within the time stipulated by the Court below for the reason that the returned paper mixed with the other Court bundle and as such, the counsel appeared on behalf of the petitioners could not able to re-present the petition to restore the suit in time. As such, there was a delay of 120 days of re-presentation. They filed a petition to extend the time which was granted to re-present the petition for restoration under Section 148 read with 151 of CPC. However, it was dismissed for the reason that already the suit was dismissed for default on two occasions and as such, the petitioners are not interested to proceed with the trial.

3. The learned counsel for the respondents would submit that the petition itself is not maintainable under Section 148 read with 151 of CPC, since the petitioners ought to have filed a petition to condone the delay under Section 5 of the Limitation Act. In this regard, he also relied upon the Judgment of this Court reported in **(2005) 3 M.L.J. 331 (K.Rangasamy Gounder -vs- Muthusamy Gounder)**, in which it has been held as follows :-

“14. Time granted by the Court for payment of costs while setting aside an exparte decree under O.9, Rule 13, as a condition precedent thereto is not an act prescribed or allowed by the Code. Section 148 CPC does not apply to such a case.

15. Section 148 only enables the Court to enlarge the said period to do any act prescribed or followed by the code. Emphasis is on “to enlarge the time to do any act prescribed or allowed by the Code”. To explain the act prescribed or allowed by the Code, we may enumerate few instances.

***Sec.148 - for payment of Court fee*

*** O.7, R.11 (b)(c) - for correction of valuation and supply of requisite stamp*

*** O.8, R.9- for filing additional pleadings*

*** O.9, R.9; O.9, R.13- To pay costs (when the petition is pending)*

*** O.16, R.2- for payment of expenses*

*** O.23, R.1- for costs when permitting withdrawal of suits.*

*** O.41, R.3- Amendment of memo for appeal.*

16. Thus Sec.148, C.P.C applies to extend the time to do any act prescribed or allowed by the Court only when the matter is pending before the Court and the Court is grant time not exceeding thirty days with a view to minimise procedural delay. When I.A.No.658 of 2002 has reached the finality, there is nothing more to do any act prescribed or allowed by the Code. Hence it would only be proper to hold that with the dismissal of the application when the Court has become functus officio. Sec.148 cannot be invoked. The effect of Sec.148 (prior to amendment) remains the same even after the amendment by inserting the expression “not exceeding thirty days”. In matters where the Court has become functus officio, inserting of expression time by thirty days is of no avail to the respondent/defendant.

17. What otherwise could not be done through the prior provision, Sec.148 is sought to have been obtained by invoking the inherent jurisdiction of the Court

under Sec.151, C.P.C. It is well settled that where the Code contains specific provisions, it would meet the instances of the case, inherent jurisdiction should not be invoked. In Nain Singh v. Koonwarjee, (1971) 1 S.C.J. 252: A.I.R. 1970 S.C 997 the Supreme Court has held:

Under inherent power of Court recognised by Sec.151, a Court has no power to do what is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. Further the power under Sec.151 of the Code cannot be exercised as an appellate power.”

4. The above judgment has been arisen out of the petition filed to set aside the ex-parte decree, where the Court below fixed the time on payment of cost. It was not filed within the period of 30 days and as such, the further delay in filing on payment of cost cannot be extended under Section 148 read with 151 of CPC. Therefore, this Court held that the petition itself is not maintainable under Section 148 read with 151 of CPC. Whereas, in the case on hand, the Court below returned the petition

for restoring the suit for want of some corrections and time was stipulated to re-present the petition. It could not be re-presented within the time stipulated by the Court below and there was a delay in re-presentation of the petition. Therefore, the above judgment is not applicable to the case on hand.

5. That apart, the petition was dismissed on the ground of maintainability. In this case, it was dismissed on the ground that already the suit was dismissed for default on two occasions. However, the petitioners may be given one more opportunity to pursue their suit for partition on payment of cost for the prejudice caused to the respondents herein.

6. In view of the above, order dated 04.03.2021 made in I.A.No.217 of 2012 in O.S.No.929 of 2002 on the file of the II Additional Subordinate Judge, Erode, is hereby set aside on condition that the petitioners shall pay a sum of Rs.10,000/- (Rupees Ten thousand only) as cost to the respondents herein within a period of two weeks from the date

of receipt of a copy of this order, failing which the order passed by this Court shall stand automatically cancelled without further reference to this Court and on such payment, the trial Court is directed to dispose of the suit within a period of six months, thereafter.

7. With the above directions, this Civil Revision Petition stands allowed. Consequently, connected miscellaneous is closed. No costs.

29.07.2021

Lpp
Index: Yes/No
Internet: Yes/No
Speaking Order: Yes/No

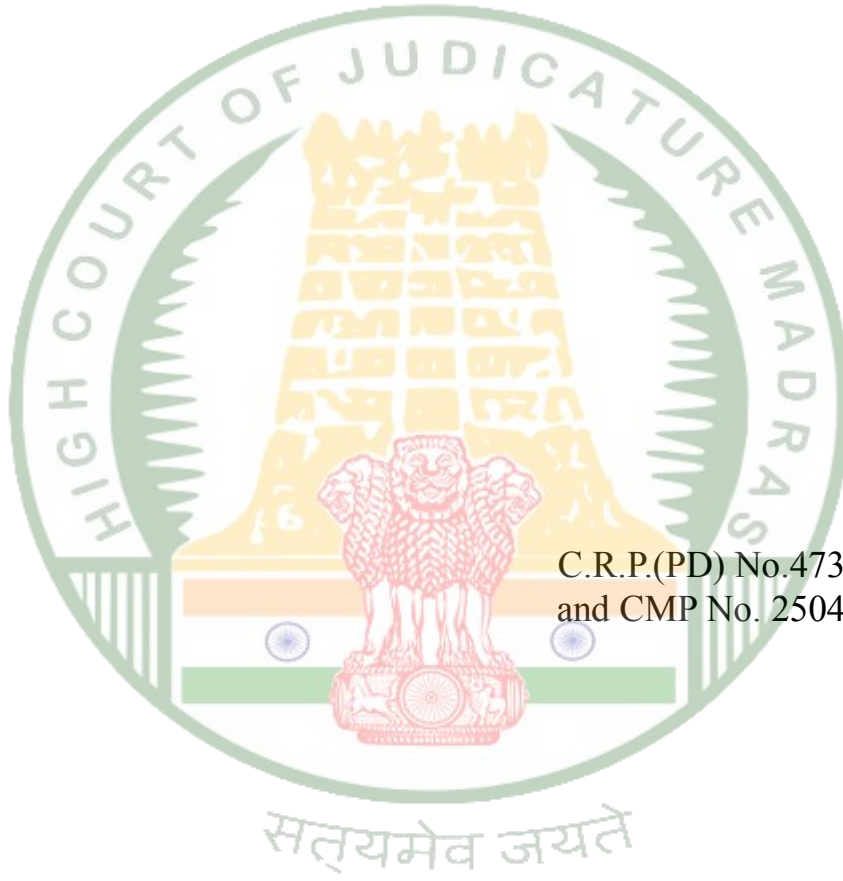
To
The II Additional Subordinate Judge,
Erode.

WEB COPY

C.R.P.(P.D).No.473 of 2018

G.K.ILANTHIRAIYAN.J,

Lpp



C.R.P.(PD) No.473 of 2018
and CMP No. 2504 of 2018

WEB COPY

29.07.2021