

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.No.867 of 2017
and
CMP.No.4262 of 2017

Muthammal (died)
1.Subburayulu Naidu
2.Jamuna
3.Girij
4.Rajina
5.Sampavi

... Petitioners

Vs.

1.B.Krishnamurthy Naidu (died)
2.Kanchana
3.R.Renuka
4.A.Usharani

... Respondents

[Respondents 2 to 4 brought on record as the LR's of the deceased sole respondent viz., B.Krishnamurthy Naidu vide court order dated 03.02.2021 made in CMP.Nos.1185, 1186 & 1187 of 2021 in CRP (PD).No.867/2017]

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order and decree dated 22.11.2016 made in I.A. No.1048 of 2016 in O.S.No.13 of 2005 on the file of Additional District Munsif Court, Tindivanam.

For Petitioners : Mr.P.Dinesh Kumar

For Respondents : Died (Steps taken) (for R1)
: Mr.K.P.Jotheeswaran
(for R2 to R4)

ORDER

This Civil Revision Petition is directed as against the order and decretal order passed in I.A. No.1048 of 2016 in O.S.No.13 of 2005 dated 22.11.2016 on the file of the learned Additional District Munsif, Tindivanam, thereby, allowing the petition to condone the delay in filing the application to set aside the ex-parte order.

2. The petitioners are the plaintiffs and the first respondent is one of the defendants. The petitioners filed the said suit for partition. Pending, the suit, the deceased/second defendant failed to appear before the trial Court on 11.02.1998 and as such, he was set ex-parte. He fell ill, due to diabetic. In fact, some of the fingers on his both legs amputated and after his sons and daughters marriage no one is there to look after him. Therefore, he could not be able to appear before the trial Court and failed to file his written statement. He filed a petition to set aside the ex-parte order under

Order 9 Rule 7 of the Civil Procedure Code with a condone delay petition. There was a delay of 6,210 days in filing the application to set aside the ex-parte order. The Court below allowed the petition on the ground that the petition filed under Order 9 Rule 7 of the Civil Procedure Code, does not prescribe any limitation period and as such, allowed the petition, on costs, of Rs.3,000/- payable by the first respondent/deceased to the petitioners herein. Aggrieved by the same, the present Civil Revision Petition is filed.

3. The learned counsel for the petitioners submitted that the reasons stated in the affidavit filed in support of the condone the delay petition are not shown any sufficient cause. In fact, the deceased/second defendant was well aware of the suit filed by the petitioners for partition. Though he underwent surgery and some of his fingers on his both legs were removed, nothing prevented him to engage a counsel on his behalf to appear before the trial Court. He further submitted that the petition filed under Article 137 of the Limitation Act applies to the facts of the case on hand. In support of his contentions, he relied upon the judgments reported in AIR 1925 Mad

1274 **(Gokarakonda Venkatasubbiah -vs- Daliparathi**

Lakshminarasimham), AIR 1955 SC 425 (*Sangram Singh -vs- Election Tribunal and other*), AIR 1964 SC 993 (*Arjun Singh -vs- Mohindra Kumar and others*), 1989 (2) MLJ 259 (*Palani Nathan -vs- Devanai Ammal*), 1997 (1) MLJ 37 (*Pilla Reddy -vs- Thimmaraya Reddy*), 2015-3-L.W.332 (*Visalakshi -vs- Umapathy*) and 2020 6 CTC 724 (*Rajasekar -vs- Govindammal (Late)*).

4. He vehemently contended that this Court in the judgment reported in 2015-3-L.W.332 (*Visalakshi -vs- Umapathy*) held that for filing an application under Order 9 Rule 7 of the Civil Procedure Code no limitation is prescribed. It does not mean that an application under Order 9 Rule 7 of the Civil Procedure Code to set aside the ex-parte order can be filed at any point of time viz., even after several years. Therefore, under Article 137 of the Limitation Act, the period of limitation is prescribed as three years. After referring the above judgment, this Court recently held in the case of (*Rajasekar -vs- Govindammal (late)*) reported in 2020 (6) CTC 724 as follows:-

“16. The point that would arise for determination in this Revision is, as to whether, Article 137 of the Limitation

*Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure. The Hon'ble Supreme Court in **Sangram Singh v. Election Tribunal, Kotah and others**, reported in **AIR 1955 SC 425**, referred to supra, had clearly held that there is no limitation for filing a petition under Order 9 Rule 7 of the Code of Civil Procedure. As the language of the provision itself would suggest an application contemplated under Rule 7 of Order 9 is not one to set aside an act of Court, but one to seek permission to put the clock back so that the defendant can defend the suit as if he was present at the earliest stages of the suit. The logic or rationale behind those decisions which conclude that there is no limitation for filing an application under Order 9 Rule 7 can be explained from another angle.*

17. *A person who has been set exparte in the proceedings will definitely have a right to seek to set aside the exparte decree that is passed against him within 30 days from the date of such exparte decree. This has been made clear by the Hon'ble Supreme Court in **Arjun Singh v. Mohindra Kumar and Others**, reported in **AIR 1964 SC 993**, wherein the Hon'ble Supreme Court had held that a rejection of an application under Order 9 Rule 7 of the Code of Civil Procedure, will not operate as res judicata, while the Courts*

considered an application under Order 9 Rule 13, made after an ex parte decree is passed in the suit or proceedings. If there is nothing in law that would prevent a person who is set ex parte in the year 2011, from filing an application to set aside an ex parte decree that is passed in the year 2017, within 30 days of such ex parte decree, I do not see how there could be a prohibition against a person, who seeks permission of the Court to relegate himself back to the position which he would have been in, if he had appeared at the previous hearing, before passing of such a decree.

18. If it is held that an application under Order 9 Rule 7 would be barred due to lapse of time be it 3 years or 30 days, it would automatically mean that an application to set aside the ex parte decree that is made within time after the decree would also be barred. Such a situation was envisaged by the Hon'ble Supreme Court when it held that an order passed rejecting an application under Order 9 Rule 7 will not operate as res judicata, if the defendant chooses to file an application to set aside the ex parte decree. If we are to go by the language of Order 9 Rule 13, the defendant, who has suffered an ex parte decree, has to only explain his absence on the day on which such ex parte decree came to be passed, if he files an application within 30 days of such ex parte decree.

Therefore, in my considered opinion, an anomaly will be created, if the Courts are to conclude Article 137 or any other Article of the Limitation Act would apply to an application under Order 9 Rule 7 of the Code of Civil Procedure.

*19. I am in entire agreement with the contention of the learned counsel appearing for the petitioner that an application contemplated under Order 9 Rule 7 is, in essence not one to set aside an act of Court, but one seeking permission of the Court to re-open the proceedings and enable the defendant, who was absent to participate in the proceedings as if he were present. It has been repeatedly held that an ex parte defendant has a right to participate in the subsequent stages of the same litigation. This Court had even as early as in 1925, in **Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham**, held that the defendant who had remained ex parte can participate in the subsequent proceedings and Order 9 Rule 7 of the Code of Civil Procedure, does not prevent such participation. It only applies to a case, where a party declared ex parte seeks to be delegated back to the position which he would have been in, if he had appeared at the previous hearing.*

20. Adverting to the decisions which take the view that Article 137 would apply, I can straight away point out that those decisions are against the spirit of the judgments of the Hon'ble Supreme Court in **Sangram Singh v. Election Tribunal, Kotah and others**, reported in AIR 1955 SC 425, and **Arjun Singh v. Mohindra Kumar and Others**, reported in AIR 1964 SC 993. Unfortunately, the two decisions of the Hon'ble Supreme Court which have a great bearing on the issue before us, viz., the judgment of the Hon'ble Supreme Court in **Sangram Singh** 's case and **Arjun Singh** 's case, cited supra, were not brought to the notice of the learned Judge, who decided **Visalakshi v. Umapathy**, reported in 2015 (5) CTC 67. The learned Judge has referred to the decision of the Delhi High Court and concluded that Article 137 would apply to the case on hand.

21. In **G.Krishnasamy v. G.Seenivasan & another**, referred to supra, the learned Judge has merely followed the judgment in **Visalakshi v. Umapathy**, to conclude that Article 137 of the Limitation Act would apply. The same is the case in **Ramados v. Mohan & Others**, made in CRP No.2412 of 2016 dated 23.08.2016, wherein we find no discussion, excepting that the decision in **Visalakshi v. Umapathy**, is applied. As regards the decision of the Division Bench of the

Kerala High Court in Y.Daniel and others v. Annamma, referred to by the learned counsel for the respondent, the Division Bench only accepted the view in Cleetus v. South Indian Bank, reported in 2007(3) KLT 868, but there are earlier decisions of the Kerala High Court taking a different view.

22. *As I had already pointed out the judgment in Tarlochan Singh and Ors. v. Union Bank of India and Ors., does not touch upon the issue. I must also point out that the judgment in Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham, was approved by the Hon'ble Supreme Court in Sangram Singh's case. In Pilla Reddy v. Thimmaraya Reddy and Others, reported in 1997 (1) MLJ 37, Hon'ble Mr. Justice S.S. Subramani, had after referring to almost all the cases on the point concluded that there is no limitation for an application under Order 9 Rule 7 of the Code of Civil Procedure."*

5. This Court relied upon the judgment reported in AIR 1964 SC 993 (*Arjun Singh vs- Mohindra Kumar and Others*), wherein the Hon'ble Supreme Court of India has held as follows:-

“Order IX Rule 7 does not put an- end to the litigation nor does it involve the determination of any issues in controversy in the suit. A decision or direction in an interlocutory proceeding of the type provided for by Order IX, Rule 7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order IX, Rule. 13.”

6. Further, this Court relied upon the judgment reported in AIR 1955 SC 425 (**Sangram Singh -vs- Election Tribunal, Kotah and others**), wherein the Hon'ble Supreme Court of India has held as follows:-

“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 IX, rule 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he 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.”

7. The above decisions are squarely applicable to the case on hand. If the above decisions are taken into account, it is clear that Article 137 of the Limitation Act does not apply to an application filed under Order 9 Rule 7 of the Civil Procedure Code and there is no limitation for an application

under Order 9 Rule 7 of the Civil Procedure Code.

8. In view of the above discussion, this Court finds no infirmity or illegality in the order passed by the Court below. Accordingly, this Civil Revision Petition is dismissed. However, while allowing the petition, the trial Court imposed costs of Rs.3,000/-. In view of the facts and circumstances, the legal heirs of the deceased/second defendant/first respondent are directed to pay a further amount of Rs.2,000/- as costs to the plaintiffs/petitioners within a period of two weeks from the date of receipt of a copy of this order. Consequently, the connected Miscellaneous Petition is closed.

03.03.2021

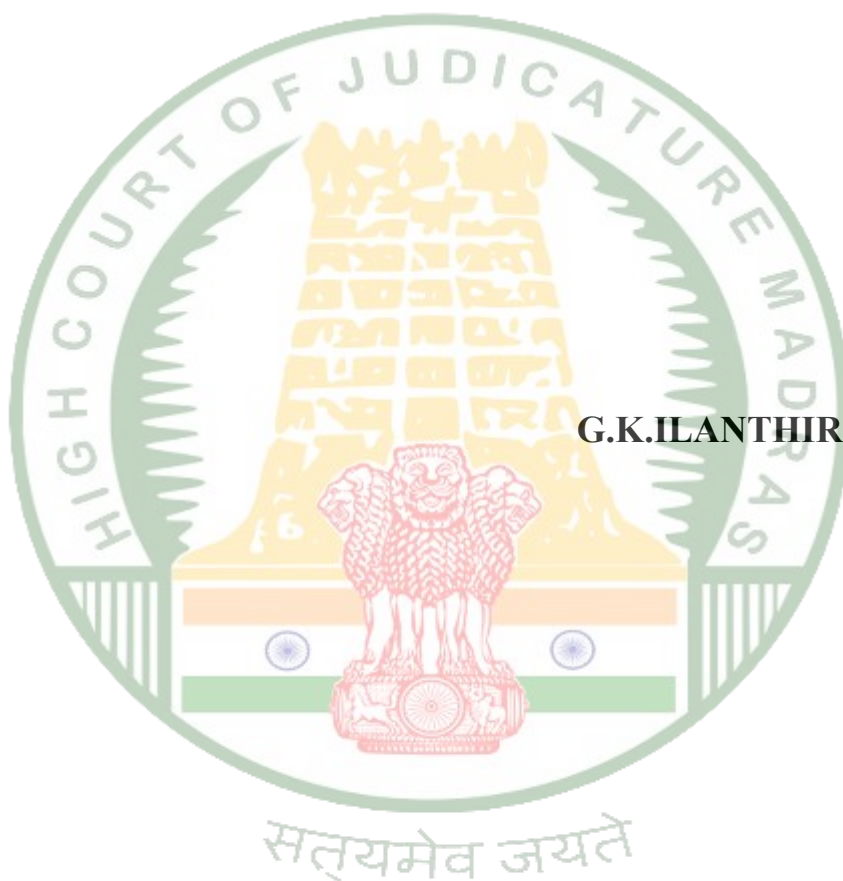
Speaking/Non-speaking order

Index : Yes/No

kv

To

The Additional District Munsif,
Tindivanam.

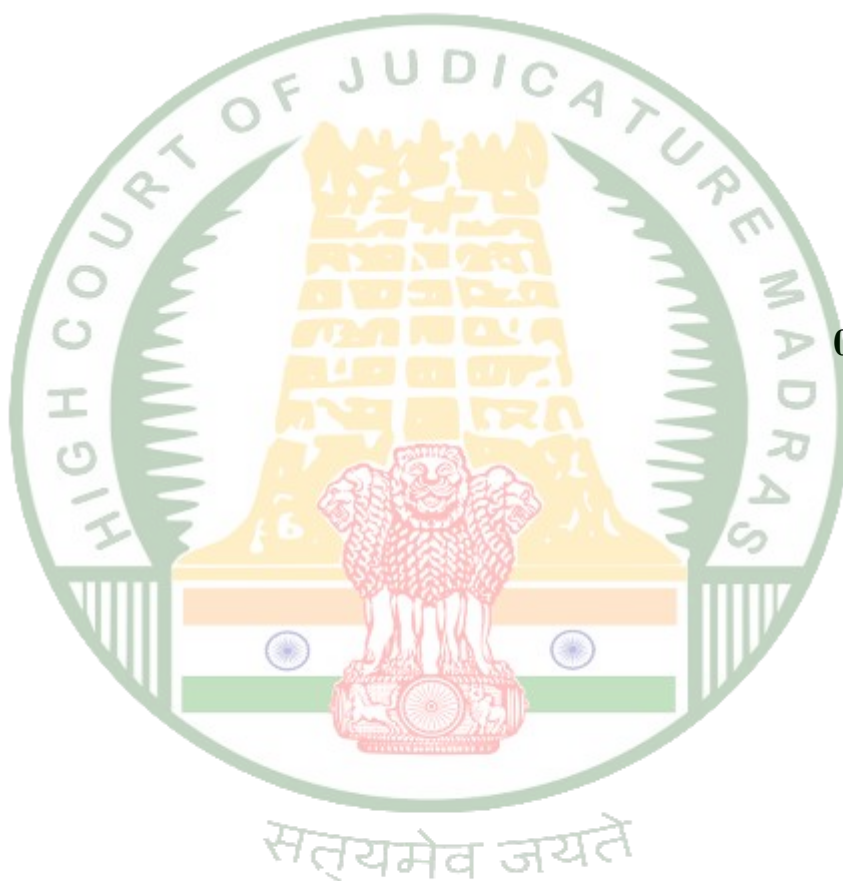


G.K.ILANTHIRAIYAN,J.

Kv

WEB COPY

CRP.PD.No.867 of 2017



03.03.2021

WEB COPY