



CRP(MD)No.2526 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

CRP(MD)No.2526 of 2022
and
CMP(MD)No.12411 of 2022

Arumugam

: Petitioner

Vs.

Palaniammal (Died)

1.Thavasumani

Jeeva Rathinam Ammal (Died)

2.Malaiyali

3.Karupuli

4.Amsavalli

5.Manikandan

6.Sandhiya

7.Prabhavathi

8.Periyasamy

9.Saravanan



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10.Marimuthu

: Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Civil Procedure Code to call for the records pertaining to the order dated 07.11.2022 passed by the learned District Munsif cum Judicial Magistrate, Srirangam, in E.A.S.R.No.3072 of 2022 in E.P.No.39 of 2019 in R.C.O.P.No.79 of 1999 and set aside the same.

For Petitioner : Mr.S.Vishnuvardhan

ORDER

The petitioner and the respondents 2 to 10 herein are the respondents in the E.P.No.39 of 2019 before the District Munsif cum Judicial Magistrate Court, Srirangam, who suffered an order of eviction in the rent control proceedings. They were set *ex-parte* in the execution proceedings and they have filed an execution application in E.A.S.R.No.3072 of 2022 under Section 5 of the Limitation Act to condone the delay of 74 days in filing an application to set aside the *ex-parte* order. The Executing Court, by order dated 07.11.2022, returned the petition without even numbering the same. Aggrieved over the same, the petitioner has filed the present revision.



2.Learned Counsel for the petitioner submitted that one Palaniammal / landlord initiated the rent control proceedings as against one Jeeva Rathinam Ammal / tenant. Pending the proceedings, both the landlord and the tenant died and their respective legal heirs were brought on record. The first respondent filed the execution petition in E.P.No.39 of 2019 for recovery of possession. According to the petitioner, the execution petition was initially filed against Jeeva Rathinam Ammal and after her demise, the petitioner and the respondents 2 to 10 herein were impleaded as legal heirs. Since they were not parties to the proceedings, they were not in custody of the documents in those proceedings. Therefore, they applied for the certified copies of the documents, as soon as they entered appearance through their Counsel. In view of the delay in getting the certified copy, they were not able to give necessary instructions to their Counsel for filing counter in the execution proceedings and therefore, they were set *ex-parte* in the execution proceedings. In filing the application to set aside the *ex-parte* order, there was a delay of 74 days and therefore, they filed an application to condone the delay, which was returned without even numbering.

3.He further submitted that the petitioner and the respondents 2 to 10 have filed an application under Section 5 of the Limitation Act to condone the delay in



filing a petition to set aside the *ex-parte*. The Executing Court dismissed the application without even numbering the same, on the issue of maintainability, which is not sustainable. The Executing Court is well within the jurisdiction to condone the delay in filing applications to set aside *ex-parte* orders by invoking Rule 105(3) of Order 21 CPC or under Section 151 CPC and he further relied on the judgment of this Court in ***N. Rajendran v. Shriram Chits T.N. (P) Ltd [2011 (5) LW 174]***, wherein it was held 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 XXI, 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.””

4.This Court considered the submissions made by the petitioner's Counsel and also perused the materials placed on the record.



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5. Under Order 21 Rule 105 CPC, the party who does not appear can be set *ex-parte* and this Court, by way of an amendment, provides for a limitation of 30 days for setting aside the *ex-parte* order. This statute is extracted hereunder for easy reference:-

“105. Hearing of application.—

(1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.

Explanation.—An application referred to in sub-rule (1) includes a claim or objection made under rule 58

High Court Amendment—[Madras]—

(i) In sub-rule (3) insert the following proviso, namely:-

“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.”

(ii) for sub-rule (4), substitute the following sub-rule (4), namely:-

“The provisions of section 5 of Limitation Act, 1908, shall apply to applications under sub-rule (1)””

6.The petitioner and the respondents 2 to 10 herein were called absent and were set *ex-parte* by the Executing Court on 27.06.2022. As per the amendment by the Madras High Court, the petition for setting aside the *ex-parte* order ought to have been filed within a period of 30 days, whereas, in the case on hand, it was filed with a delay of 74 days.

7.This Court, in **N.Rajendran's** case (cited supra), clarified that the amendment made by Madras High Court dated 01.11.1972 in Sub-Rule (3) of Rule 105 of the Civil Procedure Code is not repealed under the Central Amendment Act and therefore, a Court in Tamil Nadu need not invoke Section 5 of the Limitation Act to condone such delay and it is enough if the proviso to Sub-Rule (3) of Rule 105 is invoked to condone the delay.

8.It is a well-settled principle of law that mere wrong quoting of provision is not fatal and therefore, the petition filed by the petitioner and the respondents 2 to



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10 herein under Section 5 of the Limitation Act can be treated as a petition under Order 21 Rule 105(3) CPC by the trial Court to condone the delay in filing a petition to set aside the *ex-parte* order.

9.For the foregoing reasonings and discussions, this Court is inclined to allow this revision petition. Accordingly, this revision petition stands allowed and the learned District Munsif cum Judicial Magistrate, Srirangam, shall number the petition in E.A.S.R.No.3072 of 2022 and shall decide the same, in accordance with the law. No costs. Consequently, connected miscellaneous petition stands closed.

Index : Yes / No
Internet : Yes
gk

19.12.2022

To

The District Munsif cum Judicial Magistrate,
Srirangam.



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B.PUGALENDHI, J.

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