



CRP (PD) No.4530 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	21.06.2023
Pronounced on	28.06.2023

CORAM:

**THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN
THILAKAVADI**

CRP (PD) No.4530 of 2017

and

CMP.No.21371 of 2017

N.Rangasamy grounder

... Petitioner/ 1st defendant

Vs.

1.Samiyathal

2.Rajeswari @ Eswari

3.Dhanalakshmi @ Lakshmi

4.Viswanathan

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India seeking to set aside the fair and decreetal order dated 18.09.2017 made in C.M.A.No.10 of 2017 on the file of the learned Additional District Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode confirming the fair and decreetal order dated 16.02.2017 made in I.A.No.357 of 2016 in O.S.No.65 of 2014 on the file of the learned Sub Court, Perundurai by allowing this civil revision petition.



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For Petitioner : Mr.N.Manokaran
For RR 1 to R : Mr.V.Kadhirvelu
For R2, R3 & R4 : No appearance

ORDER

The revision petition is preferred by the 1st defendant against the order dated 18.09.2017 made in C.M.A.No.10 of 2017 on the file of the of the Additional District Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode confirming the fair and decreetal order dated 16.02.2017 made in I.A.No.357 of 2016 in O.S.No.65 of 2014 on the file of the learned Sub Court, Perundurai

2.The 1st respondent/plaintiff filed the suit for partition for the following relief:

- a. To divide the suit properties into 5 equal shares by metes and bounds and allot 1 such share to the plaintiff separately and deliver possession of the same to the plaintiff;



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- b. To appoint a commissioner to divide the suit properties as aforesaid;
- c. Granting a permanent injunction restraining the defendants, their men and agents or any one acting for them or on their behalf from alienating or encumbering the suit properties till the final partition is effected;
- d. Directing the defendants to pay the costs of the suit to the plaintiff;
- e. And granting such other and further reliefs as this Honourable Court may deem fit and proper in the circumstances of the case and render justice.

3.The revision petitioner/1st defendant was called absent and set ex parte on 24.07.2015 for non appearance. He then filed a petition to set aside the ex parte decree and the same was dismissed on the ground that the petitioner failed to comply with the order imposing condition to pay the cost of Rs.500/- in I.A.No.359 of 2015 filed under Order 9 Rule 7 CPC for setting aside the ex parte order dated 14.07.2015. The trial Court in the impugned order has stated that the 1st defendant who is the appellant in C.M.A.No.10 of 2017 failed to file the written statement on 11.10.2014 on the file of the



learned Sub Judge, Perundurai, in C.M.A.No.10 of 2017 preferred by the

revision petitioner, the learned Additional District Court, Magalir Neethi

Mandram (Fast Track Mahila Court), Erode, passed the following orders:

"7. It is noticed that, this Appellant received the summons in the suit (date not clearly mentioned in the order of the trial Court) in the month of June 2014. He failed to file the written statement till 11.10.2014. The present Appellant/1st defendant was set ex parte by the trial Court. This Appellant/1st defendant filed petition to set ex parte under Order 9 Rule 7 of the CPC before the trial Court, that petition was numbered in I.A.No.359/2015 and was ordered to be allowed on payment of cost a sum of Rs.500/- on or before 14.07.2015. The Appellant/1st defendant failed to pay the cost and that petition was dismissed by the trial Court, then passed the preliminary decree. When the Appellant/1st defendant was set ex parte and at the time of I.A.359 of 2015 was pending, the written statement of Appellant/1st defendant filed before the trial Court. There is no locus standi to the Appellant/1st defendant to file the written statement before the trial Court when I.A.No.359 of 2015 was pending. It cannot be



considered as the written statement legally filed before trial Court. The Appellant/1st defendant disobeyed the direction of the trial Court, failed to pay the cost and the I.A.No.359/2015 was dismissed, preliminary decree passed by the trial Court. The Appellant/1st defendant only to entitle to file petition to restore the I.A.No.359/2015. But, he did not do that and filed a new interlocutory application No.357/2016 before the trial Court. The Appellant/1st defendant suppressed about the facts of I.A.No.359/2015 before the trial Court. The act of the Appellant/1st defendant is not legal. That application is not only to drag the proceedings of the trial Court. But, not legal as per the provision of law. That, I.A.No.357/2016 is not an application to entertain. That petition ought to have refused for numbering or should be rejected at the initial stage before giving notice to other side. The trial Court rightly dismissed the I.A.No.357/2016. There is no substantial ground to interfere in to the order of the trial Court. This Civil Miscellaneous Appeal is deserved to be dismissed."

4. Aggrieved by this order, the 1st defendant preferred the present



revision petition on the ground that the 1st defendant is aged about 80 years.

He is suffering from ill health and was unable to meet his counsel for giving instruction to prepare the written statement. Hence, the ex parte decree was passed on 24.07.2015. Immediately, after knowing the said fact the 1st defendant/revision petitioner herein had filed the petition to set aside the ex parte decree and it was dismissed on the ground that the petitioner having filed I.A.No.359 of 2015 under Order 9 Rule 7 of CPC to set aside the ex parte order dated 14.07.2015 has failed to comply the order imposing condition to pay the cost of Rs.500/-.

5.The learned counsel for the revision petitioner/1st defendant would submit that the ex parte order dated 14.07.2015 is no longer available, in view of the subsequent ex parte preliminary decree passed on 24.07.2015. Therefore, non- payment of the cost imposed at the time of allowing I.A.No.359 of 2015 filed under Order 9 Rule 7 CPC is no way relevant for filing I.A.No.357 of 2016 under Order 9 Rule 13 CPC to set aside the ex parte decree. He would further submit that the ex parte order dated 14.07.2015 has automatically merged with the ex parte preliminary decree dated 24.07.2015.



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Therefore, filing of Order 9 Rule 7 CPC or not filing such petition has no effect on or after passing of the ex parte preliminary decree against this revision petitioner/1st defendant. He would further submit that the order in I.A.No.359 of 2015 under Order 9 Rule 7 CPC is an interlocutory order. It would neither operate as res judicata or estoppels against the petitioner. He would further submit that the revision petitioner/1st defendant was not a chronic defaulter and he was diligently defending the suit at the age of 80 years and therefore his absence before the trial Court on 24.07.2015 was neither wilful nor wanton. As per the dictum laid down in **2000 (3) SCC 54**, it is always desirable to give an opportunity to defend the suit on merits. Therefore, the fair and decreetal order dated 18.09.2017 made in C.MA.No.10 of 2017 on the file of the learned Additional District Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode confirming the fair and decreetal order dated 16.02.2017 made in I.A.No.357 of 2016 in O.S.No.65 of 2015 on the file of the learned Sub Court, Perundurai, is liable to be set aside by allowing this civil revision petition.



6. On support of his contention, the learned counsel for the revision petitioner/ 1st defendant has relied upon the following judgment reported in

(i) **AIR 1964 SC 993** in which it is held that,

"The case questioned when was the principle of res judicata applicable – It also questioned if 'good cause' and 'sufficient cause' was different – It was held that there was no material difference between the facts to be established for satisfying the two tests of 'good cause' under Order IX, Rule 3 of the Code of Civil Procedure, 1908, for non appearance and 'sufficient cause' under Order IX, rule 13 – The scope of the principle of res judicata is not confined to what is contained in Section 11 but is of more general application – Res Judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits.

(ii) The learned counsel also relied upon the order passed in C.R.P(PD).No.625 of 2018 and C.M.P.No.3275 of 2018 passed by this Court in which it is observed that,

"Order 9 Rule 7 CPC makes it clear that what is expected of a defendant in a suit which has been adjourned for an ex



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parte decree herein is to appear at such later hearing and assign good cause for his previous non appearance. If the Court accepts cause, it can hear him in answer to the suit as if he had appeared on the day fixed for his appearance. The Rule nowhere contemplates an application to set aside an order setting the defendant ex parte. Therefore, the object of the Rule is only to enable a person, 'who has not appeared at a provisions hearing to appear at a later hearing and seek the permission of the Court to defend the suit as if he had appeared on the day fixed for his appearance'.

"Para 25. Now, coming to the facts of the present case, it is seen that the second defendant/petitioner herein, was set ex parte on 19.09.2011 and the other defendants were contesting the suit. As has been pointed out the reason assigned by him for not appearing in court is that since he had sold the property he had entrusted the matter with the other defendants. As has been seen earlier, there is a distinct difference in the language of Order 9 Rule 7 and order 9 Rule 13 of the Code of Civil Procedure. While Order 9 Rule 7 requires the applicant to assign good cause for his non appearance; Order 9 Rule 13 requires the applicant to assign sufficient cause. The difference in the language is also noticed



by the Hon'ble Supreme Court in Arjun Singh's case, cited *supra*. Whether a cause shown is a good cause or not, within the meaning of the Rule, will depend on the facts and circumstance of each and every case''.

Para 27. "The reasons assigned in the affidavit filed in support of the application cannot be termed as mala fide. Having sold the property, the petitioner might have bone fide believed that the purchasers would protect their interest. I see no negligence or indifference in such belief entertained by the petitioner. I am therefore of the considered opinion that the Trial court was not right in dismissing the application. The Trial Court would have done well to afford an opportunity to the second defendant to contest the suit on merits''.

7.The Learned counsel for the petitioner /1st defendant also relied upon the judgments passed in **2019 (20) SCC 803** in which it has held that,

"Civil Procedure code, 1908 – Or. 9 R.13 – Setting aside ex parte decree – Only consideration is whether sufficient cause shown by defendant for his absence when matter was called out – Manner of interpretation of "sufficient cause" and



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exercise of power – Has to be a holistic appraisal of all the facts and circumstances’’

8.As has been seen earlier, there is a distinct difference in the language of Order 9 Rule 7 CPC and Order 9 Rule 13 of the Code of Civil Procedure. While Order 9 Rule 7 requires the applicant to assign good cause for his non appearance; Order 9 Rule 13 requires the applicant to assign sufficient cause. Whether a cause shown is a good cause or not, within the meaning of the Rule, will depend on the facts and circumstances of each and every case.

9.On the other hand, the learned counsel appearing for the respondent/plaintiff contended that the claim made in the affidavit of the above revision petition is false. The revision petitioner/1st defendant failed to substantiate his claim by producing any documents to show that the revision petitioner/1st defendant was suffering from illness and for the above reason he was unable to attend the Court on the date of passing the ex parte decree. It is further stated that in I.A.No.359 of 2015 and in I.A.No.357 of 2015 the



same reasons were stated by the revision petitioner/1st defendant for his non appearance. The revision petitioner/1st defendant failed to comply the order imposing the condition to pay the cost of Rs.500/- in I.A.No.359 of 2015 filed under Order 9 Rule 7 CPC. The revision petitioner/1st defendant has preferred the above revision petition only with an intention to drag on the proceedings and moreover at the stage of passing of final decree in the above suit. Hence, the above revision petition is liable to be dismissed.

10.The learned counsel appearing for the respondent/plaintiff would contend that in the decided case referred by the learned counsel for the revision petitioner/1st defendant is not applicable for the present set of facts and circumstances of this case. He would submit that the revision petitioner/1st defendant failed to comply the order of the Court imposing the cost of Rs.500/- which is not the fact in the decided cases referred by the learned counsel for the revision petitioner/1st defendant. Hence, the observations made in the above decided cases do not apply to the present case and the same was not to be considered.



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WEB COPY 11. Heard on both sides and records perused.

12. The main question that arises in this revision petition is, as to whether, the non-complying of the order dated 14.07.2023 in I.A.No.359 of 2015 under Order 9 Rule 7 of CPC for setting aside the ex parte decree 24.07.2015 in O.S.No.65 of 2014, imposing condition to pay cost of Rs.500/- is a bar in entertaining the petition filed under Order 9 Rule 13 of the CPC. To appreciate the argument of the learned counsel, it is necessary to advert to the language of the Rule. Rule 7 of Order 9 of the Code of Civil Procedure reads as follows:

“7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non – appearance. – Where the Court adjourned the hearing of the suit, ex parte, and the defendant, at or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance”



WEB COPY 13. A reading of the above provision makes it clear that what is expected of a defendant in a suit which has been adjourned for an ex parte hearing is to appear at such later hearing and assign good cause for his previous non appearance. If the court accepts the cause, it can hear him in answer to the suit as if he had appeared on the day fixed for his appearance. The rule nowhere contemplates an application to set aside an order setting the defendant ex parte. Therefore, according to the learned counsel appearing for the petitioner the object of the Rule is only to enable a person, who has not appeared at a previous hearing to appear at a late hearing and seek the permission of the Court to defend the suit as if he had appeared on the day fixed for his appearance.

14. The Hon'ble Supreme Court in *Arjun Singh v. Mohindra Kumar and Others*, reported in *AIR 1964 SC 993*, has observed 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



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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.’’

15.The judgment of this Court in ***Gokarakonda Venkatasubbiah v. Daliparthi Lakshmiharasimham***, reported in ***Vol 49 (1925) 273***, wherein this Court had held that a defendant, who was set ex parte will have a right to appear during the future hearings and put forth his evidence. While doing so, this Court has observed as follows:

“....The petitioner before me states that all he now wants is to be allowed to put forward his evidence, the suits having merely reached the point at which the plaintiff’s evidence has been closed. Is he debarred from doing that or is he not? I have had this point argued before me in order to decide for the guidance of the Lower Court whether the ex parte order does or does not now bar the petitioner from resuming appearance in the suits at the stage at which they now are, The point is a novel one and there is an absence of authority on it. But my view is that the petitioner is not so



debarred, in other words, that the ex parte order only covers the period during which the party was actually absent and does not act as a bar to his subsequence appearance. Respondents contend that this view is opposed to Order 9, Rule 7; but I do not think so.

One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right , and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it. Is there any rule of procedure then which gives power to a Court to say to a party when he appears to plead his case that it cannot hear him because at the previous hearing he was absent? I do not so read Order 9, Rule 7. That applies to a party who wishes to be relegated back to the position which he would have been in if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross – examination, etc., which he lost by his absence. After all “ex parte” only means that the party has not been heard because he was absent and



the adjournment of the hearing “exparte “ in the word’s of Rule 7 applies only to the hearing on the particular day when that hearing and adjournment “exparte” was made. I do not see any ground for extending its operation to all subsequent hearings of the suit.”

16.The Hon’ble Supreme Court in ***Sangram Singh v.Election Tribunal, Kotah and others***, reported in ***AIR 1955 SC 425***, has observed as follows:

“We have seen that if the defendant does not appear at the first hearing, the Court can proceed exparte, 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.”

Thus, it is clear from the above decisions, there is no limitation for filing a petition under 9, Rule 7, Code of Civil Procedure.”

17. Now coming to the facts of the present case, it is seen that the petitioner/1st defendant herein was set ex parte on 24.07.2015. As has been pointed out the reason assigned by him for not appearing in Court is that he was aged about 80 years and was suffering from illness. The reasons assigned in the affidavit filed in support of the application cannot be termed as malafide. The suit in O.S.No.65 of 2014 on the file of the learned Sub Court, Perundurai is a suit for partition. In the interest of justice sufficient opportunity must be afforded to the petitioner/1st defendant to contest the suit on merits. The trial Courts below were not right in dismissing the applications filed by the revision petitioner/1st defendant herein.



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WEB COPY 18. For the foregoing reasons, the Civil Revision Petition stands **allowed**. The order in C.M.A.No.10 of 2017 is set aside. The ex parte order dated 24.07.2015 made against the revision petitioner/1st defendant is set aside and the revision petitioner/1st defendant is permitted to defend the suit, as if he was present at the earliest stage in the suit.

19. However, considering the facts, that the proceedings in the suit will be delayed further, the revision petitioner/1st defendant shall compensate the delay by way of cost. The revision petitioner/1st defendant is directed to pay a sum of Rs.5000/- as cost to the plaintiff/defendants 2-4/respondents. The cost shall be paid to the counsel appearing for the plaintiff/defendants 2-4/respondents in this Court on or before 3.07.2023 and the receipt shall be produced before the trial Court. The Trial Court is also directed to expedite the suit by offering sufficient opportunities to the representative parties and dispose the suit within a period of three months. Consequently, connected miscellaneous petition is closed.



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Internet: Yes/No

Index: Yes/No

Speaking/Non-speaking order

K.GOVINDARAJAN THILAKAVADI,J.

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