



C.R.P.(MD) No.457 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.07.2023

CORAM

THE HON'BLE **MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI**

C.R.P.(MD) No.457 of 2023

and

C.M.P.(MD) No.2182 of 2023

G.R.Vishaga Guru

... Petitioner

Vs.

1.Premasekaran

2.Jeyabaskaran

... Respondents

Prayer:- These Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, 1908, to set aside the fair and decreetal order made in E.A.No. 1 of 2022 in E.P.No.4 of 2022 in O.S.No.5 of 2009 by the District Munsif Court, Palani, dated 07.11.2022.

For Petitioner : Mr.D.Venkatesh

For Respondents : Mr.Lenin Kumar

ORDER

This Civil Revision Petition is preferred by the petitioner to set aside the fair and decreetal order dated 07.11.2022 passed by the District Munsif Court, Palani in E.A.No.1 of 2022 in E.P.No.4 of 2022 in O.S.No.5 of 2009.



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2. The respondents herein had filed O.S.No.5 of 2009 before the District Munsif Court, Palani for permanent injunction restraining the petitioner and his father from disturbing their possession and making construction and for mandatory injunction to remove the compound wall constructed by the petitioner. The suit was decreed in favour the respondents/plaintiffs on 22.10.2021, against which, the petitioner preferred an appeal before the Sub Court, Palani in A.S.No.46 of 2021 which is pending and no stay is said to have been granted.

3. Meanwhile, the respondents filed Execution Petition under Order 21 Rule 11 of the Code of Civil Procedure, 1908, before the District Munsif Court, Palani in E.P.No.4 of 2022, in which, an *exparte* order was passed by the Execution Court on 21.04.2022.

4. Thereafter, the petitioner moved an application before the District Munsif Court, Palani in E.A.No.1 of 2022 to set aside the *exparte* order dated 21.04.2022 passed by the Execution Court which was dismissed by the Exeuction Court *vide* impugned order dated 07.11.2022 on the ground that the said E.A. was not maintainable as it was filed after lapse of 26 days, against which, the present Civil Revision Petition is preferred.



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5. According to the petitioner, the petitioner filed E.A. under Order 21 Rule 106 of the Code of Civil Procedure, 1908 to set aside the *exparte* order dated 21.04.2022, within a period of 30 days from the date of his knowledge. It is submitted that under Order 21 Rule 106(3) of the CPC, an application under Sub-Rule (1) shall be made within 30 days from the date of the order, or where, in the case of an *exparte* order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.

6. The learned counsel for the petitioner would submit that the *exparte* order was passed on 21.04.2022, but, the same came to the knowledge of the petitioner only on 13.06.2022 and immediately the petitioner filed E.A.No.1 of 2022 which is very well within time. However, the learned District Munsif, Palani dismissed the E.A. by stating that E.A. was filed after lapse of 26 days.

7. The learned counsel for the petitioner would further submit that the learned District Munsif, Palani has erroneously dismissed the E.A without considering the plea made by the petitioner that no notice was served on him in the Execution Proceedings and his father was hospitalized at Appollo Hospital, Madurai for Paralysis attack and after treatment, when he came to the house, he got knowledge about the notice in the Execution Proceedings.



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8. The specific contention of the petitioner is that Article 123 of the Limitation Act, 1963 provides 30 days period for an application to be filed to set aside the *exparte* decree/order passed from the date of the decree/order or where the summons or notice were not duly served when the applicant had the knowledge of the *exparte* decree/order. In this connection, the learned counsel appearing for the petitioner has relied upon a decision of the Madras High Court (Principal Seat of this Court), Chennai, rendered in the case of **M/s.The Motor & General Finance Limited Vs. S.Durailingam also known as S.Duraisingam and another**, in O.S.A.No.218 of 2006, dated 29.04.2009.

9. The learned counsel appearing for the petitioner would further submit that in the present case, summons or notice was not served upon the petitioner and the petitioner got knowledge of the *exparte* order only on 13.06.2022 when he met his counsel and therefore filed E.A within the time stipulated.

10. It is submitted that the petitioner has not filed any application under Section 5 of the Limitation Act, 1963 to condone the delay in filing the application to set aside the *exparte* order. The Court has power to condone the delay in filing the application under Order 21 Rule 106 of the Code of the Civil Procedure, 1908. In support of his contention, the learned counsel appearing



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for the petitioner has relied upon the decision of the Madras High Court (Principal Seat of this Court), Chennai, rendered in the case of **T.Natarajan Vs. S.Tejraj and another**, in C.R.P.Nos.1457 & 1458 of 2018, dated 16.10.2020.

11. Per contra, the learned counsel appearing for the respondent would submit that notice in the Execution Proceedings was duly served on the petitioner and therefore, the petitioner ought to have filed E.A. within 30 days and the said E.A. was barred by limitation and therefore, the Court below has rightly dismissed the E.A filed by the petitioner. He therefore prays for dismissal of the present Civil Revision Petition.

12. Heard the arguments and perused the records.

13. In view of the above facts, this Court is of the view that instead of filing the set aside application, the petitioner ought to have filed a condone delay application. However, the impugned order dated 07.11.2022 passed by the Execution Court in E.A.No.1 of 2022 in E.P.No.4 of 2022 in O.S.No.5 of 2009 can be set aside since there is an alternate remedy available to the petitioner.



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14. The respondents have not established that the notice was duly served on the petitioner in the E.P. proceedings. Hence, the petitioner can file an application under Section 5 of the Limitation Act to condone the delay in filing the application to set aside the *exparte* order passed by the Exeuction Court in E.P.No.4 of 2022. The said condone delay application shall be filed within a period of 2 weeks from the date of receipt of a copy of this order.

15. If such application is filed by the petitioner within the time stipulated above, the learned District Munsif, Palani is directed to dispose the same, on merits, expeditiously, within a period of 1 Month thereafter.

16. Accordingly, this Civil Revision Petition is allowed with the above directions. No cost. Consequently, connected Miscellaneous Petition is closed.

26.07.2023

Internet : Yes/No

Index : Yes/No

NCC : Yes/No

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Issue Order Copy on 31.07.2023



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To
The Judge,
District Munsif Court,
Palani.



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K.GOVINDARAJAN THILAKAVADI, J.

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