



C.R.P.(MD)No.1471 of 2022

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

| <b>Date of Reserving the Judgment</b> | <b>Date of Pronouncing the Judgment</b> |
|---------------------------------------|-----------------------------------------|
| 11.04.2023                            | 28.04.2023                              |

**CORAM:**

**THE HONOURABLE MR.JUSTICE C.SARAVANAN**

**C.R.P.(MD)No.1471 of 2022**

Puppy @ Chellamal, D/o.Aravamuthan

... Petitioner

vs.

Govindarajan, S/o.Late.Rajagopal

... Respondent

**Prayer :-** Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order dated 05.12.2017, passed in I.A.No.392 of 2017, by the learned Judge, Family Court, Sivagangai.

For Petitioner

: Mr.S.M.Mohan Gandhi

For Respondent

: Mr.R.Rajamohan

**ORDER**

The petitioner has filed this Civil Revision Petition against the order dated 05.12.2017, passed by the learned Judge, Family Court, Sivagangai, in I.A.No.392 of 2017 in H.M.O.P.No.70 of 2005.



2. By the impugned order, the learned Judge, Family Court, Sivagangai, has dismissed I.A.No.392 of 2017 in H.M.O.P.No.70 of 2005 filed by the petitioner under Section 5 of the Limitation Act, seeking to condone the delay of 2696 days in filing the application to set aside the *ex parte* decree, dated 14.06.2006, passed in H.M.O.P.No.70 of 2005. Relevant portion of the impugned order reads as under:-

*"11. After passing many more years, from the passing of exparte decree, this petitioner has come forward to set aside the exparte decree, by filing an application after the delay of 2696 days. If really this petitioner herein had inclination to defend the main case, she might have knocked the doors of the court in time. So it is quite obvious to consider that the petitioner herein was disinclined to proceed with her case for years together. Now, subsequently with ulterior intention, with false reason, she filed this application to condone the delay of 2696 days.*

*12. If any court mechanically approaches the delay condonation petition, without any justification, it is nothing but injustice to the legal administration system. Then each and every person may tend to avoid from appearance before court, with the positive assurance that even at any period of delay, that case can be revived. Then the object of Limitation Act may certainly be defeated. If really this petitioner was in the necessity of defending the main case in HMOP No.70/2005, no doubt, she might have appeared before the court of law, in time*

*13. There is no proof to consider that the petitioner was under a continuous illness of 2696 days, that is for years together. Further there is no proof to consider that service was not properly issued in HMOP No. 70/2005. No document has been produced to substantiate the actual place of residence of the petitioner herein, while notice was issued to her in HMOP No.70/2005 No evidence to consider that this petitioner might have taken treatment for her illness. At this juncture, there is no option, except to consider that this petitioner has willfully avoided her appearance and caused delay to file exparte decree set aside petition.*

*14. The delay cannot be condoned mechanically. Delay must be properly explained. In this case, this petitioner has not properly explained the delay of 2696 days. Reason for the delay is not acceptable one. So, it is decided that it is not justifiable to condone the delay caused in filing exparte decree set aside petition. Hence the delay of 2696 days cannot be condoned and this petition is liable to be dismissed. Accordingly the issue is answered."*



3. During the pendency of the present Civil Revision Petition, the sole respondent, who is the husband of the petitioner, died on 05.09.2022. It is submitted that the petitioner was unaware of H.M.O.P.No.70 of 2005 filed by the deceased respondent. It is submitted that the petitioner is entitled for all the terminal benefits including the pensionary benefits on account of the death of the sole respondent herein.

4. It is submitted that the respondent herein contracted a second marriage with one Saroja @ Roseline Mary, by signing a Marriage Agreement, dated 09.11.2000, stating that the petitioner had already died. However, later, proceeded to file the above H.M.O.P.No.70 of 2005 by giving a wrong address of the petitioner as Door No.90/42 instead of Door No.41/90.

5. It is further submitted that the Court notice in H.M.O.P.No.70 of 2005 remained unserved on the petitioner. Therefore, the deceased respondent obtained an order for effecting substituted service of notice and effected a paper publication in Malai Malar, Madurai Edition, which in any event, did not come to the notice of the respondent. It is submitted that though the petitioner and the respondent were estranged, the petitioner was unaware of H.M.O.P.No.70 of 2005 filed by the respondent after falsely representing to the said Saroja @ Roseline Mary that the petitioner has died.



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6.Mr.R.Raja Mohan, the learned counsel for the respondent submits that the Civil Revision Petition has become infructuous by operation of law in view of the death of the sole respondent on 05.09.2022. It is further submitted that the proceedings are also pending before the Central Administrative Tribunal both at the behest of the petitioner and at the behest of Saroja @ Roseline Mary with whom the deceased respondent had contracted the marriage on 09.11.2000. In view of the same, the terminal benefits and family pension has not been given either to the petitioner or to the respondent.

7.I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent.

8.This is a peculiar case. During the subsistence of the first marriage between the petitioner and the respondent, the deceased respondent is supposed to have contracted a second marriage with Saroja @ Roseline Mary by signing a marriage agreement dated 09.11.2000. The marriage is said to have also been solemnised on 09.11.2000. The said marriage was a void marriage, as it was contracted during the subsistence of the first marriage with the petitioner.

9.H.M.O.P.No.70 of 2005 filed by the deceased respondent, which was allowed on 14.06.2006 by the Subordinate Court, Sivagangai, appears to have secured by playing fraud not only on the petitioner but also on the Court. The



respondent died on 05.09.2022 during the pendency of the present Civil Revision Petition. As per the latin maxim "*Actio personalis moritur cum persona*", which means a personal right of action dies with that person. This principle is partly codified in Order XXII Rule 1 of CPC. As per Order XXII Rule 1 of CPC, death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

10. Order XXII Rule 1 of C.P.C. reads as under:-

**"1. No abatement by party's death if right to sue survives.**—The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives."

11. Order XXII Rule 4 of C.P.C prescribes the procedure. It reads as under:-

**"4. Procedure in case of death of one of several defendants or of sole defendant.**— (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal



representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

12. Order XXII Rule 4 A of C.P.C. prescribes the procedure, where there is no legal representative. It reads as under:-

**"4A. Procedure where there is no legal representative.—**(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may be order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court—

(a) may require notice of the application for the order to be given to such (if any) of the persons

having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person."

13. In **Smt. Yallawwa Vs. Smt. Shantavva** (JT 1996 (9) S.C. 218), the Hon'ble Supreme Court held as under:-

"Now remains the question as to whether the proceedings for divorce as



restored by the High Court by its impugned order and required to be proceeded further or the curtain must be dropped on the said proceedings. As the ex parte decree is found to be rightly set aside by the High Court, the marriage petition would automatically stand restored on the file of the learned Trial Judge at the stage prior to that at which they stood when the proceedings got intercepted by the ex parte decree. Once that happens it becomes obvious that the original petitioner seeking decree of divorce against the wife being no longer available to pursue the proceedings now the proceedings will certainly assume the character of a personal cause of action for the deceased husband and there being no decree culminating into any crystallized rights and obligations of either spouse, the said proceedings would obviously stand abated on the ground that right to sue would not survive for the other heirs of the deceased husband to get any decree of divorce against the wife as the marriage tie has already stood dissolved by the death of the husband. No action, therefore, survives for the court to snap such a non-existing tie otherwise it would be like trying to slay the slain. As this stage there remains no marriage to be dissolved by any decree of divorce. Consequently, now that the ex parte decree is set aside, no useful purpose will be served by directing the Trial Court to proceed with Hindu Marriage petition by restoring it to its file. The Hindu Marriage Petition No. 25 of 1989 moved by Shri Basappa, the husband of the respondent on the file of the Court of Civil Judge, Gadag will be treated to have abated and shall stand disposed of as infructuous. The appeal is disposed of accordingly. In the facts and circumstances of the case, there will be no order as to costs."

14.However, in the above case, the Hon'ble Supreme Court also held as under:-

"It must, therefore, be held that when a divorce decree is challenged by the aggrieved spouse in proceedings whether by way of appeal or by way of application under Order Rule 13 C.P.C. for setting aside the ex parte decree of divorce, right to sue survives to the aggrieved surviving spouse if the other spouse having obtained such decree dies after the decree and before appeal is against same by the aggrieved spouse or application is made under Order IX Rule 13 by the aggrieved for getting such an ex decree of divorce set aside. **Similarly, the right to sue would also survive even if the other spouse dies pending such appeal or application under Order IX Rule 13 C.P.C.** In either case proceedings can be continued against the legal heirs of the deceased spouse who may be interested in supporting the decree of divorce passed against the aggrieved spouse."

15.In my view, the petitioner cannot be blamed for not approaching the Court



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earlier for setting aside the *ex parte* decree granting divorce, as the address for communication given in H.M.O.P.No.70 of 2005 was not the correct address of the petitioner. The paper publication that was effected by the respondent [since deceased] was clearly intended to ensure the petitioner gets no notice in the above said proceedings.

16.HMOP No.70 of 2005, which was allowed on 14.06.2006 by the Subordinate Court, Sivagangai *ex-parte* was by playing fraud on the Court by giving wrong address of the petitioner.

17.I am of the view that the petitioner has a right to redress her grievance before this Court as fraud was played on the petitioner. The petitioner is entitled to declare the decree dated 14.06.2006 passed in H.M.O.P.No.70 of 2005 by Subordinate Court, Sivagangai, as null and void, by producing evidence to substantiate her case.

18.The present Civil Revision Petition is allowed by condoning the delay of 2696 days in filing the application to set aside the *ex parte* decree, dated 14.06.2006, passed in H.M.O.P.No.70 of 2005, vide I.A.No.392 of 2017. Consequently, the learned Judge, Family Court, Sivagangai, is directed to pass consequential order in the unnumbered Interlocutory Application to set aside the *ex parte* decree, dated



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14.06.2006 in H.M.O.P.No.70 of 2005. However, before passing order in the unnumbered Interlocutory Application to set aside the *ex parte* decree, dated 14.06.2006 in H.M.O.P.No.70 of 2005, Saroja @ Roseline Mary, with whom the deceased respondent is said to have contracted second marriage, pursuant to the so called marriage agreement dated 09.11.2000 and the legal heirs, if any, shall be arrayed as respondents and heard. The learned Judge, Family Court, Sivagangai, is directed to pass orders in the unnumbered I.A. for restoring the H.M.O.P. to file as expeditiously as possible, preferably, within a period of six months after due notice as above.

19.The Pay and Accounts Office and the Pension Authorities, who have to disburse the terminal benefits to the nominee/legal heirs of the deceased respondent herein shall await for further orders in H.M.O.P.No.70 of 2005.

20.This Civil Revision Petition is allowed accordingly. No costs.

NCC : Yes / No  
Index : Yes / No  
Internet : Yes / No  
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**28.04.2023**

To  
The Judge,  
Family Court, Sivagangai.



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**C.SARAVANAN, J.**

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**PRE-DELIVERY ORDER MADE IN**  
**C.R.P.(MD)No.1471 of 2022**

**DATED : 28.04.2023**