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CRP.No. 2674 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: .04.2024

CORAM:

THE HONOURABLE MR.JUSTICE P. DHANABAL

CRP.No. 2674 of 2022

and

CMP.No. 13882 of 2022

1.S. Lakshmi

2.S. Subramanian

...Petitioners

Versus

1.M. Subramanian

2.S. Indra

...Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, prays to set aside the fair and decretal order in IA.No. 12 of 2021 in IA.No. 408 of 2017, dated 28.06.2022 in O.S.No. 348 of 2017 on the file of Sub Judge, Tittagudi.

For Petitioners : Mr.K. Jayabalan

For Respondents : No Appearance



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ORDER

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This Civil Revision Petition has been filed as against the order passed in IA.No. 12 of 2021 in IA.No.408 of 2017 in O.S.No. 348 of 2017 by the learned Subordinate Judge, Tittagudi, wherein, the petitioners/defendants have filed the application under Order IX Rule 7 of the Code of Civil Procedure, seeking to set aside the ex-parte order passed by the trial Court against the petitioners on 18.09.2019 in I.A.No. 408 of 2017.

2. The petitioners are the defendants and the respondents are the plaintiffs in the original suit proceedings.

3. The respondents/plaintiffs have filed the suit in O.S.No. 348 of 2017 before the learned Subordinate Judge, Tittagudi, for declaration and permanent injunction and the same was contested by the petitioners/defendants. The II Item of the suit properties, was enjoyed by the father-in-law viz., Kandasamy of the 1st petitioner and the same was leased



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out to the respondents/plaintiffs for rent of Rs.40/- per month in the year 1995 and the same was also registered in the Sub Registrar Office, Pennadam, but the respondents/plaintiffs, claiming the properties in question as if they were enjoying the same for more than the statutory period.

4. While so, the respondents/plaintiffs have filed an application in I.A.No. 408 of 2017 for appointment of Advocate Commissioner and the said IA was posted on 18.09.2019 for filing counter affidavit. Prior to the said hearing date, the first petitioner's own son suffered illness and thereby, as she was taking care of her son, she was unable to appear before the trial Court and file counter affidavit. Therefore, the trial Court had passed ex-parte order against them. Hence, the petitioners/defendants pray to set aside the order of the trial Court in the impugned order dated 28.06.2022.

5. The case of the respondents/plaintiffs is that the IA.No. 12 of 2021 is not maintainable. It is false to state that the petitioners/defendants



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are the tenants through father-in-law of the first petitioner herein. In fact, the petitioners/defendants have no good case and they have filed the application in IA.No.12 of 2021 only to drag on the proceedings. Already, in the main suit, the petitioners/defendants were set ex-parte on 14.06.2016 and now, they have filed IA.No. 12 of 2021 seeking to set aside the ex-parte order passed in IA.No. 408 of 2017. Notice was also served on the respondents/plaintiffs. Thereafter, the learned Advocate Commissioner was also appointed as per the order passed in IA.No. 408 of 2017. Subsequently, the learned Advocate Commissioner has also inspected the properties in question and filed his report before the Court below. Now, the petitioners/defendants have filed the present revision after a lapse of 21 months and therefore, the respondents/plaintiffs prayed to dismiss the above said petition.

6. Before the trial Court, no oral and documentary evidence was adduced on either side. After perusing the records, the trial Court dismissed



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the application on the ground that it was barred by limitation and false averments were made in the affidavit. As against the impugned order dated 18.09.2019 passed by the trial Court, the petitioners/defendants have come forward with the present Civil Revision Petition.

7. The learned counsel appearing for the petitioners/defendants contended that the trial Court had dismissed the petition on the ground of limitation. There is no limitation to file the application under Order IX Rule 7 of the Code of Civil Procedure, but, the trial Court had erroneously dismissed the application on the ground that it was barred by limitation. He further contended that in the Advocate Commissioner's application, the petitioners/defendants were not given any opportunity to put forth their defence and thereby, the impugned order passed by the trial Court is liable to be set aside.



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8. The learned Counsel appearing for the respondents/plaintiffs contended that the petitioners/defendants were already set ex-parte in the main suit itself and thereafter, the suit was transferred to the Sub-Court, Tittagudi, and then, the case was posted for filing counter affidavit in I.A.No. 408 of 2017 but, the petitioners/defendants have not filed any counter affidavit and thereby, the trial Court passed ex-parte order dated 18.09.2019. He further contended that the petitioners/defendants have not filed any application immediately seeking to set aside the ex-parte order passed by the trial Court and they left the matter for 21 months. Now, the petitioners/defendants have filed the application in IA.No. 12 of 2021 with the only intention to drag on the suit proceedings. The trial Court has not dismissed the said application only on the ground of limitation, but also considering the other aspects, as the reasons stated by the petitioners/defendants are not sufficient. Further, the trial Court has held that the petitioners/defendants have not assigned any good cause for the petitioners' non-appearance before the trial Court. Therefore, the learned



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counsel prays that the above Civil Revision Petition may be dismissed.

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9. Heard both sides and perused the materials available on record.

10. The main contention of the petitioners/defendants is that the respondents/plaintiffs have filed an application in IA.No.408 of 2017 for appointment of Advocate Commissioner and the same was posed for filing counter on 18.09.2019. Due to illness of the 1st petitioner's son, the petitioners were unable to file their counter in time and hence, the trial Court passed ex-parte order on 18.09.2019 and therefore, the application was closed on 10.02.2020. Thereafter, the petitions have filed petition to set aside the ex-parte order passed against them and the same was dismissed by the trial Court. Therefore, the impugned order passed by the trial Court has to be set aside.



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11. The main contention of the respondents/plaintiffs is that the petitioners/defendants have not filed any application to set aside the ex-parte order passed by the trial Court on 18.09.2019 at the earliest point of time. Notice was served on the petitioners/defendants by the learned Advocate Commissioner and he filed report against them, and thereafter, the trial Court dismissed the application on the ground that they have not filed any objection to the Commissioner's report. The petitioners have not shown the good cause or proof for non-appearance before the Court below.

12. On a careful perusal of the records, it is seen that the trial Court has held that the application under Order IX Rule 7 CPC will lie only when the proceedings are pending. I.A.No. 408 of 2017 was closed on 10.02.2020 and the application I.A.No. 12 of 2021 was filed after a lapse of 10 months and this application can be filed only after condoning the delay in filing the application to set aside the ex-parte order in I.A.No. 408 of 2017. Hence, the application was thrown out at the threshold itself. In this context, the learned



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counsel for the petitioners produced the judgments in support of his contentions, the learned counsel for the petitioners/defendants had relied upon the following judgments of this Court:-

(a) **Valleeswari v. Kamalakannan**, reported in “2010 SCC Online Mad 559 = 2010 (1) MWN (Civil) 581 and the relevant Paragraph Nos.11 to 14 are extracted hereunder:-

"11.The Honourable Supreme Court in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425, has categorically held as follows:

“28. Then comes Rule 7 which provides that if at an adjourned hearing' the defendant appears and shows good cause for his “previous non-appearance”, he can be heard in answer to the Suit

“as if he had appeared on the day fixed for his appearance.”

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.”



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Participation by the defendant in the trial proceedings cannot be denied even if he does not show any good cause, it has been held by the Honourable Supreme Court in the aforesaid case.

12. This Court in *N. Ramanathan v. Meenakshi-sundaram*, 2001 (4) CTC 8, has held that even if the defendant is not in a position to substantiate the reason assigned for his non-appearance, his right to participate in the pending trial proceedings cannot be denied. Though the second defendant has come out with some weak reasons for not attending the hearings before the Trial Court, the Court finds that it would be unjust in the light of the aforesaid ratios to deny his right to participate in the trial proceedings which is pending adjudication.

13. It is true that there has been a delay of about four and half years in filing the Petition by the second defendant under Order 9, Rule 7, C.P.C. This Court in *Palani Nathan v. Devannai Ammal*, 1987 (2) MLJ 259, has held that for filing an Application under Order 9, Rule 7, C.P.C., no limitation is prescribed and it is open to the Court to condone the absence of the defendant and set aside the *ex parte* order passed as against him and permit him to take part in the proceedings at any stage of the proceedings.

14. As regard the stage of the proceedings at which the Petition under Order 9, Rule 7, C.P.C., could be filed, the *Honourable Supreme Court in Bhanu Kumar Jain v. Archana Kumar*, 2005 (1)



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CTC 368, was pleased to hold as follows:

“16. Order 9, Rule 7 of the Code postulates an Application for allowing a defendant to be heard in answer to the Suit when an order posting a Suit for *ex parte* hearing was passed only in the event, the Suit had not been heard as in a case where hearing of the Suit was complete and the Court had adjourned a Suit for pronouncing the judgment, an Application under Order 9, Rule 7 would not be maintainable.”

Only at the stage when the matter has been posted for judgment after completing the trial proceedings, an Application under Order 9, Rule 7, C.P.C., cannot be maintained, it has been ruled by the Honourable Supreme Court."

(b) Pilla Reddy and Ors v. Thimmaraya Reddy and Ors,

reported in “(1997) 1 MLJ 37” and the relevant paragraphs are extracted

hereunder:-

"8. There is no rule that an application under Order 9, Rule 7, is to be filed within 30 days from the date of the order proceeding *ex parte*.

The said decision was followed by our High Court in the decision reported in [Palani Nathan v. Devanai Animal](#) , While considering a similar question, this Court held thus:



...For filing an application under Order 9, Rule 7, [C.P.C.](#), no limitation is prescribed and that it is open to the Court to condone her absence and set aside the ex parte order and permit her to take part in the proceedings at any stage of the proceedings. In support of the contention, the learned Counsel for the respondent drew my attention to the provision of Order 9, Rule 7, [C.P.C.](#) which reads:

Where the Court had adjourned the hearing of the suit ex parte and the defendant, at or before such hearing, appears and assigns good cause for his previous no-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.

.. . . .

Order 9, Rule 7, Civil Procedure Code does not prevent this but applies to the case where the party being declared ex parte wishes to be relegated back to the position which he would have been in, if he had appeared at the previous hearing and had opportunities of cross-examination, etc. This was followed in a subsequent decision in [Pattanna v. Neeli Chetty Ramish Chetty and Anr.](#) A.I.R. 1927 Mad. 1197. In [Arjun Singh v. Mohindra Kumar](#) . Their Lordships of the Supreme Court while considering the principle of res judicata with respect to the order passed under Order 9, Rules 7 and 13, held:

Order 9, 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 of direction in an interlocutory proceeding of the type provided for by Order 9, 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 9, Rule 13.



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In *Kamal Singh v. Sripal* in para 4 it was held:

The defendant against whom an order declaring him to be proceeded ex parte was passed'On the date of the first hearing is entitled to come in and take part in the trial at a later stage. If he agrees to be bound by what his taken place during his absence he need not make an application under Order 9, Rule 7, [C.P.C.](#) for getting the order set aside. He can continue from the stage at which he appears. However, if he desires to cross-examine the witnesses examined before he entered appearance he can apply under Rule 7 of Order 9 and get an order, in which case he can claim an opportunity to cross-examine the witness examined before the entered appearance. In such a case, he seeks to be relegated back to the position he would have been if he were present on the day on which evidence was taken in his absence. Had be been so present, he would have got an opportunity to cross-examine the plaintiff's witnesses. This is the right which he can exercise after getting an order under Order 9, Rule 7, C.P.C.

In the said case, reliance was placed on the decision in [Kumara Pillai v. Thomas](#) . In [Delhi Development Authority v. Shanti Devi](#).

[Under the Limitation Act](#) no period is prescribed for filing an application for setting aside the order proceeding ex parte. Under Rule 7 of Order 9 of the Code the defendant is allowed to file an application or before the next date of hearing and if he assigns good cause for his non-appearance on the previous date of hearing the Court may set aside the order proceedings ex parte.... There is no rule that an application under Order 9, Rule 7 is to be filed within 30 days from the date of the order proceeding ex parte....

In [Sangram Singh v. Election Tribunal, Kotah](#) , after



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extracting the relevant provision Order 9, Rule 7, Order 8 Rule 10, their Lordships observed:

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 9, Rule 7 makes it clear that unless good cause is shown the defendant 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 issued 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 Order 9, Rule 7, [Code of Civil Procedure](#)...."

13. From a reading of the aforesaid judgments, it is clear that there is no limitation to file the application under Order IX Rule 7 CPC and the petitioners/defendants against whom ex-parte order was passed, on the date of first hearing, is entitled to come and take part in the trial only at a later



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stage. If the petitioners are aggrieved by what had taken place during their absence, they need not file the application under Order IX Rule 7 CPC for getting the ex-parte order set aside, considering continuance from the stage on which they appeared. However, if they decided to cross examine the witnesses before they enter into appearance, they can file application under Order IX Rule 7 CPC, to get an order, in which case, they can claim an opportunity to cross examine the witness before they enter appearance. In such a case, if they seek to relegate the properties back to their possession, they could be treated as fictitious persons on the date on which their evidence had taken place during their absence. The petition was filed by the petitioners to set aside the ex-parte order passed against them only in the year 2021.

14. On a further perusal of those judgments, it is clear that there is no limitation for filing the application under Order IX Rule 7 CPC. In this case, the Advocate Commissioner's application in IA.No. 408 of 2017 was



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closed on 10.02.2020. There is no limitation for the petitioners to file the application under Order IX Rule 7 CPC, to set aside the ex-parte order passed against them. Therefore, the trial Court ought to have decided as to whether any sufficient cause had been shown by the petitioners for their non appearance or not, but not on the point of limitation. The observation of the trial Court that the case is barred by limitation, is not legally sustainable. Therefore, as discussed stated *supra*, and in view of the above judgments, the impugned order passed by the trial Court in respect of limitation is not legally sustainable and the same is set aside.

15. The trial Court dismissed the petition not only on the ground of limitation, but also gone into the facts of the case and discussed in the impugned order, "that the learned Advocate Commissioner served the notice on the petitioners/defendants and in their presence and their counsel as the petitioners have signed on the spot itself in the inspection memo of the learned Advocate Commissioner, having participated in the inspection of the



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suit properties, the petitioners did not come forward immediately with application I.A.No. 12 of 2021, much less, they did not even file any objections to the report and plan of the learned Advocate Commissioner, if really the petitioners are aggrieved by the ex-parte order passed on 18.09.2019, they would have surely objected the inspection of properties, but they came up with this application on the next day of the inspection. But, they did not do so for the reasons best known to them. This would also amount to clear abuse of process of Court and law. On this ground also, the said application is liable to be dismissed."

16. Therefore, the aforesaid observations of the trial Court shows that the application was not dismissed only on the ground of barred by limitation, but also on the merits of the case. The petitioners/defendants have not shown any cause for their absence. Therefore, the impugned order passed by the trial Court is liable to be confirmed and the Civil Revision Petition has no merit and the same deserves to be dismissed.



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17. Further, the learned counsel appearing for the petitioner submitted that the petitioners may be permitted to file objections to the learned Advocate Commissioner's Report, and the IA.No. 12 of 2021 was filed only to set aside the ex-parte order dated 18.09.2019, but the petitioners have participated in the inspection of the Commissioner and they have not even filed any objection and not filed the petition to set aside the exparte order passed against them immediately after inspection of Commissioner. Without filing any objection now after a lapse of 10 months, at this stage belatedly they cannot challenge the appointment of Advocate Commissioner. Therefore, even on merits, the petitioners have not taken any steps for a long period after inspection of the properties by the learned Advocate Commissioner, thereby the petitions have not shown sufficient cause for their non appearance. Therefore, the Civil Revision Petition has no merits and deserves to be dismissed.



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18. In the result, the Civil Revision Petition is dismissed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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MSM

Index: Yes/no

Speaking order: Yes/no

Neutral Citation: Yes/no

To

1. The Subordinate Judge, Tittagudi.
2. The Section Officer, High Court, Madras.



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P. DHANABAL, J

MSM

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