



WEB COPY



C.R.P.(PD).No.2569 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

C.R.P.(PD).No.2569 of 2021
and CMP.No.19089 of 2021

Duraisamy

... Petitioner

vs.

1.Aravindh
2.Anusia
[Palaiammal (died)]
W/o.Kumarasamy Gounder
3.Dhanalakshmi

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, praying to set aside the fair and decretal order dated 23.08.2021 made in I.A.No.675 of 2021 in O.S.No.141 of 2008 on the file of the District Munsif, Dharapuram by allowing this Civil Revision Petition.

For Petitioner

: Mr.N.Ponraj

For Respondents

:Mr.V.Kadhirvelu for R3

No Appearance for R1 and R2



C.R.P.(PD).No.2569 of 2021

ORDER

WEB COPY

This Civil Revision Petition is filed challenging the order passed by the Court below dismissing the application filed by the petitioner under Order 9 Rule 7 of CPC, seeking to set aside the ex-parte order passed against him dated 12.06.2008.

2. The respondents 1 and 2 filed a suit seeking partition of 2/9th share in the suit property. The petitioner who was arrayed as first defendant in the suit was set ex-parte on 12.06.2008. When the suit was posted for arguments, the petitioner herein filed the instant application seeking to set aside the ex-parte order passed against him. In the affidavit filed in support of the application, it was averred by him that on 12.06.2008, he was suffering from high fever and bed ridden. Therefore, he failed to contact his counsel and file his vakalat. The said application was opposed by the 3rd respondent on the ground that the application filed by the petitioner seeking to set aside the ex-parte order after 13 years is barred by limitation and the reason assigned by him for his failure to appear before the Court was not proved.



3. The application was dismissed by the Court below mainly on the ground that the petition filed to set aside the ex-parte order after 13 years is barred by limitation by applying Article 137 of the Limitation Act. The learned Judge relied on the judgment of this Court in ***Visalakshi Vs. Umapathy*** reported in **2015 (5) CTC 67**.

4. The learned counsel appearing for the petitioner submitted that the law laid down in ***Visalakshi Vs. Umapathy*** reported in **2015 (5) CTC 67**, was later held to be not good law in ***Rajasekar Vs. Govindammal (Late) 1.Dhavamani*** reported in **2020 (6) CTC 724**. The learned counsel further submitted that there is no limitation for filing petition to set aside the ex-parte decree and the same can be filed at any time before delivery of the judgment.

5. The learned counsel appearing for the 3rd respondent vehemently contended that the petitioner failed to give any acceptable reason for his failure to appear for nearly 13 years and therefore, the Court below is justified in dismissing the application.



6. This Court in ***Rajasekar Vs. Govindammal (Late)***

I.Dhavamani reported in **2020 (6) CTC 724** held that Article 137 of Limitation Act will not be applied to the application under Order 9 Rule 7 of CPC and the said application can be filed at any time before the delivery of judgment in the suit. The relevant observation of this Court, in this regard reads as follows:

*I therefore, find that those judgments, viz., the judgment in **Visalakshi Vs. Umapathy** reported in **2015 (5) CTC 67**, judgment in **G.Krishnasamy Vs. G.Seenivasan** and another, CRP (MD).No.2819 of 2018 (PD), dated 04.06.2019, judgment in **Ramdoss Vs. Mohan and others**, CRP (PD) No.2412 of 2016, dated 23.08.2016. cannot be held to be good law, inasmuch as, they are in conflict with the decisions of the Hon'ble Supreme Court in **Sangram Singh Vs. Election Tribunal, Kotah and others**, AIR 1955 SC 425 and **Arjun Singh Vs. Mohindra Kumar and others**, AIT 1964 SC 993. For the foregoing reasons, I conclude that Article 137 of the Limitation Act, does not apply to an Application under Order 9, Rule 7 of the Code of Civil Procedure and the same can be filed at any time before the judgment is delivered in the suit or proceedings.*



7. Since the law laid down by this Court in ***Rajasekar Vs.***

Govindammal (Late) I.Dhavamani reported in ***2020 (6) CTC 724*** is based on earlier Supreme Court judgment, I prefer to follow the same. Accordingly, I hold that there is no limitation for filing application under Order 9 Rule 7 of CPC to set aside the ex-parte order. The said application can be filed at any time before the delivery of the judgment. Order 9 Rule 7 of CPC, reads as follows:

“7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance:- *Where the Court has 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.”*

8. A reading of the above provision would make it clear that the person who failed to appear before the Court on particular day, subsequently, on his satisfying the Court by showing good cause, can be allowed as answer



C.R.P.(PD).No.2569 of 2021

the suit as if he had appeared on the day fixed for his appearance. Therefore,

at every subsequent hearings, he gets a new cause of action to file a petition to set aside ex-parte order, by showing good cause for his previous non-appearance. It is a continuing cause of action till suit is reserved for judgment or judgment is delivered. Hence, question of limitation to file petition to set aside ex-parte order will not arise as cause of action is continuing one. Further, the person who failed to appear on a particular day need not show sufficient cause as mentioned in Order 9 Rule 13 CPC. If he is able to show good cause the Court can set aside exparte order against him. In the case on hand, the petitioner in the affidavit filed in support of the application to set aside the ex-parte order had averred that he was suffering from high fever and bed ridden and therefore, he failed to contact his counsel and file his vakalat. The Court shall take a liberal approach, while interpreting the procedural and law. Having regard to the fact that the suit is for partition between close relatives, this Court is inclined to take a liberal approach and allow the application filed to set aside the ex-parte order. Since the application is filed after a long delay that too when the suit was posted for arguments, this Court is inclined to impose heavy costs on the petitioner.



C.R.P.(PD).No.2569 of 2021

9. Accordingly, the Civil Revision Petition is allowed by setting aside the order passed by the Court below on condition that the petitioner shall pay a sum of Rs.15,000/- to the 3rd respondent/3rd defendant, who contested this Civil Revision Petition by engaging the counsel. The said payment shall be made within a period of four weeks from today, failing which, the Civil Revision Petition shall stand automatically dismissed without further reference to the Court. In case, the petitioner complied with the condition, the Civil Revision Petition is allowed by setting aside the impugned order. The petitioner is directed to file his written statement within a period of eight weeks from today and the Court below is directed to dispose of the suit as expeditiously as possible.

10. Accordingly, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

04.01.2024

Index : Yes / No

Speaking order : Yes / No

Neutral Citation : Yes / No

ub

Note: Issue order copy on 09.01.2024.

7/8



WEB COPY



C.R.P.(PD).No.2569 of 2021

S.SOUNTHAR, J.

ub

To

The District Munsif, Dharapuram.

C.R.P.(PD).No.2569 of 2021

04.01.2024