



*C.R.P.(MD)No.2332 of 2019*

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 26.02.2024

Delivered on : 30.04.2024

CORAM:

**THE HON'BLE MR.JUSTICE K.MURALI SHANKAR**

C.R.P.(MD)No.2332 of 2019

and

C.M.P.(MD)No.12264 of 2019

Vijayakumar

: Petitioner/9<sup>th</sup> Respondent/  
9<sup>th</sup> Defendant

Vs.

1.S.Kanagambal

2.S.Deepthi

: Respondents 1 & 2/Petitioners/  
Plaintiffs

3.P.Shanmugasundaram

4.S.Periathambi

5.Visalatchi

6.S.Suryanarayanan

7.J.Balachandar

8.J.Pandian

9.S.Saravanan



*C.R.P.(MD)No.2332 of 2019*

10.J.Jeyanthi

11.The Commissioner,  
Madurai Corporation,  
Thallakulam, Madurai.

: Respondents 3 to 11/  
Respondents 1 to 8 & 10/  
Defendants 1 to 8 & 10

(Respondents 3 to 11 are given up  
in the above Civil Revision Petition)

**Prayer** : This Civil Revision Petition filed under Section 115 of C.P.C., to set aside the order, dated 24.01.2019 in I.A.No.938 of 2018 in O.S.No.65 of 2011 on the file of the VI Additional District and Sessions Judge, Madurai.

For Petitioner : Mr.G.Aravinthan

For Respondents : Mr.A.Vadivel

### **ORDER**

The Civil Revision Petition is direction against the order passed in I.A.No.938 of 2018 in O.S.No.65 of 2011, dated 24.01.2019 on the file of the VI Additional District and Sessions Judge, Madurai, allowing the petition filed under Order 9 Rule 9 of the Code of Civil Procedure.



*C.R.P.(MD)No.2332 of 2019*

WEB COPY

2. The revision petitioner is the 9<sup>th</sup> defendant and the respondents 1 and 2 as plaintiffs have filed the suit in O.S.No.65 of 2011 against the respondents 3 to 11 and the revision petitioner for partition and allotment of 2/3 shares in respect of the suit properties and for permanent injunction restraining the defendants 1 to 8 from in any way creating any kind of encumbrance over the suit properties till the properties are divided by metes and bounds; for permanent injunction restraining the 10<sup>th</sup> defendant from in any way granting approval for construction in favour of the defendants 3 to 8 until the division of properties by metes and bounds and for permanent injunction restraining the 9<sup>th</sup> defendant from paying monthly rent for the first item of the suit property to the defendants 1 and 2 until the suit properties are divided finally.

3. The defendants 1 to 8, after entering into appearance, are contesting the suit. Since the batta for sending summons to the 9<sup>th</sup> defendant was not paid, the suit was dismissed as against the 9<sup>th</sup> defendants on 20.02.2012. The plaintiffs have filed the above petition in I.A.No.938 of 2018 under Order IX Rule 9 and Section 151 of C.P.C., seeking orders to restore the suit as against the 9<sup>th</sup> defendant, which was



*C.R.P.(MD)No.2332 of 2019*

dismissed for default. The ninth defendant has filed a lengthy counter affidavit raising objections. The learned trial Judge, after enquiry, has passed the impugned order, dated 24.01.2019 allowing the restoration petition. Aggrieved by the impugned order, the ninth defendant has preferred the present revision.

4. The case of the respondents 1 and 2/plaintiffs in the petition filed under Order IX Rule 9 C.P.C, is that the ninth defendant was impleaded as he was a tenant in the first item of the suit property; that subsequent to the suit, the ninth defendant has purchased the said property from the first defendant; that the defendants 1 to 8 have entered into appearance and are contesting the case; that the plaintiffs came to know that since the private notice was not sent to the ninth defendant, the suit was ordered to be dismissed as against the ninth defendant on 20.02.2012; that the said factum was not at all informed to them by their counsel on record; that non sending of summons and notice to the ninth defendant is neither willful nor wanton; that since the plaintiff have come to know about the said factum, filed the above petition immediately and that therefore, it has become just and necessary to restore the suit as against the ninth defendant or else, the plaintiffs will be put to irreparable loss and hardship.



*C.R.P.(MD)No.2332 of 2019*

WEB COPY

5. The defence of the ninth defendant is that the plaintiffs have not taken any steps through Court to send summons to the ninth defendant; that the plaintiffs have attempted to get the relief against the ninth defendant without his knowledge; that the plaintiffs after knowing that the ninth defendant has purchased the property, has not cared to proceed against the ninth defendant for the past seven years; that the plaintiffs have not prosecuted the suit diligently and honestly; that the plaintiffs have not filed any application to condone the delay of nearly 2150 days in filing the application for restoration and as such, the above petition filed under Order IX Rule 9 of C.P.C., is barred by time; that the plaintiffs have not offered any explanation or any cause for the inordinate delay occurred and that therefore, the petition is devoid of merits and the same is liable to be dismissed.

6. As already pointed out, the plaintiffs have filed the above suit for partition and for other reliefs on 10.05.2011; that the defendants 1 and 2 have filed their written statement on 20.02.2012 and on that day, since private notice was not sent by the plaintiffs to the ninth defendant, the suit



*C.R.P.(MD)No.2332 of 2019*

was ordered to be dismissed as against the ninth defendant. Admittedly, the suit in O.S.No.65 of 2011 is still pending and the defendants 1 to 8 are contesting the suit.

7. As rightly contended by the learned counsel for the plaintiffs, paying batta for sending the suit summons to the defendants, or sending private notice is the duty of the concerned counsel appearing for the plaintiffs and the plaintiffs have nothing to do with those work. It is for the concerned Advocate either by himself or through his clerk has to file batta memo along with necessary charges for sending summons/notices to the other side and in case of any order for private notice, the concerned Advocate has to send the notice in his name. Hence, for non payment of batta or for not sending of private notice to the other side, the plaintiffs cannot be found fault with.

8. It is the specific contention of the plaintiffs that they have originally engaged the Advocate Paranthaman, subsequently, D.Balasubramaniam Advocate and thereafter, D.Jeyam Advocate and that the earlier counsel have not informed about the dismissal of suit against the ninth defendant.



C.R.P.(MD)No.2332 of 2019

WEB COPY

9. As rightly observed by the learned trial Judge, the defendants 1 and 2, after entering into appearance in the above suit on 18.10.2011, have sold the first item of the suit property to the ninth defendant on 28.10.2011 and that the defendants 1 and 2 have filed their written statement on 20.02.2012, but they have not mentioned about the sale made to the ninth defendants. It is pertinent to note that on 20.02.2012, when the defendants 1 and 2 have filed their written statement, the suit was ordered to be dismissed as against the ninth defendant. At this juncture, it is necessary to refer the Order IX Rule 2 and 4 of C.P.C.

*“2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs. -*

*Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed :*

*Provided that no such order shall be made, if notwithstanding such failure, the defendant attends in person or by agent when he is allowed to appear by agent on the day fixed for him to appear and answer.*



C.R.P.(MD)No.2332 of 2019

WEB COPY

*4.Plaintiff may bring fresh suit or Court may restore suit to file.-*

*Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”*

10. Considering the above, the dismissal of the suit for not sending the notice to the other side can only be considered as dismissal under Order IX Rule 2 of C.P.C., and that the suit has to be restored under Rule 4 of Order IX.

11. In the case on hand, the plaintiffs have invoked Order IX Rule 9 of C.P.C. It is settled law that that mere quoting a wrong provision of law does not disentitle the applicant from claiming the relief and does not prevent the Court from granting the relief. It is pertinent to note that if a suit is dismissed under Order IX Rule 8 of C.P.C., then the plaintiff has to apply under Order IX Rule 9 to restore the suit and Rule 9 specifically bars a fresh suit in respect of the same cause of action, if the suit is wholly



C.R.P.(MD)No.2332 of 2019

or partly dismissed under Rule 8, but if a suit is dismissed under Rule 2, the plaintiff can either file a fresh suit or file an application to restore the suit under Rule 4 of Order IX and the above basic difference has to be borne in mind.

12. It is pertinent to note that there is no limitation for filing a petition to restore the suit under Order IX Rule 4 of C.P.C. The Karnataka High Court in the case of ***Syed Mustapha Kamal Pasha and Another vs Dr. H.A. Ramachandra Gowda and Others*** reported in ***AIR 1996 KANT 91***, has held as follows :

*“4. No doubt there was inordinate delay on the part of the plaintiffs in filing the application, I.A. No. 5, under O.9, R. 4 of the Code of Civil Procedure. There is no period of limitation prescribed for an application to be filed under O.9, R.4 of the Code of Civil Procedure. The view of the learned City Civil Judge that the delay in filing the application under O.9, R. 4 of the Code of Civil Procedure has not been properly explained does not hold water bearing in mind that no period of limitation is prescribed for an application under O.9, R. 4 of the Code of Civil Procedure. The order of the learned City Civil Judge is perverse.”*



C.R.P.(MD)No.2332 of 2019

WEB COPY

13. As already pointed out, Rule 9 can be applied where a suit is wholly or partly dismissed under Rule 8 of Order IX, but Rule 4 does not make any distinction between wholly or partly dismissal, but speaks about the dismissal of the suit under Rules 2 and 3 of Order IX.

14. As already pointed out, in the case on hand, the suit is still pending, as other defendants are contesting the suit. Since it is not the case of dismissal of the entire suit, technically speaking Rule 4 cannot be also applied, as it deals with the dismissal of the entire suit. When a defendant is set ex-parte and other defendants are contesting the suit, the defendant, who remains ex-parte can very well invoke Order IX Rule 7 for setting aside the ex-parte order at any time till the completion of the arguments and in such cases, invoking Section 5 of Limitation Act is also not necessary. There is no bar in applying the same analogy to the case of dismissal of the suit as against one defendant, when the other defendants are contesting the suit.

15. In the case of *A.S.J.Vilas (P) Ltd., Vs. K.N. Karuppaiah and others* reported in *AIR 1978 Madras 384*, this Court has observed that



*C.R.P.(MD)No.2332 of 2019*

where the suit has been dismissed as against one of the defendant under Order 9 Rule 5 of C.P.C., the Court may have the power to implead the very same defendant by exercise of power under Order I Rule 10(2) of C.P.C., to give a complete and comprehensive adjudication of the questions that would arise for consideration in the suit.

16. As already pointed out, in the present case, since the suit was dismissed under Rule 2, the plaintiff can very well file a fresh suit, but as rightly observed by the learned trial Judge that would only engage the multiplicity of proceedings. As rightly contended by the learned counsel for the plaintiffs, though originally ninth defendant was added as a tenant, he has allegedly purchased the first item of the suit property, during the pendency of the suit and hence, the plaintiffs have to necessarily proceed against the ninth defendant. The learned trial Judge by specifically observing that the defence now raised by the ninth defendant can very well be agitated at the trial and by holding that there will be every possibility for filing of several suits, allowed the petition.



*C.R.P.(MD)No.2332 of 2019*

WEB COPY

17. The learned counsel for the revision petitioners have relied on the decision of this Court in the case of ***K.M.Mahboopkhan Vs. A.M.Abdul Rasak (C.R.P.No.275 of 2012)***, dated 28.07.2020 and in the case of ***T.Yesudhas and another Vs. T.Sahayam (C.R.P(NPD)(MD) No.817 of 2017)*** dated 17.04.2017, wherein the applicants therein have filed an application to condone the delay of 1199 days and 1046 days respectively for filing the application to restore the suit, which was dismissed for default in entirety and the learned Judge, by specifically observing that the applicants therein have not shown sufficient cause, dismissed the revision confirming the order of dismissal passed by the trial Courts.

18. In the present case, as already pointed out, the entire suit was not dismissed for default and the suit is still pending. Moreover, the Hon'ble Supreme Court in the case of ***Sesh Nath Singh and another Vs. Baidyabati Idyabati Sheoraphuli Co-operative Bank Limited and another*** reported in ***L.L.2021 SC 177 (Civil Appeal No.9198 of 2019)***, dated 22.03.2021., has specifically observed that there is no bar to exercise by the Court of its discretion to condone delay, in the absence of a



C.R.P.(MD)No.2332 of 2019

WEB COPY

formal application to condone the delay and the relevant passages are extracted hereunder :

*“ 61. The condition precedent for condonation of the delay in filing an application or appeal, is the existence of sufficient cause. Whether the explanation furnished for the delay would constitute ‘sufficient cause’ or not would dependent upon facts of each case. There cannot be any straight jacket formula for accepting or rejecting the explanation furnished by the applicant/appellant for the delay in taking steps. Acceptance of explanation furnished should be the rule and refusal an exception, when no negligence or inaction or want of bona fides can be imputed to the defaulting party.*

*62. It is true that a valuable right may accrue to the other party by the law of limitation, which should not lightly be defeated by condoning delay in a routine manner. At the same time, when stakes are high, the explanation should not be rejected by taking a pedantic and hyper technical view of the matter, causing thereby irreparable loss and injury to the party against whom the lis terminates. The courts are required to strike a balance between the legitimate rights and interests of the respective parties.*

*63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the*



C.R.P.(MD)No.2332 of 2019

WEB COPY

*case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.*

*64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the Court can always insist that an application*



C.R.P.(MD)No.2332 of 2019

WEB COPY

*or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.”*

19. In view of the above decision, this Court has no hesitation to hold that the learned trial Judge has rightly allowed the petition and the same cannot be found fault with. Hence, this Court concludes that the Civil Revision is devoid of merits and the same is liable to be dismissed.

19. In the result, the Civil Revision Petition is dismissed. The revision petitioner/9<sup>th</sup> defendant is directed to file the written statement within 10 days from the date of receipt of copy of this order and the learned trial Judge is directed to complete the trial and dispose of the suit within a period of three months thereafter. Consequently connected Miscellaneous Petition is closed. No costs.

**30.04.2024**

NCC : yes/No  
Index : yes/No  
Internet : yes/No  
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*C.R.P.(MD)No.2332 of 2019*

**To**

- 1.The VI Additional District and Sessions Judge  
Madurai.
- 2.The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai.



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*C.R.P.(MD)No.2332 of 2019*

**K.MURALI SHANKAR,J.**

DAS

Pre-delivery Order made in  
C.R.P.(MD)No.2332 of 2019  
and  
C.M.P.(MD)No.12264 of 2019

Dated : 30.04.2024