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C.M.P.No.9138 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.11.2025

PRESENT:

THE HONOURABLE DR.JUSTICE A.D.MARIA CLETE

C.M.P.No.9138 of 2023

in

A.S.No.222 of 2019

A.K.S.Manian,
S/o.late Kailasam,
Door No.68, AyyanThottam,
Pudhu Pallipalayam Road,
Kumarapalayam – 638 183
Kumarapalayam Agraharam Village,
Kumarapalayam Taluk, Namakkal District.

...Petitioner

Vs.

1.Vadivel,
S/o.Rathinam

2.Tamilselvi,
W/o.Vadivel

3.Gokulraj,
S/o.Vadivel

4.Pratap
S/o.Vadivel



C.M.P.No.9138 of 2023

5.Minor Kamaraj,
S/o.Vadivel,
Minor rep., by next friend father Vadievel
All are residing at Door No.7/27, Kattuvalavu,
Gajjalnaickenpatty Post,
Salem Taluk & District.

...Respondents

PRAYER: Petition filed under Order 41 Rule 21 of the Code of Civil Procedure praying to set aside the Judgment and decree dated 16.02.2023 and re-hear the appeal passed in A.S.No.222 of 2019 by this Court and pass such further or other orders as this Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner : Mr.R.Marudhachalamurthy.

For Respondents : Mr.S.Kalyanaraman.

O R D E R

Heard.

2.This is a petition under Order XLI Rule 21 of the Code of Civil Procedure filed by the respondent in A.S.No.222 of 2019 praying that the ex parte disposal of the appeal on 16.02.2023 be recalled and the appeal be re-heard.



C.M.P.No.9138 of 2023

WEB COPY

3.The facts of the case in brief is that the petitioner submits that he was the successful plaintiff at trial in a suit for specific performance. When the defendants appealed, he handed the High Court notice and papers to a local advocate at Bhavani who assured him that counsel would be arranged in the High Court and that advocate unfortunately died during the second COVID-19 wave on 27.04.2021. The petitioner claims that he learnt of the appeal having been allowed only when a memo was shown on 06.03.2023 in his execution proceedings R.E.P.No.61 of 2019 on the file of II Additional District Judge, Salem and thus he moved the present petition and therefore, he attributes his non-appearance to these circumstances and seeks a rehearing.

4.The third respondent has filed a counter disputing maintainability. He says the appeal was decided on merits after hearing the appellants; that the proper remedy is a 'regualr appeal', not an application under Order XLI Rule 21; and that the petitioner was negligent in tracking the appeal when he was simultaneously pursuing execution.



C.M.P.No.9138 of 2023

5.A perusal of records shows that the Judgment in A.S.No.222 of 2019 records 'For respondent:No appearance' and proceeds to allow the appeal on 16.02.2023. That satisfies the threshold of 'appeal heard ex parte' vis-a-vis the respondent for purposes of Order XLI Rule 21.

6.The order XLI Rule 21 enables the appellate court to re-hear an appeal decided ex parte against a respondent, if he satisfied the court that he was prevented by sufficient cause from appearing when the appeal was called on for hearing.

7.Two recent decisions of this Court have applied this provision in closely similar circumstances;

(i)In C.R.P.(MD) No.2637 of 2023 (13.12.2023), the Madurai Bench of this Court held that when a respondent was set ex parte and judgment thereafter followed, a petition under Order XLI Rule 21 is maintainable and must be taken on file and proceeded with in accordance with law.

(ii)In C.M.P.No.17043 of 2019 in S.A.No.210 of 2005 (30.11.2020), a coordinate Bench recalled an ex parte disposal of a second appeal, emphasising



C.M.P.No.9138 of 2023

that procedural law is a handmaid of justice; that a litigant should ordinarily be heard; and that any inconvenience to the opposite side can be compensated by costs.

8.On sufficient cause, it is seen that the papers had been given to a local advocate who died in April 2021; the petitioner learnt of the judgment only in the execution proceedings and moved soon thereafter. Notwithstanding some want of diligence, the explanation is bona fide and makes out sufficient cause; the brief was with a counsel who died, and on learning of the ex parte disposal the petitioner acted promptly. The plea that the only remedy is a further appeal is rejected in view of Rule 21. Justice therefore warrants a one-time restoration; any prejudice to the respondents is addressed by costs and peremptory listing.

9.In view of the above, this Civil Miscellaneous Petition is allowed on terms. The Judgment dated 16.02.2023 in A.S.No.222 of 2019 is recalled, and the appeal is restored for rehearing. This is subject to the petitioner paying costs of Rs.5,000/- to the respondents within two weeks (i.e., on or before 12.12.2025) and



C.M.P.No.9138 of 2023

filing proof before the Registry; on default, the Civil Miscellaenous Petition shall stand dismissed. List the appeal for compliance on 15.12.2025.

28.11.2025

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C.M.P.No.9138 of 2023

DR. A.D. MARIA CLETE, J

ay

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in
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