

IN THE COURT OF DISTRICT MUNSIF, KATPADI, VELLORE DISTRICT
PRESENT: THIRU. K.VENKATESAN, B.A.,B.L.,
DISTRICT MUNSIF, KATPADI

Wednesday, this the 16th Day of August – 2023

I.A.No. 02 of 2023
In
O.S.No. 26 of 2021
(CNR.No.TNVL23-000051-2021)

Geetha

.....Petitioner/4th Defendant

-Vs-

Mathiazhagan

.....Respondent/Plaintiff

This petition has come up today before this Court for orders, and upon hearing the arguments of Thiru. S.Gunasekaran & Thiru. G.Vijayabaskar, the Counsels for the Petitioner/4th Defendant, and Thiru. G.Peranban, the Counsel for the Respondent/Plaintiff, and upon perusing the petition, counter and the available case records, and having stood over before this court for consideration till this date, this court delivers the following:-

ORDER

This petition has been filed by the Petitioner/4th Defendant under Order 9 Rule 7 of CPC to set aside ex-parte order passed against her on 23.02.2023 in the above suit.

1. **Brief averments of the affidavit filed by the petitioner is as follows:-**

The petitioner is the 4th defendant in the above suit. The petitioner submits that her previous counsel has given back the case bundle to her, and for more than one month, she was suffering from viral fever and she was bedridden and she was unable to move out of her house, and she recovered from her illness only two days back, and she engaged her present counsel to contest the case, and her present counsel informed that an ex-parte order was passed against her on 23.02.2023 by this Court. Her absence on the said date, is neither

wilful nor wanton but due to the reason on stated supra. Hence, the petitioner filed this petition to set aside the ex-parte order dated 23.02.2023 and permit her to contest the above case on merits, and further the petitioner submits that no pre-judice will be caused to the other side and prayed to allow the petition.

2. **Brief averments of the counter filed by the respondent is as follows:-**

The petition filed by the petitioner is not maintainable either in law or on facts, and the respondent does not admit any of the averments stated in the petition affidavit, and the respondent vehemently denies that the petitioner's sick and further denies the allegation that the petitioner was also fell ill, and failed meet her counsel, are all false and concocted story of the purpose of this vexatious petition, and specifically the respondent stated that the petitioner deliberately failed to attend the case on that day of ex-parte, and nearly 2 years the opportunity was given to them to file written statement, and it is a clear tactic to delay the justice, and the petitioner approached this court with unclean hands and mislead the facts of the case, and if the petition is allowed, the respondent will be put to great loss, hardship and injury and prays to dismiss the petition with costs.

3. Neither the petitioner nor the respondent had placed any oral or documentary evidence before this court.

4. **Point for Consideration:-**

a) Whether the petition is entitled to be allowed or not?

5. **Answering to the Point:-**

5.1 Both sides has been heard. Records perused. Upon careful analysis of the entire case records including the petition, counter and upon considering the arguments advanced by both sides, it is found that this suit has been filed for permanent injunction

restraining the defendants-1 to 4, their men, agents, and others from interfering in any manner with the plaintiff's peaceful possession and enjoyment of the suit property and for costs.

5.2 It reveals from the records that the above suit filed before this Court on 19.02.2021 and it was numbered on 22.02.2021, and the summons were duly served on the defendants-1 to 4. In which, even after service of summons, the 3rd defendant did not appear and was called absent and set ex-parte on 07.03.2022, and the 1 & 2nd defendants appeared through their counsel on 22.03.2021 but, they were not filed written statement, and hence they were set ex-parte on 08.04.2022, and the 4th defendant who is present petitioner alone filed written statement on 07.03.2022, and then, the issues were framed on 18.10.2022, and then the case was posted for trial. On the side of plaintiff, the plaintiff was examined as PW.1 and marked Ex.A-1 to Ex.A-6 on 20.01.2023, and when the case is pending at the cross examination of PW-1, on 23.02.2023, the 4th defendant counsel filed memo stating that already he had returned the brief to the 4th defendant, and he has no objection to change of vakalath and the same was duly recorded. On the same day itself, the 4th defendant was called absent and was set ex-parte, and thereafter, this case was posted for further PW's.

5.3 At that juncture, the present petitioner/4th defendant has come forward and filed this petition to set aside the ex-parte order passed against her on 23.02.2023 in the above suit. The above facts are being so, in the petition affidavit, the petitioner states that she was suffering from viral fever and she was bedridden and she was unable to move out of her house, is not acceptable reason which is contrary to the material records available before this Court and it was not supported with any piece of documents & evidences on the side of petitioner.

6. The respondent in his counter stated that the petitioner wantonly filed this petition only to delay the justice, and it was categorically stated that the petitioner has not approached this Court with clean hands and no merits or bonafide in the petition, and prayed to dismiss the petition with costs of him.

7. In the present case on hand, this petitioner/4th defendant was set ex-parte on 23.02.2023 but the present application to set aside was filed on 30.03.2023 i.e., within 36 days. But till such time no ex-parte decree was passed and the suit was pending at the trial stage. It is inevitable to this Court to refer the Judgment of our Hon'ble High Court of Madras in **N.Ramanathan Vs. Meenakshisundaram**, reported in **2001 (4) CTC Page 8**, wherein held as follows:-

“Code of Civil Procedure, 1908, Order 9, Rule 7 of CPC – Defendants against whom exparte order was passed filed application before trial court to set aside such exparte order – Rule contemplates that such petition could be allowed on costs as suit was pending – Obstructing defendants from participating in suit would be unreasonable – Exparte order should be set aside on costs even if defendants failed to substantiate reasons for non appearance in court and it would be in accordance with principles of natural justice.”

7.1 In the above Judgment, our Hon'ble High Court of Madras has further 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.”

8. In another Judgment of our Hon’ble High Court in **Valleeswari Vs. Kamalakannan**, reported in **2010 (1) MWN (Civil) 581**, wherein held as follows:-

“10. The learned counsel appearing for the second defendant rightly makes out a difference in the rigors of Order 9 Rule 13 of CPC and the liberal constriction which is warranted under Order 9 Rule 7 of CPC, it is a case where the proceedings are still pending adjudication. But after the termination of the lis, the plaintiff or the defendant invokes the provision under Order 9 Rule 7 or Order 9 Rule 13 of CPC, as the case may be. When the suit is terminated and the party concerned knocks at the doors of this Court to set aside the decree passed or to restore the Suit which was dismissed for default, a rigorous test would be applied to weigh the veracity of the reason given for the non-appearance of the party concerned. Considering the fact the suit is pending adjudication and no prejudice will be caused to the other side, the petition filed under Order 9 Rule 7 of CPC is liberally construed.”

9. It is inevitable to refer the Judgment of our Hon’ble High Court of Madras in **Palani Nathan Vs. Devannai Ammal**, reported in **1987 (2) MLJ 259**, it was held that

“for filing an Application under Order 9 Rule 7 of CPC, 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.”

10. As per the above judgments of our Hon'ble High Court of Madras, it is made clear that even if the petitioner/defendant has not assigned proper reason for non-appearance and non filing of the written statement in the set aside application under Order 9 Rule 7 of CPC, 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 against him, and permit him to take part in the proceedings at any stage of the proceedings.

11. In fact, Our Hon'ble Supreme Court has also held in case in **Bhanu Kumar Jain Vs. Ardiana Kumar** reported in **2005 (1) LW 582 : 2005 (1) CTC 368**, was pleased to hold as follows:-

“...Only at the stage when the matter has been posted for judgment after completing the trial proceedings, an Application under Order 9 Rule 7 of CPC, cannot be maintained.”

12. It is made clear that only at the stage when the matter has been posted for judgment after completing the trial proceedings, an Application under Order 9 Rule 7 of CPC, cannot be maintained, which was clearly uphold by the Hon'ble Supreme Court. Further, Our Hon'ble Apex Court also held in yet another case in **Sangram Singh Vs. 1. Election Tribunal, Kotah**, reported in **(1956) 69 L.W. 1 : 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, 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. Participation by the defendant in the trial proceedings cannot be denied even if he does not show any good cause.”

13. The Hon’ble Supreme Court has very clearly held in the above case and in various cases that participation by the defendant in the trial court proceedings cannot be denied even if he does not show any good cause for his absence in previous proceedings, which is squarely applicable to the present case in hand.

14. As per the above judgment of Our Hon’ble Supreme Court and High Court of Madras clearly held that even the defendant has not given any valid reason, the Court can give an opportunity and it is open to the Court to condone the delay of set aside application and permit him to take part in the proceedings. From the above discussions & by following the above referred judgments, this Court is inclined to set aside the ex-parte order passed against the petitioner/4th defendant in the above suit dated 23.02.2023 on terms of considering the expenses will caused to the respondent, on account of this petition. Accordingly, the point is answered in favour of the petitioner.

15. **Result:-**

In fine, in the interest of justice, this Court is inclined to allow this petition by setting aside the ex-parte order dated 23.02.2023 passed against the petitioner/4th defendant in the above suit on condition that the petitioner shall pay a sum of Rs.1,000/- payable to the respondent/plaintiff on or before 01.09.2023, if failing which this petition shall stand dismissed without any further reference. Call on 07.09.2023 for reporting compliance.

-//Dictated by me to the steno-typist, computerized by her directly to my dictation,
corrected and pronounced by me in the open court, this the 16th Day of August – 2023.//-

DISTRICT MUNSIF
KATPADI

Both sides documents and witnesses: **NIL**

DISTRICT MUNSIF
KATPADI