

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

Thursday, this the 04<sup>th</sup> Day of April – 2024

**I.A.No. 03 of 2023  
In  
O.S.No. 24 of 2015  
(CNR.No.TNVL23-000065-2015)**

1. A.Subramani @ Madhusudhanan
2. Suguna

.....Petitioners/Defendants

**-Vs-**

D.Lakshmanan

.....Respondent/Plaintiff

This petition has come up today before this Court for orders, and upon hearing the argument of Thiru. M.Aravind, the Counsel for the Petitioners/defendants, and Thiru. M.Chandramouli, the Counsel for the respondent/plaintiff, and upon perusing the petition, counter, and the available case records, and having stood over for consideration till this date, this Court delivers the following:-

**ORDER**

This petition has been filed by the Petitioners/Defendants under Order 9 Rule 7 of Code of Civil Procedure, seeking to set aside ex-parte order passed against them on 09.12.2022.

1. **Brief averments of the affidavit filed by the 1<sup>st</sup> petitioner is as follows:-**

1.1 The 1<sup>st</sup> petitioner is the 1<sup>st</sup> defendant in the above Suit, and the 2<sup>nd</sup> petitioner is his wife, and he is filing this affidavit on behalf of his wife also, and states that the Suit was posted for cross examination of P.W-1 on 09.12.2022, and they were set ex-parte for non cross examination of P.W-1, and no representation on their side, and thereby, the P.W-1 cross was closed. Further, the 1<sup>st</sup> petitioner has retired from the army, and he is working as a Security Officer in State Bank of India, Vellore Branch on the basis of Ex-service men quota.

1.2 The 1<sup>st</sup> petitioner has filed Suit in O.S.No.49/2015 against the respondent, and another on the file of this Court and the same is pending trial, and the Suit filed by the 1<sup>st</sup> petitioner was posted on 11.12.2022 for trial, and he appeared and filed a Proof Affidavit was recorded and posted for marking of documents on 05.01.2023. The petitioners further state that their advocate duly informed the stages of both Suits, and their advocate was engaged in another Court, and he could not attend the Court at the time of calling the Suit, and no representation on their side is not willful.

1.3 The petitioners could not attend the Court to give an appearance because on that day, there was no permission or leave granted for the 1<sup>st</sup> petitioner as he is working as Security Officer in the Bank, and further his wife was not well. Non-appearance and non representation, are not wilfull but due to the reason stated above. The petitioners hereby tender apology for the cause of previous hearings, and the petitioners are ready to

cross of P.W-1. Unless allow this petition, they right over the property will be defeated on a false claim, and prays to set aside the ex-parte order passed against them on 09.12.2022.

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

2.1 The petition filed by the petitioners is not sustainable either in law or on facts, and the same is liable to be dismissed, and the respondent emphatically denies all the facts set-out in the petition and the accompanying affidavit, and put the petitioners to the strict proof of the averments, and states that he filed the main Suit for the relief of permanent injunction against the petitioners, and without any right or claim over the Suit property, the petitioners creating problems to him, and the said Suit was posted on 21.10.2019 for trial, and on that day, the respondent has filed a proof affidavit along with documents before this Court, and the same was recorded, and adjourned the case to 06.11.2019 for cross examination.

2.2 But the petitioners did not come forward to cross examine the respondent herein, and this Court also given several chance to the petitioners, and finally on 11.12.2019, the respondent herein present before this Court till 1.30 p.m, when the matter is taken up for cross examination, but neither the petitioners herein nor their Counsel was present, and the P.W-1 was not cross examined by the petitioners, and hence, this Court declared the petitioners as ex-parte and passed an Ex-parte Judgment against the petitioners herein.

2.3 Further, the petitioners herein filed an applications under Section 5 of Limitation act along with the Order 9 Rule 13 application to set aside the ex-parte decree dated 06.11.2019 by this Court, and after due enquiry of this Court, allowed both the application on 27.07.2020 and restored the Suit, and gave an opportunity to the petitioners for cross examine the P.W-1. From 27.07.2020, this Court gave many opportunities to the petitioners' and they also filed 2 consecutive Order 17 Rule 1 CPC on 12.10.2022 and 04.11.2022, and the same was allowed by this Court, and finally on 09.12.2022, the P.W-1 was present before this Court till 1.30 p.m, but once again the petitioners are absent, and there is no representation for the petitioners, and hence this Court once again passed an Ex-parte Order against the petitioners, and closed the P.W-1 cross.

2.4 From 06.11.2019, the P.W-1 was not cross examined by the petitioners even at once, and the petitioners wantonly drag on the Suit for several years, and harassed the respondent, and the petitioners have not come before this Court with clean hands, and suppressed the real facts of the Case, and filed the above petition with ulterior motive to harass the respondent and to defraud the Court and prays to dismiss the petition with costs.

3. Neither the petitioners nor the respondent have 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:-**

Both sides have been heard. Records perused. Upon careful analysis of the entire case records including the petition, counter and upon considering the arguments on either sides, it is found that the present petitioners are the Defendants-1 & 2, and the respondent herein is the plaintiff in the Suit, and the above Suit is filed for the relief of Permanent Injunction restraining the defendants, their men, agents from interfering with the plaintiff's peaceful possession and enjoyment of the Schedule property, and for costs.

6. It reveals from the records that after receipt of summons, the 2<sup>nd</sup> defendant has entered appearance through her Counsel Thiru. N.Karthic by way of filing Vakalath on the very first hearing of the case i.e., 17.03.2015, and the 2<sup>nd</sup> defendant had filed Written Statement on 30.09.2015, but her husband who is none other than the 1<sup>st</sup> defendant was appeared through the same Counsel on 20.01.2016 only after effecting Paper Publication, and the 1<sup>st</sup> defendant had filed a memo & adopted the Written Statement of 2<sup>nd</sup> defendant, and issues were framed on 25.10.2018, and posted for trial.

6.1 On 21.10.2019, the Plaintiff was examined himself as P.W-1 and marked Ex.A-1 to Ex.A-7, and posted for cross of P.W-1 on 06.11.2019, 15.11.2019, 27.11.2019 and lastly on 07.12.2019, and on that date, this Court observed that P.W-1 present till

1.30 p.m, when matter is taken up for cross examination P.W-1 is present, Counsel for defendants not present, and P.W-1 not cross examined, the defendants set ex-parte. On 23.01.2020, the Plaintiff's side further evidence was closed, and Ex-parte Judgement was passed in favour of the plaintiff on 06.03.2020.

6.2 Then, the defendants-1 & 2 have filed petition to set aside the set ex-parte decree and the same was allowed, and as per the order in I.A.No.216/2020 dated 27.07.2022, the Suit was restored and posted the case for appearance of P.W-1 & for cross of P.W-1 by the defendants. On 12.09.2022, the 1<sup>st</sup> defendant was present and an Advocate Thiru. M.Aravind filed change of Vakalath on behalf of the defendants-1 & 2, and on 12.10.2022, when the P.W-1 was present in Court, the defendants have filed adjournment petition and the same allowed on condition that the defendants shall cross examine the P.W-1 on next hearing without fail, and adjourned the case on 04.11.2022, and on the date also, the defendants have filed adjournment petition on 2<sup>nd</sup> time, and the same was also allowed by this Court in the interest of justice.

6.3 At last on 09.12.2022 at 1.30 p.m, this Court observed that P.W-1 present, D1 & D2 called absent and no representation on the defendants side, and recorded the previous hearings adjudication of the case & conduct of the defendants, and suo-motu closed the P.W-1 cross examination, and set the Defendants as set ex-parte, and posted the case for further P.W's. At that juncture, the defendants-1 & 2/the petitioners herein have filed the present petition to set aside the ex-parte order passed against them on

09.12.2022 along with the petition under Order 18 Rule 17 of CPC to recall the P.W-1 for cross examination.

7. The facts are being so, in the petition affidavit, the petitioners have stated that they could not attend the Court to give an appearance because on that day, there was no permission or leave granted for the 1<sup>st</sup> petitioner/1<sup>st</sup> defendant as he is working as Security Officer in the Bank, and further his wife was not well, and they are ready to cross of P.W-1 and have filed this petition for set aside the ex-parte order passed against them on 09.12.2022. On the other hand, the respondent in his counter stated that the reasons stated by the petitioners are all false, and they filed this petition with ulterior motive to harass the respondent and to defraud the Court, and to drag on the Suit, and the averments stated in petition affidavit are all false, and thus, he prayed to dismiss the petition with costs.

8. In the present case on hand, the Petitioners herein are the defendants-1 & 2 were set ex-parte on 09.12.2022. From the above material facts, it is evident that the reasons assigned in the petition by the petitioners are not proper, and the same was not substantiated with documents for their non-appearance in Court on that date. But, the petitioners have filed this petition within 30 days from the date of ex-parte order, along with petition to recall the P.W-1.

9. At this juncture, 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.”*

9.1 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.”*

10. In another Judgment of our **Hon'ble Madras 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.”***

11. 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 specific reason for non-appearance and non filing of the written statement in the set aside application under Order 9 Rule 7 of CPC, 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.

12. In fact, Our **Hon'ble Supreme Court of India** 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.”*

13. 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 of India. 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.”***

14. The Hon'ble Supreme Court of India, 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. As per the above judgments 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.

15. Though the reason assigned by the petitioners/the defendants-1 & 2 in the petition affidavit are not supported with documents, and the petitioners' earlier conduct is not good and they took several years for cross of P.W-1 from 06.11.2019 and successfully dragged the case for all these years, from the above discussions made above paragraphs & by following the above referred judgments, and also considering the petition to recall the P.W-1 filed by the petitioners/defendants-1 & 2 along with this petition stating that they are ready to cross of P.W-1, and moreover, considering the stage of the Suit, and to dispose off the Suit on merits by giving opportunity to both parties, this Court is inclined to set aside the ex-parte order passed against the petitioners/defendants-1 & 2 in the above Suit on 09.12.2022 on heavy terms of

considering the expenses will caused to the respondent, on account of this petition. Accordingly, the point is answered in favour of the petitioners.

16. **Result:-**

In fine, in the interest of Justice, this Court is inclined to allow this petition by setting aside the ex-parte order dated 09.12.2022 passed against the petitioners/defendants-1 & 2 on condition that the petitioners shall pay a sum of Rs.4,000/- payable to the respondent/plaintiff on or before 22.04.2024, if failing which this petition shall stand dismissed without any further reference. Call on 29.04.2024 for reporting compliance.

-//Dictated to the Steno-typist and typed by her computer and after rectification taken print out and pronounced by me in the Open Court, on this the 04<sup>th</sup> Day of April 2024.//-

(Sd/-)..K.Venkatesan  
DISTRICT MUNSIF  
KATPADI

**Both sides documents and witnesses: NIL**

(Sd/-)..K.Venkatesan  
DISTRICT MUNSIF  
KATPADI