



C.R.P.No.1355 of 2025

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Date : 27.06.2025

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

C.R.P.No.1355 of 2025 & C.M.P.No.8038 of 2025

1. Shaheen
2. Uzaifa

... Petitioners

Vs.

1. M/s. Super Tech Training Co.
Rep. By its Managing Partner Mr. S. Ramasmy
Having business at No. 29/1, T.T. Mudaliar Street,
Woraiyur, Tiruchirapalli – 620 003.
2. M/s. Al-Mudassir & Co.,
Rep. By its Partner Mr. O. Nazar
37/2, Murugappa Street,
Pursawalkam, Chennai – 600 007.
3. O.M. Nazir, Partner, M/s. AL-Mudassir & Co.,
37/2, Murugappa Street,
Pursawalkam, Chennai – 600 007.
4. Mrs. Rizwana, Partner Mr. AL-Mudassir & Co.,
37/2, Murugappa Street,
Pursawalkam, Chennai – 600 007.

5. Afan
7. Ujma [deceased]

... Respondents



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Prayer : Civil Revision Petition filed under Article 227 of Constitution of India against the fair and decretal order dated 04.01.2025 in E.A.No.3 of 2024 in E.P.No.661 of 2022 in O.S.No.1355 of 2017 passed by the learned XXV Assistant Judge, City Civil Court, Chennai and thereby allow the above Civil Revision Petition.

For Petitioners : Mr.R.Abdul Mubeen
in both petitions

For Respondents : Ms.D.Kamachi – R1

ORDER

Challenging the order of the Execution Court dismissing the application under Order 21 Rule 105 of Code of Civil Procedure CPC by condoning the delay of 822 days, the present revision petition had been filed.

2.The suit in O.S.No.1355 of 2017 has been originally filed by the plaintiff/first respondent for recovery of a sum of Rs.5,87,121.80 against the petitioners and the other respondents/defendants. As the defendants have not appeared before the trial Court despite receipt of summons, an exparte decree has been passed in the suit on 28.08.2019. The decree



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holder filed Execution Petition in E.P.No.661 of 2022 to enforce the decree.

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Even in the Execution Proceedings, as the judgment debtors evaded notice, the decree holder is taking steps to bring the property for sale to recover the decree amount. When the matter stood thus, the judgment debtors have filed the present application under Order 21 Rule 105 CPC to condone the delay of 822 days in filing an application to set aside the *ex parte decree*.

3. The said application has been opposed by the decree holder on the ground that each and every day delay has not been explained with sufficient cause and the reasons were vague and not supported with any evidence. The Execution Court dismissed the application by an order 04.01.2026 on the ground that no valid reason has been stated in the application to condone such a huge delay and he has not proved the reasons stated in the application. Challenging the same, the present revision petition has been filed by the judgment debtors.

4. The learned counsel appearing for the petitioners would submit that the petitioners came to know about the judgment and decree only after receipt of notice in the Execution Proceedings. It is his further contention



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that though they had explained the reason for delay in filing an application to set aside the *ex parte* decree, the Executing Court failed to consider the same and dismissed the application.

5. Whereas, the learned counsel appearing for the petitioners would submit that, as per Order 21 Rule 106 CPC, an application to set aside an *ex parte* order in the execution proceedings has to be filed within a period of 30 days and Section 5 of the Limitation Act is not applicable to the execution proceedings. It is his primary contention that, if the application is not filed within 30 days as per Order 21 Rule 106 CPC, the delay cannot be condoned.

12. Heard the learned counsel for the petitioners and the first respondent.

13. This Court by a detailed Order dated 26.06.2025 in Civil Revision Petitions in CRP.Nos.808 and 809 of 2025 had elaborately discussed the entire history before the amendment and the issue behind the amendments brought in by the Madras High Court in 1945 and 1972 and

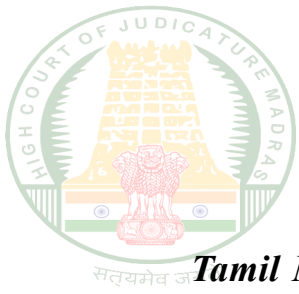


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the amendment brought to the main Code by the Parliament in 1976 and had held that mere perusal of the provisions of Order 21 Rules 104 and 105 of the Madras Amendment and Order 21 Rules 104 and 105 of the Central Act, would show that its very placement is inconsistent, since Order 21 Rules 104 and 105 of the Madras Amendment have now been placed as Order 21 Rules 105 and 106 of the Central Act. Order 21 Rule 106 of the Madras Amendment originally inserted on 19.05.1954 has also not survived. The Division Bench in *N.M.Natarajan v. Deivayanai Ammal* reported in **(1989) 1 LW 178**, has also held that amendment brought in Rule 105(4) of Order 21 CPC, which came into effect on 04.09.1945, stood repealed. Therefore, it would be anomalous to hold that proviso to Order 21 Rule 105(3) alone would survive. In such view of the matter, the proviso would certainly be unworkable. This is because, for the proviso to be workable, it can be read only along with Order 21 Rule 106(3) of Central Act and not otherwise.

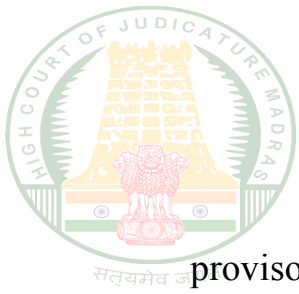
14.The judgment of the Full Bench of the Andhra Pradesh High Court in *Ch.Krishnaiah v. Ch.Prasada Rao* reported in **(2010) 2 CTC 225**, was followed by the learned Single Judge in *N.Rajendran v. Shriram Chits*



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Tamil Nadu Pvt. Ltd. reported in **(2011) 6 CTC 268**. On a perusal of the above makes it clear that Sub-Rule (4) of Rule 106 of Order 21 was inserted by the High Court of Andhra Pradesh in 1992 after the decision of the Hon'ble Supreme Court in **Ganpat Giri v. Second Additional District Judge, Ballia and others** reported in **(1986) 1 SCC 615**. However, similar provision does not exist in Tamil Nadu. Though the proviso introduced to Order 21 Rule 105(3) was retained in the Madras Amendment, it is relevant to note that Section 121 CPC clearly indicates that Rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions in the Part. Therefore, the Hon'ble Supreme Court in **Ganpat Giri's case (supra)** has clearly held that the repealing provision in Section 97(1) is not confined in its operation to provisions of the Code including the Orders and Rules in the First Schedule which are actually amended by the Amending Act. The very object of the Section 97 of the Amending Act, appears to be that, on and after 1977, throughout India, wherever the Code was in force, there should be same procedural law in operation in all the Civil Courts, subject, of course, to any future local amendment that may be made either by the State Legislature or by the High Court. In such view of the matter, though the



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proviso was brought under the First Schedule, it will have an effect as if enacted in the body of the Code. Admittedly, the First Schedule is amended by the Central Act. Any amendment of the State or High Court which is inconsistent with the Central Act stands automatically repealed as per Section 97 of the Amending Act.

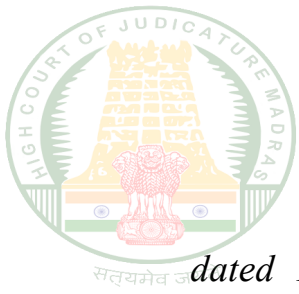
15.The Single Bench of this Court, in *Ayappa Naicker v. Subbammal and another* reported in *(1984) 1 MLJ 214*, has clearly held that question of invoking inherent powers under Section 151 CPC does not arise, that is because of the specific provisions contained in Rule 106 of Order 21 CPC. It is therefore, there is repugnancy between the Central Act under Rule 106 and the Madras Amendment under Sub-Rule (4) of Rule 105 of Order 21 CPC. It is Section 97 of the Amending Act in relation to repeal and savings that would apply. The said view has been approved by the Hon'ble Supreme Court in *Damodaran Pillai and others v. South Indian Bank Ltd.* reported in *(2005) 7 SCC 300*. The Hon'ble Supreme Court, in *Damodaran Pillai's case (supra)*, has also taken note of the hardship or injustice that may occur to the parties and held that hardship or injustice may be a relevant consideration in applying the principles of



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interpretation of the statute, but cannot be a ground for extending the period of limitation. Various learned Single Judges of this Court, viz., Hon'ble Ms. Justice P.T.Asha, in *M.Raji and others v. Arulmigu Komeleeswarar Devasthanam* reported in (2008) SCC Online Mad 4604; Hon'ble Mr. Justice S.Tamilvanan in the case of *Manickam and another v. Rahamath Beevi & others* reported in (2012) 1 LW 970; Hon'ble Mr. Justice S.Sardar Zackria Hussain, in the case of *M.Ponnupandian v. Selvabakiyam and others* reported in (2003) 4 CTC 225, have also taken a view that limitation cannot be extended. However, divergent views have been taken by various other learned Single Judges of this Court, viz., Hon'ble Mr. Justice G.Chandrasekaran, in *Chandan Pharmaceuticals Corporation v. P.K.Jalan and others* [C.R.P.(NPD) No.1992 of 2021, dated 08.10.2021]; Hon'ble Mr. Justice S.S.Sundar, in *Kanagaraj v. Sudha* [C.R.P.(NPD) No.3608 of 2019, dated 11.01.2022]; Hon'ble Mr. Justice D.Krishnakumar, in *Meera Balakrishnan v. R.Manju* [C.R.P.(NPD) No.879 of 2016, dated 20.04.2017]; Hon'ble Mr. Justice D.Hariparanthaman, in *T.S.Subbaiya v. Vengaiyan* reported in (2015) 4 LW 715; and Hon'ble Mr. Justice K.Kumaresh Babu, in *The Sports Development Authority v. Tamil Radhesoami Satsang Association* [C.R.P.(NPD) Nos.856 & 857 of 2015,



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dated 14.07.2022] have followed the judgment in ***N.Rajendran's case (supra)***. It is relevant to note that, merely because few learned Single Judges have followed the judgment in ***N.Rajendran's case (supra)*** without any further elaboration, it does not make it a precedent. The Hon'ble Supreme Court, in ***Hindustan Construction Company Limited and another v. Union of India and others*** reported in (2020) 17 SCC 324, has held that, when a decision does not state the law correctly, merely the fact that it has been subsequently followed, does not make it a precedent. Now, a question arises as to whether the matter requires reference to the Division Bench. This Court is of the view that, since the judgment of the learned Single Judge in ***Ayappa Naicker's case (supra)***, has been upheld by the Division Bench as well as by the Hon'ble Supreme Court in ***Damodaran Pillai's case (supra)***, we are bound to follow the judgment of the Hon'ble Supreme Court in ***Damodaran Pillai's case (supra)*** as a binding precedent. Therefore, this Court is of the view that the matter does not require reference to the larger Bench.

16.Hence, in the light of the above discussion, this Court is of the view that the proviso introduced to Order 21 Rule 105 CPC by Madras

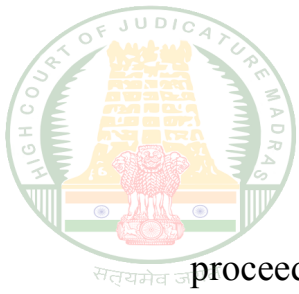


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Amendment, 1972, has been repealed by virtue of Section 97 of the Amending Act.

17.However, this Court is conscious of the fact that parties should not suffer due to the negligence on the part of their counsel in not following the cases properly. The High Court can exercise its powers under Section 122 CPC to set out its own procedure; to make rules regulating their own procedure for the Civil Courts under its jurisdiction; and to bring in amendment to the Rules in the First Schedule of Code of Civil Procedure. As the proviso to Rule 105 of Order 21 CPC, brought in by the Madras High Court Amendment, 1972, providing powers to the Courts to condone the delay in execution proceedings, has been repealed after the Central Amendment, 1976, this Court is of the view that, it is for the High Court, on the administrative side, to consider re-introducing the proviso on similar lines and placing the same below Order 21 Rule 106(3) of the present Code. However, till such an amendment is brought under the First Schedule, the provisions under Order 21 Rule 106(3) CPC as of now, alone would prevail and the Execution Court has no power to condone the delay in execution



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proceedings under Order 21 CPC, after expiry of the statutory period of limitation.

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18. Till such time a decision is taken by the Rule Committee of this Court on the administrative side, the following directions are issued under Article 227 of the Constitution to ensure that no undue injustice is caused to a genuine litigant:

[i] Order XXI Rule 105(2) deals with an order dismissing the matter when there is no appearance for the party when the case is called on for hearing. In such cases, if the party is represented by counsel who reports no instructions or continually absents himself from appearance leading to the inference that he has withdrawn from the matter, the Court must ensure fresh notice is issued to the party giving him reasonable time to make alternative arrangements or to appear in person. If after such notice the party does not appear on the next date of hearing or make alternative arrangements with reasonable time, the Court may proceed to pass an order under Order XXI Rule 105(2).



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[ii] If the matter is dismissed on a date not fixed for hearing but on a date fixed for some other purpose, the order will not come within the ambit of Order XXI Rule 105(2) (Ref: ***Radhakrishnan v. State of Kerala, 2005 SCC OnLine Ker 589 : (2006) 1 KLT 28***), and Order XXI Rule 105(1) CPC.

[iii] It is also clarified that an order passed under Order XXI Rule 105(2) is an order of dismissal for non-appearance and not for any other reason. In ***Karuppa Gounder v Pongiyanna Gounder, CRP (NPD) 1524 of 2018***, the Executing Court invoked Order XXI Rule 105(2) CPC to dismiss the Execution Petition on account of the failure of the Commissioner to file his Report. It was held by Hon'ble Justice R.Subramanian that the period of limitation of 30 days under Order XXI Rule 106(3) CPC to set aside an order under Order XXI Rule 105(2) CPC is only for setting aside orders dismissing the petition for non-appearance and not for any other reason. If the Execution Petition is dismissed for any other reason, the same would be governed by Article 137 of the Limitation Act, 1963, which prescribes a period of 3 years.

[iv] In any event, the dismissal for non-prosecution of an



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Execution Petition does not bar a fresh EP, provided the same is filed within the period of limitation.

[v] An order under Order XXI Rule 105(3) CPC is an order passed *ex parte* where the opposite party does not appear. Where the opposite party does not appear, the Court may set him *ex parte* and thereafter, proceed to hear the application and pass orders. Order XXI Rule 105(3) CPC also says “*the Court may hear the application ex parte and pass such order as it thinks fit.*” The limitation prescribed under Order XXI Rule 106(3) CPC is to set aside an order passed in consequence of the opposite party being set *ex parte*. Thus, if the opposite party is set *ex parte* and if he appears before the disposal of the petition and requests to have the order setting him *ex parte* set aside, such an application will not fall within Order XXI Rule 106(3) CPC, since an order setting the opposite party *ex parte* is not an order under Order XXI Rule 106(3) CPC. It is only when an order is passed in the petition in consequence of the opposite party being set *ex parte*, the provisions of Order XXI Rule 105(3) & 106(3) stand attracted.

[vi] Order XXI Rule 106(3) CPC for setting aside an order

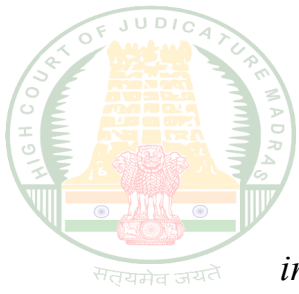


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passed under Order XXI Rule 105(3) CPC is 30 days from the date of the order if notice was not served. This is because Order XXI Rule 105(3) CPC states “*Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear....*”. Thus, if notice is served and there is no appearance, the opposite party cannot claim the benefit of Order XXI Rule 106(3) CPC to have the 30 days computed from the date of the order. Order XXI Rule 106(3) CPC itself makes it clear that the benefit of having limitation running from the date of order applies only in cases where notice is not served on the opposite party.

[vii] There may be cases where the opposite party has engaged a counsel who has absented himself frequently leading to an inference that he has abandoned the matter. In ***C.Subramania Mudali v Srinivasa Pillai, 1979 92 LW 662***, it is observed as follows :

“The record shows that learned counsel who had entered appearance for the auction-purchaser was absent in court when the case was called. It subsequently transpired that he had discontinued his profession and had put his decision



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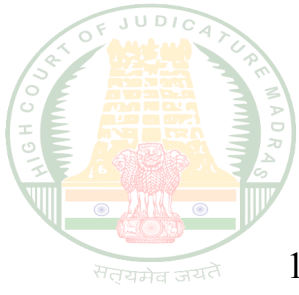
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into effect by making himself scarce from all law courts.

Apparently, the client was not aware of these developments until long afterwards.

I like to imagine that lawyers practising in courts may have excellent reasons of their own for turning their back on their profession, renouncing their robes and shunning the Courts at any given moment. But where the clients are not informed of their decision beforehand so as to enable them to make alternative arrangements, the result might well be to leave them in the lurch, and where parties find themselves in a quandary on such occasions, it would be a proper exercise of the court's good conscience to redeem the litigants from the faults of the lawyers.”

To avoid such situations, where the Court finds that the opposite party was initially represented by counsel who has thereafter not appeared on a day fixed for hearing of the application, it would be prudent for the Court to order notice to the party fixing an alternative date for hearing of the application. If notice is served on the opposite party, and on the said date, there is no appearance once again, the Court may proceed to pass orders under Order XXI Rule 105(3) CPC.



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19.In view of the above, this Civil Revision Petition is dismissed the impugned order dated 04.01.2025, in E.A.No.3 of 2024 in E.P.No.661 of 2022 in O.S.No.1355 of 2017 on the file of the XXV Assistant City Civil Court, Chennai is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

27.06.2025

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Internet : Yes

Index : Yes / No

Speaking order / Non-speaking order

Neutral Citation : Yes / No

To

The XXV Assistant Judge,
City Civil Court, Chennai.



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N. SATHISH KUMAR, J.

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