



**A.No.4276 of 2024
in
E.P.No.33 of 2019**

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**MASTER
15.12.2025**

ORDER

1. This is an application filed by the applicant/decreed holder to condone the delay of 585 days in filing the restoration application to restore the E.P No.33 of 2017 which was dismissed for default on 25.11.2022.

2. It is to be noted that this application has been taken under Master summons under Order 14, Rule 10 of Madras High Court, Original Side Rules read with Section 5 of the Limitation Act.

3. It is well known and settled law that Section 5 of Limitation Act has no application in execution proceedings. Whenever any order is passed ex parte under Sub Rule 2 of Rule 105 of Order 21, the affected party may apply to set aside the order under Rule 106 (3) of Order 21 by showing sufficient cause for his non-appearance provided that the application shall be made within 30 days.

4. Now, the point to be decided is whether the delay of 585 days in filing the application under Order 21 Rule 106 of C.P.C can be condoned or not?

5. When the E.P is dismissed under Order 21, Rule 105 (2) of C.P.C for non-appearance of the petitioner, the application to set aside the Order shall be made under Order 21, Rule 106 (1). Similarly, when notice on the E.P has been duly served on the Judgment Debtor and he was set ex parte under Order 21, rule 105 (3), the application to set aside the ex parte order shall be made under Order 21, Rule 106 (1).



In both the occasions, the application shall be made within 30 days from the date of order and not from the date of knowledge.

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6. If the applicant fails to take out application within 30 days, the remedy available to him is not under any other act but in Order 21 itself. Previously, there was a proviso under Order 21, Rule 105 (4) which was deleted and a proviso clause was inserted in Sub Rule (3) by Madras High Court amendment which runs as follows:

“Provided when an application may be admitted after the said period of 30 days if the applicant satisfies the court that he had sufficient cause for not making the application within said period.”

7. As per the said provision if sufficient cause is shown the application to set aside the exparte order or the order of dismissal can be made even after expiry of 30 days.

8. This court obliges to refer the recent decision in **Sundarammal and Another –Vs– (1) Kanagaraj and Another in C.R.P Nos.808 & 809 of 2025 and C.M.P No.4731 of 2025 dated 26.06.2025** wherein our Hon’ble High Court has observed as follows:

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

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

52. 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).

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

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OnLine Ker 589 : (2006) 1 KLT 28), and Order XXI Rule 105 (1) CPC.

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1. *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 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 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 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.”

9. 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.

10. In the case in our hand the E.P was filed in the year 2019 and the applicant was represented by his counsel. The averments of the applicant is that in the year 2022 as the Judgment Debtor has committed in making payments as per the Judgment/decreed passed in the above suit, the parties informed this Hon'ble Court that necessary applications have been filed for withdrawal of the amount lying in the account of the suit in order to satisfy the decree and also made several representations before the Office of the Registrar General of Hon'ble High Court. Meanwhile, the E.P was dismissed on 25.11.2022 and the decree holder even continuously asking the Judgment Debtor through their counsel and was under the bonafide belief that the Judgment debtor would satisfy the decree passed by the Hon'ble High Court. Further, till date the balance amount is not yet paid and so he filed the restoration application to restore the E.P. The E.P was dismissed due to non-appearance of



counsel who was held up before the Division Bench of the Hon'ble High Court and the applicant cannot be made to suffer due to inadvertence of the junior counsel from enjoying the fruits of the decree. Therefore, the delay of filing 585 days is to be condoned.

11. Per contra, the respondent / Judgment Debtor has filed his counter stating that the applicant failed to explain the delay in filing the restoration petition and he is duty bound to explain each and every delay of delay with sufficient cause. But in the above application no reason has been stated by the applicant as to why he has not filed the restoration application within the stipulated time. Law is well settled that the litigant who is not diligent and who does not explain the day to day delay in order to avail the benefit of Section 5 of the Limitation Act cannot get the benefit of condonation of delay.

12. The learned counsel for the applicant argued that the applicant should not suffer for the fault of his junior counsel who has not represented before this Court on 25.11.2022 resulting in dismissal of the E.P. On the other hand the learned counsel for the respondent submitted that no sufficient cause has been stated in the application as to why the applicant has not filed this restoration application within the stipulated time and further also stated that the Judgment and decree dated 15.12.2016 in C.S.No.601 of 2009 has been modified by an Order dated 06.01.2022 in O.S.A.No.264 of 2018 and the rate of interest was reduced from 18% to 9% and so the E.P filed based on the Judgment and decree dated 15.12.2016 in C.S.No.601 of 2009 is not maintainable and the decree holder is bound to file the E.P afresh. Further, the learned counsel for the respondent also argued that he has filed an application in A.No.1460 of 2025 to certify that the decree dated 15.12.2016 in C.S.No.601 of 2009 as modified by Order dated 06.01.2022 in O.S.A.No.264 of 2018 stand satisfied and paid in full to the decree holder which is pending in the stage of counter and that has to be decided at the first instance and the Judgment debtor has



paid the entire amount as per the Order dated 06.01.2022 in O.S.A.No.264 of 2018 and nothing remains to be satisfied to the decree holder.

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13. As rightly pointed out by the learned counsel for the respondent, the applicant herein has not spoken a single word about the reason for delay except mere statement that on the day of hearing his counsel was held up in another Division Bench of this Hon'ble Court cannot be accepted.

14. On perusal of the adjudication it is seen that an order of attachment was passed on 02.03.2022 and thereafter, the applicant/decreed holder was continuously being represented till 24.08.2022 and on 23.09.2022 when the case was adjourned to 26.10.2022 for appearance of the decree holder or his counsel with a direction to list the matter under the caption "default list", the applicant failed to appear on 26.10.2022 and the case was dismissed for default on 26.10.2022. Thereafter, the present application is filed to condone the delay of 585 days in filing the application to set aside the order of dismissal dated 26.10.2022 without any sufficient cause being mentioned in the affidavit.

15. In view of the order in **Sundarammal's case** cited supra this court is of view that the applicant cannot maintain this application under Order 14 Rule 10 of Madras High Court Original Side Rules r/w Section 5 of Limitation Act. As there is no provision under Order 21 of the C.P.C to condone the delay in filing an application to set aside the order of dismissal made under Order 21, Rule 105 (2) of C.P.C.

16. Therefore, this court does not find any merit in this application either in law or on this facts. In fine, this application is dismissed without prejudice to the rights of the applicant to workout his remedy under the manner known to law. No costs.



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