

C.M.P.(MD).Nos.4181, 4182 and 4183 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Civil Appellate Jurisdiction)

Thursday, the Sixth day of February Two Thousand and Twenty Five

PRESENT

The HONOURABLE MR. JUSTICE K.K. RAMAKRISHNAN

C.M.P.(MD).Nos.4181, 4182 and 4183 of 2019

in

S.A.(MD).No.270 of 2018

SWAMIDHAS (DIED)

1 ALVIN,

2 ALBERT,

3 VANITHA,

... PETITIONER(S)
IN ALL THE PETITIONS

Vs

KOLAPPAN NADAR (DIED),
PONNUMUTHAN (DIED),

1 LEKSHMANAN,

2 RAJAN (DIED)

3 CHELLAIAN,

4 CHELLAN,

5 PEENI PILLAI,

6 KANNAMMAL

7 PAULRAJ



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8 ALBERT
9 KASTHURI

10 JAYA

11 KAMALAKSHI

12 SASIKUMAR

13 RAJAKUMAR

14 RANGAN

15 SREEKUMAR

16 SUNDARAKUMAR

17 ANIL KUMAR

18 THANKAM

19 SARASWATHY

20 THANKARAJ

21 MUTHAMMAL (DIED)

22 SUNDARI BAI

23 SUKUMARAN

24 SUMITHRA

25 KANAGAM

26 SELVI

27 THANKAM,

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C.M.P.(MD).Nos.4181, 4182 and 4183 of 2019

28 SUDHA

29 R.S.ABISHA

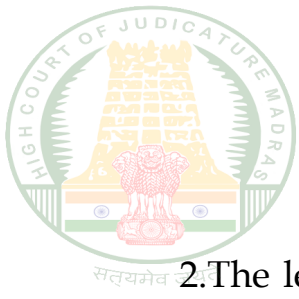
30 R.S.ANUSHA

... RESPONDENT(S)
IN ALL THE PETITIONS

For Petitioner(s) : Mr.A.Sivaji, Advocate

ORDER

The petitioners are the plaintiffs in O.S.No.649 of 1992 on the file of the learned II Additional District Judge, Kuzhithurai. He has filed a suit against the deceased/second respondent and other respondents seeking the relief of declaration and consequential injunction and damages. The suit was dismissed and the same was confirmed in A.S.No.68 of 2002 on the file of the learned Sub Judge, Kuzhithurai. The petitioners has filed this second appeal challenging both the judgments and decrees of both the Courts below. In the second appeal, notice was issued on 08.10.2018. Thereafter, the petitioners came to know that the second respondent died on 27.08.2002 itself and he immediately informed to the counsel on record. Therefore, the application was filed to condone the delay of 5872 days in filing these applications in setting aside the abatement; to set aside the abatement caused due to the death of the second respondent; and to bring on record the respondents 28 to 30 as legal heirs of the deceased/second respondent.



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2.The learned counsel appearing for the respondents has not filed any counter disputing the above reason.

3.The plaintiffs are appellant and he filed a suit for declaration and injunction in O.S.No.649 of 1992 and the same was dismissed by the trial Court and confirmed by the First Appellate Court in A.S.No.68 of 2002. Aggrieved over the same, he has preferred the second appeal and the same is pending since then before this Court.

4.During the pendency of the above appeal, the second respondent died on 27.08.2002 ie., before passing judgment in A.S.No.68 of 2002, dated 10.07.2017. The same was not informed to the appellant. The notice sent by the Registry in the above second appeal returned with endorsement “died”. The learned counsel appearing for the remaining respondents has not furnished any details about the legal representatives of the deceased/second respondent. In the said circumstances, the appellant collected the materials about the legal heirs of the deceased/second respondent from his own source and filed petition only on 26.12.2018. Therefore, there is abatement and consequential delay of 5872 days in filing the petition to set aside the abatement caused due to the death of the second respondent.

5.In each civil suit, a litigant seeks a relief. The remedy he gets is his inheritable asset. After his life period, the said asset would devolve to descendants/legal representatives. The delay in disposal of the civil suit is a sorrow of the civil litigation



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and is unavoidable. In such situation, due to the natural delay in the disposal of the appeal pending before this Court, litigant dies without obtaining a verdict. When an appeal is admitted by this Court, the said appeal is listed for final hearing after number of years. In the District Judiciary, dates of hearing are periodically fixed and parties are expected to have contact with the counsel on record and keep track of the case. In the said process of adjournment of hearing, the death of the parties to the proceedings is normally informed. No such procedure of process of adjournment of hearing is followed in the High Court. Once appeal is admitted, it virtually goes into the storage of record room and it listed before the Court only at the time of the final hearing. Neither appellant nor respondent is required to be present during the course of the hearing. This procedure is inevitable tragedy of the civil cases in the High Court. Therefore, without fault on the appellant, the delay in preferring the application to set aside the abatement usually occurs. Only when the cases come up for final disposal, the concerned counsel informs the litigants about it. The litigant travels the litigation journey to the High Court after expiry of half of his life with the hope of getting justice by spending remaining part of his life. He may be unaware of the death of the opposite parties and also ignorant of the legal procedure to implead the legal heirs on the death of the parties. In such situation, natural justice demands to condone the delay of the huge days however, extreme to meet the justice. The



dismissal of the petition on the ground of delay amounts to Judicial Massacre of the legitimate adjudication. Therefore, the Hon'ble Supreme Court in the following cases reiterated the principle that the valuable rights accrued to the legal representative of the deceased to continue the appeal without terminating it on the ground of abatement with liberal approach in condoning the delay of setting aside caused due to the death of the abatement in accepting the explanation furnished by the parties as a rule and refusal is an exception when there is no negligence or total inaction or want of bona fide could be imputed against the litigants.

5.1.In the case of Perumon Bhagvathy Devaswom v. Bhargavi Amma, reported in (2008) 8 SCC 321 :

13. The principles applicable in considering applications for setting aside abatement may thus be summarised as follows:

(i) The words “sufficient cause for not making the application within the period of limitation” should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words “sufficient cause” in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of



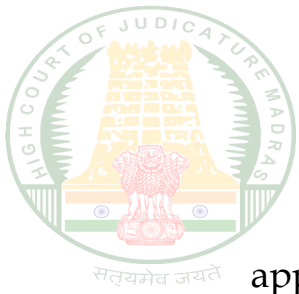
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any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than

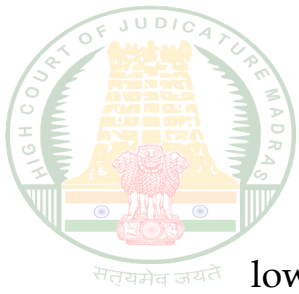


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applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of “diligence” or “inaction” can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

15. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a subordinate court and an appeal pending in a High Court. In

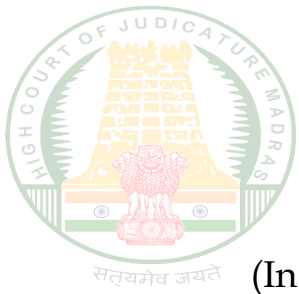


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lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as “adjournment of hearing”. In fact, this Court in Ram Charan [AIR 1964 SC 215] inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure : (AIR p. 220, para 12)

“12. ... The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence.”

16. In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the Court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years.



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(In some courts where there is a huge pendency, the non-hearing period may be as much as ten years or even more.) When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non-listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent.



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17. The second circumstance is whether the counsel for the deceased respondent or the legal representative of the deceased respondent notified the court about the death and whether the court gave notice of such death to the appellant. Rule 10-A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order-sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of the deceased. The need for diligence commences from the date of such knowledge. If the appellant pleads ignorance even after the court notifies him about the death of the respondent that may be an indication of negligence or want of diligence.

18. The third circumstance is whether there is any material to contradict the claim of the appellant, if he categorically states that he was unaware of the death of the respondent. In the



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absence of any material, the court would accept his claim that he was not aware of the death.

19. Thus it can safely be concluded that if the following three conditions exist, the courts will usually condone the delay, and set aside the abatement (even though the period of delay is considerable and a valuable right might have accrued to the opposite party—LRs of the deceased—on account of the abatement):

(i) The respondent had died during the period when the appeal had been pending without any hearing dates being fixed;

(ii) Neither the counsel for the deceased respondent nor the legal representatives of the deceased respondent had reported the death of the respondent to the court and the court has not given notice of such death to the appellant;

(iii) The appellant avers that he was unaware of the death of the respondent and there is no material to doubt or contradict his claim.

21. In this case, the appeal was not being listed periodically by the High Court. Neither the counsel for the deceased second



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respondent in the High Court, nor the legal representatives of the deceased respondent reported her death to the High Court. There was no notice of death to the appellant. The appellant is an institution which acts through its Managing Committee. During the relevant period, there was transition of management from a Court Receiver to an elected Managing Committee. An affidavit was filed on behalf of the appellant that its new committee was unaware of the pendency of the appeal. Being unaware of the pendency of appeal is equivalent to being unaware of the death of a respondent. This may happen in two circumstances. First is where the appellant himself is dead and his LRs have newly come on record. Second is where the appellant is an institution or company and a new committee or Board of Management takes over its management. In such an event, even if they knew about the death of a person, they may not know the significance or relevance of death of such a person with reference to a pending appeal if they do not know about the appeal. As the appeal had already been admitted in 1993, and as hearing dates were not fixed periodically, the new committee had no way of knowing

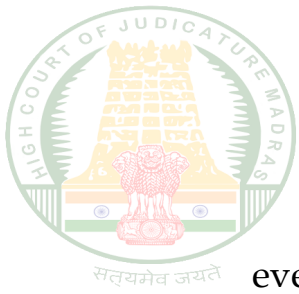


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that the appeal was pending, that Bhargavi Amma was a party to the appeal and that the legal representatives of the deceased Bhargavi Amma (the second respondent before the High Court) had not been brought on record. In the circumstances, we are of the view that the delay was satisfactorily explained. The High Court ought to have condoned the delay, set aside the abatement and permitted the appellant to bring the legal representatives of the deceased respondent on record.

6.In view of the above discussion, this Court accepts the reason stated in the Paragraph No.3 of the affidavit and finds no willful negligence or inaction on the part of the petitioners. Even though the respondents has not filed any counter, he seeks to dismiss the application. It is not the case of the respondent that he had already furnished the details of the legal heirs and also no circumstances are available on record to presume that the appellant with knowledge willfully evaded from taking steps. The Hon'ble Supreme Court in the case of Om Prakash Gupta @ Lalloowa (deceased) and others Vs. Rooprani in C.A.Nos.13407 and 13408 of 2024, has held as follows:

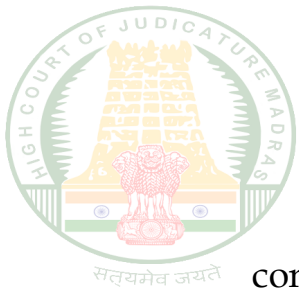
23. We find it difficult to agree with such reasoning. When an application praying for substitution had been made, then,



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even assuming that it does not have an explicit prayer for setting aside the abatement, such prayer could be read as inherent in the prayer for substitution in the interest of justice. We draw inspiration for such a conclusion, having read the decision in *Mithailal Dalsangar Singh v. Annabai Devram Kini*. This Court reiterated the need for a justice-oriented approach in such matters. Inter alia, it was held that prayer to bring on record heir (s)/legal representative(s) can also be construed as a prayer for setting aside the abatement. The relevant passage reads as under:

“8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be



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construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined



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on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

28. Rule 10-A was not originally contained in CPC, but was inserted in the CPC in the year 1976 for a noble purpose which has been acknowledged by this Court in multiple decisions. The first of such decisions, perhaps, is Gangadhar v. Raj Kumar³⁶ where this Court held:

"3. ... Rule 10-A which has been added in Order XXII of the Code of Civil Procedure by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the



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other party. In the case of an appeal, the word 'suit' has to be read as 'appeal'. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end and one cannot expect the other party to be a watch-dog for day-to-day survival of the other party. When the appeal on being notified for hearing is activated, knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovative provision has been introduced, whereby, a duty is cast upon the learned advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned counsel and for this purpose a deeming fiction is introduced that the contract between dead client and lawyer subsists to the limited extent after the death of



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the client. (emphasis supplied)

29. Rule 10-A casts a duty upon a pleader appearing for a party to the suit to intimate the court about the death of such party. It further provides that once the court is informed by the pleader of a party that he is no more, the court “shall” notify the opposing party of the death. A straightforward interpretation of this rule would suggest that the court's obligation to issue notice to the other party is indeed mandatory. Nonetheless, this obligation may not arise in all circumstances. One notable exception could be when the information regarding the party's death is conveyed to the court in the presence of the opposing party's pleader or is documented by the court in the order sheet. In such cases, if the pleader of the concerned party (and consequently the party itself) has already been notified, issuing a further notice from the court would not serve any substantial purpose other than being an exercise by way of abundant caution. Therefore, in the aforementioned scenario, the absence of a notice from the court would not imply a failure to comply with Rule 10A, suggesting that it is not “always mandatory”.



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30. Had the circumstance outlined above applied to the present appeal, we would have likely concluded that Rule 10-A has been substantially complied with. However, the facts in this instant case are not particularly clear-cut. As previously noted, in the affidavit submitted alongside an application by Anil Kumar which primarily was not intended to inform the court of Rooprani's death, it was stated that he is "one of the sons 22 of deceased Rooprani". The inclusion of such pertinent information within an inconspicuous section of an application meant for a different purpose without the date of death does not, in our considered view, constitute sufficient compliance with Rule 10-A either by the pleader of the deceased or amount to due notice to Om Prakash by the court (without such death being recorded in any order passed subsequently in the presence of counsel for Om Prakash). To rule otherwise would undermine the intention of Rule 10-A, which mandates the clear communication of information relating to death of a party which, obviously, would mean not only the factum of death being conveyed but also the date of death since limitation to apply under Article 120 of the



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Limitation Act, 1963 for substitution begins to run from the date of death. It is implicit that this information must be conveyed in a straightforward and unambiguous manner to enable the plaintiff or the appellant, as the case may be, to take steps and apply for substitution. No advantage should be allowed to be derived if such death is, by clever drafting, sought to be disclosed in an obscure corner of an application seeking to bring to the notice of the court an alleged subsequent development resulting in violation of a court's order.

31.Having held that the manner of conveying information of the death of Rooprani was not wholly in accordance with Rule 10-A, information through the application of Anil Kumar cannot operate adversely against Om Prakash. Had Om Prakash been noticed by the High Court in due compliance with Rule 10-A, yet, did not file an application for 23 substitution, he would be estopped from pleading ignorance and we would have been inclined to hold otherwise. This not being the case, the abatement of the second appeal ought to be set aside.



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32.Although no application praying for setting aside of abatement was ever made by the appellants before the High Court, but as held in Mithailal (supra), prayer for setting aside of abatement can be read in a prayer for substitution. Accordingly, the abatement of the second appeal can and ought to be set aside for ends of justice.

7.From the above judgment, it is clear that information about the date of death must be conveyed in straight forward and unambiguous manner to enable the appellant to take steps and apply for substitution. When this Court is unable to follow the “process of adjournment” as followed by the District Judiciary, dismissal of petition to condone delay, however, abnormal in setting aside the abatement caused due to death of either the appellant or the respondent would amount to judicial massacre. Abnormal delay is natural consequences of procedure that is being followed by this Court. Therefore, it is unfair to drive the departed soul from this Court premises without allowing his soul to rest in peace by dismissing the litigation without deciding on merit. Hence, it is appropriate to remind and recapitulate the epic words of Hon'ble Thiru. Justice Krishna Iyer: “Procedure is handmaid of justice” and “litigants are legal patients suffering from injustice seeking healing for their wounds”. The Hon'ble Supreme Court in number of cases also reiterated the



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principle that the administration of justice cannot be thwarted by technical procedure
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lapse. Decision on merits is good medicine to cure wounds of departed soul.

8.In all aspects, this Court is satisfied with the reasons stated in the affidavit that the appellant got to know about the death of the second respondent only in the month of December, 2018, and hence, inclines to condone the delay of 5872 days in setting aside the abatement caused due to the death of the second respondent on payment of cost of Rs.4,000/- payable to the respondent's counsel.

9.Accordingly, these petitions are allowed on the following terms of condition:-

9.1.The petitioners shall pay a sum of Rs.4,000/- (Rupees Four Thousand Only) to the respondent's counsel on or before 08.04.2025, failing which, these petition stand dismissed automatically without further reference to this Court.

10.Registry is directed to carry out the necessary amendments in the second appeal and list the second appeal on 25.04.2025.

sd/-
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/04/2025
Sub-Assistant Registrar
(C.S. I / II / III / IV)
Madurai Bench of Madras High Court,
Madurai - 625 023.



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VSG
TO
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1 THE SUBORDINATE JUDGE,
KUZHITHURAI.

2 THE II ADDITIONAL DISTRICT MUNSIF,
KUZHITHURAI.

ORDER IN
C.M.P.(MD).Nos.4181, 4182 and 4183 of 2019
in
S.A.(MD).No.270 of 2018
Date :06/02/2025

SA/SAR. /21.04.2025/24P/3C

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