IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.06.2025

Pronounced on : 26.06.2025

CORAM :

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

C.R.P.Nos.808 & 809 of 2025
and
C.M.P.No.4731 of 2025

1.Sundarammal
2.Sakthivel
Logeswaran (died) ... Petitioners
in both petitions

Vs.

1.Kanagaraj
2.Ponnusamy ... Respondents
in both petitions

Prayer in C.R.P.No.808 of 2025 : Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decretal order dated 29.07.2024 and the consequential final order dated 13.08.2024 in E.A.No.3 of 2023 in E.P.No.5 of 2022 in O.S.No.158 of 2007 on the file of the District Munsif Court, Dharapuram.

Prayer in C.R.P.No.809 of 2025 : Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decretal order dated 29.07.2024 and the consequential final order dated 13.08.2024 in E.A.No.4 of 2023 in E.P.No.5 of 2022 in O.S.No.158 of 2007 on the file

of the District Munsif Court, Dharapuram.

For Petitioners	:	Mr.R.Asokan in both petitions
For Respondents	:	No appearance in both petitions
Amici curiae	:	Mr.R.Viduthalai, Senior Counsel Mr.P.Valliappan, Senior Counsel Mr.N.Manokaran Mr.Sharath Chandran Mr.T.S.Baskaran

C O M M O N O R D E R

Challenging the order of the Execution Court allowing the application under Order 21 Rule 106(3) CPC by condoning the delay of 31 days, the present revision petitions have been filed.

2.The suit in O.S.No.158 of 2007 has been originally filed by the petitioners for declaration; consequential permanent injunction and for other reliefs. The suit was decreed in part on 27.01.2011. The decree holders filed Execution Petition in E.P.No.5 of 2022 to enforce the decree. Defendants/Judgment Debtors 11 and 21, the respondents herein, entered appearance in the execution proceedings, but failed to file their counter

affidavit. Hence, the respondents were set *ex parte* by the Execution Court on 04.07.2023 and thereafter, delivery was ordered. When the matter stood thus, the respondents have filed the present applications under Order 21 Rule 106(3) CPC, one to set aside the *ex parte* order passed against them and the other to condone the delay of 31 days in seeking to set aside the *ex parte* order.

3.Though the said applications were opposed by the petitioners/decree holders, the Execution Court allowed the applications by order 29.07.2024 on the ground that no prejudice will be caused to the petitioners in allowing the applications, however, imposed cost of Rs.1,000/- on the respondents. After the cost memo was filed, the Execution Court passed final orders on 13.08.2024. Challenging the orders of the Execution Court allowing the applications under Order 21 Rule 106(3) CPC, the present revision petitions have been filed by the decree holders.

4.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.

5.The learned counsel has also relied upon the judgment of the Division Bench of this Court in the case of ***N.M.Natarajan v. Deivayanai Ammal*** reported in ***(1989) 1 LW 178***, wherein, this Court has clearly held that the Parliamentary legislation, viz., Code of Civil Procedure (Amendment) Act, 1976, (hereinafter referred to as "Amending Act"), while amending the original Code of Civil Procedure, 1908, deliberately omitted the applicability of Section 5 of the Limitation Act to proceedings under Order 21 CPC and any amendment brought in by the High Court which is inconsistent with the Code of Civil Procedure, 1908, as amended by Civil Procedure (Amendment) Act, 1976, (hereinafter referred to as "the Central Act") has been repealed.

6.He would further submit that, earlier, a learned Single Judge of this Court, in ***Ayappa Naicker v. Subbammal and another*** reported in ***(1984) 1 MLJ 214***, has held that there is a repugnancy between Rule 106 under the Central Act and Sub-Rule (4) of Rule 105 of Order 21 CPC brought in by the Madras High Court (hereinafter referred to as "Madras Amendment"). As per Section 97 of the Amending Act, any amendment brought by the State Legislature or High Court before commencement of the Act, which is inconsistent with the Central Act, stands repealed. This view has been upheld by the Division Bench of this Court in ***N.M.Natarajan's case (supra).*** Later, the view taken in ***Ayappa Naicker's case (supra)*** was also approved by the Hon'ble Supreme Court in the case of ***Damodaran Pillai and others v. South Indian Bank Ltd.*** reported in ***(2005) 7 SCC 300.*** According to the learned counsel for the petitioners, the judgment of the Hon'ble Supreme Court in ***Damodaran's case (supra)*** will be the binding precedent. Hence, it is his contention that the delay cannot be condoned contrary to the provisions brought under the Central Act.

7.He would further emphasize that a learned Single Judge of this Court, Hon'ble Mr. Justice S.Tamilvanan, in *Manickam and another v. Rahamath Beevi & others* reported in *(2012) 1 LW 970*, by following the judgment of the Hon'ble Supreme Court in ***Damodaran Pillai's case (supra),*** has held that delay cannot be condoned beyond the period of 30 days. Similar view has also been taken by Hon'ble Ms. Justice P.T.Asha in the case of *M.Raji and others v. Arulmigu Komeleeswarar Devasthanam* reported in *(2008) SCC Online Mad 4604*.

8.However, it is brought to the notice of this Court that a learned Single Judge of this Court, in ***N.Rajendran v. Shriram Chits Tamil Nadu Pvt. Ltd.*** reported in ***(2011) 6 CTC 268,*** has held that the proviso introduced to Order 21 Rule 105(3) CPC by the Madras High Court in the year 1972, (hereinafter referred to as "Madras Amendment, 1972"), giving powers to the Court to condone the delay, is not inconsistent with the Central Act, and has therefore, held that the delay can be condoned.

9.It is to be noted that 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]* has followed the view taken in *N.Rajendran's case (supra)* and has condoned the delay. Similarly, Hon'ble Mr. Justice S.S.Sundar, in *Kanagaraj v. Sudha [C.R.P.(NPD) No.3608 of 2019, dated 11.01.2022]* has followed the view taken in *N.Rajendran's case*. Yet another single Judge Hon'ble Mr. Justice D.Krishnakumar, in *Meera Balakrishnan v. R.Manju [C.R.P.(NPD) No.879 of 2016, dated 20.04.2017]* has followed the same view. Hon'ble Mr. Justice D.Hariparanthaman has followed the same view 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, dated 14.07.2022]* has also followed the same view as in *N.Rajendran's case (supra)*.

10.In view of the divergent opinions of various Single Judges of this Court, contrary to the judgment of the Hon'ble Supreme Court in *Damodaran's case (supra)*, this Court was inclined to hear the matter further in detail. Hence, this Court appointed Mr.R.Viduthalai, Senior Advocate,

Mr.P.Valliappan, Senior Advocate, Mr.N.Manokaran, Mr.Sharath Chandran, Mr.T.S.Baskaran, Advocates, as *Amici Curiae* to assist this Court in this regard.

11.Despite notice being served, none appears for the respondents in these revision petitions.

12.Heard the learned counsel for the petitioner and the learned *Amici Curiae.*

13.Mr.R.Viduthalai, learned Senior Advocate, appearing as *Amicus Curiae* in the present case, would submit that the proviso introduced to Order 21 Rule 105 CPC by Madras Amendment, 1972, with effect from 01.11.1972, permitted condonation of delay in setting aside the *ex parte* orders in execution proceedings, despite the Limitation Act, 1963, expressly prohibiting such condonation. According to him, the Limitation Act, 1963, consciously excluded the applicability of Section 5 *ibid.,* in a proceedings under Order 21 CPC. He has also brought to the notice of this Court the Law Commission's Third Report of the year 1956, which emphasized that

the exclusion of Limitation Act was a deliberate policy decision to restrict the judicial discretion and to ensure uniformity in the application of limitation period. It is his further contention that rule-making powers of High Court under Section 122 CPC cannot supersede substantive legal protections made in the parent Act. His further contention is that the judgment in ***Damodaran Pillai and others v. South Indian Bank Ltd.*** reported in ***(2005) 7 SCC 300*** has affirmed the substantive character of limitation law and its applicability to proceedings under Order 21 CPC. Hence, according to him, the view taken by the learned Single Judge in ***N.Rajendran v. Shriram Chits Tamil Nadu Pvt. Ltd.*** reported in ***(2011) 6 CTC 268,*** relying upon the Madras High Court Amendment of the year 1972, directly conflicts with the judgment of the Hon'ble Supreme Court and the same is hit by doctrine of *stare decisis*. Hence, according to him, the view taken by the learned Single Judge requires re-consideration by a larger Bench. It is his further contention that substantive right of limitation cannot be diluted by procedural rules and the deliberate policy decision made by the Parliament will prevail over any inconsistent High Court amendments.

14.Mr.P.Valliappan, learned Senior Advocate, appearing as *Amicus Curiae*, would submit that, in ***N.Rajendran v. Shriram Chits Tamil Nadu Pvt. Ltd.*** reported in ***(2011) 6 CTC 268,*** the core issue was whether the application for condonation of delay in setting aside an *ex parte* order in the execution proceedings can be entertained by the Court. The learned Single Judge, considering the procedural rules and amendments made over time, particularly focusing on the changes introduced by the Madras High Court and subsequent legislative amendments, held that proviso to Rule 105 introduced by the Madras High Court Amendment in the year 1972 is not inconsistent with the Central Act. Further, the same view has been followed by several single Judges of this Court later. It is his contention that, on account of the mistake on the part of lawyers, parties should not suffer and this aspect also has to be kept in mind.

15.Mr.N.Manokaran, learned Advocate, appearing as *Amicus Curiae*, would submit that the original Code of Civil Procedure, 1908, does not provide for the applicability of Section 5 of the Limitation Act, 1963, to execution proceedings. However, by way of an amendment, the Madras High Court has specifically made Section 5 of the Limitation Act applicable

to execution proceedings within its jurisdiction. This has given rise to a situation of repugnancy between the Central legislation and the State amendment on this aspect. He referred to the judgment of the Division Bench of this Court in ***N.M.Natarajan's case (supra),*** wherein, this Court held that there is a statutory bar in applying the provisions of Section 5 of the Limitation Act, 1963, to the proceedings under Order 21 CPC. By referring to catena of judgments of this Court taking divergent views either relying upon the judgment of the Division Bench of this Court in ***N.M.Natarjan's case (supra)*** or ***N.Rajendran's case (supra)***, he would suggest that an express Statutory amendment should be made to the Code of Civil Procedure, 1908, making it clear that Section 5 of the Limitation Act is applicable to execution proceedings, which would remove ambiguity, avoid unnecessary litigation, and promote certainty and uniformity in procedural law.

16.Mr.Sharath Chandran, learned Advocate, appearing as *Amcius Curiae*, would submit that, in the event of any amendment brought by the Madras State or High Court which is inconsistent to the Central Act, the Central Act will prevail. According to him, when the Central Act restricts

the period of limitation, the Court cannot invoke inherent jurisdiction under Section 151 of CPC to condone the delay. The Division Bench of this Court in ***N.M.Natarajan v. Deivayanai Ammal*** reported in ***(1989) 1 LW 178,*** has clearly clarified that State specific amendment permitting recourse to the Limitation Act stood impliedly repealed. Further, it is his contention that in ***Damodaran Pillai and others v. South Indian Bank Ltd.*** reported in ***(2005) 7 SCC 300,*** the Hon'ble Supreme Court has held that Limitation Act is not applicable and also held that inherent powers under Section 151 CPC cannot be invoked to override express timelines. He would further submit that post amendment restructuring of Order 21 CPC, particularly omission of Sub-Rule (4) from Rule 106 which was Rule 105 prior to amendment, has led to considerable uncertainty, while earlier Sub-Rule explicitly provided for application of Limitation Act. According to him, its absence in the amendment has created the uncertainty. Hence, he would submit that the only option available is to bring in an amendment by exercising the power under Section 122 CPC. In any event, as on date, the amendment that existed prior to Central Amendment of the year 1976, will not hold good.

17.In the light of the above submissions, the point that arises for consideration in these revision petitions is whether the amendment brought in by the Madras High Court, with effect from 01.11.1972, introducing a proviso to Rule 105(3) of Order 21 CPC, providing power to the Courts to condone the delay, will survive after the amendment of the Code of Civil Procedure by the Central Amending Act, 1976 ?

18.To answer this issue, this Court has gone through the entire history behind the amendments brought in by the Madras High Court in 1945 and 1972 and the amendment brought to the main Code by the Parliament in 1976.

19.Before amendment by way of the Amending Act (Act 104 of 1976), Order 21 of Code of Civil Procedure, 1908, contained Rules 1 to 103. In ***Arunchalam v. P.K.A.C.T. Veerappa Chettiar*** reported in ***AIR 1931 Mad 656***, a larger Bench consisting of five Judges of Madras High Court held that the provisions of Order 9 Rule 13 CPC had no application to the execution proceedings under Order 21 CPC. While holding so, the Court also observed as follows :

"We *are of the opinion that many cases may occur in execution proceedings, where to prevent a judgment-debtor or a decree-holder having an application or petition restored under Order 9 Rule 13 may be a great hardship and immediate steps will be taken to frame a new rule making Order 9 applicable to such proceedings in execution."*

20.Pursuant to the said observation of the larger Bench, by exercising the power under Section 122 CPC, the Madras High Court introduced Rules 104 and 105 into Order 21 CPC. The said Rules came into force from 04.09.1945. The amended Rule 104 introduced by the Madras Amendment read as follows :

> ***"104. (1)*** *The Court before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.*
>
> ***(2)*** *Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.*
>
> ***(3)*** *Where the applicant appears and the respondent to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.*
>
> *Explanation. — An application referred to in sub-rule (1)*

*includes a claim or objection made under Rule 58.***"**

Rule 105 read as follows :

"105. (1) *The applicant, against whom an order is made under sub-rule (2) of the preceding rule or the respondent against whom an order is passed ex parte under sub-rule (3) of the preceding rule or under sub-rule (1) of rule 23 of this order, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs or otherwise as it thinks fit and shall appoint a day for the further hearing of the application.*

(2) *No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the opposite party.*

(3) *An application under sub-rule (1) shall be made within 30 days from the date of the order or, where in the case of an ex parte order, the notice was not duly served, the date when the applicant had knowledge of the order.*

(4) *The provisions of Section 5 of the Limitation Act, 1908 shall apply to applications under sub-rule (1).***"**

21.As per the above amendment, the Executing Court not only had

the power to set aside the order dismissing an application for non-prosecution but also to set aside the *ex parte* order and also to condone any delay in filing such application by applying the provisions of Section 5 of the Limitation Act, 1908.

22.Thereafter, on 19.05.1954, Rule 106 was inserted into Order 21 CPC by a Madras High Court Amendment. The amended Rule 106 read as follows :

> ***"106.****Where and in so far as a decree or order is varied or reversed and the case does not fall within the scope of Section 47 or Section 144, the Court of first instance shall, on the application of any party affected by the decree or order, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order on such part thereof as has been varied or reversed."*

23.It is to be noted that, under the old Limitation Act, 1908, the provisions for condonation of delay under Section 5 were applicable to the execution proceedings. However, on the advent of Limitation Act, 1963, the

applicability of Section 5 to execution proceedings was specifically excluded. Therefore, in view of the new Limitation Act, 1963, coming into force on and from 01.01.1964, the provisions introduced by the Madras High Court Amendment in Order 21 Rule 105(4) CPC did not survive. Realising the change of law, the Madras High Court, by way of an Amendment in the year 1972, deleted Order 21 Rule 105(4) CPC, however, introduced a proviso to Order 21 Rule 105(3) CPC with effect from 27.02.1972, as follows :

> *"Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the Court that he had sufficient cause for making the application within such period."*

24.In the meanwhile, the Law Commission of India, in its 27th Report in December, 1964, recommended introducing Rules 104 and 105 into the original Code on the lines of the Madras Amendment, 1945. The Law Commission, in its report, has observed as follows :

> **"***These rules are new, and have been inserted on the lines of the Madras Amendment, Order 21 Rules 104 and 105, which empower the Court to set aside ex parte orders, etc., passed in execution proceedings. They have been adopted as useful provisions. Order 9 does not, in terms, apply to execution*

proceedings. Courts have had to resort to Section 151, but the position in that respect is also not clear. The amendment will settle the position. Section 5 of the Limitation Act has been mentioned in the Madras Amendment as applicable to applications under the new Rules. This has been retained in the draft. Though Section 5 of the Limitation Act, 1963, makes its provisions applicable to all applications, it expressly excludes its application for execution. Therefore, it is desirable to mention that section expressly. It may also be noted that there is a certain amount of controversy as to whether the words "special law" in Section 29 of the Limitation Act apply to the Civil Procedure Code."

25.By observing so, the Law Commission recommended Order 21 Rule 105 CPC as follows :

***"105.Setting aside orders passed ex parte, etc.**—(1) The applicant against whom an order is made under sub rule (2) of rule 104 or the opposite party against whom an order is passed ex parte under sub rule (3) of that rule or under sub rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.*

(2) *No order shall be made on an application under sub rule (1) unless notice of the application has been served on the other party.*

(3) *An application under sub rule (1) shall be made within 30 days of the date of the order, or where in the case of an ex parte order the notice was not duly served, within 30 days from the date when the applicant had knowledge of the order.*

(4) *The provisions of Section 5 of the Limitation Act, 1963 (Act 36 of 1963), shall apply to applications under sub rule (1).”*

26.The recommendation made by the Law Commission in its 27th Report was once again reiterated in the 54th Report of the Law Commission in February, 1973. The Law Commission, in the said report, has observed as follows :

“21.56.Order 21 Rules 104-105 (New) — Hearing of execution proceedings : *It is now well settled that owing to the non-applicability of the provisions of Section 141 to the execution proceedings, Order 9 also does not apply to execution proceedings. The result has been that the Courts have found it difficult to decide the circumstances in which an application for execution can be dismissed for non-appearance, or if a court has dismissed an application for non-appearance,*

whether the Court, in the absence of any specific provision regarding the restoration in the CPC, restore such application. They cannot be restored under Order 9 Rule 9, as that rule does not apply to execution proceedings.

The situation has been proposed to be dealt with by the earlier report where two new rules were inserted to deal with the bearing of applications for execution. We agree with this recommendation. No other amendments are necessary in this regard."

27.The above two reports of the Law Commission were examined by the Parliament. Thereafter, the Parliament brought out the Code of Civil Procedure (Amendment) Act, 1976. The said amendment, apart from substituting the provisions of Rules 97 to 103 of Order 21 CPC, inserted Rules 104 to 106 to Order 21 CPC, which are as follows :

"104.Orders under rule 101 or rule 103 to be subject to the result or pending suit.*—Every order made under rule 101 or rule 103 shall subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order, is made if in such suit the party against whom the order under rule 101 or rule 103 is made has sought to establish a right which he claims to the present possession of the property.*

105.Hearing of application.—(1) *The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.*

(2)*Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.*

(3)*Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit. Explanation.—An application referred to in sub-rule (1) includes a claim or objection made under rule 58.*

106.Setting aside orders passed ex parte, etc.—(1) *The applicant, against whom an order is made under sub-rule (2) rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance whom the application was called on for hearing, the Court shall set aside the order or such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further*

hearing of the application.

(2)*No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.*

(3)*An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.**"***

28.It is relevant to note that, despite the recommendations of the Law Commission in two of its reports, the Parliament did not think it fit to re-introduce Order 21 Rule 105(4) (Madras Amendment) in Order 21 Rule 106 of the Central Code to make the provisions of Section 5 of the Limitation Act applicable to the proceedings under Order 21 CPC.

29.It is relevant to refer to the judgment of this Court rendered by Hon'ble Mr. Justice Mohan in ***Ayappa Naicker v. Subbammal and another*** reported in ***(1984) 1 MLJ 214.*** The learned Judge explained the reasons for non-inclusion of Section 5 in the Central Amendment. In Para No.4 of the judgment in *Ayappa Naicker's case (supra)*, the learned Judge has given his explanation as follows :

> ***"4.*** *... Therefore, after 1st January, 1964, Sub-rule (4) of Rule 105 of Order 21, Civil Procedure Code, could no longer be applied, because of the express language of Section 5 of the Limitation Act. That is why the Central Code, in Rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that Section 5 of the Limitation Act would be applicable."*

Further, it is observed as follows :

> *"The question of invoking inherent powers under Section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under Rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under Rule 106, and the Madras Amendment under Sub-rule (4) of Rule 105 of Order 21, it is Section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act, shall except in so far as such amendment or provision is consistent with the provisions of the principal Act, as amended by this Act, stand repealed."*

30.It is relevant to note that the said view of the learned Single Judge has been upheld by the Division Bench of this Court consisting of Hon'ble Mr.Justice Sathiadev and Hon'ble Mr. Justice Sivasubramaniam in

N.M.Natarajan v. Deivayanai Ammal reported in ***(1989) 1 LW 178.*** Later, the Hon'ble Supreme Court, in ***Damodaran Pillai and others v. South Indian Bank Ltd.*** reported in ***(2005) 7 SCC 300,*** which is a case arising from Kerala dealing with similar provisions akin to Order 21 Rule 105(4) of Madras High Court Amendment, has held that *"An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order 21 of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked."* The same view has been expressed by Hon'ble Mr. Justice S.Sardar Zackria Hussain in ***M.Ponnupandian v. Selvabakiyam and others*** reported in ***(2003) 4 CTC 225*** and by Hon'ble Mr. Justice M.M.Sundresh, as he then was, in ***J.Edward v. A.Chelladurai*** reported in ***(2009) 7 MLJ 949***.

31.However, a learned Single of this Court in ***N.Rajendran v. Shriram Chits Tamil Nadu Pvt. Ltd.*** reported in ***(2011) 6 CTC 268,*** has held that, even though Section 5 of the Limitation Act was inapplicable on

account of the deletion of Order 21 Rule 105(4) CPC, the proviso to Order 21 Rule 105(3) can be invoked to condone the delay in filing the application to set aside the order either dismissing an application under Order 21 for non-appearance or to set aside an order passed *ex parte*. While holding so, the learned Single Judge, in Para Nos.38 and 42 of the said judgment, has observed as follows :

> ***"38.****But, then the next question which is crucial is as to whether the proviso under Sub-rule (3) of Rule 105 also stood repealed in terms of Section 97(1) of Amendment Act 104 of 1976 or not.*
>
> *...*
>
> ***42.****Act 22 of 2002 contained a provision for repeal and savings under Section 16. Section 16(1) was in pari materia with Section 32(1) of Act 46 of 1999, both of which were identical to Section 97(1) of Act 104 of 1976. Therefore, what should be taken to have been repealed would be those provisions of the State or High Court Amendment, which became inconsistent with the amendments introduced. There is nothing on record to show that the proviso to Sub-rule (3) of Rule 105, which would now become the proviso to Sub-rule (3) of Rule 106 of Order XXI, is, in any way, inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002. So long as the proviso under Sub-rule (3) is not shown to*

be inconsistent with any of the amendments, it cannot be stated to have been repealed under the Central Amendment Acts."

32.The provisions of Order 21 Rules 104 and 105 CPC, before and after amendment, have already been extracted above. For the present, it is sufficient to extract Order 21 Rule 105 CPC of Madras Amendment and its present form under Order 21 Rule 106 CPC after the Central Amendment.

33.Order 21 Rule 105 CPC of Madras Amendment prior to Central Amendment, 1976, read as follows :

> ***"105. (1)*** *The applicant, against whom an order is made under sub-rule (2) of the preceding rule or the respondent against whom an order is passed ex parte under sub-rule (3) of the preceding rule or under sub-rule (1) of rule 23 of this order, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs or otherwise as it thinks fit and shall appoint a day for the further hearing of the application.*

(2) *No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the opposite party.*

(3) *An application under sub-rule (1) shall be made within 30 days from the date of the order or, where in the case of an ex parte order, the notice was not duly served, the date when the applicant had knowledge of the order.*

*Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the Court that he had sufficient cause for making the application within such period.**"***

Order 21 Rule 106 CPC after Central Amendment, 1976, reads as follows :

"106.Setting aside orders passed ex parte, etc.—(1) *The applicant, against whom an order is made under sub-rule (2) rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance whom the application was called on for hearing, the Court shall set aside the order or such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.*

(2)*No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the*

other party.

(3)*An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.**"***

34.In ***N.Rajendran's case (supra)***, the learned Single Judge has arrived at a conclusion that Order 21 Rule 105 CPC (Madras Amendment) has survived the amendment to the Code of Civil Procedure by the Central Amendment, 1976. Order 21 Rule 105 CPC, after amendment in 1976, reads as follows :

"105.Hearing of application.—(1) *The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.*

(2)*Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.*

(3)*Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit. Explanation.—An application referred to*

in sub-rule (1) includes a claim or objection made under rule 58."

35.A close reading of Order 21 Rule 105 of Central Act shows that it corresponds to Order 21 Rule 104 of the Madras Amendment. In other words, there is obvious inconsistency between Order 21 Rules 104 and 105 of the Madras Amendment and the present Order 21 Rule 105 and 106, as the very placement of the provisions in the Statute has undergone a change. It is relevant to note that rest of the provisions under Order 21 Rule 105 of the Madras Amendment have not survived and they have now been shifted to Order 21 Rule 106 by the Central Amendment. Therefore, this Court is of the view that, if the proviso to Order 21 Rule 105(3) of Madras Amendment is held to survive, it can only be read along with present Order 21 Rule 105(3) CPC. The provisions would then read as follows :

> ***"105.Hearing of application.—(1)*** *The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.*
>
> ***(2)****Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.*

> ***(3)****Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit. Explanation.—An application referred to in sub-rule (1) includes a claim or objection made under rule 58.*
>
> *Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the Court that he had sufficient cause for making the application within such period.**"***

36.A reading of the proviso along with Order 21 Rule 105(3) indicates that the proviso to Order 21 Rule 105(3) uses the expression "said period of 30 days" and "such period", which is not present anywhere in the present Order 21 Rule 105(3), but it is prescribed only in Order 21 Rule 106(3) of Central Act which corresponds to Order 21 Rule 105(3) of the Madras Amendment. Thus, if the proviso is to be workable, it can be read only as a proviso to Order 21 Rule 106(3) and not as a proviso to Order 21 Rule 105(3) as it presently stands. But such course is not permissible since it will amount to virtually rewriting the Statute. In ***Saregama (India) Ltd. v. Next Radio Ltd.*** reported in ***(2022) 1 SCC 701***, the Hon'ble Supreme Court has held that *"draftsmanship is a function entrusted to the legislature.*

Craftsmanship on the judicial side cannot transgress into the legislative domain by rewriting the words of a statute. For then, the judicial craft enters the forbidden domain of a legislative draft."

37.There is also one more reason why the proviso is unworkable when read with the present Order 21 Rule 105(3). At the risk of repetition, Order 21 Rule 105 of Madras Amendment is as follows :

> ***"105. (1)*** *The applicant, against whom an order is made under sub-rule (2) of the preceding rule or the respondent against whom an order is passed ex parte under sub-rule (3) of the preceding rule or under sub-rule (1) of rule 23 of this order, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs or otherwise as it thinks fit and shall appoint a day for the further hearing of the application.*
>
> ***(2)*** *No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the opposite party.*
>
> ***(3)*** *An application under sub-rule (1) shall be made within 30 days from the date of the order or, where in the case of an ex parte order, the notice was not duly served, the date when the applicant had knowledge of the order.*

Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the Court that he had sufficient cause for making the application within such period."

38.Thus, under the Madras Amendment, Order 21 Rule 105(1) contemplates three types of applications : (1) Application to set aside an order under Order 21 Rule 104(2) of Madras Amendment; (2) Application under Order 21 Rule 104(3) of Madras Amendment to set aside an order passed *ex parte*; and (3) Application to set aside an order passed *ex parte* under Order 21 Rule 23(1). Under Order 21 Rule 105(3) of the Madras Amendment, all the above applications were required to be made within 30 days from the date of order or from the date of knowledge where order is passed *ex parte*. (The proviso enabled the Court to condone the delay in filing the above applications). Therefore, after the 1976 amendment, Order 21 Rule 104 of the Madras Amendment is now Order 21 Rule 105 of Central Act and Order 21 Rule 105 of Madras Amendment is now Order 21 Rule 106 of Central Act. If the proviso then is held to survive as held in

N.Rajendran's case (supra), it can only be a proviso to the present Order 21 Rule 105(3) Central Act, which would read as follows :

> ***"105. ... (3)****Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.*
>
> *Provided that an application may be admitted after the said period of thirty days if the applicant satisfies the Court that he had sufficient cause for making the application within such period."*

39.If the proviso brought by the Madras Amendment is held to be survived, that proviso will apply only to Rule 105(3) of Central Act. This will lead to a situation where the power to condone the delay under the proviso would be available only to an application to set aside an order passed *ex parte* under Order 21 Rule 105(3) and not to an application to set aside the order under Order 21 Rule 105(2) dismissing an application for non-appearance of the parties. Therefore, this Court is of the view that the proviso to Order 105(3) of the Madras Amendment cannot be said to have survived for it to be read along with Order 21 Rule 105(3) of the Central Act. Therefore, there is obvious inconsistency between the Madras

Amendment and the present Order 21 Rules 104 and 105 of the Central Act.

40.Even in ***N.Rajendran's case (supra)***, the learned Single Judge has observed as follows :

> ***"24.****A comparison of Rules 104 and 105 inserted by Madras (Pondicherry) High Court Amendment with effect from 04.9.1945, with Rules 104 to 106 inserted by Amendment Act 104 of 1976, would show that Rule 104 of the Madras High Court Amendment is in pari materia with Rule 105 inserted by Amendment Act 104 of 1976. Similarly, Rule 105 of the Madras High Court Amendment is in pari materia with Rule 106, except that neither the proviso under Sub-rule (3) of Rule 105 nor Sub-rule (4) of Rule 105, find a place in Rule 106 as inserted by the Amendment Act 104 of 1976."*

41.From the observations of the learned Single Judge, it is clear that, even the learned Single Judge has found that proviso to Rule 105(3) of Order 21 CPC of the Madras Amendment did not find a place in Order 21 Rule 106(3) of the Central Act. Even from the above observations also, it is clear that proviso ought to have been placed only after Order 21 Rule 106(3)

CPC as it stands today. However, the Central Amendment Act obviously omitted the proviso in the Rule, which is clearly an inconsistency by virtue of Section 97 of the Amending Act.

42.Section 97 of the Code of Civil Procedure (Amendment) Act, 1976, reads as follows :

> ***"97.Repeal and savings.—(1)****Any amendment made, or any provision inserted in the principal Act by State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.****"***

43.The Hon'ble Supreme Court, in ***Ganpat Giri v. Second Additional District Judge, Ballia and others*** reported in ***(1986) 1 SCC 615***, in Para No.5, has held as follows :

> ***"5.*** *... A reading of section 97 of the Amending Act shows that it deals with the effect of the Amending Act on the entire Code both the main part of the Code consisting of sections and the First Schedule to the Code which contains Orders and Rules. Section 97(1) of the Amending Act takes note of the*

several local amendments made by a State Legislature and by a High Court before the commencement of the Amending Act and states that any such amendment shall except insofar as such amendment or provision is consistent with the provisions of the Code as amended by the Amending Act stands repealed. It means that any local amendment of the Code which is inconsistent with the Code as amended by the Amending Act would cease to be operative on the commencement of the Amending Act, i.e., on February 1, 1977. 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 object of section 97 of the Amending Act appears to be that on and after February 1, 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, as the case may be in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code."

44.In ***Pt.Rishikesh and another v. Salma Begum*** reported in ***(1995) 4 SCC 718***, it was clarified by the Hon'ble Supreme Court that Section 97(1) would operate only to those State or High Court amendments which are

inconsistent with the provisions inserted by the Amendment Act, 1976. It was further observed that "*We may clarify at once that if the central law and the State law or a provision made by the High Court occupy the same field and operate in collision course, the State Act or the provision made in the Order by a High Court being inconsistent with or in other words being incompatible with the Central Act, it becomes void unless it is re-enacted, reserved for consideration and receives the assent of the President after the Central Act was made by Parliament i.e. 10-9-1976.*"

45.The Division Bench of this Court in ***Gnanasoundari and others v. G.Vijayakala and others*** reported in ***(2023) 6 MLJ 135***, in Para No.18, has held as follows :

> ***"18.****We will have to examine the issue on the language of Section 97(1) and the effect of the said provision. Section 97(1) is clear in its terms. It lays down that any amendment carried out by a High Court in exercise of the powers under Section 122 before the commencement of Act 104 of 1976 shall stand repealed, if they are found to be inconsistent with the provisions of the Principal Act namely, Act 5 of 1908 as amended by this Act namely Act 104 of 1976. We have extracted the provisions of Rule 14 of Order 41 as they stood prior to and after Act, 104 of 1976. We have also held that the proviso inserted by the High*

Court with effect from 17.11.1976 vide G.O.Ms.No.153 dated 01.09.1976 runs inconsistent with Sub-Rule 4 of Rule 14 of Order 41, which was introduced by Act, 104 of 1976. Therefore, in terms of Section 97, the proviso would stand repealed."

46.The Constitution Bench of the Hon'ble Supreme Court in ***Pankajakshi (dead) through legal representatives and others vs. Chandrika and Others*** reported in ***(2016) 6 SCC 157*** has held as follows :

"25.*We are afraid that this judgment in Kulwant Kaur case [Kulwant Kaur v. Gurdial Singh Mann, (2001) 4 SCC 262] does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by a State Legislature or a High Court, the said section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression "principal Act" occurring in Section 97(1). What Section 97(1) really does is to state that where a State Legislature makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Schedule VII List III Entry 13 to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the*

Parliamentary enactment contained in the 1976 Amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression "any provision inserted in the principal Act" by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the First Schedule to the Code of Civil Procedure."

The above judgment makes it clear that any amendment inserted in the Code of Civil Procedure which is inconsistent with the Central Act stands repealed.

47.The expression "inconsistency" has been defined in Black's Law Dictionary to mean lacking consistency; not compatible with. 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's case (supra),*** 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.

48.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' case (supra)***. 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 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.

49.The Single Bench of this Court, in ***Ayappan Naicker's case***

(supra), 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's case (supra).*** 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 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, 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.

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 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 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."*

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.

53.In view of the above, the impugned orders dated 29.07.2024, in E.A.Nos.3 and 4 of 2023 in E.P.No.5 of 2022 in O.S.No.158 of 2007 on the file of the District Munsif Court, Dharapuram, are set aside. The said applications in E.A.Nos.3 and 4 of 2023 in E.P.No.5 of 2022 filed to condone the delay and to set aside the *ex parte* order, stand dismissed.

54.Consequently, these Civil Revision Petitions are allowed with the above observations. No costs. Consequently, connected miscellaneous petition is closed.

55.This Court also places its appreciation on record for the valuable assistance rendered by the learned *Amici Curiae* by placing before this Court, all the provisions of the Code pre and post amendments and the relevant judgments in this aspect.

56.Registry is directed to place this order before the Hon'ble Rule Committee (Civil) on the Administrative Side of this Court for appropriate action.

26.06.2025

mkn

Internet : Yes
Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No

To

1.The District Munsif,
Dharapuram.

2.The Registrar General,
High Court, Madras.

3.The Registrar (Judicial),
High Court, Madras.

4.The Section Officer,
VR Section,
High Court, Madras.

N. SATHISH KUMAR, J.

mkn

Order in
C.R.P.Nos.808 & 809 of 2025

26.06.2025