

**IN THE COURT OF THE SUBORDINATE JUDGE, PERUMBAVOOR**

Present:- Sri.Johnson M.I, Sub Judge

Friday, the 20<sup>th</sup> day of January, 2023/30<sup>th</sup> Pousha 1944

**E.A.No.76/2022 in E.P.No. 56/2009 in O.S.No.871/2008**

**Petitioner (Judgment Debtor) :-**

K.C.Jose, S/o Mathai Chacko, Kizhakkevattom, Pallikkavala,  
Mudickal P.O., 683547, Pallipram Kara, Marampilly Village.

By Adv.Sri.P.T.Geeverghese.

**Respondent (Decree Holder) :-**

Sajan J.Pynunkel, S/o Joseph Xavier, Pynunkal House, Plot No.E-31,  
Changampuzha Nagar P.O., 682033, South Kalamassery.

By Adv.Sri.G.Santhosh Kumar.

This petition is filed under Order 47 Rule 1 and Section 151 & 47 of the Code of Civil Procedure for reviewing the order dated 14.07.2022 restoring the E.P to file and is coming on for final hearing on 20.12.2022 in the presence of the above counsels and the Court on the 20.01.2023 passed the following :-

**ORDER**

This is a petition filed by judgment debtor u/S.47 of CPC for reviewing the order dated 14-7-2022 restoring the E.P to file.

2. Decree holder filed objection to this petition.
3. I heard the counsel for both sides and perused the case records.
4. E.P.56/2009 was filed by decree holder for realisation of the decree amount. In the E.P., there is a prayer for attachment and sale of movable and immovable properties of judgment debtor as well as arrest and detention of judgment debtor for willful non payment of decree debt. In the E.P, E.A.111/2012 was filed by a third party for lifting the attaching over the property which was sought to be sold out in auction for realisation of decree amount. That petition was allowed and attachment over the property was lifted. Thereafter, decree holder prayed for arrest and detention of judgment debtor for willful non payment of decree debt. On that prayer decree holder was directed to take steps for issuing Order 21 Rule 37 notice. Decree holder took steps for issuing Order 21 Rule 37 notice to judgment debtor and Order 21 Rule 37 notice was served on the judgment debtor. Judgment debtor appeared, but omitted to file any objection. Thereupon, my learned predecessor set the judgment debtor exparte and directed the decree holder to take steps to arrest the judgment debtor. Finally, on 24-11-2018, EP was

dismissed for default on failure on the part of decree holder to take steps for arrest of judgment debtor. Later on, decree holder filed E.A.71/2021 for setting aside the exparte order and to restore the EP to file along with E.A.70/2021 u/S.5 of Limitation Act for condonation of delay in filing E.A.71/2021. Both the petitions were allowed and EP was restored to file on 14-7-2022. Now, judgment debtor has filed this petition for reviewing the order dated 14-7-2022 restoring the EP to file.

5. In this petition, judgment debtor has alleged that, there is a delay of 1120 days in filing the petition for restoration of the execution petition to file. It is further alleged that, as per Order 21 Rule 106 (3) of CPC, for restoration of an EP which was dismissed under Order 21 Rule 105 (2), there is a period of limitation of 30 days and there is no provision for condonation of delay in filing that petition. It is further alleged that, court has no inherent power to condone the delay. According to judgment debtor, decree holder is precluded from filing a petition u/S.5 of Limitation Act for restoration of EP to file. With the said allegations, it is further alleged that, there is an error apparent on the face of record in restoring the petition to file

by order dated 14-7-2022 and hence, judgment debtor has prayed for reviewing that order.

6. On the other hand, decree holder has contended that, petition for restoration of E.P which was dismissed for default is not to be treated under Order 21 Rule 106 of CPC, but under S.151 of CPC. It is further contended that, there is no error apparent on the face of record and there is nothing before this court to review the said order.

7. Decree holder relied on the decision of the Hon'ble High Court of Kerala in "*Chellamma v. Somakumari and Others (2015 (5) KHC 737*" and argued that, a petition for restoration of E.P dismissed for default can be filed u/S.151 of CPC and Order 21 Rule 106 is not applicable. It is significant to note that, EP was dismissed for default on 24-11-2018 due to the failure on the part of decree holder to take steps to issue arrest warrant to judgment debtor.

8. In **Chellamma's case**, it was held by Hon'ble High Court of Kerala that:

**"15. R.105 specifically provides that the executing Court may fix a day for hearing of the application. The eventualities covered by**

sub-rules (2) and (3) of R.105 could occur only in a case where the executing Court did fix a day for hearing of the application. When no such day was fixed for hearing of the application, R.105 and R.106 of Order XXI does not apply at all. When the Execution Petition is posted for taking steps before the date fixed for hearing, it is not covered by R.106 of Order XXI. The consequences of non – appearance of the parties on any such day before the date fixed for hearing are not provided under Order XXI CPC. Those cases are covered by the inherent powers of the Court which are saved under S.151 of the Code of Civil Procedure. For filing an application under S.151 CPC, no period of limitation is provided under the Code of Civil Procedure. Art.122 of the Limitation Act providing for a period of 30 days’ time to file an application for restoration specifically relates only to a suit or appeal or application for review or revision dismissed for default of appearance or want of prosecution or for failure to pay costs of service of process or to furnish security for costs. Art.122 does not cover any application other than the applications mentioned therein. If so, Art.137 of the Limitation Act which provides for a period of three years as limitation, in any other application for which no period of limitation is provided, would apply. Since the application is not under any of the provisions of Order XXI of the Code of Civil Procedure, but an application which is outside the scope of Order XXI CPC, S.5 of the Limitation Act also would apply.”

In the light of abovesaid decision, it is only to be held that, decree holder is entitled to file petition u/S.5 of Limitation Act for condonation of delay in filing the petition for restoration of EP to file. None of the allegations of

judgment debtor are sustainable and hence, the said allegations are only to be discarded.

9. In my considered opinion, there is no error apparent on the face of record and there is nothing before this court to review the order dated 14-7-2022 restoring the EP to file. Hence, this petition is only to be dismissed.

In the result, petition is dismissed. No cost.

Dictated to the Confdl.Asst., transcribed and typed by her, corrected by me and pronounced in the Open court on this the 20<sup>th</sup> day of January, 2023.

Sd/-  
JOHNSON M.I  
SUB JUDGE

**APPENDIX :- NIL**

Sd/-  
Sub Judge

Pkm.  
Compd.by.Ss

EA.76/2022  
E.P.56/2009

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E.A.No. 76/2022

in E.P.No.56/2009

in O.S.No.871/2008

ORDER

Dated : 20.01.2023