

IN THE COURT OF THE MUNSIFF, ATTINGAL
PRESENT: SMT. SWATHI.R.KRISHNAN, MUNSIFF
THURSDAY 22nd MAY, 2025 / 1st JAISHTA, 1947

EA 162/2022 (a) EP.10/2014 IN OS.No. 326/2009

Petitioner/Judgment Debtor:-

Babu, S/o Appiamma, aged 48 years, Valiyavila Veedu, Kodithookkikunnu,
X Ward, Kavalayoor P O, Manamboor Village, Varkala Taluk,
Thiruvananthapuram.

By Advocate: Sri.T.A.Rajeev

Counter Petitioner/ Decree Holder:-

Muhammed Ismail @ Sainulabdeen, aged 90 years, S/o Asanaru Pillai
(Late) Munjanadu Veedu, Kavalayoor, Manamboor Village.

By Advocate: Sri.G.Surendran

This petition having been heard on 26.03.2025 and the court on 22.05.2025 passed the following:

ORDER

This is a petition filed under Section 5 of Limitation Act.

2. **The petition averments are as follows:** The petitioner is the judgment debtor in the EP and the counter petitioner is the decree holder. The EP as well as the suit is not maintainable either under law or on facts. The petitioner has serious contentions against the averments. The execution petition was posted to 19.09.2022 for evidence and hearing whereas petitioner's previous counsel did not inform him regarding the posting and hence the petitioner was set ex parte on 19.09.2022. On 09.11.2022 the SHO informed the petitioner that they were directed to give police protection to Amin to deliver the plaint schedule property to the counter petitioner. It was only then that the petitioner came to know that he was set ex parte and delivery was ordered in the aforesaid EP. There occurred a delay

of 57 days in filing the petition. There are no willful latches or negligence on the part of the petitioner. Hence the petition to condone the delay.

3. **The decree holder filed an objection as follows:** The petition is not maintainable either under law or on facts. The petitioner has not adduced any sufficient grounds to allow this petition. The failure to inform the posting date by the prior counsel is not a sufficient ground and the petitioner has also not clarified why posting date was not informed. If the SHO has directly informed the petitioner to obstruct the Amin, necessary legal proceedings have to be initiated against the SHO. The appeal filed by the judgment debtor was also dismissed. There are no sufficient grounds to allow this petition. Hence the petition may be dismissed with costs.

4. Following points are raised for consideration:

1. Can the petition be allowed ?
2. Reliefs and costs ?

5. Heard both sides.

6. **Point No.(1):** The judgment debtors filed this petition to condone the delay in filing this petition to set aside the ex parte order dated 19.09.2022. The decree holder filed an objection contending that there are no sufficient grounds to allow this petition. The judgment debtor averred that the previous counsel did not inform him regarding the posting and he received knowledge only after the SHO informed him that they were directed to give protection to the Amin to deliver the

plaint schedule property to the decree holder.

7. Order XXI Rule 106 is the provision for setting aside the orders passed ex parte. **Order XXI Rule 106 of CPC** is as follows:

‘106. Setting aside orders passed ex parte, etc.- (1) The applicant, against whom an order is made under sub-rule (2) of 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 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 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 that date when the applicant had knowledge of the order,

8. On perusal of Order XXI Rule 106 of CPC it can be seen that the period of limitation to set aside the ex parte order is 30 days from the date of order or if notice is not served within 30 days from the date that the applicant had knowledge of the order. This court is of the view that this court has no power to condone the

delay under Order XXI Rule 106.

9. In ***Appu v. P. Surendra Swami 2011 (4) KHC 315*** the Hon'ble High Court of Kerala held as follows:

'9. Reference can also be made to the decision of this Court in C. L. Cleetus v. South Indian Bank Ltd. and Another, 2007 (3) KHC 911: AIR 2007 Ker. 301: 2007 (3) KLT 868: 2007 (3) KLJ 258: ILR 2007 (4) Ker. 48.. There, in paragraph 6 it is held that R.105 (of the O.21 of the Code) deals with the hearing of applications which can either be the execution petition or an application in the execution petition. The Rule says that if the opposite party who has been issued with notice fails to appear (on the application regarding which notice is served) the Court shall hear the application ex parte and proceed to pass any Order it deems fit. Those orders could be orders finally disposing of the execution petition or orders deciding any specific issue, for eg., regarding executability of the decree in response to a notice under R.22 of O.21 or arrest pursuant to a notice under R.37 or even settlement of draft proclamation decided in response to a notice under R.66 of Order XXI. In paragraph 7 of the said decision it is observed that an Order setting the judgment debtor ex parte cannot preclude him from participating in the further proceedings in execution petition on matters not concluded by the ex parte order'.

10. From the aforesaid decision it is clear that the judgment debtor cannot be precluded from participating in further proceedings which is not concluded by

the ex parte order. In the instant case, the judgment debtor received notice and already appeared and it was during the stage of evidence that they were set ex parte. Hence there is no case that the judgment debtor did not receive notice. Hence they are expected to file the petition to set aside the ex parte order within 30 days from the date of order. Order XXI Rule 106 gives this court power to set aside the ex parte order whereas there is no provision to condone the delay in filing the petition to set aside an ex parte order in execution petition. It is clear that the judgment debtor can participate in further proceedings and the ex parte order does not restrict them from contesting or participating in the subsequent proceedings whereas this court cannot condone the delay occurred in filing the petition.

11. **Point No.(2):** In view of the above discussions, petition is dismissed with costs.

Dictated to the Confidential Assistant, transcribed and typed by her corrected and pronounced by me in open Court on this the 22nd day of May 2025.

Sd/-
SWATHI. R. KRISHNAN
MUNSIFF

Appendix: Nil

Id/-
MUNSIFF

//True Copy//

Typed by: Sheena K
Compared by: Shilpa.K S

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