

IN THE COURT OF DISTRICT MUNSIF, METTUR, SALEM DISTRICTPresent: **Thiru. M.Selvam, B.A., B.L.,**

District Munsif, Mettur

Thursday, this the 07th day of August 2025**E.A.No. 03 of 2024****in****E.P. No. 09 of 2022****in****O.S. No. 80 of 2013**

(CNR No. TNSA17-00092-2022)

Kolandaiyappan

...Petitioner/Respondent/Judgment Debtor

/Versus/

K. Kandasamy

... Respondent/Petitioner/Decree Holder

This petition came up before me in the presence of the learned counsel Mr. P. Gopinath., B.Sc., B.L., appearing for Petitioner/Respondent/Judgment Debtor and learned counsel Mrs. S. Kavitha., B.A., B.L., appearing for Respondent/Petitioner/Decree Holder. Upon hearing both sides submissions and after stood over for my consideration till this day, this court passed the following:-

ORDER

This petition is filed by the petitioner/judgment debtor to set-aside the exparte order dated 17.03.2023 passed in the above execution petition.

1.Brief averments in the petition filed by the petitioner is as follows:

1.1. The petitioner is the judgment debtor in the above execution proceedings. The case of the respondent is that the petitioner had encroached upon the property of the respondent. The petitioner had constructed his house and was residing therein for more than 40 years. The petitioner had engaged his relative advocate to conduct the case. He had endorsed the matter to the counsel at Mettur. Since, the counsel needs documents to file a detailed counter, the petitioner herein had applied for certified copies before the concern authorities. But it was not granted in time.

1.2. In the mean time, the petitioner's wife was suffered from severe heart ailment and was bed ridden from March 2018. As per the advice of the doctors, the petitioner had taken care of her for continuous treatment for more than 6 months. In this juncture, he could not able to concentrate for further affairs. Already his counsel had not given proper directions about the case proceedings. The petitioner had appeared several times before this court, but no one helped him to intimate the hearing date. Though the petitioner again and again contacted his counsel at his office, he had not ascertained the proper developments in the case.

1.3. Last week the respondent's company persons had came nearby his properties and openly proclaim that they will take over the properties at their own and demolish with the help of police and court officer. The petitioner had got severe mental agony and immediately contacted his counsel, but he was not explaining the real state of affairs till now. So the petitioner directly approached this court office, but they refuse to give particulars. Hence, the petitioner had engaged new counsel and verified the records to know the fact that on 17.03.2023, he was called absent, set-exparte for no representation of his side and this court had passed an exparte order against the petitioner.

1.4. The non appearance before this court is neither willful nor wanton. The respondent had not properly issued a notice under Order 21 Rule 22 of CPC and not followed the procedure of law. In the March 2024 first week alone, the petitioner came to know about the exparte order passed against him. Immediately, the petitioner had come forward with this petition to set-aside the same.

2. Brief facts in the counter filed by the respondent is as follows:

2.1. The respondent denied the averments made by the petitioner in his petition. The execution petition was filed on 21.04.2022 and the petitioner had appeared in person on 11.08.2022 and requested time for appointing advocate for him and the petitioner entered appearance through his advocate on 01.11.2022 and

took time for filing counter. The case was adjourned to 08.12.2022, 09.01.2023, 27.01.2023 as last chance for filing counter. Then on 17.03.2023, since the petitioner had not filed his counter, he was set-exparte and case was posted for enquiry on 21.04.2023. The respondent herein argued the execution petition on 16.06.2023 and the orders was passed on 14.07.2023. The counsel who filed the vakalath for the petitioner on 01.11.2022 and this petition to set-aside the exparte order are one and the same. On 12.07.2023, the court amin was taken proceedings as per the order of this court, but the petitioner herein was not co-operated for the court order and made quarrels. Then the respondent herein had filed police aid petition on 22.09.2023 and the same is pending before this court.

2.2. This set-aside petition is not filed within 30 days of the order and hence, the same is barred by limitation. This petition is filed only to delay the respondent from realizing the fruits of the decree. This petition is not maintainable, since he had himself appeared before this court. Hence, this petition is liable to be dismissed.

3. No oral and documentary evidence on either side.

4. Points for Consideration:

(i) Whether this petition has to be allowed or not ?

5. Discussion:

5.1. Both side rival submissions heard with regard to their pleadings and perused the materials on record. The original suit is filed by the respondent/decreed holder to remove the encroachment made by the petitioner/defendant in the suit property. In the said suit, the petitioner/judgment debtor though appeared through a counsel, he had not turned up to cross examine the plaintiff side witness and hence, he was set-exparte in the original suit proceedings and subsequently, the same was decreed in favour of the respondent/decreed holder on 24.06.2019. Thereafter, this execution petition is filed to remove the said encroachment through

the process of the court on 09.12.2021. Though the learned counsel for the petitioner/judgment debtor had contended that they had filed a petition to set-aside the exparte decree passed in the original suit proceedings, no particulars in respect of the same was produced by the petitioner. Rather, the learned counsel for the respondent/decreed holder had submitted that the said set-aside petition was also dismissed by this court. But the respondent had also not produced any materials in this regard.

5.2. On perusal of the case records, it shows that the court notice in this execution petition was duly served to the petitioner/judgment debtor on 27.07.2022 and thereafter, he had appeared before this court on 11.08.2022 and sought for time to appoint a counsel on his behalf. Therefore, the contention of the petitioner that the respondent had not properly issued a notice under Order 21 Rule 22 of CPC in this execution petition is not having any considerable force.

5.3. Thereafter, the petitioner had appeared in this execution petition on 01.11.2022 through One learned counsel Mr. P. Gopinath., B.Sc., B.L., who is the counsel for the petitioner in this application. Therefore, it is further clear that the contention of the petitioner that he had engaged new counsel and verified the records to know the fact that on 17.03.2023, whether he was called absent and was set-exparte for no representation of his side are all a false one.

5.4. On perusal of the case records, it shows that this court had granted sufficient time to the petitioner/judgment debtor to file his counter statement on and from 08.12.2022, 09.01.2023, 27.01.2023 and on 17.03.2023. Since, the petitioner had not turned up to file his counter and there was no representation on his side, he was called absent and set-exparte on 17.03.2023. In pursuance, delivery was also ordered in the execution petition on 14.07.2023. At this juncture, the petitioner had come forward with this petition to set-aside the exparte order dated 17.03.2023 passed in the execution proceeding under Order XXI Rule 106(2) and

section 94 and 151 of CPC. It was held by **Our Hon'ble Madras High Court** in the case of **Sundarammal vs Kanagaraj in CRP No. 808 and 809 of 2025** as follows,

“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”

Therefore, it is clear that the the provision under Order XXI Rule 106(3) of CPC would attract only to set-aside the order passed in the execution petition consequent to the opposite party being set-exparte, and not for the order setting him exparte before passing an order under XXI Rule 105(3) of CPC. In this instant case on hand, though the order of delivery was also passed by this court on 14.07.2023 under Order XXI Rule 105(3) of CPC, subsequent to setting the petitioner herein exparte on 17.03.2023, the petitioner had not took any steps to set-aside the order of delivery passed on 14.07.2023.

5.5. It is the contention of the petitioner that his wife was suffered from severe heart ailment and was bed ridden from March 2018 and as per the advice of the doctors, the petitioner had taken care of her for continuous treatment for more than 6 months and hence, he could not able to concentrate for further affairs. Admittedly, the petitioner herein had not produced any materials to establish the above contention to the considered opinion of this court. Further, though it was contended in the petition averments that the petitioner herein had applied for certified copies before concent authorities in order to file a detailed counter and it was not granted to him in time, the petitioner had also not disclosed any such particulars in respect of the certified copies applied by him and before which authority he had applied the same.

5.6. The petitioner herein was set-exparte in the execution petition on 17.03.2023 and subsequently order of delivery was also passed by this court on 14.07.2023, but this petition is filed by the petitioner only on 15.03.2024. On perusal of the case records, it further shows that the court amin had went for the execution of the warrant on 12.09.2023 issued by this court in pursuance of the order of delivery passed by this court and the same was also returned to this court on 15.09.2023 with an endorsement that the petitioner herein and his relatives had prevented to execute the warrant and sought for police aid. Therefore, it is further clear that the petitioner herein had kept silence till the respondent herein had taken steps to take delivery of the petition property and thereafter, had come forward with this petition. Hence, this court considers that this petition is devoid of merits and thereby, in the interest of justice liable to be dismissed.

In the result, this petition is dismissed. Considering the facts and circumstance of this case, there is no order as to cost.

This order is typed by me in my official laptop, corrected and pronounced by me in the open court on this 07th day of August 2025.

**Sd./-Thiru.M.Selvam,
District Munsif,
Mettur.**

Both side witnesses and exhibits: Nil

**Sd./-Thiru.M.Selvam,
District Munsif,
Mettur.**