
(1961) 08 MAD CK 0021
In the Madras High Court

M. Abdul Salam and Others APPELLANT
Vs
Lourdusami Chettiar RESPONDENT

Date of Decision : 11-08-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 104

Citation : (1962) ILR (Mad) 438 : (1961) 74 LW 832 : (1962) 1 MLJ 319

Hon'ble Judges : Ganapatia Pillai, J

Bench : Division Bench

Judgement

Ganapatia Pillai, J.—These two petitions arise out of a common order passed by the Principal District Munsif, Salem, in two petitions under

Order 21, Rules 104 and 105 and Section 151 of the Code of Civil Procedure. These two petitions before the lower Court were to restore

R.E.A. No. 1326 of 1956 and R.E.A. No. 648 of 1956 which were dismissed on 16th April, 1958, for non-prosecution. The petitioners before

me who were the decree-holders before the District Munsif had obtained an order of eviction of the respondent from a building and they applied to

the District Munsif for execution of that order for obtaining delivery of possession. These two petitions, one for recognising the assignment and the

other for an order of delivery, came up before the District Munsif on a particular date. On that date the counsel for the decree-holder was not

present. A request for adjournment till the counsel appeared was refused. The party was unable to go on with the proceeding and consequently,

the District Munsif made the order dismissing the Execution Petitions for non-prosecution. The order which is now sought to be attacked by Mr.

Ramamurthi, counsel for the petitioners, is an order restoring the two E.P.'s to file under Rule 105 of Order 21, Civil Procedure Code. It is true

the learned District Munsif seems to have assumed that he had power of restoration of these execution proceedings, apart from any specific

provisions in the Code. As early as 1929 a Full Bench of this Court in Alagasundaram Pillai Vs. Pichuvier, minor, by Court guardian Mr. S.

Krishnaswami Aiyangar, High Court Vakil, , had ruled that Courts governed by the CPC had no inherent power to set aside orders in any case

where other remedy existed. The dismissal in that case was of an application under Order 21, Rules 97 and 100. To remedy this state of affairs

Rules 104 and 105 were inserted by this Court in Order 21 in 1945. Obviously the learned District Munsif was Unaware of this correct legal

position when he said that he had inherent powers to restore the Execution Petitions to file. His power is solely derived from Rules 104 and 105 of

Order 21. Mr. Ramamurthi, counsel for the petitioners contended that the dismissal for non-prosecution would not be dismissal for default within

the meaning of Rule 104. I am sure that what constitutes ex parte disposal of a suit will equally apply to an ex parte order of dismissal of an

Execution Petition. This Court has consistently held that the mere physical presence of a party when an ex parte decree is passed in a suit would

not be appearance of the party before Court, sufficient to constitute the disposal one made in the presence of the party. The principle is that where

a party is represented by a counsel and the counsel is not present and the party alone is present and the party asks for an adjournment to enable

him to procure the presence of the counsel, an adjudication made in such circumstances in the presence of the party would still be an ex parte

adjudication, despite the physical presence of the party. This principle must equally apply to execution proceedings. The dismissal of the Execution

Petitions for non-prosecution in this case must really therefore be construed as dismissal for default, in which case Rule 104 will be attracted; and

the District Munsif will have jurisdiction to restore these Execution Petitions to file. The order restoring the Exections Petitions is correct and the

Civil Revision Petitions are dismissed with costs in one Civil Revision Petition.