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**(1998) 03 MAD CK 0114**  
**In the Madras High Court**

V. Ramalingam

APPELLANT

Vs

Thayamuthammal

RESPONDENT

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**Date of Decision :** 09-03-1998

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 106, Order 21 Rule 48, 115

**Citation :** (1998) 3 MLJ 241

**Hon'ble Judges :** S.M. Siddickk, J

**Bench :** Single Bench

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**Judgement**

S.M. Siddickk, J.—This is an petition filed by the petitioner/judgment-debtor u/s 115 of C.P.C. to set aside the order dated 1.8.1997 made in an unnumbered E.A. of 1997 in E.P.No. 4 of 1997 in O.S.No. 124 of 1996 on the file of District at Paramakudi.

2. On a perusal of the papers it appears that the respondents/decreed-holder in pursuance of an ex parte decree levied execution in E.P. 4 of 1997 in O.S.No. 124 of 1996 on the file of District Munsif at Paramakudi under Order 21, Rule 48 of C.P.C. to attach a sum of Rs. 1,113 in the monthly salary of the petitioner/judgment-debtor herein by issuing an order of garnishee.

3. In the said execution petition the petitioner/judgment-debtor entered appearance in person on 4.4.1997 and on the next hearing date i.e., on 6.6.1997 he remained absent and he was set ex parte and thereafter notice was issued by the execution court to the 2nd respondent viz., garnishee, and the Garnishee remained absent on 4.7.1997, and so the order of attachment of a sum of Rs. 1,113 in the monthly salary of the petitioner/judgment-debtor was passed, and thereafter no further notice was issued to the 1st respondent, and on 1.8.1997 the learned District Munsif at Paramakudi called both the respondents once again and set them ex parte and the attachment order was made absolute, and the execution petition was closed. Then on 4.7.1997 the counsel for the judgment-debtor filed an application under Order 21, Rule 106 of C.P.C. to set aside the ex parte order, and the said application was not numbered by the learned District

Munsif, though notice was taken by the counsel for the decree-holder before the lower court on 4.7.1997 and thereafter, on 1.8.1997 the learned District Munsif at Paramakudi passed an order in the numbered petition to set aside the ex parte order in the execution petition by stating as follows:

Since the E.P. is closed this petition is not maintainable. Hence this petition is rejected.

4. The Execution Petition was closed only for statistical purpose, and there is no final adjudication in this matter because there is no order of the learned District Munsif by stating that the Execution Petition was allowed giving direction to deduct a sum of Rs. 1,113 every month in the monthly salary of the judgment-debtor and send the same to the execution court. Such an order is conspicuously missing in the order passed in the execution petition on 1.8.1997 and as a result the attachment of substantial portion on 1.8.1997 and as a result the attachment of substantial portion in the monthly salary of the judgment-debtor remains in fact. The judgment-debtor was aggrieved against the said order of "closed" of the execution petition. Though the execution petition was closed on 1.8.1997, there is no final adjudication order in this matter by giving any direction to the garnishee to deduct a sum of Rs. 1,113 from the monthly salary of the judgment-debtor, and in my view such an order of "execution petition is closed" can be taken only as an order for statistical purpose.

5. Even ignoring this aspect and accepting that there was a final order of adjudication in this matter, even then it is not open to the learned District Munsif at Paramakudi to say that since execution petition is closed, the petition filed by the petitioner under Order 21, Rule 106 of the CPC to set aside the ex parte order in the Execution Petition No. 4 of 1997 is not maintainable. He has been set ex parte. He has a right to seek the relief of getting aside that order. It is not known as to how this application filed by the judgment-debtor to set aside the ex parte order is not maintainable when he has not put forth his objections to the attachment of his salary. A person who has got a right, must have a remedy. For the above reasons I am of the view that the order dated 1.8.1997 passed by the learned District Munsif at Paramakudi in the unnumbered Execution Application of 1997 filed by the judgment-debtor under Order 21, Rule 106 of C.P.C. is erroneous, and the same has to be set aside, and so this civil revision petition has to be set aside, and so this civil revision petition has to be allowed, and the learned District Munsif at Paramakudi shall number the application filed by the judgment-debtor under Order 21, Rule 106 of C.P.C. and take it on his file and then issue notice to the counsel for the decree-holder and dispose of the petition filed by the judgment-debtor under Order 21, Rule 106 of C.P.C. on merits after hearing both sides in accordance with law, and consequently I answer this point in favour of the petitioner/judgment-debtor.

6. In the result this civil revision petition is allowed and the order dated 1.8.1997 passed by the learned District Munsif at Paramakudi in the unnumbered petition of 1997 filed by the judgment-debtor under Order 21, Rule 106 of C.P.C. is set

aside. The learned District Munsif at Paramakudi is directed to number the said application and take it on his file and then issue notice to the counsel for the decree-holder and dispose the said petition filed under Order 21, Rule 106 of C.P.C. in accordance with law on the merits of the case after hearing both sides.

7. Consequently the stay petition in C.M.P.No. 2855 of 1998 is dismissed as unnecessary.