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**(2003) 03 BOM CK 0117**

**In the Bombay High Court**

**Case No :** Notice No. 759 of 2002 with Chamber Summons No. 1316 of 2001 in Execution Application No. 259 of 2002 in Suit No. 1530 of 1983

Om Prakash Navani and Another

APPELLANT

Vs

no Changas Pereira and Others

RESPONDENT

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**Date of Decision :** 20-03-2003

**Acts Referred:**

Limitation Act, 1963 — Article 136

**Citation :** AIR 2003 Bom 381 : (2003) 5 BomCR 565 : (2003) 3 MhLj 772

**Hon'ble Judges :** A.M. Khanwilkar, J

**Bench :** Single Bench

**Advocate :** Mahendra Shah and Mahendra Ghelani, instructed by Law Charter in support of Chamber Summons, for the Appellant; Aspi Chinoy, S.K. Sen, Sachin Mandlik and Akshay Kolsepatil, instructed by U.U. Berjis, F.E. Devitre, instructed by R.A.K. Najam-es-sani, for the Respondent

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**Judgement**

A.M. Khanwilkar, J.—The main question that would put at rest the entire controversy before this Court in the present proceedings is : whether the execution of the consent decree passed on August 20, 1983 in Suit No. 1530 of 1983 has become barred by limitation? Briefly stated, the plaintiffs instituted suit for specific performance against the defendants in which, Consent Terms were filed and the suit was decreed in terms of the said Consent Terms. It will be apposite to advert to the said Consent Decree as passed by this Court on 20th August, 1983. The same reads thus :--

"1. AGREED AND DECLARED that the agreement for sale dated 23rd October, 1981, Exhibit "B" to the plaint is valid, subsisting and binding on the parties.

2. ORDERED AND DECREED that defendant Nos. 1, 2 and 3 as the executors and executrix of the Last Will and Testament of Mary Antoninette Pereira (hereinafter referred to as "the said deceased") do sell, transfer and assign to and defendants Nos. 3, 4 and 5 do confirm in favour of the plaintiffs their leasehold right, title and interest in the immovable property known as "Mark Haven" more particularly

described in Exhibit "A" to the plaint and in the schedule hereto annexed (hereinafter referred to as "the said immovable property").

3. AGREED AND DECLARED that if in respect of the area of 474.39 square yards resumed by the Bombay Port Trust under the terms of the lease any additional F.S.I. is available, the plaintiffs shall be entitled to the benefit but the defendants shall not be liable in any manner whatsoever if no such additional F.S.I, is available nor will the plaintiffs are entitled to any diminution in price by reason thereof.

4. AGREED AND DECLARED that the sum of Rs. 13,00,000/- is due and payable by the plaintiffs to defendants Nos. 1 and 2 as the balance purchase price of the said immovable property.

5. The defendants Nos. 1 and 2 do obtain permission of the Board of trustees of the Port of Bombay to the assignment of the lease of the said immovable property in favour of the plaintiffs. The plaintiffs undertake to this Hon''ble Court to accept such terms and conditions that may the imposed by the Board of Trustees of the Port of Bombay and not to raise any objection thereto.

6. ORDERED AND DECREED that on permission of the Board of Trustees of the Port of Bombay being obtained this decree do operate as a conveyance and/or an assignment of the leasehold rights of the defendants in the said immovable property in favour of the plaintiffs.

7. ORDERED AND DECREED that the plaintiffs do pay to defendants Nos. 1 and 2 the sum of Rs. 13,00,000/- together with interest thereon at the rate of 4% per annum from the date hereof till payment within one month of the permission of the Board of Trustees of the Port of Bombay being obtained.

8. In the event of the plaintiffs committing default in payment of the said sum of Rs. 13,00,000/- and interest thereon at the rate of 4% per annum as mentioned hereinabove within a period of one month of the permission of the Board of Trustees of the Port of Bombay being obtained then the plaintiffs do pay to defendants Nos. 1 and 2 the said sum of Rs. 13,00,000/- with interest on the said sum of 13,00,000/- at the rate of 4% per annum from the date hereof till one month after permission is obtained and thereafter at the rate of 18% per annum till payment or realisation.

9. AGREED ORDERED AND DECLARED that the defendants have a charge on the said immovable property for the said sum of Rs. 13,00,000/- and interest as aforesaid.

10. In the event of the plaintiffs committing default in payment of the said sum of Rs. 13,00,000/- and interest thereon as aforesaid within six months after the permission of the Board of Trustees of the Port of Bombay is obtained, the Court Receiver do stand appointed Receiver of the said immovable property and do sell the same by public auction or private treaty and do apply the net sale proceeds thereof in or towards the payment to defendants Nos. 1 and 2 of the said sum of

Rs. 13,00,000/- and interest thereon as aforesaid and in the event of the net sale proceeds thereof being insufficient to satisfy in full the said sum of Rs. 13,00,000/- and interest thereon as aforesaid the plaintiffs do pay to defendants Nos. 1 and 2 the amount of such shortfall.

11. AGREED AND DECLARED that on the execution of these Consent Terms defendants Nos. 1 and 2 have put the plaintiffs in possession of the said immovable property and the plaintiffs are entitled to collect all rents and profits and to pay all outgoings in respect thereof (except for repairs unless such repairs are required to be carried out by the Board of Trustees of the Port of Bombay or the Municipal Corporation of Greater Bombay) and to transfer tenancies of flats in the said immovable property.

12. The plaintiffs do hereby indemnify and keep indemnified the defendants from and against all actions, costs, claims, demands, loss and damages if any that may be made against or suffered by the defendants or any of them by reason of any Act or omission whatsoever on the part of these plaintiffs.

13. AGREED AND DECLARED that on or before the execution of these Consent Terms defendants Nos. 1 and 2 have executed an irrevocable Power of Attorney in favour of the plaintiffs to enable the plaintiffs to recover the rents and profits and pay the outgoings in respect of the said immovable property and/or to represent defendants Nos. 1 and 2 before the Board of Trustees of the Port of Bombay for the purpose of obtaining the permission or assignment of the lease in favour of the plaintiffs and the defendants hereby undertake to this Hon''ble Court not to revoke and/or cancel the same except in the event of the plaintiffs making default in payment of purchase price and interest thereon.

14. The plaintiffs undertake to this Hon''ble Court not to sell, dispose of, mortgage, encumber or part with possession of the said immovable property until the plaintiffs have paid to defendants Nos. 1 and 2 the said sum of Rs. 13,00,000/- and interest thereon as aforesaid.

15. The parties do hereby agree to get the decree passed herein drawn up sealed and have the same duly lodged for registration with the Sub-Registrar of Assurances at Bombay and to do all other Acts, deeds, matters and things necessary for having the said decree registered and registration charges and other expenses if any required to be incurred for getting the decree registered shall be paid by the parties hereto in equal shares.

16. AGREED AND DECLARED that the Agreement regarding sale of furniture mentioned in paragraph 8 of the plaint is hereby cancelled by mutual consent and the defendants have refunded to the plaintiffs the sum of Rs. 5,000/- paid by the plaintiffs as advance price in respect of the said furniture.

17. No order as to costs of the suit. Dated this 20th day of August, 1983.

SD/-

Sd/-

Sd/-

Stmp-Sd/-

THE SCHEDULE OF THE PROPERTY ABOVE REFERRED TO : All THAT piece or parcel of land together with the buildings and erections thereon known as "Mark Haven" situated at Stand Road on the Apollo Reclamation Estate of the Trustees of the Port of Bombay at Colaba in the Island of Bombay containing by admeasurements 1655.71 square meters 1980.2/9 square yards or thereabouts (out of which the land admeasuring 474.3/9-Bombay) and bounded as follows; that is to say on or towards the North by "Evelyn House" the property of the Trustees on or towards the South by land belonging to the said Trustees on or towards the East by Strand Road and on or towards the West by the Municipal Pumping Station and partly by land belonging to the said Trustees which the said premises are registered in the Books of the Collector of Land Revenue Bombay under Cadastral Survey No. 3/384 of Colaba Division and are situated in the Registration District and Sub-District of Bombay City and Bombay Suburban and assessed by the and Collector of Municipal Rates and Taxes under "A" Ward No. 574(8) and Street No. 22."

2. Although my attention was drawn to various correspondence between the parties inter se and with the Bombay Port Trust Authority after the aforesaid decree was passed by this Court, however, I do not think it necessary to burden this Judgment with the said aspect because the question whether this Decree can be put into execution in view of the Execution Application filed on 29th September, 2001 is the core issue that needs to be considered. Pursuant to the said Application Notice under Order XXI, Rule 22 being Notice No. 759 of 2002 has been issued. Besides, the plaintiffs have taken out Chamber Summons No. 1316 of 2001, essentially, for enforcement of Clauses 5, 6 and 13 of the Consent Decree. Reliefs claimed in the Chamber Summons would read thus :--

"(a) That the defendant No. 1 by a mandatory order and injunction of this Hon"ble Court be ordered and directed to obtain the written permission of the Board of Trustees of the Port of Bombay for the assignment of the lease of the said suit property i.e. "Mark Haven" as more particularly described in Exhibit "A" to the plaint and in the Schedule annexed to the said Consent Decree dated 20th August 1983 and in accordance with the Clause No. 5 of the said Consent Decree in favour of the plaintiffs within a period of (4) four weeks from the date of the passing of the order hereof.

(b) That the defendants and respondents be further by mandatory order and injunction of this Hon"ble Court be ordered and directed to sign and execute all necessary papers, instruments, documents and deeds that may be necessary for the purpose of effecting the assignment of the lease of the said property i.e. Mark Haven as more particularly described in Exhibit "A" to the plaint and in the schedule annexed to the said Consent Decree dated 20th August, 1983 in

accordance with the said Consent Decree. Failing which and in alternative to prayer (a) and (b) above

(c) That the plaintiffs be permitted to deposit the balance of the decretal amount in the office of the Prothonotary and Senior Master and on deposit of such balance of decretal amount, the Prothonotary and Senior Master do apply and obtain the No Objection Certificate from the Board of Trustees of the Bombay Port Trust for and on behalf of the defendants/respondents for the assignment of the lease of the said suit property as more particularly described in the schedule annexed to the said Consent Decree, in favour of the plaintiffs.

(d) That after obtaining the permission from the Board of Trustees of the Bombay Port Trust, the Prothonotary & Senior Master do sign the Deed of Confirmation incorporating the Consent Decree and the permission so granted by the Board of Trustees of the Bombay Port Trust after paying the necessary Stamp Duty and Registration Charges to the Registrar of Assurances, Mumbai.

(e) That the defendants/respondents be restrained by an order and injunction of this Hon"ble Court from preventing and/or obstructing and/or denying the plaintiffs herein from exercising the powers conferred upon the plaintiffs by the said defendant No. 1 vide irrevocable Power of Attorney dated 13th May 1983 duly executed by the said defendant No. 1 along with the defendant No. 2 in accordance with the Clause No. 13 of the said Consent Decree and further be restrained by an order and injunction of this Hon"ble Court from interfering with the quiet, peaceful possession and enjoyment of the said suit property as more particularly mentioned in Exhibit "A" to the plaint and also in the Schedule to the said Consent Decree dated 20th August 1983, as envisaged by the said irrevocable Power of Attorney duly executed by the defendant No. 1 and defendant No. 2 and further be restrained from preventing and/or obstructing and/or denying the plaintiffs from exercising their rights and privileges qua the said property in accordance with the said Consent Decree dated 20th August 1983 and said irrevocable Power of Attorney dated 13th May 1983 duly executed by the defendant Nos. 1 and 2 which is still valid, subsisting and binding on the parties.

(f) That defendants/respondents be restrained by an order and injunction of this Hon"ble Court from exercising and/or ascertaining purported rights and privileges of any nature whatsoever as an owner or in any other capacity in respect of the said property or any part thereof, and/or occupants thereof in breach and/or violation of the said Consent Decree dated 13th August, 1983.

(g) Ad-interim and interim order in terms of prayer (e) and (f) above,

(h) Costs of the Chamber Summons and the order to be made therein;

(i) Such further and other reliefs as the nature and circumstances of the case may require, be granted."

3. Undisputedly, the plaintiffs have taken out Execution Application after expiry

of twelve years from the date of the decree. However, according to the plaintiffs, the Decree as passed, is a conditional decree and the same would become "enforceable" only upon happening of the event of permission being accorded by the Bombay Port Trust for the assignment of the lease of the said immovable property in favour of the plaintiffs. On the other hand, according to the defendants, the Decree as passed, is neither a conditional decree nor specifies deferred date for its enforcement as was required to be specified in the decree itself. And in such a situation, it is well settled that the decree becomes enforceable from the date when it was made i.e. on 20th August, 1983. Therefore, the Execution Application is barred by limitation. Various other contentions were raised by both the sides in the context of the Chamber Summons. However, if this Court were to hold that the execution of the subject decree is barred by limitation, then no other contention need to be addressed. I have preferred that course.

4. Before I proceed to examine the rival submissions, it will be necessary to advert to Article 136 of the Limitation Act, which reads thus:--

Description of Suit Period of limitation Time from which period begins to run

"136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.

Twelve years

2 (When) the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment of delivery in respect of which execution is sought, takes place : Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation." (emphasis supplied)

5. Besides Article 136, reference was also made to Section 18 of the Limitation Act by the Counsel appearing for the plaintiffs to contend that because of certain developments that took place after the passing of the decree, the limitation would get extended on account of the acknowledgment of the liability by the defendants. Section 18 of the Limitation Act reads thus :--

"18. Effect of acknowledgment in writing. - (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of

its contents shall not be received.

Explanation. - For the purposes of this section, -

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

Introduction. - The Section corresponds to Section 19 of the repealed Act IX of 1908 in all respects. It lays down the law as to effect of acknowledgment in writing on the computation of the period of limitation for institution of a suit or making an application."

However, it has been rightly argued on behalf of the defendants that Section 18 of the Act has no application to execution of a decree [as expressly provided in Explanation (c)], such as the present case, and therefore, submissions founded on principle stated therein, "are untenable.

6. The moot question that requires to be considered is; whether the Decree as passed, can be said to be a conditional decree or it became enforceable from the date when it was made? Going by the plain language of the Decree, to my mind, the same became enforceable from the date when it was made on 20th August, 1983. The plaintiffs have mainly asked for the enforcement of Clause 5 of the Decree - whereunder the defendants 1 and 2 were ordained to obtain permission of the Board of trustees of the Port of Bombay to the assignment of the Lease of the immovable property in favour of the plaintiffs. That Clause does not provide for any future date to discharge the obligation by defendant Nos. 1 and 2, but became enforceable with immediate effect. In such a situation, the former part of the provision providing for time from which limitation period begins to run, would apply.

7. To overcome this position, learned Counsel for the plaintiffs contends that on reading the Decree as a whole, it would appear that the same was a conditional decree and depended on the happening of the event of according of permission by the Board of Bombay Port Trust to the assignment of lease of the subject immovable property in favour of the plaintiffs and, since that event has not occurred so far, it has not become enforceable. It was also argued that the obligation of the plaintiffs under the decree of payment could be discharged only after the defendants had discharged their obligation. Even for that reason, the latter part of the provision would apply - in which case, the limitation period was still available and yet to commence. However, it is not possible to countenance

that submission. It is well settled that decree becomes enforceable from the date when it is passed, unless, the decree itself specifies some future date for its enforcement. In the present case, there is no specific date provided for the enforcement of the decree. Clause 5, on the other hand, cannot be read as a provision for providing a future date for its enforcement. Moreover, on reading the Decree as it is, I have no hesitation in taking the view that the same became enforceable on the date when it was passed on 20th August, 1983. The above view is reinforced by the recent enunciation of the Apex Court reported in Hameed Joharan (d) and Others Vs. Abdul Salam (d) by L.rs. and Others, . In this decision, the law has been neatly expounded. In paragraph 13 of the Judgment, the Apex Court has observed that Article 136 prescribes a twelve year period certain and what is relevant for Article 136 is, "as to when the decree became enforceable and not when the decree became executable." Besides, the Apex Court has observed in paragraph 34 of the Judgment that if no conditions are attached to the decree and the same has been passed declaring the rights of the parties finally, the Court is not required to deal with the matter any further, then the decree becomes enforceable on the date when it was passed. That is the test laid down by the Apex Court in paragraph 34 of the Judgment. The Apex Court has observed that the test thus should be has the Court left out something for being adjudicated at a later point of time or is the decree contingent upon the happening of an event i.e. to say the Court by its own order postpones the enforceability of the order - in the event of there being no postponement by a specific order of the Court, there being a suspension of the decree being unenforceable would not arise. This is well settled legal position.

8. No doubt, reliance was placed on the other decisions of the Supreme Court by the Counsel appearing for the plaintiffs to contend that the decree in the present case would become enforceable only on the happening of event of grant of permission by the Bombay Port Trust to the assignment of the lease of the subject immovable properties in favour of the plaintiffs. Reliance was placed on the decisions reported in Antonysami Vs. Arulanandam Pillai (D) by Lrs. and Another, , 2001(1) AH MR 789 in the case of Ratansingh v. Vijaysingh and Bhaskaran Vs. Sreedharan, . However, these decisions, to my mind, have reiterated the settled legal position that ordinarily a decree becomes enforceable immediately after the Judgment is pronounced, as in the present case. In the case of Antonysami (supra), the decree-holder deposited the balance of the sale price by the specified date but the measurement and demarcation was not done by the Judgment-debtor on or before the time fixed for the purpose. But it was done six years after the prescribed date. Besides, the Execution Petition was filed more than seven years later. In this backdrop, the Apex Court observed that a specified date was mentioned in the decree for the Judgment debtor to discharge his obligation and if he failed to carry out the same, the decree-holder could get the sale deed executed by taking help of the Court. In other words, in that case, the decree itself provided for future dates and immediately after the date specified, the decree became enforceable, understood thus, that decision is of no

avail to the case on hand, which does not specify any specific date for discharging the obligation of the defendants. Accordingly, the decree in a case, such as the present one, would become enforceable from the date of the decree. Whereas, in the case of Ratansingh (supra), the question was whether filing of an appeal would affect the enforceability of the decree. That question has been answered in para 9 of the decision. Even this decision is of no avail to the case on hand. The learned Counsel for the plaintiffs then strongly relied on the decision in Bhaskran's case (supra). Relying on observations in paras 4 and 5 of this decision, it was contended that when each party is required to fulfil certain conditions and if any party commits default, then the other party can seek the assistance of the Court and only in that eventuality, the decree would become executable. However, on close reading of this decision, it is seen that the same has no application to the case on hand. In that case, each party was required to fulfil certain conditions for acquiring the share of the other party in property before a specified time. In other words, the observations made in the said decision are in the fact situation of that case. As mentioned earlier, the Apex Court in Hameed's case (supra), after considering the gamut of case law, neatly stated the settled legal position regarding the distinction between "enforceable" and "executable" and observed that for the purpose of Article 136, the relevancy is of when the decree became enforceable and not when it became executable. It is not necessary to multiply the decisions on this aspect of the matter.

9. As observed earlier, to my mind, the decree as passed, is neither a conditional decree nor any specific deferred date for its enforceability has been provided for, in the decree itself. In such a situation, as observed in the case of Hameed (supra) the decree would become enforceable from the date when it was made i.e. on 20th August, 1983. It is not in dispute that the Execution Application and other related proceedings have been initiated much after twelve years from that date and as recently as September 2001. The other aspects which were pressed into service regarding the conduct of the parties, to my mind, need not be addressed in this Judgment.

10. Relying on Clause 7 of the decree, it was argued that the obligation of the plaintiffs would accrue only after the permission was granted and till such time, the decree cannot become enforceable. This submission clearly overlooks that the enforceability of the decree will have to be examined in the context of the obligation of the defendants and their failure to discharge that in terms of Clause 5. And once that part of the decree became enforceable from the date of the decree, the limitation cannot be arrested due to any subsequent event or any other provision in the decree. This view is reinforced by the very provision in Article 136 of the Act. Taking the other view would mean that the decree shall not become enforceable so long as permission is not granted by the Bombay Port Trust and that period can be limitless, for the Bombay Port Trust has already declined to grant permission for the decree in the present form. That view will be wholly untenable.

11. Counsel for the plaintiffs had strongly relied on the averments in paragraph 38 of the plaint in Suit No. 3091 of 2001 filed by the defendants to contend that even the defendants have understood that the limitation would start running from 1991 onwards. That, to my mind, is incorrect reading of the assertion made in the plaint. In Paragraph 38 of the said plaint in suit No. 3091 of 2001, the defendants have asserted as under:

"The Assignment contemplated by the said Agreement/Consent Terms became incapable of performance in 1991."

Emphasis was placed on expression "incapable of performance from 1991". However, the submission clearly overlooks the distinction between incapability of the performance of the decree and the date of its enforceability. Understood thus, I have no hesitation in taking the view that Execution Application and related proceedings taken out by the plaintiffs in relation to the Consent Decree dated 20th August, 1983 are obviously barred by limitation, having been filed after expiry of twelve years from the date when the decree became enforceable.

12. In the circumstances, the Notice under Order XXI, Rule 22 would stand discharged. The Chamber Summons and the Execution Application taken out by the plaintiffs are dismissed.

13. No order as to costs.