

(2014) 07 GUJ CK 0132

In the Gujarat High Court

Case No : Special Civil Application No. 4200 of 2012

Paschim Gujarat Vij Company Ltd.

APPELLANT

Vs

Rajesh Steel Industries

RESPONDENT

Date of Decision : 31-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 105(2), Order 21 Rule 105(3), Order 21 Rule 106
Limitation Act, 1963 — Section 14, 2(1), 5

Citation : (2014) 3 GLR 2454

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Dipak R. Dave, Advocate for the Appellant; A.S. Vakil, Advocate for the Respondent

Judgement

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K.M. Thaker, J.—In present petition, the petitioner has prayed, inter alia, that:

"7(A) This Hon"ble Court may be pleased to issue an appropriate writ, order or direction to quash and set aside the order dated 31-12-2011 passed by the learned Principal Senior Civil Judge, Bhavnagar in Misc. Civil Application No. 99 of 2010 and further be pleased to allow the Misc. Civil Application of the petitioner;

(B) This Hon"ble Court may be pleased to issue appropriate writ, order or direction to set aside the ex-parte dismissal of Execution Application and further be pleased to direct that Execution Application No. 7 of 1999 be restored to its original file and the learned Senior Civil Judge, Bhavnagar may be directed to proceed with the said Execution Application in accordance with law."

The factual matrix of present case can be summarised thus:

1.1. The petitioner herein is original plaintiff and also the judgment creditor - decree holder and the respondent herein is original defendant and also judgment-debtor. For sake of convenience, original plaintiff and defendant are described as

petitioner and respondent.

1.2. The petitioner herein filed a suit being Special Civil Suit No. 119 of 1987 for recovery of Rs. 1,49,913-40 towards the alleged dues from the respondent.

1.3. It is further alleged by the petitioner that on 5-7-1997, the learned trial Court decreed the suit in its (plaintiffs) favour and directed the respondent herein {i.e. original defendant) to pay Rs. 1,49,913-40 with interest at the rate of 30% from the date of filing of the suit until actual payment.

1.4. On or around 18-3-1999, the judgment-creditor - decree holder filed an application for execution of the decree dated 5-7-1997. The said Execution Application was registered as Execution Application No. 7 of 1999.

1.5. After examination of the said application, the learned Court passed order to issue notice as per and under Rule 22.

1.6. Subsequently, during pendency of the said Execution Application No. 7 of 1999, the learned executing Court passed direction, under Order 21, Rule 30, vide order dated 14-12-2005 to issue warrant of attachment of movable properties of the judgment-debtor"s (i.e. present respondents").

1.7. The learned executing Court dismissed the said Execution Application No. 7 of 1999 vide order dated 1-9-2009 for the reasons recorded in the said order.

1.8. In November, 2010, i.e. almost 14 months after, the Court passed the impugned order dated 1-9-2009, the decree holder, i.e. the petitioner herein, approached the learned executing Court and filed an application dated 2-11-2010, which came to be registered as Misc. Civil Application No. 99 of 2010.

A glance at the said application shows that the petitioner titled and described the said application as "Delay condonation application."

1.9. By way of the said Misc. Application being Misc. Civil Application No. 99 of 2010 dated 2-11-2010, the petitioner requested the learned Executing Court to condone the delay and permit it to file "Execution Application".

1.10. With reference to delay, the petitioner has claimed (in Para 2.5 of the petition) that 120 days" delay occurred in taking out the Application No. 99 of 2010.

1.11. What is more relevant and important is the contradiction and anomaly in the petitioner"s stand inasmuch as in Para 2.5 of the petition, the petitioner has claimed that extent of delay is 120 days whereas, at one place in Para 6 of said Misc. Application No. 99 of 2010, the petitioner has mentioned that the extent of delay is 120 days whereas in the same Para 6 of the application, the petitioner has also said that the extent of delay is 485 days and during the hearing of said Misc. Civil Application No. 99 of 2010 before learned executing Court, the learned Advocate for the petitioner acknowledged that extent of delay is 485 days. This aspect is recorded by learned Court in impugned order (first Paragraph below

title of issue Nos. 1 and 2 in the impugned order).

1.12. Another relevant aspect is that there is no material, and there is not an averment either in said Misc. Application or even in present petition, to establish that on the same day any substantive and separate Execution Application or any application other than the said Misc. Application No. 99 of 2010 (e.g. an application seeking "restoration" of Execution Application No. 7 of 1999) was also filed. Thus, there is nothing on record to establish the terminal point for determination of total length/period of delay.

1.13. By treating the said Misc. Application No. 99 of 2010 as an application under sub-rule (1) of Rule 106 of Order 21 and after considering the rival submissions and after taking into account relevant provisions and factual background, more particularly the date on which the order dismissing the Execution Petition No. 7 of 1999 was passed and the date when the said Misc. Application No. 99 of 2010 came to be filed, the learned executing Court dismissed the said Misc. Application No. 99 of 2010 (filed on 2-11-2010) vide order dated 31-12-2011 on the ground that in view of Sec. 5 of the Limitation Act and sub-rule (3) of Rule 106 read with sub-rule (1) of Rule 106 of Order 21 of the Code, the Court does not have power to condone delay.

1.14. The petitioner (i.e. the holder of the decree dated 5-7-1997) is aggrieved by the said order dated 31-12-2011 hence, present petition.

2. In light of the factual background, learned Advocate for the petitioner would contend that the learned executing Court has committed error in construing the provision under Order 21, Rule 105, Order 21, Rule 106 and Sec. 5 of the Limitation Act and has also committed error in holding that Sec. 5 of the Limitation Act would not be applicable in such cases. Learned Advocate for the petitioner would also contend that the period of limitation ought to have been calculated and considered from the date of knowledge of the order dismissing the Execution Petition No. 7 of 1999 and not from the date of the order dismissing the Execution Petition for non-prosecution, i.e. 1-9-2009. Learned Advocate for the petitioner would also contend that the learned executing Court has committed error in exercising jurisdiction conferred by law, and that the application for condonation of delay ought to have been considered liberally and it should also have been appreciated by the learned executing Court that there was no fault on the part of the decree holder and that the delay was not caused intentionally. Learned Advocate for the petitioner submitted that it should also have been considered by the learned Court that the defendants willfully avoided the valid decree and did not discharge the obligation. The learned Advocate for the petitioner also submitted that the plaintiff-petitioner - Electricity Company had filed the Execution Petition No. 7 of 1999 on 18-3-1999 within limitation prescribed under Art. 136 of the Limitation Act, and that therefore, so far as the said Misc. Application No. 99 of 2010 filed on 2-11-2010 is concerned, the provision under Art. 136 of the Limitation Act would not be applicable. The learned Advocate for the petitioner relied on the decision by Apex Court in case

of J. Kumaradasan Nair and Another Vs. IRIC Sohan and Others, .

2.1. Per contra, the learned Counsel for the respondents, i.e. the judgment-debtors, while opposing the said Application No. 99 of 2010 submitted, inter alia, that the Execution Petition is hit by vice of delay, and that therefore, it is not maintainable. The respondents - original defendants also contended that in view of the provision under Order 21, Rule 105, Order 21, Rule 106 of the Code read with Sec. 5 of the Limitation Act, 1963, learned executing Court does not have jurisdiction to condone the delay, and that therefore, also the Application No. 99 of 2010 is not maintainable and the order is just, legal and proper and in consonance with the provision contained under Order 21, Rule 106 read with Order 21, Rule 105 of the Code and Sec. 5 of the Limitation Act. Learned Counsel for the respondents relied on the decisions in the case between M. Ponnupandian Vs. Selvabakiyam and Others, , C.L. Cleetus Vs. South Indian Bank Ltd. and Another, , Damodaran Pillai and Others Vs. South Indian Bank Ltd., , Mahabir Sah Vs. Bibi Jubeda Khatoon and Others and Deo Narayan Goala, (Deceased by L.R.) and Others Vs. Jagadish Pandit, .

3. I have heard learned Counsel for the petitioner and respondent at length and I have also considered rival submissions, relevant provisions and the facts of the case, the material on record and the decisions.

4. In order to consider the rival submissions and to examine the order impugned in present petition, it would be appropriate to take into consideration the factual background and relevant provisions viz. Art. 136 of Limitation Act, Order 21, Rule 105, Order 21, Rule 106 of C.P.C. and Sec. 5 of the Limitation Act, 1963, which read thus:

"Article 136 of Limitation Act:

Order 21, Rule 105 - Hearing of application:- (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex-parte and pass such order as it thinks fit.

(Emphasis supplied)

Order 21, Rule 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 or 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 the date when applicant had knowledge of the order.

(Emphasis supplied)

Section 5 of Limitation Act - Extension of prescribed period in certain cases:- Any appeal or any application, other than an application under any of the provisions of Order 21 of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation:- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section."

4.1. So far as sub-clause (1) of Rule 105 is concerned, it postulates that a date should be "fixed" for "hearing" of the application. This aspect emerges from the words "may fix a day for hearing of the application" and also from the words used in sub-rule (2) i.e. where on the day "fixed" or any other day to which the "hearing" may be adjourned.

4.2. Sub-rule (2) of said Rule 105 empowers the Court to pass an order dismissing the application if "on the day fixed or any other day to which the hearing is adjourned", the applicant does not appear when the case is called out for hearing. According to the sub-rule (3) of said Rule 105, if the opposite party does not appear while the applicant appears before the Court, then, the Court may pass ex-parte order.

4.3. Simultaneously, power to set aside such order is also conferred on the Court.

4.4. The power to set aside the order is conferred by virtue of sub-rule (1) of Rule 106, which provides, inter alia, that the applicant against whom the order is made under sub-rule (2) of Rule 105 or the opponent against whom ex-parte order is made under sub-rule (3) of Rule 105 or under sub-rule (1) of Rule 23 may request the Court to set aside such order.

4.5. The said Rule 106 empowers the executing Court, if the Court is satisfied that there was sufficient cause for non-appearance, to set aside such order on such terms as the Court thinks appropriate and thereafter, the Court shall fix a day for hearing of the application.

4.6. However, the said power is subject to one limitation, or restriction, imposed by virtue of sub-rule (3) of Rule 106 viz. the said power can be exercised if the application under sub-rule (1) is made within 30 days from the date of the order (or from the date of knowledge of the order passed ex-parte).

5. On reading of the impugned order, it emerges and becomes clear that while resisting the Misc. Application, the opponent raised objection against the said Misc. Civil Application No. 99 of 2010 considering the application as an application under sub-rule (1) of Rule 106 and the learned executing Court also, without examining whether the application falls within the purview of sub-rule (1) of Rule 106 or not and without recording any conclusion; passed the impugned order dated 1-9-2009 below the above referred Misc. Application No. 99 of 2010 by assuming that, and by treating the said application as if, the said application is an application (i.e. "restoration application") which would fall within purview of sub-rule (1) of Rule 106.

5.1. Therefore, before proceeding further, it is relevant and necessary to examine as to whether the said Misc. Application No. 99 of 2010 is an application which would come within purview of, and whether it can be treated and considered as, an application within purview of, sub-rule (1) of Rule 106.

5.2. This is necessary also because the opponent has opposed the application on strength of the provision under sub-rule (3) of Rule 106.

5.3. It is pertinent that the said sub-rule (3) of Rule 106 applies to an application under sub-rule (1) of Rule 106 and not to any other application, (i.e. to an application made under any other provision of the Code), and that therefore also, it is necessary and appropriate to examine and determine whether the said Misc. Application No. 99 of 2010 falls within purview of sub-rule (1) of Rule 106 or not.

6. Before proceeding, it is appropriate to note that after the petitioner filed said Misc. Civil Application No. 99 of 2010, the learned Court had passed order to issue notice to the respondent in response to which the respondent entered appearance in the said Misc. Civil Application No. 99 of 2010, but, for some reason, he did not file any reply against the application.

6.1. The respondent, however, filed written arguments/submissions and opposed the petitioner's application on the ground that the learned executing Court does not have any power to entertain any application, which is filed beyond the period prescribed under sub-rule (3) of Rule 106 of Order 21 of the Code.

6.2. In this context, it is relevant to mention that even in present petition, the respondent has not filed any affidavit denying or disputing any factual aspects asserted by the petitioner. During the hearing of the petition, the respondent contested and opposed the petition on the aforesaid solitary ground.

7. Now, turning to the said Misc. Application, it is relevant to recall and keep in focus that:

- (a) the learned Court dismissed the Execution Petition No. 7 of 1999,
- (b) whereas the petitioner/decreed holder filed the said Misc. Civil Application on 2-11-2010,
- (c) there is nothing on record to establish that any other application, i.e. any application other than the said Misc. Civil Application No. 99 of 2010 is filed by the petitioner, i.e. the decreed holder,
- (d) there is no claim or assertion either in the memo of said application and/or even in present petition claiming and asserting that either before filing said Misc. Application or along with the said application the petitioner filed any other application (e.g. substantive restoration application or substantive execution petition). Even in the impugned order, there is no observation or discussion on this count.

8. In this backdrop, it is appropriate at this stage to examine the above mentioned issue i.e. whether the said Misc. Application No. 99 of 2010 is an application which would come within purview of and can be treated and considered as an application within purview of, sub-rule (1) of Rule 106.

8.1. An application can be treated as an application under, and within the purview of, sub-rule (1) of Rule 106, if:

- (1) the application is filed with reference to or against order passed under Rule 23(1) or Rule 105(2) or Rule 105(3); and
- (2) the applicant, by such application, seeks that the order passed either under sub-rule (1) of Rule 23 or under sub-rule (2) or sub-rule (3) of Rule 105 may be set aside; and
- (3) the applicant also seeks that the Execution Application (wherein the Court passed order under Rule 23(1) or Rule 105(2) or Rule 105(3) of Order 21), may be restored and date for hearing of the application may be fixed/appointed; and
- (4) the order which the Court passed i.e. the order which is sought, by way of the said application, to be set aside must be an order passed either under Rule 23(1) or under Rule 105(2) or under Rule 105(3), because application contemplated under sub-rule (1) of Rule 106 can be made only in respect of the order passed under sub-rule (2) or sub-rule (3) of said Rule 105 of Order 21 or under sub-rule (1) of Rule 23 of Order 21.

8.2. Thus, an application under Rule 106(1) would not be maintainable if the order against which the application is filed is not passed under sub-rule (1) of Rule 23 or sub-rule (2) or sub-rule (3) of Rule 105 i.e. if it is filed against an order which is not filed under sub-rule (2) or (3) of Rule 105 or sub-rule (1) of Rule 23.

9. On examination of the application in question (i.e. the Misc. Civil Application No. 99 of 2010), in light of the above mentioned requirements of Rule 106(1), it

emerges that the said application is not and cannot be treated as an application seeking restoration of the Execution Petition No. 7 of 1999.

9.1. This aspect emerges and becomes clear from the fact that according to the tenor and the text and the contents of the said Misc. Application and according to the relief prayed for therein, the ambit of the said application is limited inasmuch it is filed with limited purpose and with limited prayer, viz.:

(a) seeking condonation of delay; and

(b) seeking permission to file Execution Petition for execution of decree in Civil Suit No. 119 of 1987.

9.2. In this context, it is relevant to take into account the relief prayed for in the application which makes it clear that in the said Misc. Application, the applicant has neither prayed that the order dated 1-9-2009 may be set aside/recalled nor it has prayed that the Execution Application may be restored.

9.3. Even on plain reading of said application, it comes out that the said application is merely an application seeking condonation of delay.

9.4. These aspects emerge from the relief prayed for in the said Misc. Civil Application No. 99 of 2010 which reads thus:

"(a) Considering the aforesaid reasons permission to file Execution Petition for execution of decree in Civil Suit No. 119 of 1987 may be granted by condoning delay caused in filing the Execution Petition for execution of the said decree.

(b) Be pleased to grant ancillary relief or reliefs to this application."

(Free translation from Gujarati)

9.5. On examining the application and from the text, the contents and the tenor of the said Misc. Civil Application No. 99 of 2010 and more particularly the relief prayed for therein (translation quoted above), it comes out that the said application in itself is not substantive "restoration application" (i.e. application seeking restoration of Execution Petition No. 7 of 1999) as contemplated under sub-rule (1) of Rule 106.

9.6. On reading the said Misc. Application, it also comes out that the said application is not and cannot be deemed to be or construed as main or substantive Execution Application. It is pertinent that the said Misc. Application No. 99 of 2010 does not contain request for execution of the decree. Another important aspect required to be taken into account at the outset is provision under sub-rule (2) of Rule 11 of Order 21. The said sub-rule (2) prescribes the format and the requirements of an Execution Application. It is prescribed under the said sub-rule that:

"(2) Written application:- Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court

to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely--

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the Court is required whether--
 - (i) by the delivery of any property specifically decreed;
 - [(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;]
 - (iii) by the arrest and detention in prison of any person;
 - (iv) by the appointment of a receiver;
 - (v) otherwise, as the nature of the relief granted may require."

9.7. Thus, Execution Application must contain the details prescribed by the said sub-rule. If one examines the Misc. Application No. 99 of 2010, it comes out that the said Misc. Application does not fulfill and does not meet with the requirements prescribed (for a regular and substantive Execution Application) under sub-rule (2) of Rule 11 of Order 21. Besides this, on 1-9-2009 i.e. when the learned Court passed the order dismissing Execution Application No. 7 of 1999 as well as on 2-11-2010 i.e. the date when the petitioner filed said Misc. Application No. 99 of 2010, the remedy to file substantive Execution Application or to file another/fresh Execution Application was already barred since the period of limitation (12 years, as per Art. 136) had, by then, already expired.

10. More important is the fact that on examination of the averments and submissions in the application as well as tenor and purport of the averments and submissions in the said application and having regard to the relief prayed for by the applicant in the said Application No. 99 of 2010, it comes out clearly that in

the said application, the applicant - petitioner has not prayed that the order dated 1-9-2009 (i.e. the order dismissing the Execution Petition) may be set aside. Further, the applicant has also not prayed that the "Execution Application No. 7 of 1999 may be restored" and even the petitioner has described the said Application No. 99 of 2010 as "application for condonation of delay".

11. It is relevant to note that the Rule 106 of Order 21 of the Code takes in its fold only such application whereby the applicant seeks that (a) the order passed under Rule 105(2) or Rule 105(3) or Rule 23(1) may be set aside, and (b) the Execution Application may be restored and a date for hearing of the application may be fixed/appointed.

11.1. The said Misc. Application does not fulfill and does not meet with any parameters or requirements for an application under Rule 106(1).

11.2. Thus, the said Misc. Application would not fall within purview of sub-rule (1) of Rule 106 and it is not possible to construe, read and treat the said Misc. Application No. 99 of 2010 as an application under or within purview of sub-rule (1) of Rule 106 seeking restoration of the Execution Application No. 7 of 1999.

11.3. Therefore, the reply to the issue mentioned hereinabove in Para No. 9 read with Para Nos. 6.1 and 6.2 is in negative.

12. In this background, the next question which would arise is: when the Misc. Application in question is not an application which would come within purview of sub-rule (1) of Rule 106, whether the sub-rule (3) of Rule 106 and the restriction flowing therefrom will be applicable to the said Misc. Application No. 99 of 2010.

13. In view of the nature and range of the dispute, it is necessary to keep in focus that in present case, two periods of limitation are relevant, viz.--

(a) 12 years, i.e. the period of limitation prescribed under Art. 136 of Limitation Act (which is relevant for and applicable in case of filing substantive Execution Application under Order 21 of the Code for execution of a decree); and

(b) 30 days, i.e. the period of limitation prescribed under sub-rule (3) of Rule 106 of Order 21 (which is relevant for filing "restoration" application under sub-rule (1) of Rule 106 against order passed under Rule 23(1) or Rule 105(2) or Rule 105(3) of Order 21).

14. Now, it is necessary to recall that the respondent raised the objection in light of sub-rule (3) of Rule 106 and submitted, inter alia, that the said Application No. 99 of 2010 is filed after expiry of time limit prescribed under sub-rule (3) of Rule 106 and that the learned executing Court does not have power to condone delay and entertain the said Misc. Application which is filed after limit of 30 days prescribed under sub-rule (3).

14.1. By virtue of sub-rule (1) of Rule 106 the learned Court has power to set aside an ex-parte order passed under Rules 23(1) or 105(2) or 105(3) of Order 21 (provided the applicant shows sufficient cause and satisfies the Court for his

non-appearance), however, such power can be exercised only if request application under sub-rule (1) is made within 30 days because the said sub-rule (3) of Rule 106 prescribes time limit viz. 30 days, for filing application under sub-rule (1) of Rule 106 and entire Rule 106 does not contain any provision on strength of which delay, if any, caused in filing application under sub-rule (1) can be condoned and an application filed under sub-rule (1) of Rule 106 after more than 30 days from the date of order can be entertained.

14.2. The position as regards power of learned executing Court in matter of condoning delay, if any, in submitting application under sub-rule (1) of Rule 106 is no more res integra. The position is explained and clarified by Hon"ble Apex Court in the case between Damodaran Pillai and Others Vs. South Indian Bank Ltd., wherein Hon"ble Apex Court in Paragraphs 8, 10 to 12, 14 to 16, 20 and 21 observed that:

"8. It is not in dispute that the Execution Petition was dismissed in terms of the provisions of Rule 105 of Order 21 of the Code of Civil Procedure. Sub-rule (1) of the said Rule provides for fixing a day for hearing of the application, whereas sub-rule (2) thereof envisages that if on the day so fixed or on any other day to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed. Sub-rule (3) of the said Rule postulates hearing of an application ex-parte in a case where the applicant appears and the opposite party to whom the notice has been issued by the Court does not. Sub-rule (1) of Rule 106 of Order 21 of the Civil Procedure Code provides for restoration of the application for default or setting aside of the order passed under sub-rules (2) and (3) of Rule 105 of Order 21 in the following terms:

"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."

10. The learned Executing Court allowed application of restoration filed by the respondent herein on the ground that it acquired the knowledge about the dismissal of the Execution Petition only on 25-3-1998.

11. The learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabout. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of

limitation being knowledge about the disposal of Execution Petition would arise only in a case where an ex-parte order was passed and that too without proper notice upon the judgment-debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the Execution Petition was, therefore, wholly irrelevant.

12. We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the Second Schedule appended to the Limitation Act, 1963.

14. It is also trite that the Civil Court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Sec. 5 of the Limitation Act, the Court cannot invoke its inherent power.

15. It is well-settled that when a power is to be exercised by a Civil Court under an express provision, the inherent power cannot be taken recourse to.

16. An application under Sec. 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order 21 of the Code. In that view of the matter, even an application under Sec. 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked.

20. The principles underlying the provisions prescribing limitation are based on public policy aiming at justice, the principles of repose and peace and intended to induce claimants to be prompt in claiming relief.

21. Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation."

14.3. Thus, according to sub-rule (3) of Rule 106, application under sub-rule (1) of Rule 106 for restoration of Execution Application i.e. the Execution Application, in respect of which an order is passed either under sub-rule (2) or (3) of Rule 105 or under sub-rule (1) of Rule 23) must be filed within a period of 30 days from the date of the order.

14.4. However, the said provision viz. sub-rule (3) will be applicable to an application which comes within the purview of sub-rule (1) of Rule 106 and not to an application which does not come within the purview of sub-rule (1) of Rule 106.

14.5. On the other hand, an application to be an application under sub-rule (1) of Rule 106, must match and fit into earlier mentioned requirements (Para 9.1)

and only if the application fulfils the said requirements, then alone, it can be treated as, and can be dealt with as, an application under and within purview of sub-rule (1) of Rule 106. Moreover, such application must be filed within 30 days after the order under Rule 23(1) or Rule 105(2) or Rule 105(3).

14.6. Therefore, when in present case a conclusion is reached that the Misc. Application No. 99 of 2010 does not come within purview of sub-rule (1) of Rule 106, then, the said sub-rule (3) will not be attracted and the said provision will not come in operation in present case.

14.7. Consequently, even the restriction imposed by the said provision will not be attracted and will not be applicable to the said application.

14.8. Therefore, the reply to the second issue viz. the issue mentioned hereinabove in Para No. 11 is also in negative.

15. Before proceeding further, it would be appropriate to deal with one submission by the learned Advocate for the petitioner. Learned Advocate for the petitioner relied on the decision in the case between J. Kumaradasan Nair and Another Vs. IRIC Sohan and Others, and submitted that merely because the petitioner has made mistake in mentioning relevant provision, the application should not have been dismissed and should have been considered on merits.

15.1. The said submission, though attractive at first blush, does not answer the objection raised by the respondents in light of the provision under Order 21, Rule 106. A glance at the observations in the said decision, which is relied on by learned Advocate for the petitioner, clarifies this aspect. In the said decision, it is recorded that:

"8. Pursuant to or in furtherance of the said observations, a Revision Application was filed by the appellant on 30-6-2008 which was marked as C.R.P. No. 593 of 2008 (B). Along with the said application, an application for condonation of delay in terms of Sec. 5 of the Act was also filed. However, later on the said application was withdrawn and an application under Sec. 14 thereof was filed. An affidavit was affirmed in support thereof, inter alia, stating:

"The impugned order is dated 6-9-2005. The first appeal was filed on 3-10-2005. The second appeal was disposed of by this Hon'ble Court on 28-6-2008. This Revision Petition is filed on 7-7-2008. Hence in any view of the matter this Revision Petition is well within time. It is also submitted that the time taken for obtaining certified copies also is liable to be excluded."

12. The question which arises for consideration is as to whether only because a mistake has been committed by or on behalf of the appellants in approaching the appropriate forum for ventilating their grievances, the same would mean that the provision of sub-sec. (2) of Sec. 14 of the Limitation Act, which is otherwise available, should not be taken into consideration at all. The answer to the said question must be rendered in the negative. The provisions contained in Secs. 5 and 14 of the Limitation Act are meant for grant of relief where a person has

committed some mistake.

The provisions of Secs. 5 and 14 of the Limitation Act alike should, thus, be applied in a broad-based manner. When sub-sec. (2) of Sec. 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Sec. 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature."

In the said decision, after taking into consideration the facts, Hon"ble Apex Court observed that:

"13. There cannot furthermore be any doubt whatsoever that having regard to the definition of "suit" as contained in Sec. 2(1) of the Limitation Act, a revision application will not answer the said description. But, although the provisions of Sec. 14 of the Limitation Act per se are not applicable, in our opinion, the principles thereof would be applicable for the purpose of condonation of delay in filing an appeal or a revision application in terms of Sec. 5 thereof.

14. It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a Court if it is otherwise vested in it in law. While exercising its power, the Court will merely consider whether it has the source to exercise such power or not. The Court will not apply the beneficent provisions like Secs. 5 and 14 of the! Limitation Act in a pedantic manner. When the provisions are meant to apply and in fact found to be applicable to the facts and circumstances of a case, in our opinion, there is no reason as to why the Court will refuse to apply the same only because a wrong provision has been mentioned. In a case of this nature, sub-sec. (2) of Sec. 14 of the Limitation Act per se may not be applicable, but as indicated hereinbefore, the principles thereof would be applicable for the purpose of condonation of delay in terms of Sec. 5 thereof."

15.2. It can be seen that even in the said decision, Hon"ble Apex Court has observed that, mentioning of a wrong provision or non-mentioning any provision of law would not be sufficient to take away the jurisdiction of the Court if it is otherwise vested in it in law. Therefore, crucial issue is whether the power to condone delay is, "otherwise" vested in the learned executing Court while considering the application of like nature.

15.3. However, as explained by Hon"ble Apex Court in above mentioned decision in case of Damodaran Pillai (supra), the learned executing Court does not have any power and authority in law to condone delay in filing application under Rule 106(1), and that therefore, the submission on the ground that merely because wrong provision is mentioned or relevant provision is not mentioned, the application should not have been dismissed, is ill-founded.

16. Now, when in present case, the above mentioned two aspects are examined

and two conclusions (viz. the said Misc. Application No. 99 of 2010 is not application which comes within purview of sub-rule (1) of Rule 106 and that the restriction - i.e. the time-limit - under sub-rule (3) of Rule 106 is not applicable to the said Misc. Application) are reached, the question, which, as a corollary, ought to have been addressed by the Court is, how, and in light of which provisions, the said Misc. Application No. 99 of 2010 should be considered and decided.

16.1. From the impugned order, it emerges that the learned Court did not examine the application and did not address the above discussed issues.

16.2. If the learned Court had addressed the said issues and examined the application from the said perspective, then, the learned Court would have noticed the above discussed aspects and having found that the application does not come within purview of Rule 106(1), the learned Court would have recognised that the said Misc. Application is required to be examined and decided from other perspective and in light of other applicable provision/s.

16.3. Instead, the learned Court proceeded on the above mentioned assumption and decided the said Misc. Application No. 99 of 2010 without examining it in light of any other provision and/or from any other perspective.

16.4. This is an error or defect in the order. In the facts of the case, the said Misc. Application ought to have been examined and decided from all possible perspectives and angles and in light of relevant provisions. The said process can be, and should be, undertaken by the learned Court and not in a petition or under supervisory jurisdiction. Therefore, the matter deserves to be remanded to the learned Court for consideration of these aspects in light of material on record.

17. Now, i.e. after having reached to the above conclusions, as such, it is not necessary to address any other aspect or issue, however, it appears appropriate that the above-mentioned [Para 9.1(4)] other feature (viz. whether the order dated 1-9-2009 under which the Court dismissed the Execution Application No. 7 of 1999 is, and whether it can be considered as, an order passed in exercise of and under Rule 23(1) or Rule 105(2) or Rule 105(3) of Order 21) may be considered.

17.1. In this context, it is relevant to note that sub-rule (1) of Rule 106 of Order 21 provides that an application under the said provision may be made by a person against whom an order under sub-rule (2) of Rule 105 or by the person against whom an ex-parte order under sub-rule (3) of Rule 105 is passed or when an order under sub-rule (1) of Rule 23 is passed.

17.2. If the order in question is not passed under Rule 105 (or Rule 23(1) of Order 21), then, the application which is filed would not be an application against order made under Rules 105(2) or 105(3) or 23(1) (i.e. it would not be an application under sub-rule (1) of Rule 106), therefore, sub-rule (1) or sub-rule (3) of Rule 106 would not be attracted and will not be applicable.

17.3. Therefore, it was necessary and relevant for the learned Court to examine the issue viz. whether the order dated 1-9-2009 is passed in exercise of and under sub-rule (2) of Rule 105 and whether it can be considered as an order under Rule 105(2). However, the said aspect is not addressed in the impugned order.

18. Now, so far as the above mentioned aspect is concerned, it is pertinent that the said sub-rule (2) of Rule 105 empowers the Court to dismiss the Execution Application if the applicant does not appear at the time when the case is called out and taken up for "hearing" on the day "fixed" for hearing. The said sub-rule contemplates four requirements viz.:

- "(a) the Court must have "fixed" a date for "hearing" of the Execution Application,
- (b) on the date so fixed (or on any other day when the hearing may be adjourned) the Court takes up the Execution Application for "hearing", and
- (c) when the Court takes-up the Execution Application for hearing (on the date fixed or on the date to which it was earlier adjourned) the applicant does not appear,
- (d) the reason for passing the order dismissing the Execution Application should be "absence/non-appearance of the applicant when the application is called out and taken up for hearing."

18.1. Thus, the said provision viz. Rule 105(2) contemplates that Execution Application can be dismissed "on the date of hearing" and confers special and specific power to dismiss the application on "date of hearing". However, dismissal of the application on any other date or at any other stage will not attract or will not fall under Rule 105(2).

19. It is settled position that when specific provision conferring particular power is made, then, recourse cannot be had to inherent power. In this context, reference may be made to following observations by Hon"ble Apex Court in the case between Arjun Singh Vs. Mohindra Kumar and Others, , wherein it is observed that:

"(19) In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates...."

19.1. In this context, it may be recalled that Rule 105, by virtue of its sub-rule (1) requires the Court to fix a date of hearing in respect of an Execution Application. It is trite that if law requires that particular steps should be taken or particular procedure should be followed before passing order, then, such; steps

should be taken or procedure must be followed. Therefore, when the Court proposes to make an order under sub-rule (2) or sub-rule (3) of Rule 105, then, the procedure prescribed under sub-rule (1) of Rule 105 should be complied. It, therefore, follows that before an order under Rule 105(2) can be passed, the Court should have fixed date for hearing of the Execution Application. It is also pertinent that the Rule 105 does not contemplate a situation under which, or does not confer power on the Court whereby, Execution Application can be rejected for any reason other than the reason mentioned under said sub-rule. The said sub-rule (2) does not address a situation and would not be applicable to the situation where Execution Application is rejected for not taking necessary steps in the case. In the cases where the judgment-creditor does not take appropriate steps, then also, the Court may reject the Execution Application on the ground of non-prosecution. However, such order will not fall within purview of sub-rule (2) of Rule 105. There may be myriad situations wherein, or on account of which, the Court may dismiss or reject Execution Application. However, all such different situations are not addressed by or taken care of by or covered within, purview of Rule 105. Therefore, if an order dismissing the Execution Application is passed on account of a reason or a situation which is not provided for or contemplated under Rule 105, then, such order would not come within purview of Rule 105. Consequently, the principle that when express provision is available, then, inherent power cannot be exercised, would not be applicable in such situation/to such order i.e. the order dismissing Execution Application for circumstances not contemplated under Rule 105. Such order would be relatable to any other provision under the Code or it would be relatable to Court's inherent power to dismiss a suit or application for non-prosecution. In this view of the matter, then also, it would be necessary for the learned Court to pause and find out as to whether the order (against which the application is filed) is passed under Rule 105(2) or Rule 105(3) or Rule 23(1) or not. As mentioned above, the Court might have passed the order on account of such situation or for such reason/circumstance, which is not contemplated under Rule 105 then such an order would not be hit by the principle that when specific provision is made by law (e.g. Rule 105), then, inherent power cannot be exercised. When Rule 105 does not address or does not cover all situations or circumstances, then, the probability that the order in question might not be in exercise of power under Rule 105 cannot be ruled out on assumption and without further inquiry.

19.2. Rule 106 confers power on the learned Court to recall the dismissal order passed ex-parte under Rule 105(2) or Rule 105(3), but the said provision does not confer power on the Court to set aside and recall any order other than the order passed under Rule 105(2) or Rule 105(3) or Rule 23(1). When power to recall order passed by the Court in exercise of power under Rule 105(2) or Rule 105(3) or Rule 23(1) of Order 21 is conferred by the Code by virtue of provision under sub-rule (1) of Rule 106, then, the power under any other provision, including inherent power of the Court cannot be exercised for recalling and setting aside an order which is passed under Rule 105(2) and Rule 105(3) or

Rule 23(1) of Order 21.

19.3. However, if the order in question is not passed on the day fixed for hearing of Execution Application, but is passed when the matter is listed and taken up for some other process or purpose, then, the power under Rule 105 would not be available and such order cannot be said to be an order passed in exercise of power under Rule 1.05(2).

19.4. The above view is supported by the view taken in observations made in the decision in the case between Khoobchand Jain and Another Vs. Kashi Prasad and Others, wherein the High Court of Madhya Pradesh has observed, inter alia, that:

"13. In the present case, as stated earlier, the decree-holders filed the Execution Application with the prayer to recover the decretal amount by attachment of moveables of the judgment-debtors. The decree-holders filed a list of moveable property to be attached but the Court rejected this list on the ground that the property of the non-applicant No. 4 could not be attached since no decree was passed against him and directed the decree-holders to file a fresh list of moveable property of the judgment-debtors.

14. Execution of the decree by attachment of moveables is one of the modes contemplated under Rule 11 of Order 21. Rule 12 provides that when an application is made for attachment of any moveable property belonging to a judgment-debtor but "not in his possession", the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same. In AIR 1941 152 (Nagpur) and Gulabchand Ramlal and Another Vs. Onkar Bholia and Others, , this Court held that no inventory is necessary where the decree-holder seeks to attach the property in possession of the judgment-debtor. At this stage, a reference may also be made to Rule 41 of Order 21 which provides for examination of judgment-debtor as to his property. Where a decree is for the payment of money, the decree-holder under this rule may apply to the Court for an order that the judgment-debtor or any other officer or person be orally examined as to the property possessed by the judgment-debtor.

15. In the present case, the decree-holders had already applied for execution and paid process-fee for issuance of a warrant of attachment. It was, therefore, for the Court to issue a warrant of attachment of such property as was in possession of the judgment-debtors. Submission of the inventory of moveable property in possession of the judgment-debtors is not necessary under the relevant rules. In case, the warrant is returned unexecuted, the decree-holders could, in their discretion, make an application for examination of the judgment-debtors under Rule 41 or could resort to any other mode to recover the decretal amount.

16. As seen above, the execution was being adjourned from time to time to file such an inventory of movables. The excerpt from Order-sheet dated 27-7-1979 runs as under:

On 21-8-1979, since no one appeared on behalf of the decree-holders, the Execution Application was dismissed in default of appearance. There cannot be any dispute that the Court has powers to dismiss the application in default of appearance or failure to comply with any direction by the Court. But in this case, the question is whether the dismissal was under Rule 105 so as to attract Rule 106.

17. Rule 106 of Order 21 of the C.P.C. provides that if the Court is satisfied that there was sufficient cause for non-appearance, when the application was called for "hearing", the Court shall set aside the order. No such order shall be made unless the application is made within 30 days from the date of order. Rule 105 contemplates dismissal of the application on a date of "hearing", while Rule 106 provides, for restoration of application on making out sufficient cause for non-appearance, when the application was called for "hearing".

18. In my opinion, the date on which the Execution Application was dismissed for default of appearance of the decree-holders, namely, 21-8-1979 was not a date fixed for "hearing" within the meaning of Rule 105. It was a date awaiting report as to execution of the warrant which was supposed to be issued on submission of a list of moveable property by the decree-holders within three days of the earlier order dated 21-7-1979. Consequently, the dismissal of Execution Application on 21-8-1979 was not under Rule 105(2) of Order 21 of the C.P.C., and therefore, the provisions of Rule 106 are not attracted. The dismissal of the Execution Application in default of appearance on 21-8-1979 is referable to inherent powers of the Court.

19. I have pointed out above that there is a specific provision for dismissal of suit for non-payment of costs etc. in Order 9, while there is no analogous provision in Order 21 of the C.P.C. Consequently, the dismissal of Execution Application for non-payment of process fee or for failure to comply with any direction of the Court, will be in exercise of inherent powers. In the present case, the dismissal was not failure of the decree-holders to pay process fee or to submit a list of property, but was in default of appearance of the decree-holders. The Courts below committed a mistake in treating the dismissal of Execution Application under Rule 105 so as to attract Rule 106 of Order 21 of the Code. The orders passed by the Courts below cannot be sustained.

20. Since the dismissal of the Execution Application on 21-8-1979 was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time-limit is prescribed for invoking the inherent powers of the Court.

21. After weighing all the facts and circumstances of the present case, I deem it proper to exercise inherent powers and order restoration of the Execution Application dismissed on 21-8-1979 on a condition of the decree-holders paying costs of Rs. 300/- to the judgment-debtors within two months from the date of this order or such further time, as may be extended by the Executing Court....."

19.5. The above view is supported and fortified by the decision in the case between Deo Narayan Goala, (Deceased by L.R.) and Others Vs. Jagadish Pandit, , wherein the Court observed, inter alia, that:

"5. These two Rules were inserted by the Code of Civil Procedure Amendment Act, 1976 and were brought into force with effect from 1st February, 1977. Rule 105 deals with the hearing of an Execution Application. Sub-clause (1) of Rule 105 requires the Court to fix a date for the hearing of an Execution Application. Sub-clause (2) of this Rule provides that if on the date fixed for hearing of the Execution Application or any application arising out of the Execution Application or on any other date to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the Court may dismiss that application. Similarly, if the other party to whom the notice has been served does not appear, the Court may proceed to hear the application ex-parte and pass such orders as it thinks fit and proper. Rule 106, empowers the executing Court to recall the order of dismissal passed ex-parte and it provides that the Court may set aside the order passed either under sub-clause (1) of Rule 105 or of sub-clause (2) of Rule 105, if it is satisfied that there was sufficient cause for the non-appearance when the application is called on for hearing. Rule 105 also covers the Execution Application. The Court may fix a date of hearing of an Execution Application if any objection is filed against the same and if on the date of hearing of the application, the decree-holder is not present, the application may be rejected. Similarly, if the judgment-debtor is not present at the time of hearing of the Execution Application, the hearing may be done ex-parte and suitable orders may be passed in the case after hearing the decree-holder. Rule 105, however, does not deal with the situation when an Execution Application is rejected on account of not taking the requisite steps in the case. It is quite plain from sub-clause (1) of Rule 105 that the Court may fix a date for the hearing of the application. But before an application is set down for hearing, it should have in fact, ripened for the hearing. In other words, the judgment-debtor should have the information that an application has been moved against him and he may show cause against the same. In order to serve notices on the judgment-debtor certain steps are to be taken. If the decree-holder does not take the requisite steps to serve notice on the judgment-debtor, the Execution Application may be rejected on account of non-prosecution. But that order of rejection will not be covered by Rule 105, Code of Civil Procedure; because, the date was not fixed for hearing the application but was fixed for taking requisite steps in the case. This distinction is also made out in the provisions of Order 9 of the Code of Civil Procedure. I have referred to the provisions of Order 9 not with a view to say that those provisions apply to the execution case but I have just mentioned them by way of an illustration. It cannot, therefore, be said that Rule 105 covers all the situations and if any application has to be made for setting aside the ex-parte order, it should be only under Rule 106 of Order 21. In fact Rule 106 comes into play when an application was fixed for hearing and the applicant was absent at the time of the hearing and the application was, therefore, rejected. In the case

in hand, the learned Munsiff rejected the Execution Application on the ground that the decree-holder took no other steps for proceeding with the execution. Quite obviously, the Execution Application was not fixed on 11th July, 1980 for its hearing. The Petition No. 49 of 2011 filed by the judgment-debtor was fixed for hearing and that petition was rejected on that day. After rejecting that application, the Court below further passed an order dismissing the execution case for default on the ground that the decree-holder took no other steps. This order was obviously not covered by the provisions of Rule 105 of Order 21, Code of Civil Procedure. Hence the provisions of Rule 106 could not be invoked. The decree was passed on 4th March, 1968. The period of 12 years had expired on 4th March, 1980. The Execution Application was dismissed on 11th July, 1980. In these circumstances, the decree-holder filed an application under Sec. 151, Code of Civil Procedure for recalling the order of 11th July, 1980 instead of filing a second application for execution.

7. It is by now well established that inherent power of the Court cannot override the express provisions of the law. If there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. (See *Arjun Singh Vs. Mohindra Kumar and Others*,).

8. I have already pointed out above that the provisions of Rules 105 and 106 of Order 21 could not be invoked on the facts and circumstances of the instant case. There is no other express provision in the Code of Civil Procedure dealing with the situation which had arisen in the present case. The trial Court had not fixed the Execution Application for hearing on 11th July, 1980. It had fixed that date for hearing of the petition of the judgment-debtor whereby he wanted the stay of the execution proceedings till the harvesting was done. That application was rejected by the Court below as it had become infructuous. The parties were present before the Court. If any steps were required to be taken by the decree-holder for proceeding with the execution, the Court should have granted time for doing so. Instead, the Court below rejected the application in default. The decree-holder, therefore, applied for setting aside that order. Such an order not being covered by Rule 105 of Order 21, Code of Civil Procedure, the application for setting it aside could not be filed under Rule 106 of Order 21. The inherent power of the Court was, therefore, invoked to set aside that order. The Court below having found that there were sufficient grounds for setting aside that order, recalled it and allowed the application of the decree-holder and fixed 24th July, 1980 for taking steps in the case. Such an order could not be said to be capricious or arbitrary. The discretion exercised by the Court below in setting aside the order dated 11th July, 1980 could not, therefore, be interfered with. In

fact the impugned order was passed in the interest of justice and taking of course the notice of the fact that the alternative remedy to file a fresh Execution Application had become barred by time. The petitioners have thus failed to make out a case warranting interference under Sec. 115 of the Code of Civil Procedure."

20. Thus, it emerges that if the order in question does not reflect and do not meet with the aforesaid requirements/aspects, then, the order would not be an order passed in exercise of Rule 105(2) or (3) but under or as per some other provision e.g. it could be an order passed in exercise of inherent power (to dismiss a case/application on ground of non-prosecution).

20.1. If, in the facts of the case, examination of the order in question leads the Court to such conclusion i.e. the conclusion that the order is not passed in exercise of or is not passed under and/or as per the said sub-rules, then the corollary would be that the application filed against, or with reference to, such order cannot be treated as an application against an order passed under the said sub-rules and within purview of Rule 106(1) and consequently, it would not be within the sweep of Rule 106(3) of Order 21 because under and as per the said provision, an applicant against whom order is passed under Rule 23(1) or 105(2) or 105(3) can file application under Rule 106(1), but if an order is passed under, or in exercise of power under, any other provision (i.e. any provision/rule (or order or Section), then, the party against whom such order (i.e. an order under some other provision is passed) would not be entitled to make application under Rule 106(1).

21. In this context, it is appropriate to also recall that in present case, vide order dated 14-12-2005, the Court had directed the applicant to furnish, on oath, within 7 days from the order, certain particulars viz. (i) the amount actually due from the judgment-debtor as on the date of the affidavit, and (ii) the description and particulars of movable properties sought to be attached.

21.1. However, neither from the impugned order dated 1-9-2010 nor from the petition and/or from the memo of Application No. 99 of 2010 it becomes clear as to whether on 1-9-2009 when the Court passed the order, the case was fixed for hearing the Execution Application No. 7 of 1999 or it was scheduled for ascertaining the compliance of the direction under order dated 14-2-2005.

21.2. The said order dated 1-9-2009, or its reading, gives out that the learned Court passed the said order on two grounds and for two reasons viz. (1) on account of not taking requisite steps in the case inasmuch as the applicant of Execution Application was not taking steps for service and implementation of the warrant issued by the Court under Rule 30 of Order 21; and (2) the applicant of Execution Application was not remaining present.

21.3. From the facts of the case, it appears that on the date of dismissal of the Execution Application, the Court was probably waiting for compliance of order dated 14-12-2005 and to take further action for identifying movable property of judgment-debtor (present respondent) and for attachment of movable properties.

21.4. Thus, the date when the Court passed the order was, probably, not the date "for hearing", and that therefore, one of the said four basic requirements was probably not fulfilled/did not exist.

21.5. However, for want of clarity in the order and in absence of any indication, it is not possible to conclude either way and it is only learned Court who, on proper examination of record, can determine this factual aspect.

22. The order in question does not clarify as to whether the case was fixed for (a) hearing Execution Petition No. 7 of 1999, or (b) it was fixed for ascertaining compliance of direction under order dated 14-12-2005.

22.1. Differently put the impugned order does not clarify whether the scheduled hearing was restricted (by virtue of the Notice referred to by the petitioner) to a particular issue (e.g. compliance of direction issued vide order dated 14-12-2005 related to attachment warrant) or the hearing was for all purposes. It emerges from the impugned order that without clarifying the said aspects and without mentioning/clarifying whether the order is passed under and in exercise of power under Rule 105(2) or in exercise of power under any other provision, the learned Court passed such composite order dated 1-9-2009 dismissing the Execution Application No. 7 of 1999 on two grounds.

23. If the case was not fixed for "hearing" of the application No. 7 of 1999 and the stage or purpose was restricted to hear the parties on some other aspect, then, the order cannot be treated as order under sub-rule (2) of Rule 105, and that therefore, the limitation under sub-rule (3) of Rule 106 will not be applicable to the said Misc. Application No. 99 of 2010.

23.1. On the other hand, if it is assumed that the application was scheduled, after fixing the date, for hearing and thereby the order in question is treated as an order under Rule 105, then also, the fact remains that the said Misc. Application No. 99 of 2010, in light of its contents, tenor, averments and relief prayed for is, as discussed earlier, not capable of being treated as an application within purview of sub-rule (1) of Rule 106.

23.2. This would culminate into a situation according to which even if it is assumed that the order dated 1-9-2009 is an order under sub-rule (2) of Rule 105, but the fact remains that any application under sub-rule (1) of Rule 106 is not filed i.e. any application requesting the Court to set aside the order dated 1-9-2009 and/or requesting the Court to restore Execution Application is not filed and the application which is filed i.e. Misc. Application No. 99 of 2010 does not come within purview of sub-rule (1) of Rule 106.

23.3. In this view of the matter and for this reason also instead of assuming that the said Misc. Application is as an application under sub-rule (1) of Rule 106 and/or instead of restricting its consideration in light of Rule 106(1) and Rule 106(3), it was necessary (for the learned Court) to consider and examine said Misc. Application No. 99 of 2010 from other perspectives and angle and in light of

other provision/s under the Code.

24. However, the learned Court erred in not considering these aspects and committed error of not examining the said Misc. Application No. 99 of 2010 from different, or all possible, perspectives and angles and in light of all relevant or applicable provisions and in restricting the consideration in light of Rule 106 only.

25. When it has, on examination of the said Misc. Application, come out that the said Misc. Application is not an application which would come within the purview of sub-rule (1) of Rule 106 then it was necessary to deal with and decide its fate from other perspective and angle and in light of other provisions under the Code.

25.1. If the learned Court had examined said Misc. Application from all perspectives then the Court would have noticed that the said Misc. Application does not come within purview of sub-rule (1) of Rule 106, and that therefore, the said application would have received different consideration.

25.2. In view of facts of the case, more particularly the fact that in said Misc. Application, the applicant has not even prayed that the order dated 1-9-2009 may be recalled and Execution Application No. 7 of 1999 may be restored and the said Misc. Application does not give indication from the averments therein or from the relief prayed for thereby or from its tenor and contents that it is filed under Rule 106 and/or when the petitioner does not appear to have claimed that the Misc. Application is filed under Rule 106(1) and/or it is filed against order dated 1-9-2009 by treating the said order as order under Rule 105, the learned Court before passing the impugned order ought to have ascertained as to whether the order dated 1-9-2009 was passed in exercise of power under Rule 105(2) or not.

25.3. For ascertaining the said aspect, it was necessary for the Court to ascertain as to whether the date on which the Court passed the order the Execution Application No. 7 of 1999, was "fixed for hearing" as contemplated under Rule 105(2), or the matter was scheduled/listed for some other purpose e.g. for ascertaining compliance of the directions under order dated 14-12-2005 or for considering the decree holder's request for further actions pursuant to the direction to issue attachment warrant.

25.4. Without examining the said aspect and without being satisfied that the order in question was passed under Rule 105(2), the learned Court ought not to have assumed that the order in question was passed under Rule 105(2) and/or the Misc. Application No. 99 of 2010 was an application which would come within purview of Rule 106(1).

25.5. As mentioned earlier, any material is not available on record which would provide any satisfactory reply to this issue. Therefore, the Court finds no option, but to remand the case to the learned Court for examining the above mentioned aspects.

As an upshot of the above discussion, it emerges that for considering and

examining the above mentioned two aspects, i.e. the said Misc. Application No. 99 of 2010 is required to be examined in light of any other relevant provision, and the other aspect, viz. whether the order dated 1-9-2009 would come within purview of Rule 105(2), or not, the matter is required to be remanded to the learned Court. This Court tried to search for relevant details from the material available on record, however, requisite details and reply could not be found from the available material. It appears that only from the material available on file of Misc. Application No. 99 of 2010 that the learned Court would be able to ascertain the stage of hearing of the application on 1-9-2009 when the order in question came to be passed and on that basis, the Court would be able to ascertain as to whether the order in question would fall within purview of Rule 105 or not. Therefore, though this Court tried to avoid eventuality of remanding the case and to find reply from available material and decide the case in this proceeding, however, there is no option but to remand the case.

25.6. In view of the above discussed facts and for the foregoing reasons, this Court finds it necessary and appropriate to remand the case to the learned Court where this application was heard and decided. For the said purpose, the impugned order is set aside, and following order is passed:

(A) The impugned order dated 31-12-2011 is set aside.

(B) The case, i.e. Misc. Application No. 99 of 2010, is remanded to the learned Court.

(C) The learned Court will examine the record and ascertain as to whether the order in question, i.e. order dated 1-9-2009, was passed in exercise of power under Rule 105(2) and whether it falls within purview of Rule 105(2).

(D) After taking into consideration the foregoing discussion and the above quoted decisions, the learned Court will consider the said Misc. Application No. 99 of 2010 afresh and will determine as to whether the said Misc. Application comes within purview of any other provision under the Code and whether it deserves to be considered and decided in light of any other provision, and thereafter, the learned Court will decide the said application in accordance with law.

With aforesaid observations and direction, present petition stands disposed of.

Mr. Vakil, learned Advocate for the respondents, requested for stay of present order.

Having regard to the facts and circumstances of the case and taking into account the request made by learned Advocate for the respondents, it is directed that the operation of present order will remain stayed till 20-9-2014.