

(2017) 09 BOM CK 0057
In the Bombay High Court
Case No : 10439 of 2015

Shaikh Chand s/o Shaikh Ahmed, died per legal
representatives: Sk.Pashu s/o Sk.Chand, & Ors.

APPELLANT

Vs

Zaitunbee w/o Shaikh Lal, & Anr.

RESPONDENT

Date of Decision : 07-09-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 7 Rule 11](#), [Section 151](#), [Order 21 Rule 105](#), [Order 21 Rule 106](#), [Order 21 Rule 106](#)

Citation : (2017) 09 BOM CK 0057

Hon'ble Judges : Ravindra V. Ghuge

Bench : SINGLE BENCH

Advocate : P.R.Katneshwarkar, Mohammad Waseemullah, Adwant S.V., Neha B. Kamble

Final Decision : Allowed

Judgement

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The Petitioners are aggrieved by the order dated 04.07.2015 by which MARJI No.527/2012 filed by the Petitioners seeking restoration of Regular Darkhast No.119/1997 has been rejected.
3. I have considered the strenuous submissions of the learned Advocates for the respective sides.
4. The Petitioners rely upon the following judgments:
 - (a) Maharashtra State Electricity Board vs. Niranjana Alloys Steels Private Limited, Aurangabad, 2007 (2) Mh.L.J. 229.
 - (b) Smt.Suglabai w/o Prabhu Jaishete and another vs. Rangrao s/o Govindrao (since dead through his L.Rs.) and others, 2011 (1) AIR Bom. R 858 : 2011(6)

Bom.C.R. 403 : 2011(1) All.M.R. 858.

5. The Respondents rely upon the following judgments:

(a) Damodaran Pillai and others vs. South Indian Bank, AIR 2005 SC 3460.

(b) Mhatarba Laxman Dongare vs. Central Bank Of India and others, 2005(2) ALL MR 742.

(c) Dattatraya Raghunath Jog vs. Radhabai Laxmanrao Ghatge, 2007 (3) Mh.L.J. 425.

(d) Mahabir Sah vs. Bibi Jubeda Khatoon and others, AIR 2011 Patna 35.

6. After considering the submissions of the learned Advocates and upon going through the judgments cited, the undisputed factors can be summarized as under:

(a) The Petitioners herein are the original Defendants.

(b) Regular Civil Suit No.643/1987 led to the judgment and decree dated 28.03.1990 with regard to House No.41938 situated at Laxman Chawadi, Aurangabad.

(c) Regular Civil Appeal No.150/1990 was filed by the Defendants which was decided by the Appellate Court on 17.11.1993 and the appeal was partly allowed and the decree was modified.

(d) The Petitioners preferred Second Appeal No.131/1994 and by the judgment dated 25.08.1994, this Court concluded that since Zaitunbee had no title to the suit property and is allowed to occupy the property only as a licensee of the Defendants, the decree passed shall be operative till the lifetime of Zaitunbee and thereafter, the Defendants would be entitled to get back the possession by the due process of law.

(e) As Zaitunbee passed away on 02.12.1996, the execution proceeding Regular Darkhast No.119/1997 was instituted.

(f) After considering the submissions of the parties and the objections of the Judgment Debtors, the Executing Court passed the order dated 12.02.1999 by which the possession warrant was issued.

(g) By order dated 13.12.2010, Regular Darkhast No.119/1997 was disposed of for want of steps.

(h) The Decree Holders preferred MARJI No.527/2012 on 12.06.2012 and prayed for condonation of delay of one year, 04 months and 22 days in filing the application for restoration of the execution proceedings.

(i) By the impugned order dated 04.07.2015, the MARJI No.527/2012 has been rejected for the reason that sufficient grounds were not cited.

7. The thrust of the submissions of the Petitioners herein is that after the hearing was concluded, no further hearing was contemplated. Upon deciding all the objections of the Judgment Debtors, the Executing Court had issued the possession warrant and in that backdrop, the dismissal of the execution proceedings for want of steps would not be an order passed under Order 21 Rule 105 of the Code of Civil Procedure. Hence, Rule 106 of Order 21 and especially subrule (3) of Rule 106 of Order 21 of the Code of Civil Procedure r/w Section 5 of the Limitation Act, 1963 would not be applicable to this case.

8. Per contra, the strenuous submissions of the Respondents are two fold. Firstly, the dismissal of the execution proceedings is under Order 21 Rule 105 and as such, the restoration application could have been entertained only within 30 days from the date of the order of dismissal. The ratio laid down in Damodaran Pillai (supra) would become applicable. Secondly, Section 5 of the Limitation Act would not apply to this case and the execution proceedings are specifically excluded from the ambit of Order 21 of the Code of Civil Procedure. Consequentially, there could be no order of restoration of the execution proceedings. The other option open to the Decree Holders is to prefer a fresh execution proceedings provided it is within the limitation of 12 years from the date of the decree as per Article 136 of the Limitation Act.

9. Considering the above, the first issue that needs to be dealt with in this matter before touching the issue of Section 151 of the Code of Civil Procedure, would be, whether, the order of dismissing the execution proceedings for want of taking steps, would be covered by Rule 105 of Order 21.

10. For ready reference, Rules 105 and 106 of Order 21 read as under:

" Order XXI

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.

Explanation : An application referred to in subrule (1) includes a claim or objection made under rule 58."

"Rule 106. Setting aside order passed ex parte, etc.-

(1) The applicant, against whom an order is made under subrule (2) of rule 105 or the opposite party against whom an order is passed ex parte under subrule

(3) of that rule or under subrule (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 nonappearance 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.

(2) No order shall be made on an application under subrule (1) unless notice of the application has been served on the other party.

(3) An application under subrule (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 the applicant had knowledge of the order."

11. Notwithstanding the strenuous submissions of the Respondents/ Judgment Debtors, this issue finds an answer in the judgment in the matter of Damodaran Pillai (supra). In paragraph 8 of the said judgment, the Honourable Supreme Court considered the undisputed position that the execution petition was dismissed in terms of the provisions of Rule 105 of Order 21. It was noted that the matter was fixed for hearing under subrule (1) of Rule 105. As the matter was called out for hearing and since the matter went unattended, the same was dismissed.

12. In the above facts, the Honourable Supreme Court in Damodaran Pillai (supra), observed in paragraph 11 that in regard to the limitation period for filing the restoration application in the execution proceedings dismissed under Rule 105, Rule 106(3) would become squarely applicable. It was held that if an order has been passed dismissing the application in default, the restoration application must be filed necessarily within a period of only 30 days from the date of the order and not thereafter. It was held that the date when the Decree Holders acquired the knowledge of the order of the dismissal of the execution petition was, therefore, wholly irrelevant. In this backdrop, it was held that when the Civil Court was expressly barred from condoning the delay, Section 151 of the Code of Civil Procedure for invoking inherent powers would not be applicable.

13. While distinguishing the execution proceedings dismissed at the stage of hearing and dismissed at the stage post hearing, the Honourable Supreme Court, in Damodaran Pillai (supra), considered the view taken in some judgments delivered earlier. Paragraphs 18 and 19 of Damodaran Pillai (supra) are relevant and they read as under:

"13. Similar views have been taken in M. Abdul Salam & Ors. Vs. Lourdusami Chettiar [AIR 1962 Madras 386], Sri Tankala Appalaswamy Gari Samba Murthy Vs. Gopasundara Sabatho [AIR 1963 AP 127] and Ganapathy Vs. Murugesu Chetty [1989 (2) L.W. 38].

19. Mr.Joshi, however, placed strong reliance upon Khoobchand Jain & Anr. Vs. Kashi Prasad & Ors. [AIR 1986 MP 66]. The said decision, in our opinion, has no

application to the facts and circumstances of the present case. Therein the Execution Application was dismissed on a day which was not fixed for hearing. The said order of dismissal, therefore, was not passed in terms of subrule (2) of Rule 105 of Order XXI of Code of Civil Procedure. In that situation it was opined:

"In the present case, the decreeholders 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 decreeholders could, in their discretion, make an application for examination of the judgment debtors under R.41 or could resort to any other mode to recover the decretal amount."

It was further observed:

"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."

(Emphasis supplied in this judgment)

14. The Honourable Supreme Court, while considering the view taken in *M. Abdul Salam (supra)* and *Khoobchand Jain (supra)*, did not conclude that the conclusions in *Khoobchand Jain (supra)* were bad in law. It was thus, held that considering the law laid down in *Khoobchand Jain (supra)* that while issuing the warrant of attachment of the suit property as may be in the possession of the Judgment Debtors, the submission of inventory of the movable property in possession of the Judgment Debtors may not be necessary. The dismissal of the execution application post hearing in the matter was, therefore, under the inherent powers and hence, the application for its restoration would also be by invoking the inherent powers of the court and for which no time limit is prescribed.

15. It cannot be ignored that this Court is presently considering only the issue of condonation of delay and not the reasons cited for restoration of the execution proceedings. The order of disposal of the execution proceedings dated 13.12.2010 reads as under:

"The Decree Holder and his advocate when called out, they are absent. Matter is old, steps not taken since 2004. Today the Decree Holder and his Advocate was called several times till 5:00 pm but they did not turn to the Court. This shows Decree Holder is not interested in the matter. It would be worthless to keep the matter pending henceforth. Hence, case is disposed off for want of steps. Proceeding is closed."

16. Considering the above, as the hearing in the execution proceedings was concluded and the possession warrant was also issued, the said execution

proceedings cannot be said to have been dismissed at the stage of hearing as no further hearing was contemplated. The case has been disposed off.

17. This brings me to the issue of exercise of Section 151 of the Code of Civil Procedure as was invoked by the Petitioners.

18. Section 151 of the Code of Civil Procedure reads as under:

" 151. Saving of inherent powers of Court- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

19. The learned Advocate for the Respondents has cited the view taken by this Court in *Mhatarba Laxman Dongare* (supra). Apparently, the learned Single Judge of this Court did not have the assistance of the view taken by the Honourable Supreme Court in *Damodaran Pillai* (supra) as this Court delivered it's judgment in *Mhatarba Laxman Dongare* (supra) on 09.12.2004 and the Honourable Supreme Court decided the case of *Damodaran Pillai* on 08.09.2005. In *Mhatarba Laxman Dongare* (supra), the view taken by this Court was that for restoration of the execution proceedings dismissed in default, Section 151 cannot be invoked. In that case also, the execution proceedings were dismissed in default before the attachment warrant was issued and at the stage of hearing.

20. The judgments cited by the learned Advocate for the Respondents in *Dattatraya Raghunath Jog* and *Mahabir Sah* (supra), are in relation to the dismissal of the matter under Rule 105 of Order 21. Considering the law laid down in *Damodaran Pillai* (supra), when the hearing in the execution proceedings is concluded and the said proceedings are disposed off, as in this case, after the stage of hearing in the matter, the said disposal would be out of the purview of Rule 105 and hence, would amount to dismissal/disposal under the inherent powers of the Executing Court. Section 151 would, therefore, come into play.

21. In *Maharashtra State Electricity Board* case (supra), this Court concluded that even in the matters where the plaint was rejected under Order 7 Rule 11 of the Code of Civil Procedure, though the remedy of filing an appeal was available, inasmuch as, the remedy under Order 7 Rule 13 would enable the Plaintiff to file a fresh suit, Section 151 of the Code of Civil Procedure could be invoked for the restoration of the suit.

22. In *Smt.Suglabai w/o Prabhu Jaishete* (supra) , the execution proceedings were dismissed and the record reveals that the dismissal occurred as "No steps. Dismissed for want of prosecution. No costs." This Court concluded that as no steps were taken resulting in the dismissal of the execution proceedings for want of prosecution, Section 151 could be invoked so as to enable the Court to exercise it's inherent powers. Nevertheless, the facts of the case in hand would be covered by the *Damodaran* judgment (supra).

23. Considering the above, Section 151 of the Code of Civil Procedure could have

been invoked by the Executing Court in this matter while considering MARJI No.527/2012.

24. This brings me to the last limb of the case as regards, whether, sufficient grounds were set out by the Petitioners and what would be the effect of the refusal to condone the delay of one year and 05 months under Section 151 of the Code of Civil Procedure.

25. The learned Advocate for the Respondents has made strenuous efforts to indicate that the reasons cited by the Petitioners in their application for condonation of delay, are insufficient and not convincing. It is further canvassed that as the Petitioners were sleeping for about 11 years after the possession warrant was issued, that the execution proceedings were disposed of. It is in this backdrop that the Judgment Debtors, by passage of more than 15 years, have settled in possession of the property and it would be causing grave hardship if the execution proceedings are to be resumed from the stage at which they were disposed of.

26. It is altogether an independent issue as to whether, the Executing Court would be convinced so as to restore the execution proceedings. Adverting to the facts of this case, the issue before me is of condonation of one year and five months delay. The Honourable Supreme Court, in *Collector, Land Acquisition, Anantnag v/s Mst.Katiji*, AIR 1987 SC 1353, while considering the philosophy behind the condonation of delay and its effects, has observed in paragraph 3 as under:

" 3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

" Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 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."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided

on merits after hearing the parties.

3. "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a nondeliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justiceoriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a stepmotherly treatment when the State is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the notemaking, file pushing, and passingonthebuck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigantnongrata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do evenhanded justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

27. It requires no debate that the Decree Holders would not squander away the advantage of having achieved the decree, by neglecting their proceedings and causing delay against their own interest. The delay of one year and five months cannot be termed as being deliberate or inordinate. The Decree Holders do not

achieve any advantage by delaying their proceedings. In fact, irreparable harm, serious prejudice and manifest inconvenience would be caused to the Decree Holders if the delay is not condoned. If a pedantic approach is to be taken in this matter on account of the laxity on the part of the Decree Holders, the Judgment Debtors would stand to gain undue advantage after they have been held disentitled by an adjudicatory process leading to the judgment and decree in favour of the Petitioners herein.

28. While taking a pragmatic view in this matter, hardships suffered by the Decree Holders also need to be softened. As has been held by the Honourable Supreme Court in catena of judgments that the delay can be condoned by imposing suitable costs so that hardships suffered by the other side can be reduced.

29. Taking into account the above factors, this Writ Petition is allowed. The impugned order dated 04.07.2015 is quashed and set aside. MARJI No.527/2012 is allowed and the delay of one year, four months and 22 days is condoned, but by imposing costs of Rs.25,000/(Rupees Twenty Five Thousand) to be deposited by the Petitioners before the Executing Court within a period of FOUR WEEKS from today. After the said amount is deposited, Respondent Nos.1 and 2 in this petition, shall receive equal share in the said costs and shall withdraw the said amount in equal proportions without any conditions.

30. Needless to state, in the event of the failure of the Petitioners in depositing the said amount within the time period prescribed, it would lead to the restoration of the impugned order dated 04.07.2015 in which case, this order shall stand recalled.

31. Rule is made absolute in the above terms.