
(2014) 12 BOM CK 0133

In the Bombay High Court

Case No : Chamber Summons No. 726 of 2013 in Execution Application No. 528 of 2001 in Rangareddy Court Suit No. 132 of 1987

Union of India

APPELLANT

Vs

Metal India

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

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

Citation : (2015) 2 ABR 39 : (2015) 3 ALLMR 242

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : S.R. Rajguru a/w. A.R. Verma i/b. Jyosthna Pandhi, Advocate for the Appellant; U.K. Shah, Advocate for the Respondent

Judgement

R.S. Dalvi, J.—This execution application has been taken out in 2001. It was placed on board for dismissal and it came to be dismissed as it was not pursued under the provisions of Rule 329 of the High Court Original Side Rules. Rule 329 runs thus:

"R. 329. Non-prosecution of application for execution. When a party does not proceed with the application for execution for a period of twelve months from the date of the filing of application, the Prothonotary and Senior Master shall place the application before the Judge in Chambers for dismissal for want of prosecution. The Judge may pass such orders thereon as he may think fit".

2. Consequently if for a period of 12 months from the date of the filing of the application for execution it is not prosecuted it would be placed on board for dismissal and dismissed. This would be whether or not the parties appeared. This execution application was taken out in 2001. It was placed on board and dismissed on 12th March, 2012. The Court has observed that the application is not pursued by the plaintiff and hence it is dismissed.

3. The object and purport of the rule must be first understood. Execution has to be levied in one of the five modes set out in Section 51 of the CPC. An execution application is taken out for such purpose. If the decree holder fails to take recourse to any of these modes, the execution application remains on board for a number of years. The execution application is not to be left on board unpursued for more than 12 months. Hence after 12 months the Court may place it on board for dismissal and dismiss it.

4. In this case the execution application is placed on board after 11 years and then dismissed.

5. The reason for the dismissal is that the plaintiff / decree holder had not pursued it. It is not dismissed for default of appearance of the plaintiff.

6. It is contended by the plaintiff that the plaintiff's Advocate failed to appear and attended the Court 15 minutes after the execution application was dismissed. The plaintiff has set out how the plaintiff had pursued the execution application during the years that it remained pending.

7. What is material is to see whether this application is taken out within time. The plaintiff has taken out this application in September, 2013. It was 1 1/2 years after the plaintiff knew of the dismissal because the plaintiff's Advocate appeared 15 minutes after the order of dismissal on the same day.

8. It is contended on behalf of the Judgment Debtor/defendants that the execution application is barred by limitation. The judgment debtor would contend that the period of limitation is 30 days under Order 21 Rule 106(3) of the CPC.

9. The Counsel on behalf of the Judgment Debtor relied upon the judgment in the case of Damodaran Pillai and Others Vs. South Indian Bank Ltd., which was the case of an application made for restoration of execution application dismissed for default under Order 21 Rule 105(2).

10. The Supreme Court observed that Section 5 of the Limitation Act does not apply to execution applications under Order 21 of the CPC. In para 14 of the judgment it is made that when there is no express power to condone the delay for filing application under Section 5 of the Limitation Act the Court cannot invoke its inherent power. In para 16 of the judgment it is held that Section 5 of the Limitation Act does not apply to a proceeding under Order 21 of the CPC and such an application is not maintainable.

11. The defendant / Judgment Debtor has also relied upon the judgment in the case of Dattatraya Jog Vs. Radhabai Ghate, which deals with Order 21 Rules 105 and 106. The judgment holds that a restoration application can be filed within 30 days and whether it is not filed the delay cannot be condoned because Section 5 of the Limitation Act has no application to execution proceedings.

12. The plaintiff / decree holder has relied upon a judgment of the Patna High Court in the case of Darsan Das Vs. Ganesh Prasad Sinha and Another, , which

considered the Limitation Act 1908. In that case application for restoration of an execution was held to be within limitation under Articles 181 and 182 of the provisions of Limitation Act if it was filed within 3 years from the date of its dismissal. It must borne in mind that an application for order passed under Rule 105(2) of Order 21 would be required to file within 30 days of the applicant having knowledge of the order. In view of this expression the provision in the CPC itself relating to execution application relying upon the previous Limitation Act is misplaced. In another judgment of the Patna High Court in the case of Mahabir Sah Vs. Bibi Jubeda Khatoon and Others relied upon by the plaintiff / decree holder the period of 30 days from the order of dismissal is specifically set out. The application made after a delay of 4 years was held not allowable.

13. The plaintiff / decree holder has further relied upon the judgment of Khoobchand Jain and Another Vs. Kashi Prasad and Others, that the order required to be passed would be under the inherent powers of the Court where no time limit is prescribed. Indeed the inherent power of the Court will be exercised only when there is no specific provision in respect of what the power is sought. In this case there is a specific provision of the period of 30 days. Under Order 21 Rule 106(3) the application is required to be filed within the period of 30 days. There is no provision of law under which it to be entertained thereafter because it is settled law that Section 5 of the Limitation Act does not apply on execution proceedings under Order 21 of the CPC entitling the Court to condone the delay.

14. In this case the plaintiff had knowledge of the order of dismissal on the date of the order of dismissal itself. The plaintiff could not have claimed knowledge from the posterior date. The application is seen to be barred by the specific period of limitation set out in Order 21 Rule 106(3).

15. It is argued that the application has been disposed off on the ground that it was not pursued by the plaintiffs. That ground is incorrect because the plaintiffs had taken out an application under Order 21 Rule 41 of the CPC and sought the disclosure of the properties of the judgment debtor in an earlier chamber summons. Hence if application was made within 30 days to set aside the impugned order dated 12th March, 2012 the Court would have set aside that order upon seeing that the plaintiff had pursued the application for execution. The Court would have seen also whether the plaintiff had so pursued the execution application within 12 months of the date of the filing of the application or even within 12 months of the date it was kept on board for dismissal and dismissed. That aspect cannot be seen if the application for setting aside the dismissal order is not taken out within 30 days of the order of dismissal.

16. Consequently the chamber summons is seen to be barred by the law of limitation. The period of limitation cannot be extended and the delay cannot be condoned by the Court.

17. Hence the chamber summons is dismissed.