
(2023) 01 BOM CK 0007

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 1962 Of 2022

M/S Hasnatey
Burhanaiayah
Fiddiayah

APPELLANT

Vs

Kamalkishor

RESPONDENT

Date of Decision: Jan. 3, 2023

Acts Referred:

- Limitation Act, 1963 - Article 136
- Code Of Civil Procedure, 1908 - Section 48, Order 21 Rule 105, Order 21 Rule 105(2), Order 21 Rule 106, Order 21 Rule 106(1), Order 21 Rule 106(3)

Citation: (2023) 01 BOM CK 0007

Hon'ble Judges: Avinash G. Gharote, J

Bench: Single Bench

Advocate: Rashi Deshpande, D.G. Paunikar

Final Decision: Allowed

Judgement

Sr. No,Date,Event

01,2001,"Regular Civil Suit No.256/2001 for ejectment, possession and arrears of rent filed by petitioner against respondent.

02,09/08/2004,Decree for eviction passed ex parte.

03,2005,"Execution proceedings Special Darkhast No.135/2005, for execution of the decree in Regular Civil Suit No.256/2001 filed.

04,28/03/2006,M.J.C. No.33/2006 filed by judgment debtor/respondent for setting aside ex parte decree and for condonation of delay.

05,05/07/2011,Special Darkhast No.135/2005 dismissed by Small Causes Court for want of steps.

06,27/02/2013,Application for condonation of delay in filing M.J.C. No.33/2006 rejected (pg.51)

07,05/03/2013,"Regular Civil Appeal No.129/2013 filed challenging the order dated 27/02/2013 dismissing application for condonation of delay in

M.J.C. No.33/2006

08,26/06/2016,Regular Civil Appeal No.129/2013 dismissed (pg.79).

09,12/03/2019,"Writ Petition No.4518/2018 filed by judgment debtor/respondent against judgment in Regular Civil Appeal No.129/2013 came to

be dismissed.

10,09/10/2017,"Fresh executing proceedings bearing Regular Darkhast No.130/2017 filed by petitioner/decreed holder for execution of the decree

passed in Regular Civil Suit No.256/2001.

11,21/12/2018,Judgment Debtor/respondent filed application (Exh.14) for dismissal of the execution proceedings.

12,17/09/2019,"Petitioner/decreed holder filed application (Exh.21) for treating Special Darkhast No.130/2017 as application for restoration of

Special Darkhast No.135/2005.

13,16/03/2022,Application (Exh.21) filed by petitioner/decreed holder dismissed.

14,23/03/2022,Application (Exh.14) filed by judgment debtor/respondent allowed and Special Darkhast No.130/2017 dismissed

6. It cannot be disputed that Special Darkhast No.130/2017 which was filed on 09/10/2017, for execution of the decree dated 09/08/2004, in Regular",,

Civil Suit No.256/2001, was clearly beyond a period of 12 years, as postulated by Article 136 of the Limitation Act and therefore, would be beyond",,

limitation, considering which, the impugned order below Exh.14 cannot be assailed, on this count.",,

7. Insofar as the plea regarding applicability of the doctrine of merger is concerned, the doctrine of merger contemplates a challenge on merits, to the",,

decree being decided by the Appellate Court in which case then the decree of the Trial Court merges into the decree of the Appellate Court and it is,,

the decree of the Appellate Court which becomes executable, as has been held in Surinder Pal Soni Vs. Sohan Lal (Dead) through Legal",,,

Representatives (2020) 15 SCC 771. In the instant case what is material to note is that the original decree dated 09/08/2004 passed in Regular Civil,,

Suit No.256/2001, was not in challenge in M.J.C. No.33/2006, which was an application for condonation of delay, and therefore, the doctrine of",,,

merger would not be applicable, for the petitioner/decreed holder, to take the benefit of dismissal of Writ Petition No.4518/2018 on 12/03/2019, which",,,

upheld the order of dismissal of the application for condonation of delay.,,

8. What remains to be seen is whether the application Exh.21 could have been considered by the learned Executing Court and Special Darkhast,,

No.130/2017 could have been treated as an application for restoration of Special Darkhast No.135/2005.,,

9. Order 21 Rule 105 of CPC permits the Court to dismiss the execution application, for non-appearance of the decreed holder, however, such dismissal",,,

can be when the case is fixed for hearing of the application. Order 21 Rule 106 of CPC permits the setting aside of the order passed under Order 21,,

Rule 105 (2) of CPC in case sufficient cause is shown and on such terms as to costs or otherwise as the Court thinks fit, who is then enjoined to",,,

appoint a day for further hearing of the application.,,

10. In the instant case, when Special Darkhast No.135/2005 came to be dismissed on 05/07/2011 admittedly it was not fixed for hearing of the",,,

application but was fixed for taking certain steps and was dismissed for want of steps.,,

11. In Pentapati China Venkanna (supra) while considering Section 48 of CPC as it then stood, which prevented the Court from passing any orders",,,

for execution of a decree on any fresh application presented after expiration of 12 years from the date of decree sought to be executed, it was held as",,,

under :-,,

6. -----. It is not necessary to express our opinion on the question whether such procedure is sanctioned by the Code of Civil Procedure or,,

not; but assuming that the court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the",,,

court in making an order "closed" for statistical purposes is manifest. It is intended not to finally dispose of the application, but to keep it pending.",,,

Whether the order was without jurisdiction or whether it was valid, the legal position would be the same; in one case it would be ignored and in the",,,

other, it would mean what it stated. In either case the execution petition would be pending on the file of the court. That apart, it is not the phraseology",,,

used by the executing court that really matters, but it is really the substance of the order that is material. Whatever, terminology may be used, it is for",,,

the court to ascertain, having regard to the circumstances under which the said order was made, whether the court intended to finally terminate the",,,

execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the court. We have no",,,

hesitation, therefore, in agreeing with the High Court that EP No. 13 of 1939 is pending on the file of the executing court and that the present",,,

application is only an application to continue the same.,,,

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9. The result of the decisions may be summarized thus: An application made after 12 years from the date of the decree would be a fresh application,,

within the meaning of Section 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application",,,

if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief,,

substantially different from that asked for in the earlier petition.,,,

10. In this case, as we have pointed out, the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding",,,

against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meaning of Section 48 of the",,,

Code. It is only an application to continue EP No. 13. of 1939 which is pending on the file of the executing court.,,

11. That apart, the decree-holders filed E.A. No. 142 of 1952 in E.P. No. 13 of 1939 expressly asking for the reopening of the said execution petition",,

and for proceeding with it. As we have held that the earlier execution petition is still pending on the file of the court, the executing court will be well",,

within its rights in proceeding on the basis of the earlier execution petition even without a new petition. Ã¢â€œ,,

12. In M/s. Botanium Limited (supra) the Court was considering the question of delay in filing an application for restoration of execution application on,,

the ground that it was not filed within 30 days of dismissal of the execution application as no steps were taken by the decree holder. While considering,,

the provisions of Order 21 Rules 105 and 106 of CPC it was held that since the execution application was not fixed for hearing as contemplated by,,

Order 21 Rule 105 of CPC but was dismissed on the ground that no steps were taken time of 30 days as prescribed in Sub Rule 3 of Rule 106 of,,

Order 21 of CPC for making an application would not be attracted in such a situation and so also there would be no limitation prescribed for making,,

such an application for setting aside the order dismissing the execution application dismissed due to the steps not being taken by the decree holder in,,

the execution application and such application has to be filed within a reasonable period (para 13).,,

13. In Shaikh Chand (supra) the Court was considering a similar position as was considered in M/s. Botanium Limited (supra) and the same view was,,

reiterated based upon Damodaran Pillai Vs. South Indian Bank, 2005 (5) ALL MR 961 (SC) .",,

14. In Chhattar Singh (supra) while considering the proposition, that the decree for sale dated 07/06/1913 was put to execution on 04/01/1916 which",,

were transferred to the Collector on 23/03/1916, another proceeding came to be filed for declaration that the property was not liable to be sold in",,

auction which ultimately came to be decided by the High Court on 06/07/1920. In the subsequent suit, the execution proceedings before the Collector",,,

was stayed which came to be withdrawn by the judgment of the High Court dated 06/07/1920. On 17/08/1920 the Collector took up the execution,,,

proceedings and finding that no steps were taken to prosecute directed the papers to be returned to the Court of the Sub-ordinate Judge, who on",,,

31/08/1920 without issuing notice to either of the parties ordered the application for execution to be struck off the list of pending applications and an,,,

entry be made in the register of decided cases accordingly. On 10/01/1923 the decree-holders filed another application for execution, which came to",,,

be dismissed on account of limitation. Considering the above position, it was held that though the second application was styled as an application for",,,

execution, in sum and substance it was an application to revive the earlier execution application and therefore since the earlier execution application",,,

was not finally decided, directed that the original application for execution should be proceeded to be decided.",,,

15. The case in hand is similar to the one decided in Chhattar Singh (supra). Shaikh Chand (supra) also holds that it requires no debate that the,,,

decree-holders would not squander away the advantage of having achieved the decree by neglecting the proceedings and causing delay against their,,,

own interest. In the instant case also, the proceeding for setting aside the ex parte decree was pending in the form of M.J.C. No.33/2006, which",,,

throughout was contested by the petitioner/judgment debtor and ultimately culminated in Writ Petition No.4518/2018 being dismissed on 12/03/2019,,,

prior to which itself Special Darkhast No.130/2017 already stood filed on 09/10/2017 in which the application at Exh.21 was also filed on 17/09/2019.,,,

That apart, the earlier execution application, i.e., Special Darkhast No.135/2005 was not decided finally, nor was it fixed for hearing as contemplated",,,

by Order 21 Rule 105 of CPC on 05/07/2011 when it was dismissed for want of steps, considering which, as held in M/s. Botanium Limited and",,,

Shaikh Chand (supra), the dismissal would not be one under Order 21 Rule 105 (2) of CPC, as a result of which Order 21 Rule 106 (1) of CPC would",,,

clearly also not be attracted and in such cases it would be permissible for the decree holder to file an application for restoration within a reasonable,,

period of time.,,

In view of the above, I need not go into the other judgments referred to by the learned counsel for the petitioner/decreed holder.",,

16. The learned Executing Court while deciding Exh.21 merely went upon the form and not the substance as is indicated from para 4 of the order,,

dated 16/03/2022 (pg.109). It is apt to state that whatever be the label of the application, it is the substance which governs the application and not the",,,

form and though Special Darkhast No.130/2017, was in fact an application for execution, of the decree, however in light of Exh.21, and the fact that",,,

the earlier Special Darkhast No.135/2005 was not finally decided, in sum and substance it could be termed to be a proceeding for continuing the earlier",,,

execution, considering which, the learned Executing Court ought to have considered it as such and decided it accordingly, which has not been done.",,

17. In view of the aforesaid discussion, the impugned order dated 16/03/2022 below Exh.21 and so also the one dated 23/03/2022 below Exh.14 are",,,

hereby quashed and set aside and the application below Exh.21 is allowed. Special Darkhast No.135/2005 stands revived and be proceeded ahead.,,

The writ petition is accordingly allowed.,,

18. Rule is made absolute in the above terms. No order as to costs.,,