**(2003) 04 BOM CK 0034**

**Bombay High Court**

**Case No:** Notice No. 824 of 2002 along with Execution Application No. 5 of 1994 in Suit No. 1538 of 1983

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| Om Prakash Navani and Phool Omprakash Navani | | APPELLANT |
| | Vs | |
| Herebert Joseph Pereira (Dr. Ivan Pinto and Juno C. Pereira), Mrs. Joyce Evelyn Forbes Irving, Ena Theresa Naylor, Edna Cecilin D. Silva and Jaccueline Angela Meers | | RESPONDENT |

**Date of Decision:** April 16, 2003

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 10, Order 21 Rule 105, Order 21 Rule 105(2), Order 21 Rule 106, Order 21 Rule 16
- Constitution of India, 1950 - Article 226
- Limitation Act, 1963 - Article 135, 136, 137

**Citation:** (2003) 3 ALLMR 67 : (2003) 6 BomCR 170 : (2003) 3 MhLj 989(1)

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

**Bench:** Single Bench

**Advocate:** Mahendra Ghelani, instructed by Law Charter, for the Appellant; Aspi Chinoy, F.E. De Vitre, S.K. Sen, Sachin Mandlik and Akshay Kolse Patil, instructed by Udwadia, Udeshi and Berjis, for the Respondent

**Final Decision:** Dismissed

**Judgement**

A.M. Khanwilkar, J.

This Notice is issued under Order XXI Rule 22 of the Code of Civil Procedure, 1908 in respect of Execution Application No. 5 of 1994 taken out by the Defendants in Suit No. 1538 of 1983. The property in question is known as "Joyden" which is a trust property, comprising of land and building situated at Apolo Reclamation Estate at

Bombay Port Trust. Ms. Mary Periera (settler) and the trustee entered into an Agreement for Sale dated 30th October, 1981, in respect of this property with the Plaintiffs Mr. Omprakash Navani (hereinafter referred to as ''Navani'') for consideration of Rs. 16,00,000/-, as trustees of Rishi Gagan Trust. At the time of execution of this Agreement, deposit of Rs. 2,00,000/- was made with the vendors Advocates. Later on, Suit for specific performance being Suit No. 1538 of 1983 was filed by Navani for specific performance of Agreement dated 30th October, 1981. That Suit was disposed of on 18th October, 1984 on the basis of Consent Terms filed by the parties. As per the Consent Terms, it was agreed that the balance sum of Rs. 14,00,000/- was payable by the Plaintiffs under the said Agreement for Sale dated 30th October, 1981. Out of which amount, Rs. 1,00,000/- was to be paid to M/s. Husseini Doctor and Company towards legal fees payable by Defendants 2 to 5 to them in respect of and relating to the Agreement for Sale and matter connected therewith. Further, the Plaintiffs shall pay sum of Rs. 3,25,000/- to each of the Defendants 2 to 5 as per the terms stated in the Consent Terms. As per Clause 15 of the Consent Terms, the Plaintiffs were obliged to pay the balance price of Rs. 14,00,000/- in the manner mentioned in Clause 6 of the Consent Terms, and interest thereon as mentioned in Clause 16 of the Consent Terms on or before the expiry of 15 months from the date of passing of the decree. Time for payment was made essence of that Agreement. In other words, 15 months period for payment of balance amount was to expire on 18th January, 1986. It is not necessary to burden this Judgment with other details, for the same would not be relevant for deciding the issue that arises for my consideration in this proceedings. Since according to the Defendants, the Plaintiffs failed to comply with the obligation of payment of balance sum of Rs. 14,00,000/-, as per the terms of the Agreement, the consequence as per Clause 23 of the Consent Terms was that the earnest money of Rs. 2,00,000/- and interest accrued thereon was to stand forfeited and the Consent Decree passed in accordance with the Consent Terms was to stand automatically cancelled and the Power of Attorney issued in favour of the Plaintiffs to stand revoked and the Suit to stand dismissed with no order as to costs. Clause 23 of the Consent Terms further provided that the Plaintiffs who were put in possession of the property on execution of the Consent Terms, undertook to this Hon''ble Court to redeliver the possession of the said Immovable property to Defendants 2 to 5. According to the Defendants, since the Plaintiffs committed default, the Consent Decree stood cancelled, and that, the Power of Attorney was also revoked in due course of time. The Defendants contended that as per Clause 23 of the Consent Terms, the Plaintiffs were obliged to redeliver possession of the Immovable property to the Defendants 2 to 5 and since that was not done, the Defendants filed Execution Application under Order XXI Rule 11(2) of the Code of Civil Procedure, 1908 on 10th November, 1993, which was later on numbered as Execution Application No. 5 of 1994. In Clause J of this Application, the Defendants have prayed for execution by issuing warrant of possession under Order XXI Rule 35 and 36 of CPC in respect of the Immovable property as detailed in the Schedule. As this Execution Application was filed after expiry of two years from

the date of the decree, Notice under Order XXI Rule 22 of the CPC was taken out being Notice No. 38 of 1994 on 14th January, 1994. That Notice was duly served on the Plaintiffs. However, the said Notice came to be dismissed on 11th September, 1995. From the order-sheet, as produced along with affidavit filed by the Plaintiffs, it appears that Defendants and their Advocates were absent and the Court passed the following order:

"Notice dismissed with no order as to costs."

In other words, this Notice was dismissed for default for nonappearance of the Defendants and their Advocates. Later on, the Defendants took out fresh Notice under Order XXI Rule 22 of the Code of Civil Procedure, which is the present Notice numbered as Notice No. 824 of 2002, sometime on 10th July, 2002. This Notice has been duly served on the Plaintiffs. In response to this Notice, Plaintiffs have filed reply affidavit before this Court, essentially contending that the second Notice was not maintainable and that, in any case, the Execution Application itself cannot proceed against the Plaintiffs for the reasons stated in the reply affidavit. Amongst others, it is contended that the Execution Application is barred by limitation, the same has not been filed by the authorised persons and the Advocates who have filed the said Application had no valid authority and the relevant Power of Attorney has not been produced. It is also urged that there is no order for possession passed by this Court, and therefore, the Consent Decree as passed, was inexecutable against the Plaintiffs. It is contended that in Clause 23, the Plaintiffs gave undertaking to redeliver the possession and that cannot be said to be an order. It is further contended that assuming that undertaking given by the Plaintiffs is in the nature of order of injunction against the Plaintiffs, recourse to procedure under Order XXI Rule 35 and 36, as invoked by the Defendants, was impermissible in law. On the above contentions, the Notice as well as the Execution Application as taken out by the Defendants, has been resisted by the Plaintiffs.

2. On the other hand, according to the Defendants, Execution Application is filed within limitation and by proper persons. It is contended that even if there is any technical flaw in the Execution Application or the Notice taken out by the Defendants, the executing Court shall allow the Defendants to remedy the defects and permit the Defendants to pursue the Execution Application filed on record. In support of this contention, reliance has been placed on the decision reported in T.A. Darbar and Company and Others Vs. Union Bank of India, , M/s. T.A. Darbar and Company and others Vs. Union Bank of India, and V. Uthirapathi Vs. Ashrab Ali and Others, . Besides, Defendants contend that there is no express provision which would prohibit taking out second Notice under Order XXI Rule 22 such as the provision for instituting Suit in the nature of Order IX Rule 9. It is therefore contended that the present Notice which is a step in execution proceedings, is valid and permissible in law. Besides, it is contended that dismissal of earlier Notice was on the ground of the default as is evident from the proceedings recorded by this

Court on 11th September, 1995 and in such a case, there would be no question of non-suiting the Defendants by invoking the principles of res-judicata and principles analogous to res-judicata. Reliance is placed on the decision of the Apex Court in Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, and the decision of the Division Bench of this Court in Volume XXXI The Bombay Law Reporter 400 in Lakshmibai v. Ravji.

3. Learned Counsel for the Defendants further contends that assuming that there is no order of Court directing the Plaintiffs to redeliver possession, but undertaking given by the Plaintiffs to the Court as recorded in Clause 23 of the Consent Terms, that is in the nature of order of injunction and even order of injunction can be put in execution in terms of Section 36 read with provisions of Order XXI of the Code. In the circumstances, learned Counsel for the Defendants contends that the Notice as well as the Execution Application are appropriate, and the Notice be made absolute and the objections taken on behalf of the Plaintiffs be rejected.

4. As observed earlier, broadly, the objections taken on behalf of the Plaintiffs are twofold. One is regarding the maintainability of second Notice which is the present Notice No. 824 of 2002 under Order XXI Rule 22 of the Code and secondly, that the Execution application is itself not maintainable. Besides these two contentions, during course of arguments, learned Counsel for the Plaintiffs has also contended that the Application was not filed by authorised persons and that, the Advocates who have filed the application, had no authority and the relevant Power of Attorney was also not produced. For all these reasons, the proceedings deserves to be dismissed.

5. I shall first deal with the objection regarding the maintainability of second Notice under Order XXI Rule 22 of the Code. The argument of the Plaintiffs is that once proper Notice is issued and duly served upon the other side, is dismissed by the Court, for whatever reason, in such a case, second Notice under Order XXI Rule 22 is impermissible, on account of the scheme of the relevant provisions of the Code of Civil Procedure. It is further contended that at best, the Defendants could have taken recourse to application for setting aside ex-parte order passed on the earlier Notice and not by taking out fresh Notice under the same provisions. For this purpose, it would be necessary to advert to the scheme of Order XXI. Provisions contained in Order XXI, Rules 10 to 16 provide for the mode of setting in motion the execution of decrees and orders. In the present case, the Execution Application has been filed under Sub-rule (2) of Rule 11 of the Order XXI namely, a written application. Once such application is filed, the procedure to be adopted can be found in Rule 17 onwards. In the present case, however, since the Execution Application was filed after lapse of two years after the date of decree, it was obligatory to issue Notice under Rule 22. The Notice once issued has to be proceeded further in accord with the provisions contained in Rule 23. Rule 23 provides that where the person to whom Notice is issued under Rule 22 does not

appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed. It further provides that where such a person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. In the present case, the latter part of the provision would apply. The other relevant provision as has been pressed into service on behalf of the Plaintiffs, is Rule 105, which pertains to hearing of the Application under any of the foregoing rules of Order XXI. Sub-rule (2) of Rule 105 postulates that when 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 out for hearing, the Court may make an order that the Application be dismissed. We are not concerned with the provisions contained in Sub-rule (3) in this case. The order as passed on the earlier Notice No. 38 of 1994 on 11th September, 1995 is obviously ascribable to Sub-rule (2) of Rule 105. To put it differently, the previous Notice taken out by the Defendants which was step-in-aid of the Execution Application, came to be dismissed for default on 11th September, 1995. That order could have been challenged by the Defendants by virtue of Rule 106, by getting that ex-parte order set-aside. However, the Defendants did not take recourse to that remedy, but after more than seven years, took out fresh Notice under Order XXI Rule 22, which is the present Notice No. 824 of 2002 on 10th July, 202. The question therefore is: whether such a second Notice or successive notices are permissible? Going by the plain language of the provisions of Order XXI, to my mind, it does not provide for successive notices to be taken out or issued under Rule 22. On the other hand, the remedy available to the Defendants was to get the order dated 11th September, 1995 set-aside by taking recourse to provisions of Rule 106. In other words, the Plaintiffs will be right in contending that second Notice such as the present one, is not maintainable and permissible in law and the same needs to be dismissed.

6. The next question is: what is the consequence of dismissal of the previous Notice under Order XXI Rule 22? It is well settled that Notice under XXI Rule 22 is step-in-aid of execution proceedings and if that Notice is to be rejected, and the objections of the opponents were to be accepted, then, the Execution Application would automatically terminate with that order, and cannot be said to remain pending in law. However, it is only when the Notice under Order XXI Rule 22 is made absolute, that the Execution Application can proceed further on other issues to be decided in accordance with law. In the present case, the previous Notice has been dismissed, though on the ground of default. The above legal position, however, would apply even to that situation and the consequence of dismissal of previous Notice on 11th September, 1995 would be that the Execution Application No. 5 of 1994 as filed by the Defendants would become redundant and will have to be terminated by a formal order to be passed at a latter point of time. In the circumstances, the present Notice will have to be discharged and consequential orders will have to be passed on the Execution Application which has remained pending on the record of this

Court.

7. In view of the above reasoning, it will not be necessary for me to go into the other issues raised on behalf of the Plaintiffs that the Execution Application has been filed by persons not authorised or that there is no proper authority in the Advocate who have presented the Application and the Notice or for non-production of relevant Power of Attorney. However, I shall proceed to examine the other relevant aspects which have been canvassed before this Court. According to the Plaintiffs, there is no order passed by the Court requiring the Plaintiffs to redeliver possession of the property in question and if that is so, there is no executable order for possession in favour of the Defendants. No doubt, on plain language of Clause 23 of the Consent Terms, this argument seems to be attractive. It will be apposite to advert to Clause 23 of the Consent Terms at this stage. Clause 23 reads thus:--

"ORDERED AND DECREED that in the event of the Plaintiffs committing default in payment of the said balance price of Rs. 14,00,000/- and interest thereon on or before the said date for payment of the earnest money of Rs. 2,00,000/- (Rupees two lakhs) and interest accrued thereon do stand forfeited and the Consent Decree passed in accordance with the Consent Terms do stand cancelled, the said power of attorney do stand revoked and the Suit do stand dismissed with no order as to costs and the plaintiffs undertake to this Hon''ble Court to re-deliver possession of the said Immovable property to defendants Nos. 2 to 5."

On plain language of this Clause, it is seen that the consequence of default by the Plaintiffs was that the Suit was to stand dismissed and the Power of Attorney given in favour of the Plaintiffs was to stand revoked. However, in so far as question of possession and redelivery of possession of the Immovable property is concerned, it is only records that the Plaintiffs undertook to this Hon''ble Court to redeliver possession of the said Immovable property to Defendants 2 to 5. There is no express order passed by the Court, but I am inclined to accept the argument canvassed on behalf of the Defendants that even an undertaking given by a party to the Court is in the nature of order of injunction against that party. Since the undertaking given by the Plaintiffs to redeliver the possession of the Immovable property is in the nature of order of injunction against the Plaintiffs, it was open to the Defendants to get that order executed by way of Execution Application. However, in such a case, the party could have taken recourse to provisions of Order XXI Rule 32 and not as has been invoked in the present case under Order XXI Rules 35 and 36. Such an application is not maintainable, as the Court cannot issue warrant of possession in respect of an order of injunction. The Plaintiffs have rightly relied on the decision of the full Bench of Delhi High Court reported in Sarup Singh Vs. Daryodhan Singh, . In this decision, after examining the gamut of case-law, it has been held that a decree for injunction must be executed in the manner provided by Rule 32 and the issue of warrant for delivery of possession in execution of a decree for injunction is not justified either by Rule 35 of Order XXI or Clause (e) of Section

51. Applying that principle, it will have to be held that even if the undertaking given by the Plaintiffs as recorded in the Consent Decree is in the nature of order of injunction, the Defendants could not have taken recourse to Order XXI Rule 35 for execution of that part of the decree by issuance of warrant of possession. If that is so, the Execution Application as filed, would not be maintainable and will have to be dismissed on that account and as a necessary corollary the objection taken on behalf of the Plaintiffs will have to be accepted and the Notice against them discharged.

8. The next question that arises for consideration is: whether it will be permissible for this Court to allow the Defendants to suitably amend the Execution Application as already filed, by allowing them to pray for appropriate relief? However, there is no such formal application made before me, nor even suggested during the course of arguments. To my mind, the defect of invoking provisions of Order XXI Rule 35 and not the correct provision (Rule 32) which was actually applicable, is a substantive and incurable defect. Assuming that the said defect could be cured, the Plaintiffs have rightly contended that the Execution Application itself, in the fact situation of the present case, would be barred by limitation. It will be useful to advert to Article 135, 136 and 137 of the Limitation Act. Article 135 provides for three years limitation for the enforcement of a decree, granting a mandatory injunction. The period of three years would start from the date of the decree or when the date is fixed for performance, such date. In the present case, limitation would obviously start from 18th January, 1986 when the fifteen months period expired, consequent to which, the Suit stood automatically dismissed by virtue of Clause 23 of the Consent Decree. In other words, it was obligatory on the part of the Defendants to institute the Execution Application before expiry of three years from 18th January, 1986, whereas, the Execution Application has been lodged on 10th November, 1993. I am assuming that Article 135 applies to the fact situation of the present case, on the premise of the above reasoning that undertaking given by the Plaintiffs is in the nature of order of mandatory injunction against the Plaintiffs, which could be executed against the Plaintiffs.

9. That takes me to Article 136 of the Limitation Act. That provision would apply for execution of any decree other than a decree granting a mandatory injunction or order of any Civil Court. On the above reasoning, it will have to be held that Article 136 has no application to the case on hand. Assuming that Article 136 was to apply in the present case, even then, the Execution Application as filed, cannot proceed, as I have already taken the view that on dismissal of the earlier Notice No. 38 of 1994 on 11th September, 1995, the said Application would stand terminated, the Notice under Order XXI Rule 22 being step-in-aid of the Execution Application. On dismissal of the said Notice, nothing would survive for further consideration in the Execution Application, in law. The other provision which, at best, can be invoke by the Defendants, is Article 137 which is a residuary provision and applies to any other application for which no period of limitation is provided elsewhere in that division.

even if this Article was to be applicable, the limitation provided is only three years from, when the right to apply accrues. In the present case as is seen, the right to apply accrued on expiry of fifteen months from the date of decree dated 10th October, 1984, which period completed on 18th January, 1986; whereas, the present Application has been filed on 10th November, 1993. In that view of the matter, the Execution Application as filed, cannot proceed, being barred by limitation. If that is so, the Notice will have to be discharged and the Execution application dismissed, assuming that the same had remained pending inspite of the dismissal of the earlier Notice on 11th September, 1995.

10. That takes me to the other contention raised on behalf of the Plaintiffs that the second Notice is barred by principles of res-judicata. The Defendants, however, contend that principles of res-judicata have no application to proceedings in Execution Application. For this purpose, reliance has been placed on S.P. Shah''s case (Supra) and Lakshmibai''s case (Supra). On the other hand, learned Counsel for the Plaintiffs contend that the said decisions will have no application to the present case, as principle stated in those decisions has undergone change on account of the amendment of 1976 by insertion of Explanation VII to Section 11 of the Code, which expressly provides that the provisions of Section 11 shall apply to proceedings for the execution of a decree and reference in that Section to any Suit or former suit, shall be considered as references, respectively, to a proceedings for the execution of a decree. It is therefore, contended that in view of the amended Section 11, the second Notice issued to the Plaintiffs would be barred by principles of res-judicata. However, it is not necessary for me to go into these questions, having held that the Execution Application is barred by limitation.

11. It was next contended on behalf of the Plaintiffs that the order passed on 11th September, 1995 was in substance, an order ascribable to the provisions of Order IX Rule VIII of the Code, and in which case, the second Notice which is the present Notice was barred by virtue of provisions analogous to Rule IX Order 9. To overcome this contention, Counsel for the Defendants contended that provisions of Order IX of the CPC have no application to the execution proceedings which are governed by Order XXI of the Code which is a self contained Code. On other other hand, learned Counsel for the Plaintiffs contends that by virtue of amendment to Section 141 of the Code by Act 1 of 1976 and inserting explanation therein, the provisions of Order 9 would automatically apply even to the proceedings under Order XXI. Section 141 of the Code applies to miscellaneous proceedings. It is provided that the procedure provided in the Code in regard to Suits shall be followed as far as it can be made applicable in all proceedings in any case of civil jurisdiction. As mentioned earlier by Act of 1976, Explanation has been inserted to Section 141 which reads thus:

"In this Section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

12. It was therefore contended that having regard to the amendment to Section 141 the provisions of Order IX would automatically apply even to Execution Application and the order passed on 11th September, 1995 will be one under Order IX Rule 8 of the Code. In my vie, it is not necessary for me to examine even the said question, having held that the Execution Application is barred by Limitation.

13. It was contended on behalf of the Plaintiffs that the second Notice issued which is the present Notice, is barred by limitation. In response to this contention, it was argued on behalf of the Defendants that the original Execution Application was filed in time and the Notice which is only step-in-aid of the said Execution Application, if issued at a latter point of time and beyond limitation, would be of no consequence. To buttress this contention, reliance was placed on the decisions in the case of S.K. Sahgal (Supra) and V. Uthirapathi''s case (Supra). To my mind, there can be no difficulty in accepting the proposition that "if" the Execution Application is filed within limitation, then subsequent application or notices required to be taken up in that Application, if issued, or filed after the expiry of period of limitation that would be of no consequence, for the limitation has already stopped running on the institution of the Execution Application. However, in the present case, I have already taken the view that the Execution Application as filed, is obviously barred by limitation.

14. It is made clear that it will be open to the Defendants to take recourse to any other remedy, if available and permissible in law.

15. On the above reasoning, I would proceed to discharge the Notice issued to the Plaintiffs under Order XXI Rule 22 and as a consequence, the Execution Application No. 5 of 1994 would also stand dismissed. No order as to costs.