(2009) 07 DEL CK 0459

Delhi High Court

Case No: E.A. (OS) No. 187 of 2009 and Ex.P. 58 of 1994

Deutsche Ranco GMBH	APPELLANT
Vs	
Mohan Murti	RESPONDENT

Date of Decision: July 28, 2009

Acts Referred:

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

Citation: (2009) ILR Delhi 646 Supp

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Tanseem Ahmadi and Sarifa Chowdhury, for the Appellant; Party-in-Person, for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

The petitioner, (Judgment debtor, referred to as such) seeks review of an order dated 25.01.2008 whereby the present execution proceedings were restored; they had been dismissed in default, by the court''s earlier order dated 7th August, 2007.

2. M/s Deutsche Ranco Gmbh (hereafter referred to as "decree holder") had claimed US$ 10,00,000/- (US $ One Million) ? the Rupee equivalent being Rs. 1,51,50,000/- at the relevant time, according to the prevailing exchange rates. This court decreed the suit by judgment dated 15th October 1993. The decree holder filed the present proceeding, in 1994, for execution of that decree. The details of various orders issued in these proceedings need not be recounted, as the present review proceeding is focused on the determination of a narrow issue. At an earlier stage, the execution proceeding was dismissed in default, on 13.01.1999, since the decree holder did not prosecute its case with promptitude; it applied for restoration of the

proceeding, by moving E.A. 97/1999, on 22.02.1999 under Order 9, Rule 4 of the CPC ("CPC"). The court noted that provisions of that order were inapplicable, and that courts are normally reluctant to restore execution proceedings, if fresh execution petitions could be filed. However, noting the existence of inherent powers u/s 151, the court restored the execution petition.

3. The previous order sheets of this Court, in the present execution proceeding too reveal that the judgment debtor objected to the maintainability. He had also appealed to the Division Bench, aggrieved by the order of 22.02.1999; that appeal was disposed off on 10.12.2003. The Division bench left open the question of maintainability of the execution proceedings, to be determined by this Court. The judgment debtor''s objections to maintainability were articulated in E.A. 258/2004. The decree holder sought time, to file its response to these objections on 09.07.2004 and on subsequent dates. On 10.01.2006, the decree holder contended that it had been "taken over" by another company; it sought time to move the court through an appropriate application. Further adjournment was sought on this score on 21.04.2006. Eventually an application E.A. 356/06 was filed and the provisions of Order 22 Rule 10, CPC; the judgment debtor sought time to file reply to the application on 21.07.2006. Apparently reply was filed; the order of court dated 04.12.2006 reveals that the application E.A. 356/06 was set down for hearing on 20.03.2007. On that later date, it was represented by Counsel appearing for the decree holder that he had instructions to withdraw from the case and that he would be moving the court for discharge. On 07.08.2007, there was no
appearance on behalf of the decree holder; consequently the execution proceeding was dismissed.

4. An application, E.A. 36/2008 was filed in court on 24.01.2008, under Order IX Rule 4, CPC contending that Counsel for the decree holder was under bona fide belief that he did not have instructions to proceed with the execution petition but was however taken aback upon receiving an e-mail communication on 15.01.2008, from the decree holder seeking a status report of the matter. It was contended that at that stage the decree holder''s Counsel checked the records in his office and found that they had not been returned; it was also contended that subsequently, the Counsel found out that the execution petition had been dismissed on 07.08.2007. On the basis of these facts, restoration of the execution proceeding was sought. The application relied on a photo copy of the e-mail received by Counsel for the decree holder.

5. By the order under review, dated 25.01.2008, the court took note of the averments, including the statement that the decree holder''s Counsel defaulted in appearance under the bona fide belief that some other Counsel had secured instructions; it relied upon certain rulings under provisions of Order 9, Rule 4, CPC, which were to the effect that if a suit were dismissed for non-prosecution by the plaintiff, in absence of the defendant, the court could restore it without notice to the

defendant. Recording its satisfaction that the decree holder disclosed reasonable cause for non-appearance on 07.08.2007, (when the execution proceeding was dismissed), the court restored Ex. 58/1994.

6. The judgment debtor, in his review contends that the reference to Order 9, Rule 4, was misplaced, in the order dated 25.01.2008 since the decree holder was aware of this Court''s admonition, in the course of execution proceedings when they had been dismissed for non-prosecution in 1999. Yet an attempt to have the preceding restored through a wrong provision was resorted to. It is argued more fundamentally, that the decree holder''s application for restoration is a virtual fraud on the court. The judgment debtor points out that though an application E.A. 356/2006 for substitution of the decree holder with Invensys Deutschland GmbH (hereafter called "Invensys Deutschland") was pending, the court had not made any order accepting it. Yet, Invensys Deutschland, without any locus standi filed the application for restoration of the proceeding. It is pointed out that the said application, E.A. 36/2008 was not supported by the affidavit of any one from Invensys Deutschland or the decree holder but by an Advocate claiming to be the associate of the decree holder''s Counsel, M/s Fox Mandal & Co. The decree holder points out that the same Counsel (law firm) always represented the decree holder and relies upon the court records of this purpose.

7. It is pointed out in the review that the satisfaction of the court in cases like the present is to be recorded after considering the overall circumstances of the case. The decree holder -or indeed Invensys Deutschland, which claims to have stepped into its shoes- could reasonably be expected to be aware that the power of restoration of execution proceedings though available would be used by the court in the overall interests of justice. Having once been admonished about the wrong approach in seeking restoration under Order 9 Rule 4, CPC, the least that the decree holder''s Counsel was expected to do was apply under the correct provisions of law. The judgment debtor emphasized that the Counsel in both instances were the same. It was also argued that no attempt was made to explain the delay in approaching the court for seeking restoration of the execution proceeding. The judgment debtor relied upon the order of court dated 20.03.2007 when it was represented by Counsel appearing for the decree holder that he had instructions to withdraw from the case and that he would be moving the court for discharge. It was urged that the Counsel who made that submission continued to act under the mandate of the same law firm which was authorized to appear for the decree holder. Arguing that the later application for restoration, E.A. 36/2008 sought to convey a misleading picture, the judgment debtor stated that the court should not have restored the proceedings to his detriment, by the order under review, without even issuing notice. It is urged that the conduct of the decree holder, emerging from the record of this case, did not in any case, warrant restoration of the proceeding; the judgment debtor further argued that though the application for restoration was delayed, the decree holder, applicant of EA 36/2008, did not mention it. The judgment debtor argued that in

terms of Order 21 Rule 106, the limitation period for applying for restoration, starts from the date of order (of dismissal of the execution petition) and not from date of its knowledge; even Section 5 of the Limitation Act, or Section 151, CPC is excluded in its application. Reliance was placed on the judgment of the Supreme Court, reported as Damodaran Pillai and Others Vs. South Indian Bank Ltd., . In these circumstances, the judgment debtor requests the court to review its order, dated 25.01.2008 and dismiss the execution petition.

8. Invensys Deutschland, represented by Ms. Tanseem Ahmadi, argues that there was no intentional or deliberate delay in approaching the court, for restoration. It is urged that although the court had recorded on a previous occasion that the decree holder had sought restoration (previously, in 2003) by moving an application citing a wrong provision of law, the court was alive to the justice of the case, and had, even while admonishing the decree holder, ultimately restored the proceeding. It was argued that the record nowhere reveals any intention to present wrong or false facts; the previous Counsel, had no doubt filed an affidavit in support of the application (I.A. 36/2008) but nevertheless the e-mail correspondence annexed to it, showed that the decree holder was concerned about the proceeding, and anxious to follow its progress. These documents were a part of the record, and the court had occasion to go through them.

9. It was argued in opposition to the review petition, that a transferee of a decree holder has locus standi to maintain the proceedings, in execution. Counsel relied on the judgment reported as In re M/s Bajrangbali Engineering Co. Ltd. AIR 1989 Cal 356; it was emphasized that even an application need not be preferred, as the rights of the original plaintiff or the decree holder are recognized by the court. The transferee merely steps into his shoes. Relying on the judgments reported as Raj Kumar Ramavtar Chourasia Vs. Mathew Charian Christian, and Paramita Das Vs. Pranati Sarkar and Others, , it was argued that review jurisdiction is extremely limited and that questions of law do not fall within the domain of the court. Again, relying on Parsion Devi and Others Vs. Sumitri Devi and Others, Counsel argued that while considering review petitions, the court does not re-consider the soundness of its findings, or act as an appellate court. According to Invensys Deutschland, the review petitioner''s arguments are not only hyper technical, but, if accepted, would defeat the ends of justice, since the decree-holder''s right to execution would be foreclosed.

10. Before discussing the merits of the parties'' arguments, it would necessary to notice the relevant provisions pertaining to dismissal of execution proceedings, and their restoration. Though the Invensys Deutschland opposed the review petition, it did not dispute the power of the court to dismiss the execution proceeding, in default, embodied in Order XXI, Rule 105, and the power to restore it, in terms of Rule 106. Those provisions are as follows:

Order 21 Rule 105. Hearing of application

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 Sub-rule (1) includes a claim or objection made under Rule 58.

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 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 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 the applicant had knowledge of the order.

11. The narration of facts in the previous portion of this judgment reveals certain undisputed facts. They are that on a previous occasion, the execution petition was dismissed, in January, 1999; it was eventually restored in the year 2003. At that stage, the court granted relief to the decree holder, despite its moving under a wrong provision of law. By that time, the law firm, representing the decree holder had been engaged; its authorization to appear, in the form of the ''vakalatnama'' dated 09.04.2003 is on record. The decree holder had sought time, in 2004 to file its reply to the judgment debtor''s objections about maintainability of the proceeding. Such reply was not placed on the record for more than 3 years; it is not a part of the record even till date. On 10.01.2006, the decree holder contended that it had been "taken over" by another company; it sought time to move the court through an appropriate application. An application E.A. 356/06 was filed and the provisions of Order 22 Rule 10, CPC; the judgment debtor filed his reply. On 20.03.2007, it was represented by Counsel appearing for the decree holder that he had instructions to

withdraw from the case and that he would be moving the court for discharge. On 07.08.2007, there was no appearance on behalf of the decree holder; consequently the execution proceeding was dismissed. E.A. 36/2008 was moved on 24th January, 2008. It is unsupported by affidavit of the decree holder, or of Invensys Deutschland; Mr. Ugen Butia, an associate of M/s Fox Mandal deposed in its support. The application encloses copies of e-mails of Invensys Deutschland, dated 11.01.2007 (asking that the files should be handed over to another counsel) and another, dated 15.01.2007, enquiring about the status of the case. This e-mail also contained the previous one, dated 11.01.2007. Apparently, this latter e-mail triggered the search by the Counsel, impelling the application for restoration, E.A. 36/2008.

12. EA 36/2008, interestingly, does not state that the order dated 20.03.2007 was wrongly recorded. It suggests that the Counsel were under the impression that the files were handed over, and that they were discharged. This is borne out by the copy of email, dated 11.01.2007 which suggests that the decree holder (or its transferee company) was withdrawing instructions from the previous counsel. There is also no averment that the date set down by the court, i.e. 07.08.2007 was unknown to the counsel. In these circumstances, the averments in E.A. 36/2008 reveal that Invensys (or the decree holder, since formal transposition had not been directed by the court) did not wish to continue with its counsel. Invensys Deutschland''s conduct also has to be scrutinized, because there is no material to suggest that it ever took any steps to pursue the case; apart from the e-mail dated 11.01.2007, there is no material showing that any follow up with any Counsel took place till 15.01.2008. The materials on record bear out the application for restoration E.A. 36/2008 was filed after Invensys Deutschland had withdrawn instructions from its previous Counsel, in January 2007. These are matters of record, not inferences which the court is drawing.

13. There is no gainsaying that procedure is the handmaiden of justice, and cannot supplant a call for justice. Yet, this aphorism applies where the court has to exercise discretionary powers or jurisdiction. Here, quite apart from the decree-holder''s lackadaisical approach in the prosecution of the execution proceeding, the judgment debtor''s argument about the court''s lack of jurisdiction, to restore the execution proceeding, is a substantial one. Ms. Ahmadi''s submission, in this respect, that the court''s power, if said to exist, cannot be defeated, if a litigant refers to a wrong provision, are no doubt applicable in general; that is a well known proposition. Yet, where questions of limitation challenge the efficacy of a court''s jurisdiction, in the absence of a power to condone or excuse the delay, such general arguments are overborne.

14. Order 21, Rule 105(2) empowers the court to dismiss an execution proceeding, if the decree holder does not appear, or is unrepresented. Rule 106(1) empowers the court to restore the execution proceeding, or recall the order, made ex-parte against the opposite party (such as the judgment debtor, who may be faced with an

ex-parte order, for non appearance, under Rule 105) if the application is made by the party aggrieved. Rule 106(2) enjoins the court not to make any order under Rule 106(1) unless the opposite party is served with notice. Rule 106(3) provides for limitation of such applications. It is in two parts. The first part refers to executions dismissed by court; the second part refers to ex-parte orders. The limitation in respect of the first part, or class is thirty days from the date of the order, dismissing the execution; in the case of recalling of ex-parte orders (against judgment debtors) the limitation period is 30 days from the date of knowledge of the order (by the judgment debtor, or opposite party suffering the ex parte order). The Supreme Court had, in Damodaran Pillai, considered the impact of these provisions, and the Limitation Act, particularly Section 5. The case was decided in the context of a submission that the Limitation Act applied to execution proceedings, due to a local (Kerala) law. Rejecting the argument, the court noted that the local law could not apply after the enactment of the Limitation Act; it held that:

...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 CPC 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:

106. (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 on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

9. Sub-rule (3) of Rule 106 provides for the period of limitation for filing such an application which reads as under:

106. (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 the applicant had knowledge of the order.

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 Sub-rule (2) of Rule 105, the starting point 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 the execution petition would arise only in a case where an ex parte order was passed [illegible] 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 under Sub-rule (2) of Rule 105, 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.

13. It is also not in dispute that the Kerala Amendment providing for application of Section 5 of the Limitation Act in Order 21 Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963 (Act 56 of 1964).

14. It is also trite that the civil court in the absence of any express power cannot condone the delay. For the purpose of condonation of delay in the absence of applicability of the provisions of Section 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 u/s 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 u/s 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.

15. Here, quite apart from other facts, the restoration application had to be dealt with under Rule 106. The order of dismissal was made on 07.08.2007. The application for restoration was filed on 24.01.2008, i.e. 170 days after the date of dismissal; it was clearly barred by 140 days. The exclusion of the Limitation Act meant that even the court lacked the power to entertain the application. The averments in the application, besides, showed that Counsel for the decree holder,

(or Invensys Deutschland) were aware that the proceeding was scheduled for 07.08.2007. Clearly, the court lacked the power to make the order that it did on 25.01.2008.

16. The consequence flowing from dismissal of an execution proceeding can be drastic. When the decree holder approaches the court with a fresh execution petition, it would be maintainable, if it is within the overall time prescribed for execution petitions (twelve years from the date of decree). However, if a pending petition is dismissed, as in this case, he has to be by virtue of Rule 106 and the judgment in Damodaran Pillai (supra) vigilant in applying for restoration within the time prescribed. Any lapse here would result in the execution proceeding becoming barred, which would correspondingly accrue as a right to the other party, or the judgment debtor. Ordinarily, notions of equity and interests of justice are relevant, where the court exercises discretionary jurisdiction. However, such notions of equity have no role, where the law dictates certain consequences, as in the cases of statutes of repose, such as laws of limitation. Viewed in this context, the argument of Invensys Deutschland about the restrictive nature of review jurisdiction, are insubstantial. On the other hand, it is settled that review jurisdiction has to be exercised if the justice of the case so demands. The goal or objective of every legal system is to secure justice. This may no doubt mean different things to different people, but in this case it has to imply only one thing, that the mandate of the law should be respected. The Supreme Court in S. Nagaraj and Others Vs. State of Karnataka and Another, , explained the rationale of review jurisdiction in the following terms:
Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice....

17. On a careful consideration of the overall circumstances of this case, this Court concludes that the order sought to be reviewed, cannot be allowed to stand; it is contrary to the mandate of Order 21, Rule 106, which admits no discretion in regard to entertaining applications for restoration of execution proceedings, dismissed in default, if presented beyond the period of limitation prescribed by law. For these reasons, the order dated 25.01.2008 is hereby recalled; the previous order of 07.08.2007 is therefore, restored on the file. In the circumstances of this case, the applicant Invensys Deutschland is directed to bear the costs for this application, quantified at Rs. 75,000/-the same shall be paid to the judgment debtor within two weeks. The execution petition, i.e. Ex. 58/1994 therefore, stands dismissed.