

**(2007) 01 BOM CK 0112****Bombay High Court (Nagpur Bench)****Case No:** Civil Rev. Application No. 115 of 2006

Dattatraya Jog

APPELLANT

Vs

Radhabai Ghate

RESPONDENT

**Date of Decision:** Jan. 29, 2007**Acts Referred:**

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

**Citation:** (2007) 3 ALLMR 618 : (2008) 1 BomCR 718 : (2007) 3 MhLJ 425**Hon'ble Judges:** C.L. Pangarkar, J**Bench:** Single Bench**Advocate:** M.S. Jawalkar, for the Appellant; None, for the Respondent**Judgement**

C.L. Pangarkar, J.

This revision application is filed by applicant/Judgment Debtor - Dattatraya being aggrieved by the order of Civil Judge (Jr. Dn.) Nagpur whereby he reopened the execution Application R.D. No. 131/1976.

2. Radhabai Ghate had instituted Civil Suit No. 955/1971. It came to be decreed on 28-2-1974. The decree was for delivery of possession and recovery of money. Initially two execution applications were filed being R.D. No. 280/74 and 931/76. First application i.e. R.D. No. 280/74 was dismissed as infructuous. Later the Judgment Debtor i.e. the present applicant filed M.J.C. No. 67/1976 contending that the decree for money could not be executed due to Debt Relief Act, 1975. The M.J.C. was allowed and Execution Application No. 131/76 was dismissed. The Decree Holder/non-applicant filed a revision before this Court being C.R.A. No. 339/77. The Civil Revision Application was allowed on 6-9-1980. After this Civil Revision Application was decided in 1980, the non-applicant/decree-holder Radhabai filed R.D. No. 175/81 on 13th April, 1981. It is obvious, therefore, that this R.D. No. 175/81 was filed immediately after revision was decided by the High Court. The

Decree-holder, however, did not prosecute this R.D. No. 175/81 properly. The Court passed the following order while dismissing R.D. No. 175/81.

Decree Holder called absent. Decree-holder's counsel filed no instruction pursis. The office objection that remained till today and no further steps has been taken by the Decree Holder, hence the execution proceeding is filed for non-compliance.

3. The decree-holder did not even remove the office objection. Since no steps were being taken by the non-applicant/decree-holder, the Regular Darkhast was dismissed on 5-8-1983. After this R.D. was dismissed in the year 1983 and application for reopening of R.D. No. 131/76 was filed being Miscellaneous Application not Requiring Judicial Enquiry No. 46/01. It was filed on 26th April, 2001 i.e. after lapse of 18 years.

4. The learned Judge of the Lower Court ordered revival of R.D. No. 131/76. It has to be borne in mind that after decision in revision, the non-applicant-decree holder had filed R.D. No. 175/81. This R.D. was filed precisely because the impediment in form of Debt Relief Act was removed by the decision of the High Court. Hence, it is clear that by filing new R.D. No. 175/81, the execution was revived. Hence, to my mind, there could have been no revival of R.D. No. 131/76. Furthermore, if at all there could have been any revival, it could be of R.D. No. 175/81 being the latest i.e. later in time. For this reason itself the order of lower court can be set aside.

5. Furthermore, the non-applicant/decree-holder did not take any steps for restoration of R.D. No. 131/76 or 175/81 within a period of 12 years from the date of its dismissal. Even if we exclude time spent in prosecuting the Revision, still the revival application is hopelessly barred by limitation. The limitation for execution of the decree begins from the date of decree. The decree is of 1974. The time spent in prosecution of Civil Revision Application is only of three years. Even if that period is excluded, still the time of more than 20 years is lost.

6. Order 21 Rule 105 and 106 speak of restoration of execution application. Restoration application can be filed within thirty days. If we read Section 5 of the Limitation Act, it has no application to execution proceedings. Therefore, where restoration application is not filed within 30 days in execution proceedings, there is no provision to condone the delay. The learned judge of the Lower Court, therefore, to my mind, fell in error in allowing the application. The order patently suffers from illegality and also suffers from wrong exercise of jurisdiction. The revision is, therefore, allowed. The order passed by the lower Court is set aside. MANRJE No. 46/2001 stands dismissed.