

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7670 OF 2014

R. S. Kumar ... Petitioner
Vs.
M/s. Sherali Khan Mohamed Manekia & others... Respondents

Mr. R. S. Apte, Senior Advocate a/w. Mr. Mandar Limaye for Petitioner.
Mr. P. S. Dani, Senior Advocate a/w. Mr. Ayaz Bilawala and Ms Siddhi Doshi
i/b. Bilawala & Co. Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 5, 2016

P.C. :

Heard Mr. Apte, learned Senior Counsel for petitioner and
Mr. Dani, learned Senior Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, judgment debtor No.7 has challenged the judgment and order dated 07.07.2014 passed by the learned 5th Joint Civil Judge, Senior Division, Thane below exhibit-1 in Miscellaneous Application No.168 of 2011. By that order, the learned trial Judge allowed the application for restoration and restored Special Darkhast No.4 of 1999, which was dismissed in default on 08.10.2010.

3. Mr. Apte submitted that respondent No.1 had instituted Regular Civil Suit No.37 of 1980. The said Suit was decreed on 04.02.1988. Respondent No.1 instituted Special Darkhast No.4 of 1999 for execution of that decree. Respondent No.1 did not take steps for serving all the judgment debtors. Some of the judgment debtors were represented by Shri V. P. Deodhar, Advocate. The said Advocate withdrew his appearance by passing purshis exhibit-27. On 08.10.2010, the learned

trial Judge passed the following order:

“Till date the decree holder has not secured presence of all judgment debtors. Shri V. P. Deodhar, Advocate withdrawn his Vakalatnama and passed purshis Exh.27. D.H. are absent. Hence, his proceedings stands disposed off.

sd/-
08.10.2010”

4. Mr. Apte submitted that within 30 days, respondent No.1 filed Restoration Application in Miscellaneous Application No.168 of 2011. He submitted that in the first place, no sufficient cause is given for not serving all the judgment debtors right from 1999 till order dated 08.10.2010. Secondly, the Darkhast is instituted by M/s. Sherali Khan Mohamed Manekia through its Constituted Attorney Mr. Bipin Chimanlal Shah. The said firm is dissolved. Even the Power of Attorney is not produced on record. If the firm is dissolved, Restoration Application could not have been filed on its behalf, that too, by a person who claims to be Constituted Attorney, without filing Power of Attorney. He submitted that the learned trial Judge was not justified in allowing the application. He further submitted that in case the Court is not inclined to interfere with the impugned order, all the contentions as regards maintainability of Darkhast may be kept open.

5. On the other hand, Mr. Dani supported the impugned order. He submitted that Darkhast was filed in the year 1999 for execution of decree passed on 04.02.1988. The Darkhast was filed within limitation. In Miscellaneous Application No.168 of 2011, it is asserted that even after dismissal of Darkhast for not taking steps, respondent No.1 could have filed Darkhast within the period of limitation. He further submitted that the delay in not taking steps will not enure to the benefit of the decree-holder but rather it will enure to the benefit of the judgment debtors as the decree was passed in 1988 and till date, decree

is not satisfied. In other words, prejudice will be caused to the decree holder on account of delay and not the judgment debtors. He, therefore, submitted that since the application was filed within 30 days for restoration of Miscellaneous Application, the learned trial Judge has rightly exercised his discretion, and therefore, no case is made out for invocation of powers under Article 227 of the Constitution of India.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that in the year 1999, respondent No.1 filed Darkhast for execution of decree passed on 04.02.1988 in Regular Civil Suit No.37 of 1980. It appears that some of the judgment debtors in fact were represented by Advocate Shri V. P. Deodhar. In my view, if some of the judgment debtors were represented by Advocate, the learned trial Judge was not justified in dismissing Darkhast against all the judgment debtors. At the highest, the learned trial Judge could have dismissed Darkhast only against those judgment debtors, who were not served.

7. That apart, as noted earlier, it is not in dispute that Restoration Application was filed within 30 days from the date of dismissal. Perusal of the application, and in particular paragraphs 2 to 5 shows that respondent No.1 gave reason for not taking steps. As noted earlier, the delay in proceeding with Darkhast will not enure to benefit of the decree-holder. Rather, delay will cause great prejudice to the decree-holder if Darkhast is not disposed of with promptitude. Delay in execution proceedings will enure to the benefit of the judgment-debtors. In view thereof and for the reasons stated by the learned trial Judge in the impugned order, I do not find that any case is made out for interfering with the impugned order. Hence, the Petition fails and the

same is dismissed. It is however, made clear that all the contentions of the judgment-debtors on merits of Darkhast as also maintainability are expressly left open. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab