

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Civil Revision Application NO. 199 OF 2006**

|                                |                |
|--------------------------------|----------------|
| MOHAN KRISHNAROA GUNJAL        | ...Applicant   |
| <i>Versus</i>                  |                |
| MR. PRABHAKAR PURSHOTTAM JOSHI |                |
| since deceased through L.Rs.   | ...Respondents |

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Mr. Tejas D. Deshmukh a/w. Samrat Shinde, Advocate for the Applicant.

Mr. Sachin V. Dhakephalkar, Advocate for the respondents.

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CORAM : R. G. KETKAR, J.

DATE : 11<sup>th</sup> FEBRUARY, 2016

**JUDGMENT:**

1. Heard Mr. Tejas D. Deshmukh, learned Counsel for the applicant and Mr. Sachin Dhakephalkar, learned Counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, CPC), the applicant, hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 15.7.2006 passed by learned II<sup>nd</sup> Additional Judge, Small Causes Court, Pune in Misc.

Application No.47/2006. By that order, learned trial Judge allowed the application made by the respondent, hereinafter referred to as the 'defendant' for condonation of delay in filing application for restitution under Section 144 of CPC.

3. The plaintiff had instituted Civil Suit No.2050/1980 against the defendant for possession of plot Nos.41 and 42 situate at Bhamburda (Shirajinagar), Pune in the Small Causes Court at Pune on the ground that the defendant has stopped paying rent to the plaintiff. Plot No.41 admeasuring 5565 sq. ft. i.e. 517 sq. mtrs. was vacant. In plot No.42 there was a building consisting of six flats. On 30.10.1985, the suit was decreed. The plaintiff filed execution proceedings No.143/1986. On 24.2.1986, the plaintiff obtained possession of vacant plot No.41. Possession of plot No.42 could not be taken as the building consisting of six flats was constructed over it.

4. The defendant preferred Civil appeal No.263/1986. On 7.8.1992, learned District Judge allowed the appeal and quashed and set aside the trial Court's decree. The matter

was remitted to the trial Court for fresh trial with a direction to implead respondent no.2 as a party in the suit. On 17.7.1999 as the plaintiff was absent, the suit was dismissed in default. It appears that application for restoration of the Suit is made and till today it is pending. On 31.7.1999, compromise took place between the parties. It is case of the plaintiff that the defendant confirmed the possession of plot No.41. Clause 25 provided for adjustment of the money decree. It appears that the defendant met with an accident on 26.10.2002. The plaintiff published the notice on 13.11.2005 expressing his intention to dispose of plot No.41. On 23.11.2005, the defendant raised objections. On 15.6.2006, the defendant through his son filed an application for restitution under Section 144 of CPC for possession of plot No.41. As there was delay in filing the application, application for condonation of delay was also filed. By the impugned order, learned trial Judge has allowed the application.

5. Mr. Deshmukh submitted that the application

made by the defendant under Section 144 of CPC is one for execution of a decree. Article 136 of the Limitation Act (for short, 'the Act') prescribes the period of limitation as 12 years for execution of any decree (other than a decree granting a mandatory injunction or order of any Civil Court) and time is to run when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. Article 137 of the Act provides that any other application for which no period of limitation is provided elsewhere in this division, the period of limitation prescribed is three years and time from which period begins to run is when the right to apply accrues. He submitted that the District Judge reversed the trial Court's decree on 7.8.1992 and the period of limitation of

12 years expired in 2004 for filing application under Section 144 of CPC. Application under Section 144 of CPC is filed in the year 2006 which is therefore clearly barred. He further submitted that Section 5 of the Act lays down that any appeal or any application, other than an application under any of the provisions of Order XXI of CPC, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. He, therefore, submitted that Section 5 of the Act is not applicable to an application under any of the provisions of Order XXI of CPC. As application under Section 144 of CPC is an application for execution of a decree, Section 5 of the Act is not applicable. In support of this proposition, he relied upon a decision of the Apex Court in the case of ***Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai***, AIR 1965 SC 1477, wherein the majority decision holds that Section 144 of CPC is an application for execution of a decree. He submitted that

said decision is also considered by the Division Bench of this Court in ***Purshottam Bhagwant Sulakhe and others v. Suryakant Gopal Sulakhe, AIR 1978 BOMBAY 303.***

In paragraph-12, the Division Bench observed that if an application for restitution under Section 144 of CPC is made, it is an application for execution of a decree. He, therefore, submitted that as the defendant did not file application under Section 144 of CPC within 12 years from 7.8.1992, learned trial Judge was not justified in condoning the delay as Section 5 of the Act is not applicable.

6. On the other hand, Mr. Dhakephalkar supported the impugned order. He relied upon paragraphs-22 and 23 of ***Mahijibhai Mohanbhai Barot's case (supra).*** He further submitted that Section 5 of the Act is applicable to any appeal or any application other than an application under any of the provisions of Order XXI of CPC. However, Section 5 of the Act does not lay down that it is not applicable to application under Section 144 of CPC. In other words for deciding application under Section 144 of

CPC, Section 5 of the Act is applicable. He further submitted that an application under Section 144 of CPC can be made only when the appellate Court reverses the decree passed by the lower Court and, therefore, also Section 5 of the Act is applicable to application under Section 144 of CPC.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record.

8. It is not in dispute that the suit instituted by the plaintiff was decreed on 30.10.1985. The plaintiff filed execution proceedings in 1986 being Execution Proceeding No.143/1986. It is also not in dispute that on 24.2.1986 the plaintiff obtained vacant possession of plot No.41. On 7.8.1992 appeal preferred by the defendant was allowed and the trial Court's decree was set aside and the suit was restored to the trial Court for fresh decision. On 17.7.1999 the Suit was dismissed in default and application for restoration is still pending.

9. It is also not in dispute that the defendant filed application for restitution under Section 144 of CPC on 15.6.2006. Articles 136 and 137 of the Act read thus :

|             | <b><i>Description of suit</i></b>                                                                                  | <b><i>Period of limitation</i></b> | <b><i>Time from which period begins to run</i></b>                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-------------|--------------------------------------------------------------------------------------------------------------------|------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>136.</b> | For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court. | Twelve years                       | When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place:<br>Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. |

|             | <b><i>Description of application</i></b>                                                        | <b><i>Period of limitation</i></b> | <b><i>Time from which period begins to run</i></b> |
|-------------|-------------------------------------------------------------------------------------------------|------------------------------------|----------------------------------------------------|
| <b>137.</b> | Any other application for which no period of limitation is provided elsewhere in this division. | Three years                        | When the right to apply accrues.                   |

10. In the impugned order, learned trial Judge has held that as the application under Section 144 of CPC comes under Article 136 of the Act, said application is required to be filed within 12 years from the decree or order becoming enforceable. Learned trial Judge thereafter noted that the suit was dismissed in default on 17.7.1999 and, therefore, the period commencing from 7.8.1992 to 17.7.1999 requires to be excluded and if that period is excluded, the application for restitution is well within time.

11. The moot question is whether Section 5 of the Act is applicable. Section 5 of the Act reads thus :

**“5. Extension of prescribed period in certain cases –** Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

*Explanation.* – The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

12. In the case of ***Mahijibhai Barot (supra)***, the

majority judgment has held that the historical background of Section 144 of CPC, the acceptance of the legal position that an application for restitution is one for execution of a decree by number of High Courts, on a fair consideration of Section 144 of CPC an application for restitution is an application for execution of a decree.

13. In the case of ***Purshottam Sulakhe (supra)***, the Division Bench of this Court referred to the decision in the case of ***Mahijibhai Barot (supra)*** and observed that the conflict amongst various High Courts in India as to whether proceedings under Section 144 of CPC amounts to execution proceeding and whether an application for restitution under Section 144 of CPC is an application for execution of a decree is resolved. The Apex Court in the case of ***Mahijibhai Barot (supra)*** has held that application under Section 144 of CPC is an application for execution of a decree. Mr. Deshmukh submitted that as the application under Section 144 of CPC is an application for execution of a decree, Section 5 of the Act is not applicable.

14. On the other hand, Mr.Dhakephalkar submitted that on 7.8.1992 the appellate Court reversed the trial Court's decree. Section 5 of the Act does not specifically lay down that it is not applicable to application under Section 144 of CPC and, therefore, Section 5 of the Act will apply.

15. Perusal of the impugned order, perusal of the reply filed by the plaintiff to the application under Section 144 of CPC as also perusal of the impugned order shows that no such contention was raised by the plaintiff in the reply as also it was not agitated before the learned trial Judge. As the said question is a pure question of law it requires to be adjudicated upon by the learned trial Judge. Hence, on this ground, the impugned order is required to be set aside thereby restoring Misc. Application No.47/2006 filed by the defendant for condonation of delay. Learned trial Judge is requested to decide the said application after considering contentions recorded in this order as also any other contentions that are available to the parties. Hence, the following order :

- [i] The impugned order dated 15.7.2006 passed by learned IInd Additional Judge, Small Causes Court, Pune is set aside;
- [ii] Misc. Application No.47/2006 is restored to the file of the trial Court. All contentions of the parties are expressly kept open.
- [iii] Parties agree that they will appear before the trial Court on 1.3.2016 and for that purpose no fresh notice be issued to them;
- [iv] Learned trial Judge is also requested to decide the application for restoration of the Civil Suit No.2050/1980 which was dismissed in default on 17.7.1999 as also Misc. Application No.47/2006 as expeditiously as possible and preferably within three months from the date of appearance of the parties. All contentions in that regard are expressly kept open.
- [v] Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

( R. G. KETKAR, J.)