

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1474 OF 2015

Sayeed Ismail s/o Sayeed Kasim and others ...Petitioners

versus

Ushadevi w/o Rajendra Anand ...Respondent

.....
Mr. S.V. Dixit, advocate for the petitioners
Mr. S.S. Wagh, advocate for respondent

.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 19.04.2018**

**Date of pronouncing
the Order: 04.05.2018**

PER COURT :-

1. By consent of the parties, heard finally at admission stage.
2. This writ petition has been preferred for quashing and setting aside the order dated 28.11.2014 passed by learned C.J.S.D. Jalna below Exh.68 in M.A. (R.J.I.) No. 119 of 2005 seeking condonation of delay in filing the application under Order 9 Rule 13 of the Code of Civil Procedure 1908 (hereinafter for short referred to as "the CPC").
3. Brief facts giving rise to the present writ petition are as follow:-

a) The petitioners had instituted R.C.S. No. 111 of 1973 for declaration, ownership and recovery of possession of land survey No. 12/1 (Gat No. 25), admeasuring 3 Acre 4 Gunthas situated at village Salegaon (Ghare), Tq. and District Jalna. The learned Joint C.J.J.D. Jalna, by judgment and decree dated 28.8.1998 decreed the suit with costs and directed the defendants in the said suit to hand over the possession of the suit land to the plaintiff on or before 31.10.1998. The said judgment and decree passed by the learned Joint C.J.J.D. Jalna, as aforesaid, has attained finality, since no appeal was preferred by the aggrieved persons-defendants in the said suit.

b) Consequently, the petitioners have filed execution proceeding bearing Regular Darkhast No. 8 of 1999 dated 9.3.1999 for obtaining the possession of the suit land. The executing court has issued possession warrant. The present respondent had raised objection by filing objection petition on 1.1.2002 and the same was rejected on 21.12.2002. The respondent thereafter again filed another objection petition and the petitioners resisted the said objection. The executing Court has rejected the said objection petition also by order dated 3.9.2007. Being aggrieved by the same, the respondent has preferred appeal before the District Court, Jalna bearing Regular Civil

Appeal No. 200 of 2007. By order dated 30.3.2009 the learned District Judge, Jalna has dismissed the said appeal. Being aggrieved by the same, the respondent had preferred second appeal bearing No. 156 of 2011 in this Hon'ble court. The said appeal came to be dismissed as withdrawn.

c) In the meantime, the respondent had filed an application bearing M.A. (R.J.I.) No. 119 of 2005 under the provisions of Order IX Rule 13 of CPC for setting aside the exparte decree passed in R.C.S. No. 111 of 1973 dated 28.8.1998. The learned Joint C.J.J.D. Jalna by order dated 27.4.2007 has rejected the said application bearing M.A. (R.J.I.) No. 119 of 2005. Being aggrieved by the same, the respondent has preferred Misc. Civil appeal No. 36 of 2007 before the District Court at Jalna and the learned District Judge-2, Jalna has dismissed the said appeal by order dated 30.3.2009.

d) Being aggrieved by the same, respondent had preferred writ petition No. 8746 of 2010 before this Court and this court (Coram: B.P. Dharmadhikari, J.) by order dated 2.5.2011 has allowed the said writ petition and quashed and set aside the order dated 27.4.2007 passed by the learned Joint C.J.J.D. Jalna in M.A. (R.J.I.) No. 119 of 2005 and the judgment dated 30.3.2009 in appeal No. 36 of 2007 and restored the proceeding of M.A. (R.J.I.) No. 119 of 2005 to the

file of Joint C.J.J.D. Jalna by directing the learned Joint C.J.J.D. Jalna to take fresh decision in accordance with law. Thereafter, the learned C.J.J.D. Jalna has recorded the evidence of the respondent and by order dated 15.10.2011 quashed and set aside the decree passed in R.C.S. No. 111 of 1973.

e) Being aggrieved by the same, the petitioners filed writ petition No. 1795 of 2013 before this court. By order dated 25.4.2014, this court (Coram: Ravindra V. Ghuge, J.) has quashed and set aside the judgment and order dated 15.10.2011 passed in M.A. (R.J.I.) No. 119 of 2005 and restored the M.A. (R.J.I.) No. 119 of 2005 to the file of learned C.J.J.D. Jalna by granting liberty to the present respondent to file an application for condonation of delay caused in filing M.A. (R.J.I.) No. 119 of 2005. This Court while disposing of the aforesaid writ petition has further directed the trial court to decide the application for condonation of delay on its own merits and in the event delay is condoned, further directed the trial court to decide M.A. (R.J.I.) No. 119 of 2005, as expeditiously as possible, preferably on or before 29.11.2014 subject to the legal remedies of the litigating parties to challenge the order of condonation of delay.

f) Thereafter, the respondent had filed an application for condonation of delay caused in filing M.A. (R.J.I.) No. 119 of 2005

under Order IX Rule 13 of CPC on 10.6.2014. The petitioners have strongly resisted the said application. The learned C.J.S.D. Jalna by the impugned order dated 28.11.2014 below Exh.68 in M.A. (R.J.I.) No. 119 of 2005 partly allowed the application to the extent of condonation of delay subject to payment of costs of Rs.10,000/- and further directed that the application under Order IX Rule 13 of C.P.C. be registered after due compliance and verification. Hence, this writ petition.

4. Learned counsel for the petitioners submits that the reasons put-forth for seeking condonation of delay can be gathered from the contents of application bearing M.A. (R.J.I.) No. 119 of 2005 itself. It has been contended in the said application that decree in R.C.S. No. 111 of 1973 was obtained by fraud, forgery and collusion and therefore, the same is null and void. It has been contended that signature of Sayed Lal are forged and the respondent was not party to the suit and therefore, the said decree is not binding on the respondent. It has been also stated in the said application that Syed Lal was never served with the suit summons and hence, decree in R.C.S. No. 111 of 1973 was obtained in collusion. Apart from this, it has also been contended that the respondent herein was aware about the alleged exparte judgment and decree in R.C.S. No. 111 of 1973 and the respondent became aware only after warrant of

possession was served. Learned counsel submits that the respondent has filed objection petition in the execution petition on 1.1.2002 before the executing Court and the same is required to be considered as the date of her knowledge and delay is required to be explained from that date. According to the respondent herein, for the purpose of explaining the delay from 1.1.2002 to 23.9.2005, the respondent was litigating the matter bonafidely before the different courts and in view of the provisions of Section 14 of the Limitation Act, delay deserves to be condoned.

5. Learned counsel for the petitioners submits that the respondent has not clearly mentioned the exact period of delay caused in filing the application for setting aside the decree passed in R.C.S. No. 111 of 1973. The computation of limitation would start from the date of judgment and decree and as such, delay has not been explained from the date of judgment and decree passed in R.C.S. No. 111 of 1973. Learned counsel submits that the respondent could not have filed application seeking condonation of delay as the respondent is not yet added as party respondent and the prayer to add as party in the suit is yet to be considered by the trial court. The trial court has erred in holding that time spent by the respondent in prosecuting the other available legal remedies has to be accepted as per the provisions of Section 14 of Limitation Act.

The trial court has further erroneously observed that the respondent is diligent only in filing the objection petitions and the said objection petitions were not determined till the year 2009. The respondent ought to have filed an application for setting aside the exparte decree only after withdrawal of the second appeal in the year 2011. However, the respondent has persuaded every available remedies on one or another ground so as to deprive the petitioners from enjoying the fruits of the decree passed in R.C.S. No. 111 of 1973.

6. Learned counsel for the petitioners submits that the objection petition filed by the respondent in the execution proceedings was adjudicated on merits and it is not dismissed on the ground of defect of jurisdiction. Therefore, the time spent in prosecuting the objection petition in the execution proceeding till the year 2011 cannot be considered as a ground for excluding the period of delay caused in filing application for setting aside the exparte decree by taking recourse to the provisions of Section 14 of the Limitation Act. Learned counsel submits that the respondent has availed both the remedies of objection petition and also by filing an application for setting aside the exparte decree at the same time. Even after filing of application for setting aside the exparte decree, the respondent did not stop to prosecute remedy of objection petition filed in the execution petition. The respondent also filed Regular Civil Appeal

No. 200 of 2007 after filing of the application for setting aside the exparte decree. The said appeal came to be dismissed on 30.3.2009 and thereafter the respondent filed second appeal No. 156 of 2011 which came to be withdrawn on 5.8.2011. These dates sufficiently demonstrate malafide intention and conduct of the respondent. Learned counsel submits that the trial court has erroneously considered the date of knowledge as 1.1.2002. The trial court has also failed to consider the provisions of Section 5 of Limitation Act which provides for extension of the prescribed period. The provisions of Section 5 of Limitation Act contemplates extension only in the cases where sufficient cause for the delay has been explained. In the instant case, no such sufficient cause is brought to the notice for seeking condonation of delay. Learned counsel submits that so far as the grounds raised in the application in respect of collusive decree, forgery or fraud or other grounds are concerned, those can be considered on merits. Even the respondent has instituted R.C.S. 453 of 2013 for setting aside the decree passed in R.C.S. No. 111 of 1973.

7. Learned counsel for the petitioners further submits that the provisions of Order IX Rule 13 of CPC provides that the defendant may apply to the court for setting aside the exparte decree only on the ground that summons was not duly served, or defendant was

prevented from appearing when the suit was called for hearing. The suit summons was very much served on all defendants, which is apparent from the judgment and decree dated 28.8.1998 in R.C.S. No. 111 of 1973. Learned counsel submits that the respondent is purchaser pendent lite and as such the respondent will not get any better right than the predecessor in title and the respondent is bound by the judgment and decree passed in R.C.S. No. 111 of 1973. Learned counsel submits that the impugned order passed by the learned C.J.J.D. is cryptic, unreasoned and without considering the provisions of law in its proper perspectives. Learned counsel submits that this writ petition thus deserves to be allowed by setting aside the order dated 28.11.2014 passed by the Court below, thereby condoning the delay in filing application for setting aside the alleged exparte decree in R.C.S. No. 11 of 1973.

Learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the judgment in the case of ***Chandrakant Laxman Kulbhaiyya and another vs. State of Maharashtra and others, reported in 2015 (2) Mh.L.J. 323.***

8. Learned counsel for the respondent submits that the respondent has not resorted to the remedy under the provisions of Order IX Rule 13 of CPC after exhausting all remedies. The

respondent after receipt of the notice of execution proceeding, filed objection petition under Order XXI Rule 97 of CPC and also filed an application under Order IX Rule 13 of CPC on 23.9.2005. Learned counsel submits that this writ petition has been preferred only against the order of condonation of delay passed by the trial court. Respondent has immediately filed objection under Order XXI Rule 97 of CPC on the next day after warrant of possession was served on her. The learned Judge of the executing Court has dismissed the application by observing that the respondent has failed to adduce any evidence. In fact, the application under Order XXI Rule 97 is required to be filed for removal of obstruction in execution of the decree by the decree holder himself or at the most purchaser of such property sold in such execution petition. In the year 2004, for the first time, the Supreme Court has held that even application of the obstructer can be considered under Order XXI Rule 97 of C.P.C. Thereafter, the respondent has filed second application under Order XXI Rule 97 of C.P.C. and the executing court has rejected the said application by directing the decree holder to file an application. However, the decree holder has not filed any application. Consequently, the respondent has filed an application bearing M.A. (R.J.I.) No. 119 of 2005 under Order IX Rule 13 of CPC only after dismissal of her application under Order XXI Rule 97 of CPC on 15.7.2005. The said application bearing M.A. (R.J.I.) No. 119 of

2005 was filed, as the decree holder has not filed any application under Order XXI Rule 97 despite the directions given by the executing Court. Learned counsel submits that the respondent was diligent and bonafidely prosecuting the remedies but in wrong forum under Order XXI Rule 97 of CPC as per the view expressed by the Court at that time. Learned counsel submits that in view of the same, the respondent is entitled for protection as provided under section 14 of the Limitation Act. Learned counsel submits that it is well settled law that if there are no malafides in the act of the party, the delay deserves to be condoned. Learned counsel submits that the Supreme Court in case of ***Collector, Land Acquisition Anantnag and another vs. Mst. Katiji and others, reported in AIR 1987 SC 1353*** has observed that *"Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties"*.

9. Learned counsel for the respondent submits that it is an admitted position that Sayed Lal was defendant No.4 and he has sold the suit property to the respondent. Syed Lal was Muslim and under Muslim Law the heirs cannot inherit the property of their father or ancestor in his life time. Learned counsel submits that as the

property was admittedly in possession of the vendor of respondent and thereafter it is in the possession of the respondent since the date of sale. All the parties have colluded together against the respondent. Learned counsel submits that the decree is obtained by fraud and collusion and therefore, is null and void.

Learned counsel for the respondent, in order to substantiate his contentions, placed reliance on the following cases:-

- i) Custodian of Branches of BANC National Ultramarinos. Nalini Bai Naique, reported in AIR 1989 SC 1589,
- ii) J. Kumaradasan Nair and Anr. vs. IRIC Sohan and others, reported in AIR 2009 SC 1333,
- iii) Collector, Land Acquisition, Anantnag and Anr. vs. Mst. Katiji and others, reported in AIR 1987 SC 1353,
- iv) Silverline Forum Pvt. Ltd. vs. Rajiv Trust and another, decided by the Supreme Court on 31.3.1998.

10. The petitioners have filed execution proceeding bearing R.D. No. 8 of 1999 arising out the judgment and decree passed in R.C.S. No. 111 of 1973 decided on 28.8.1998. In the said execution proceeding, warrant of possession came to be issued and it was obstructed by the respondent herein. Initially, the respondent has

filed objection petition under Order XXI Rule 97 of CPC on 1.1.2002. However, by order dated 21.12.2002 the learned Joint C.J.J.D. Jalna has rejected the said objection petition on the ground that the respondent-objection petitioner failed to adduce any evidence. The respondent herein again filed another objection petition and the present petitioners have resisted the said objection petition by filing say. Initially, the executing court rejected the prayer of the respondent directing the present petitioners to file an application under Order XXI Rule 97 of C.P.C.. However, the executing Court has permitted the respondent herein to lead evidence oral as well as documentary. The present petitioners have not led any evidence and after hearing both sides, the executing court has rejected the application Exh.49 on 3.9.2007. Being aggrieved by the same, the respondent herein has preferred R.C.A. No. 200 of 2007 before the District Court, Jalna and by judgment and order dated 30.3.2009, the learned District Judge-2, Jalna has dismissed the said appeal on the ground that the application filed by the respondent under Order XXI Rule 97 of CPC is not maintainable. Though the respondent herein has preferred second appeal No. 156 of 2011 in this Court, however, the same was dismissed as withdrawn by order dated 5.8.2011.

11. It is a further part of record that meanwhile on 23.9.2005 the respondent herein has filed M.A. (R.J.I.) No. 119 of 2005 under order

IX Rule 13 of C.P.C. for setting aside the exparte decree passed in R.C.S. No. 111 of 1973. The trial court by order dated 27.4.2007 rejected the said application M.A. (R.J.I.) No. 119 of 2005 filed under Order IX Rule 13 of CPC on the ground that the application is not maintainable for the reason that the applicant (respondent herein) is not defendant to the original suit. Being aggrieved by the same, the respondent herein has preferred Misc. Civil Appeal No. 36 of 2007 and the learned District Judge confirmed the said order of rejection of M.A. (R.J.I.) No. 119 of 2005 passed by the trial Court. Being aggrieved by the same, the respondent has approached this Court by filing writ petition No.8746 of 2010 and this court (Coram: B.P. Dharmadhikari, J.) by order dated 2.5.2011 allowed the writ petition and quashed and set aside the order dated 27.4.2007 passed in M.A. (R.J.I.) No. 119 of 2005 appellate judgment and order dated 30.3.2009 and restored back the proceedings in M.A. (R.J.I.) No. 119 of 2005 to the file of the Joint C.J.J.D. Jalna for taking fresh decision in accordance with law. This Court has referred the judgment of the apex Court in the case of ***Raj Kumar vs. Sardari Lal and others, reported in 2004 SAR (Civil) 181 SC***, and held that when the decree is exparte, the purchaser from defendants therein can move application under Order IX Rule 13 of CPC. As such, application moved by the respondent bearing M.A. (R.J.I.) No. 119 of 2005 filed under Order IX Rule 13 of CPC is sustainable. The trial court by

order dated 15.10.2011 initially allowed the application bearing M.A. (R.J.I.) No. 119 of 2005 and set aside the ex parte judgment and order passed in R.C.S. No.111 of 1973 and also directed to implead the present respondent as party defendant. The present petitioners have challenged the said order by filing writ petition No. 1795 of 2013 and by order dated 25.4.2014 this Court has permitted the present respondent to file an application for condonation of delay caused in filing M.A. (R.J.I.) No. 119 of 2005 and accordingly restored the M.A. (R.J.I.) No. 119 of 2005 to the file of C.J.J.D. Jalna.

12. It thus appears that immediately after issuance of possession warrant by the executing court in R.D. No. 8 of 1999 in pursuance to the judgment and decree passed in R.C.S. No. 111 of 1973, the respondent had filed objection petition on 1.1.2002 and although the same was rejected on 21.12.2002 on some technical ground, the respondent has filed objection petition Exh.49 under Order XXI Rule 97 of CPC. Learned Judge of the executing court has rejected the said objection petition by order dated 3.9.2007 on the ground that the application under Order XXI Rule 97 of CPC is not maintainable and the learned District Judge-2, Jalna by judgment and order in R.C.A. No. 200 of 2007 also confirmed the said order passed by the executing Court mainly on the ground that the application filed by respondent under Order XXI Rule 97 of C.P.C. is not maintainable. It

further appears that meanwhile the respondent has also filed an application bearing M.A. (R.J.I.) No. 119 of 2005 under Order IX Rule 13 of C.P.C. for setting aside the judgment and decree passed in R.C.S. No. 111 of 1973. The respondent has filed objection petition in Regular Darkhast No. 8 of 1999 on 1.1.2002 and although it was rejected on 21.12.2002 on some other ground, filed another objection petition Exh.49 in the said Darkhast. However, the executing Court has rejected the said objection petition by order dated 3.9.2007. It is thus clear the remedy under Order IX Rule 13 is not resorted after exhausting all remedies. It is a part of record that the application filed by the respondent under Order XXI Rule 97 came to be rejected on 15.7.2005 by the executing Court directing the decree holder to file application under Order XXI Rule 97 of CPC, however, the decree holder has not filed any application. The respondent therefore, filed an application under Order IX Rule 13 of CPC bearing M.A. (R.J.I.) No. 119 of 2005 on 23.9.2005. Till that time, the executing court has not decided the objection petition filed by the respondent at Exh.49.

13. So far as the applicability of Section 14 of the Limitation Act is concerned, any order to claim benefits of Section 14 of the Limitation Act, the applicant must satisfy the Court (i) that the applicant has prosecuted the earlier civil proceeding with due diligence, (ii) the

former proceeding must have been prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of like nature, was unable to entertain it and (iii) the earlier proceeding and the latter proceedings must be based on the same cause of action.

14. It is well settled that the essential requirements of Section 14 of Limitation Act and the principles, which underlines the section broadly speaking, the protection against the bar of limitation of a man honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial.

15. In the case of **J. Kumaradasan Nair and Anr vs. IRIC Sohan and others, reported in AIR 2009 SC 1333** (supra) in para 12 of the judgment, the Supreme Court has made following observations:-

"12. The question which arises for consideration is as to whether only because a mistake has been committed by or on behalf of the appellants in approaching the appropriate forum for ventilating their grievances, the same would mean that the provision of Sub-section (2) of Section 14 of the Limitation Act, which is otherwise available, should not be taken into consideration at all. The answer to the said question must be rendered in the negative. The provisions contained in Sections 5 and 14 of the Limitation Act are meant for grant of relief where a person has committed some mistake.

The provisions of Sections 5 and 14 of the Limitation Act alike should, thus, be applied in a broad-based manner. When Sub-section (2) of Section 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Section 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature."

16. In view of above discussion, I find no fault in the order passed by the trial court in condoning the delay caused in filing the M.A. (R.J.I.) No. 119 of 2005 under Order IX Rule 13 of CPC for setting aside the exparte decree passed in R.C.S. No. 111 of 1973, by giving benefit of Section 14 of the Limitation Act.

17. In the result, writ petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

18. Learned counsel for the petitioners requests to stay the effect of this order for a period of six weeks so as to enable the petitioners to approach the Supreme Court. During pendency of this writ petition, the interim relief was granted by this court. In view of the same, the effect of this order is hereby stayed for a period of six weeks from today. In case the petitioners decides not to approach the Supreme Court, the trial court shall dispose of M.A.R.J.I. No. 119

of 2005 filed under the provisions of Order IX Rule 13 of C.P.C. as expeditiously as possible, preferably within a period of (05) five months from today.

(V. K. JADHAV, J.)

rlj/