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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5896 OF 2015

M/s.Botanium Limited,)
Now merged in Go Airlines (India) Limited)
A company registered under the)
Companies Act, 1956, having its registered)
office at : C/o Britannia Industries Limited)
A-33, Lawrence Road Industrial Area,)
New Delhi – 110 035, and Administrative)
Office at : C-1, Wadia International Centre,)
Pandurang Budhkar Marg, Worli,)
Mumbai – 400 025,)
Through their Constituted Attorney Holder)
Mr.Ajit Walvekar, Age : 43 years,)
Occupation : Service, Having address at)
Naville House, J.N. Heredia Marg,)
Ballard Estate, Mumbai – 400 038,) ...Petitioner

....Versus....

Shri Babu Raghu, since deceased)
per Legal Heir – Shri Krishna (son of))
Krishna Babu Raghu, Age : Adult,)
Occupation : Agriculture, R/At)
Bhayender Pada, Ovala,)
Ghodbunder Road, Taluka Thane,)
District Thane.) ...Respondent

WITH
WRIT PETITION NO.5897 OF 2015

M/s.Botanium Limited,)
Now merged in Go Airlines (India) Limited)
A company registered under the)
Companies Act, 1956, having its registered)
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Through their Constituted Attorney Holder)
Mr.Ajit Walvekar, Age : 43 years,)
Occupation : Service, Having address at)
Naville House, J.N. Heredia Marg,)
Ballard Estate, Mumbai – 400 038,) ...Petitioner

....Versus....

Shri Hari Ramji Nagalkar,)
per Legal Heir – Shri Kamlakar Hari)
Nagalkar, Age : Adult, Occupation :)
Agriculture, R/At Bhayender Pada, Ovale,)
Ghodbunder Road, Taluka Thane,)
District Thane.) ...Respondent

Mr.P.K. Dhakephalkar, Senior Counsel I/b Mr.Jaydeep Deo for the
Petitioner.

CORAM : R.D. DHANUKA, J.
DATE : 15TH OCTOBER, 2018.

ORAL JUDGMENT :-

1. By these two writ petitions filed under Article 227 of the Constitution of India, the petitioner (original decree holder) has impugned the order dated 12th June, 2014 passed by the learned Second Joint Civil Judge, Senior Division, Thane, in dismissing the application for condonation of delay in filing Miscellaneous Application No.161 of 2008 filed by the petitioner in Regular Darkhast No.5 of 1995 in Regular Civil Suit No.292 of 1983 and the order dated 12th June, 2014 passed by the same Judge dismissing the

application for condonation of delay in filing Miscellaneous Application No.159 of 2008 filed by the petitioner in Regular Darkhast No.40 of 1996 in Regular Civil Suit No.998 of 1988. Though the respondent has been served pursuant to the order dated 2nd July, 2015 passed by this Court intimating that these petitions would be disposed of finally at the stage of admission, the respondents have chosen to remain absent when the matters were called out. No affidavit in reply has been filed. Both the writ petitions were thus heard finally at the admission stage and are being disposed of by a common order. The facts of both these writ petitions being identical, this Court shall deal with the facts and submissions made by the learned senior counsel for the petitioner in Writ Petition No.5896 of 2015. Some of the relevant facts for the purpose of deciding these writ petitions are as under :

2. In the year 1983, the petitioner had filed two separate suits before the Civil Judge, Senior Division, Thane for declaration and possession of the suit property. This petition is arising out of the application for condonation of delay in seeking restoration of the execution application dismissed by the learned Executing Court in Regular Civil Suit No.292 of 1983.

3. On 30th June, 1992, the learned Trial Judge passed a decree after hearing the petitioner and examining the evidence on

record in favour of the petitioner. Some time in the year 1995, the petitioner filed an execution application seeking execution of the said decree dated 30th June, 1992 before the Executing Court. On 2nd April, 2004, the said execution application came to be dismissed for default on the ground "no steps have been taken for prosecution as such the said Darkhast stands disposed of as dismissed. The petitioner filed an application on 24th March, 2008 *inter-alia* praying for restoration of the Regular Darkhast before the Executing Court and also applied for condonation of delay in filing the said application for restoration. There was delay of about three years three months and 23 days in filing such application for restoration of the execution application .

4. By an order dated 12th June, 2014, the Executing Court dismissed the said application for condonation of delay. The petitioner has impugned the said order dated 12th June, 2014 in this writ petition. Similar order is passed by the Executing Court on the same date which is the subject matter of Writ Petition No.5897 of 2025.

5. Mr.Dhakephalkar, learned senior counsel appearing for the petitioner invited my attention to the various annexures to the writ petition including the application filed by the petitioner for condonation of delay in filing the application for restoration of

execution application, the impugned order passed by the Executing Court thereon, the order passed by the Executing Court dismissing the application for default on the ground that no steps were taken.

6. It is submitted by the learned senior counsel that when the execution application was dismissed by the Executing Court, the matter was not listed for hearing of the said execution application. The said application was not dismissed under Order XXI Rule 105(2) of the Code of Civil Procedure, 1908 (for short "CPC"). The provisions of Order XXI Rule 106 of CPC and more particularly Rule 106(3) of CPC were not applicable in these situation. He submits that the period of 30 days provided under Order XXI Rule 106(3) of CPC for making an application for restoration of the execution application would have been attracted only if the execution application would have been dismissed for default on the date of hearing of the said execution application and not otherwise. He invited my attention to the order passed by the Executing Court while dismissing the execution application and submits that the said order would clearly indicate that the said execution application was dismissed in view of the petitioners (decree holders) not having been taken steps for prosecution. He submits that the question of applicability of section 5 of the Limitation Act to such an application under Order XXI Rule 106 of CPC did not arise.

7. It is submitted by the learned senior counsel that the petitioner had not made any such application for condonation of delay under Order XXI Rule 106 of CPC but had invoked inherent powers of the Court under section 151 of the Code of Civil Procedure, 1908. He submits that though the petitioner had made sufficient cause for condonation of delay, the Executing Court has refused to condone the delay by invoking the provisions of section 5 of the Limitation Act, 1963 and has frustrated the decree on such technical ground. He submits that the petitioner had succeeded in the said suit filed by the petitioner and thus could not have been deprived of execution of such decree on such technical ground.

8. Learned senior submits that the ultimate object of procedural law is to see that substantial justice is done to the parties and hence the Courts should endeavour to see that the disputes are resolved on merits in just, fair and reasonable manner and cannot be dismissed on technical grounds. Learned senior counsel placed reliance on the judgment of the Madhya Pradesh High Court in case of **Khoobchand Swaroopchand & Anr. vs. Kashiprasad Parmanand & Ors. 1986 M.P.L.J. 52** and the judgment of this Court in case of **Shaikh Chand s/o Shaikh Ahmed & Ors. vs. Zaitunbee w/o Shaikh Lal & Ors.(2018) 2 Mah.L.J. 679** and in particular paragraphs 6, 7, 11, 12 and 22 to 24.

9. It is submitted by the learned senior counsel that the plaintiff had sufficiently shown cause for condonation of delay of three years 3 months and 23 days in filing the said application for setting aside the order of dismissal of the execution application. He submits that Mr.N.D. Paul, who was representing the petitioner in the execution proceedings had left the service of the petitioner in the year 1997. There were 45 execution proceedings filed by the petitioner. The said Mr.N.D. Paul however, handed over only 40 execution proceedings to his successors. The petitioner had thus no knowledge of remaining five pending execution proceedings including the executing proceedings which are subject matter of these two writ petitions. The petitioner came to know about dismissal of those execution applications on 11th January, 2008 and immediately applied for certified copy on 11th January, 2008.

10. The certified copy was ready on 22nd February, 2008 and were received by the petitioner on 25th February, 2008. The petitioner thereafter filed an application for setting aside the order of dismissal of the execution application and for condonation of delay on 24th March, 2008. He submits that though the delay was sufficiently explained by the petitioner, the learned Executing Court erroneously rejected the said application for condonation of delay on erroneous premise that the application for setting aside the order of dismissal in

the execution application ought to have been filed within 30 days from the date of such order and not beyond the said period.

REASONS AND CONCLUSIONS :

11. A perusal of the order dated 2nd November, 2004 clearly indicates that the said execution application was dismissed on the ground that the petitioner had not taken any steps for prosecuting the said execution application. A perusal of the said order does not indicate that the matter was listed on board for hearing. The impugned order passed by the Executing Court also does not indicate that the said execution application was when dismissed was placed for hearing on board. In paragraph 7 of the impugned order, the Executing Court has clearly stated that the said execution application was dismissed as no steps were taken for prosecution.

12. Under Order XXI Rule 105 of CPC, the Court is empowered to fix a date for hearing of the execution application. It further provides that if on the date fixed or on any date the hearing is adjourned, the applicant does not appear when the case is called for hearing, the Court may make an order that the application be dismissed. Order XXI Rule 106 of CPC provides that when an order is made under sub-rule 2 of Rule 105 Order XXI or sub-rule 3 of that Rule, such party against whom such order is passed may apply to such Court to set aside such an order and if he satisfies the Court

that there was sufficient cause for his non-appearance, the Court shall set aside the order on such terms it thinks fit and shall place the matter on the day for further hearing of the application. Sub-rule 3 of Rule 106 of Order XXI further provides that an application under sub-rule 1 of Rule 106 of Order XXI shall be made within 30 days from the date of the order or in case an *ex-parte* order, if a notice was not duly served, within 30 days from the date when the applicant had knowledge of the order.

13. In my view, since the record clearly indicates that on the date of the said execution application, the Executing Court had not fixed the execution application for hearing under Order XXI Rule 105 of CPC, the said execution application has been dismissed on the ground that no steps were taken by the petitioner. In my view, the time of 30 days prescribed in sub-rule 3 of Rule 106 of Order XXI of CPC for making an application for setting aside the *ex-parte* order would not be attracted in such a situation. There would be thus no limitation prescribed for making an application for setting aside the order dismissing the execution application dismissed due to the steps not having been taken by the decree holder in the execution application. Such application shall be filed within reasonable period.

14. The judgment of the Madhya Pradesh High Court considered a situation where the execution application was

dismissed for default of appearance of the decree holder. The Executing Court had treated the said order under Rule 105 of Order XXI of CPC so as to attract Rule 106 of Order XXI of CPC. The Madhya Pradesh High Court was pleased to set aside the said order passed by the Executing Court on the ground that both these provisions were not applicable and thus exercised the inherent powers and has set aside the order passed by the Executing Court dismissing the execution application and restored the said application subject to payment of costs of Rs.300/-. The principles of law laid down by the Madhya Pradesh High Court in case of **Khoobchand Swaroopchand & Anr.** (supra) squarely applies to the facts of this case. I am in respectful agreement with the views expressed by the Madhya Pradesh High Court.

15. This Court in case of **Shaikh Chand s/o Shaikh Ahmed & Ors.** (supra) has adverted to various judgments of this Court and also the Hon'ble Supreme Court including the judgment of this Court in case of **Smt.Suglabai w/o Prabhu Jaishete vs. Rangrao s/o Govindrao, (2011) 6 Bom.C.R. 403** in which this Court considered an identical facts. In that case the execution application was dismissed on the ground that no steps were taken and was accordingly dismissed for want of prosecution. This Court held that as no steps were taken resulting in the dismissal of the execution

proceedings for want of prosecution, section 151 could be invoked so as to enable the Court to exercise its inherent powers. In the said judgment, this Court adverted to the judgment of the Hon'ble Supreme Court in case of **Damodaran Pillai vs. South Indian Bank, (2005) 7 SCC 300.** After considering several judgments referred to aforesaid, this Court held that this Court had inherent powers to condone the delay under section 151 of CPC.

16. The Hon'ble Supreme Court in case of **Collector, Land Acquisition, Anantnag vs. Mst. Katiji, (1987) 2 SCC 107** laid down the principles to be considered by the Court while considering an application for condonation of delay. This Court accordingly held that while taking pragmatic view in the matter, hardship suffered by the decree holders also need to be softened. In my view, the principles laid down by this Court in case of **Shaikh Chand s/o Shaikh Ahmed & Ors.** (supra) squarely applies to the facts of this case.

17. A perusal of the order passed by the learned Executing Court indicates that the learned Judge has rejected the said application for condonation of delay on the ground that section 5 of the Limitation Act was not applicable to the restoration proceedings under Order XXI Ruled 106 of CPC. In my view, since the provisions of Order XXI Rule 106 of CPC, were not attracted in this case, in view of the execution application itself not having been placed on

board for hearing, reference to section 5 of the Limitation Act, 1963 in the impugned order shows perversity.

18. A perusal of the record further indicates that the petitioner had sufficiently explained the delay caused in filing the application for restoration of the execution proceedings for the reason that the person who was in-charge of these execution proceedings, had left the services of the petitioner in the year 1997, and had handed over only 40 proceedings to his successors out of 45 proceedings including these two execution proceedings and that the petitioner had no knowledge about the remaining five execution proceedings. I am inclined to accept the case of the petitioner that the petitioner came to know about the dismissal of these two execution applications on 11th January, 2008. The petitioner applied for certified copy on 11th January, 2008 itself which was received on 22nd February, 2008. The application for condonation of delay and for setting aside the order in question was thereafter immediately came to be filed on 24th March, 2008. With such facts at hand, in my view, the learned Executing Court ought to have condoned the delay. The petitioner had sufficiently explained the causes of delay in filing the application for setting aside the order of dismissing the execution application for default.

19. In my view, section 151 of the CPC clearly attracted to the

facts of this case. Section 5 of the Limitation Act was not applicable in view of the fact that the Order XXI Rule 106(3) of CPC was not attracted. In these circumstances, the Executing Court ought to have exercised inherent powers under section 151 of CPC and ought to have condoned the delay and consequently ought to have set aside the said order passed by the Executing Court dismissing the execution application for default.

20. I therefore, pass the following order :-

a). Rule is made absolute in terms of prayer clause (b) in both the Writ Petitions. Hearing of the execution proceedings are expedited. The petitioner shall not ask for any unnecessary adjournment before the learned Executing Court. There shall be no order as to costs.

b). All the parties as well as the learned Executing Court to act on the authenticated copy of this order.

Vasant
Anandrao Idhol

Digitally signed by Vasant
Anandrao Idhol
Date: 2018.10.23 18:55:42
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(R.D. DHANUKA, J.)