

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.08.2019

CORAM

**THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE**

CRP (NPD)No.3409 of 2014

and

MP No.1 of 2014

R. Siddeswaran

.... Petitioner

versus

1. Selvi

2. Raja

3. Minor Jayaprakash

S/o. K. Gunasekaran

Rep. By next friend and

Guardian the 1<sup>st</sup> respondent Selvi

.... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order passed by the I Additional Subordinate Judge at Salem in REA No.276 of 2013 in REP No.128 of 2013 in O.S. No.4 of 2013, dated 28.2.2014.

For Petitioner

: Mr.M.M.Bhuvanesh

for Mr.T.T. Ravichandran

For Respondents

: No appearance

**ORDER**

The instant Civil Revision petition has been filed challenging the order dated 28.02.2014 passed by the I Additional Subordinate Judge,

Salem in REA No.276 of 2013 in REP No.128 of 2013.

**Brief facts leading to the filing of the instant Civil Revision Petition filed under Article 227 of the Constitution of India.**

2. The petitioner is the decree holder, he having obtained a decree for specific performance of an agreement of sale in his favour by the judgment and decree, dated 23.11.2012 passed by the Principal Subordinate Judge, Salem in O.S. No.4 of 2012. It was an ex-parte decree. He filed an Execution Petition R.E.P. No.128 of 2013 to execute the ex-parte decree, dated 23.11.2012 passed in his favour in O.S. No.4 of 2012. The respondents, who are the judgment debtors entered appearance in R.E.P. No.128 of 2013 and a counsel represented them in the said Execution Petition by filing a counter. Thereafter, the respondents were set ex-parte on 07.06.2013 due to non appearance on the said date. Thereafter, R.E.A. No.276 of 2013 was filed by the respondents under Order XXI Rule 106 CPC to set aside the ex-parte order dated 07.06.2013 passed in R.E.P. No.128 of 2013.

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3. According to the respondents, the petitioner has obtained ex-parte decree on 23.11.2012 in O.S. No.4 of 2012 based on an

agreement of sale, which according to them is a forged and fabricated document and it is an invalid sale agreement. Further, it is stated in the affidavit filed in support of in R.E.A. No.276 of 2013 by the first respondent on behalf of the remaining respondents that the first respondent was suffering from Jaundice and she was unable to attend the Court on 23.11.2012. It has also been stated that their counsel was also unwell from 07.06.2013 to 24.09.2013 and he was taking treatment and was bed ridden during that particular period. It has also been admitted by the respondents that R.E.A. No.276 of 2013 filed by them to set aside ex-parte decree dated 23.11.2012 passed in O.S. No.4 of 2012 was also dismissed for default on 16.07.2013. With these averments, an application has been filed under Order XXI Rule 106 CPC to set aside ex-parte order dated 7.06.2013 passed in Execution Petition viz., R.E.P. No.128 of 2013.

4. A counter affidavit was also filed by the petitioner, in R.E.A. No.276 of 2013 filed by the respondents in REP No.128 of 2013 denying the allegations contained in the affidavit filed in support of R.E.A. No.276 of 2013, reiterating that the agreement of a sale is a valid agreement and the Trial Court has rightly granted a decree for specific performance in his favour.

5. By order dated 28.02.2014, the Executing Court allowed R.E.A. No.276 of 2013 filed by the respondents on the ground that the dispute between the parties have to be adjudicated on merits and only to avoid multiplicity of proceedings, the application filed by the respondents in R.E.A. No.276 of 2013 was allowed. Accordingly, the Executing Court allowed R.E.A. No.276 of 2013, on condition that the respondents pay a costs of Rs.750/- to the petitioner on or before 27.03.2014, failing which the application stands dismissed. Aggrieved by the order dated 28.02.2014 passed in R.E.A. No.276 of 2013, the instant Civil Revision Petition has been filed by the decree holder under Article 227 of the Constitution of India.

6. Heard Mr.M.Bhuvanesh, learned counsel for the petitioner. Despite service of notice on the respondents and their names having been printed in the cause list today, no one has entered appearance on their side.

7. The learned counsel for the petitioner drew the attention of this Court to Order XXI Rule 106 CPC and submitted that the application filed by the respondents under Order XXI Rule 106 CPC is

not maintainable, since the said application has not been filed within 30 days from the date of passing of the ex-parte order. According to him, in the instant case, the ex-parte order was passed on 07.06.2013, whereas the application to set aside the ex-parte order was filed by the respondents only on 04.10.2013. In particular he referred to Order XXI Rule 106 (3) CPC, which reads as follows :

*(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex-parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.*

8. Referring to the above provision, the learned counsel for the petitioner would submit that the respondents having entered appearance in the Execution Petition and having engaged a counsel and having filed a counter, has knowledge of the ex-parte order on 07.06.2013 itself. Therefore, according to him, the application filed by the respondents beyond the prescribed period is not maintainable. Further, he referred to a decision of the Hon'ble Supreme Court of India in the case of **Damodaran Pillai versus South Indian Bank Ltd.**, reported **in 2005 AIR (SC) 3460**, in particular he referred to paragraphs 8 and 10.

9. Relying upon the aforesaid judgment, the learned counsel for the petitioner would point out that the starting period of limitation for filing a restoration application under Order XXI Rule 106 is the date of ex-parte order and not the date of the knowledge of the ex-parte order. The learned counsel further submitted that the ex-parte decree dated 23.11.2012 passed in O.S. No.4 of 2012 has attained finality as no application has been filed to set aside the ex-parte decree and the application earlier filed by the respondents to set aside the ex-parte decree has already been dismissed for default. According to him, the application filed by the respondents in the Execution Petition in R.E.A. No.276 of 2013 is a frivolous and a vexatious petition, as it is not maintainable as per the provisions of Order XXI Rule 106 CPC.

### **Discussion**

10. As seen from Order XXI Rule 106 (3) CPC, an application to set aside the ex-parte order in an Execution Petition will have to be filed within a period of 30 days from the date of the order. The Hon'ble Supreme Court of India has held in the case of **Damodaran Pillai and others vs. South Indian Bank Limited** reported in **2005 AR SC 3460**, that an application under Order XXI Rule 106 of CPC has to be filed within 30 days from the date of the order and not from

the date of knowledge. The relevant paragraphs of the said judgment are extracted hereunder :

10. *The learned Judge, however, while arriving at the said finding failed and / or neglected to consider the effect of sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereof. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex-parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.*

13. *It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power.*

*14. It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.*

*15. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code Application of the said provision has, thus, expressly been excluded in a proceeding under Order 21 of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.*

11. It is clear from the aforesaid paragraphs that the Civil Court in the absence of any express power cannot condone the delay. In the instant case, the ex-parte order was passed in the Execution Petition R.E.P. No.128 of 2013 on 07.06.2013, whereas the application REA No.276 of 2013 was filed by the respondent under Order XXI Rule 106 CPC only on 04.10.2013. It is clear from Order XXI Rule 106 CPC that an application to set aside the ex-parte order has to be filed within a period of 30 days from the date of order. But, in the instant case, the said application has been filed beyond the period of 30 days. Hence, this Court is of the considered view that the application filed by

the respondents in REA No.276 of 2013 is not maintainable. The respondents have filed the application only under Order XXI Rule 106 CPC and this being the case, as held by the Hon'ble Supreme Court of India, it is well settled that when a power is to be exercised by the Civil Court under an express provision, the inherent power cannot be taken recourse to. It is also made clear by the decision referred to above of the Hon'ble Supreme Court of India that an application to set aside the ex-parte order will have to be filed under Order XXI Rule 106 CPC within a period of 30 days and not from the date of knowledge. Further in the instant case, the ex-parte decree dated 23.11.2012 passed in O.S. No.4 of 2012 has also attained finality, since no application as on date is pending on the file of the Trial Court to set aside the ex-parte decree. Even the earlier application filed by the respondents to set aside the ex-parte decree has also been dismissed for default.

12. All the above mentioned factors have not been considered by the Executing Court before allowing R.E.A. No.276 of 2013. In the considered view of this Court, the Executing Court ought to have dismissed REA No.276 of 2013 but by an erroneous order has allowed

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R.E.A. No.276 of 2013 filed under Order XXI Rule 106 CPC.

**Conclusion :**

13. For the foregoing reasons, the impugned order dated 28.02.2014 passed by the learned I Additional Subordinate Judge in R.E.A. No.276 of 2013 in REP No.128 of 2013 is hereby set aside and the Civil Revision Petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

**13.08.2019**

Index: Yes/ No  
Internet: Yes/No  
Speaking Order/Non-speaking Order  
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To  
The I Additional Subordinate Judge,  
Salem .

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**ABDUL QUDDHOSE, J.**



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