

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.10.2019

CORAM:

THE HONOURABLE Mr. JUSTICE R. SURESH KUMAR

C.R.P. (NPD) No. 3126 of 2019

and

C.M.P. No. 20487 of 2019

1. M/s. Chandan Pharmaceuitals Corporation,
Represented by its Partner
L. Harishkumar Metha,
No. 62, Burkit Road,
Chennai - 17.
2. L. Harishkumar Metha ... Petitioners

-Vs-

1. P. K. Jalan
2. J. K. Iron and Steel Manufacturing Company,
Represented by its Partner B.K. Jalan,
No. 218, Linghi Chetty Street,
Chennai 600 001.
3. L. Udayakumar Metha
4. L. Shantha Metha
5. L. Sasikala Metha
6. L. Lalitha Metha
7. L. Vijayalakshmi Metha
8. L. Sowbhagyavathi Metha ... Respondents

Prayer : Petition filed under Article 227 of the Constitution of India against the order and decretal order dated 06.07.2019 in E.A. No. 3078 of 2019 in E.P. No. 1950 of 2006 in O.S. No. 6686 of 1996 on the file of the X Assistant City Civil Court, Chennai.

For Petitioners : Mr. P. Sunil

For Respondents : Mr. G. Krishnakumar

ORDER

This Civil Revision Petition has been filed against the fair and decretal order passed in E.A. No. 3078 of 2019 in E.P. No. 1950 of 2006 in O.S. No. 6686 of 1996 on the file of the X Assistant City Civil Court, Chennai, by order dated 06.07.2019.

2. Before the Execution Court, the first and second respondents herein, who are the decree holders, had filed E.P. No. 1950 of 2006. Though the said EP was filed in the year 2006, after nearly a decade, no progress could be made in the said EP, in view of the pendency of the appeal before the Appellate Court. However, at one point of time, i.e., on 07.02.2017, when the EP came up for hearing, the learned Judge had passed an order stating that, the EP is pending from

the year 2006, in spite of several opportunities given neither the decree holders nor the judgment debtors and their counsel appeared, on verification of Hon'ble High Court, Case Status Information System, no data is found, EP is pending more than ten years without any progression, decree holders have no interest to proceed the EP, hence the EP is closed.

3. Since the EP was closed accordingly, after sometime the present E.A i.e., E.A. No. 3078 of 2018 was filed, just to restore the EP which was closed on 07.02.2017, by the first and second respondents herein, who are the decree holders and the petitioners in the execution proceedings. The said application, after having been considered, was allowed by the Execution Court through the impugned order dated 06.07.2019, aggrieved over the same, the second and third respondents in the EP proceedings, who are the judgment debtors have filed this revision petition.

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4. The learned counsel appearing for the revision petitioners made submissions stating that, though the EP came to an end by the

order of closure made by the Execution Court on 07.02.2017, it's effect is dismissal and if at all, the EP is dismissed, which shall be construed only as dismissal that too in the absence of the parties, under Order XXI Rule 105 of the Civil Procedure Code. In that case, no doubt, the petitioners can restore the EP by setting aside the dismissal order for which, a petition can be filed under Order XXI Rule 106 of Civil Procedure Code, of course, within the limitation period of thirty days as has been contemplated under Order XXI Rule 106(3) of Civil Procedure Code.

5. He would further submit that, here in the case in hand, the decree holders have filed the said E.A. No. 3078 of 2018, invoking Section 151 of Civil Procedure Code and not under Order XXI Rule 106 of Civil Procedure Code, thereby avoiding the petition to condone the delay to be filed under Section 5 of the Limitation Act, as enabled / contemplated under Order XXI Rule 106(3) of Civil Procedure Code. However, the learned Judge of the Execution Court without having considered the said defects, since have allowed the EA through the impugned order, the learned counsel appearing for the revision

petitioners submits that, the said order is infirm and cannot be sustained, therefore, in order to revise the same, the present revision petition has been filed.

6. Per contra, Mr. G. Krishnakumar, learned counsel appearing for the respondents herein, who are the decree holders and the petitioners in the execution proceedings submitted that, the learned Judge has not dismissed the said EP, as the very order passed on 07.02.2017 has disclosed this factor to state that, the EP was closed.

7. Once the EP is closed, it can only be presumed that, for whatever reasons the EP is closed, within a period for execution of the decree, the said EP can very well be restored by filing a formal petition and that has been adopted by the respondents / decree holders in filing the present EA under Section 151 of Civil Procedure Code and the same, since was allowed on merits, there can be no quarrel over the said view taken by the Execution Court in allowing the EA.

8. The learned counsel appearing for the respondents / decree holders has further submitted that, there is no provision available in the Civil Procedure Code, to close the EP especially under Order XXI and therefore, if at all, the Execution Court closes the EP or passed an order using the terminology “closed”, it can only be construed as an adjournment or kept away or kept aside the EP for the time being, which means the EP can be restored at a later point of time, either on petition by the decree holder or otherwise and therefore, the order dated 07.02.2017 closing the EP of the respondents / decree holders does not mean to dismissal within the meaning of Order XXI Rule 105. Therefore, the respondents / decree holders need not be relegated to take the route of Order XXI Rule 106 of Civil Procedure Code and thereby to file a petition under Section 5 of the Limitation Act as contemplated under Order XXI Rule 106 (3) to set aside the order of closure or for restoration of EP which was closed.

9. In support of his contentions, the learned counsel appearing for the respondents / decree holders has relied upon the decision of the Hon'ble Apex Court reported in **(1964) 6 SCR 251: AIR**

1964 SC 1454 in the matter of ***Pentapati China Venkanna and others***
vs Pentapati Bangararaju and others.

10. In the said decision, the learned counsel has relied upon the following paragraphs:

"6. Learned counsel for the appellants contends that the Code of Civil Procedure does not sanction the passing of an order closing an execution petition for statistical purposes and that practice has been condemned by Courts. Under Order 21 Rule 17(1) of the code, the Court may reject an execution application if the requirements of Rules 11 to 14 have not been complied with. Under Rule 23 thereof, if the judgment-debtor does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the Court shall order the decree to be executed, and where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit. Under Rule 57 thereof, "where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application

for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date...". Relying upon these provisions it is argued that though the power of the Court to make an order under Order 21, Rule 23(2) is wide and it can make any order it thinks fit, it can only make one or other of the two orders mentioned in Rule 57 when it could not proceed with the execution because of the default of the decree-holder. It is said that in this case the decree-holders could not proceed with the execution in view of the stay order of the High Court and, therefore, the executing Court could have either dismissed the application or adjourned the proceedings to a future date and it has no jurisdiction to pass an order closing the execution for statistical purposes. It is further said that an order closing proceedings for statistical purposes is not an order of adjournment, for an order of adjournment implies that the application is on the file, whereas the object of closing is to take it out of the file, though temporarily, and, therefore, the order, in effect and substance, is one of dismissal. Assuming that the order was made by reason of the decree-holder's default within the meaning of O. 21, Rule 57 of the Code, we find it difficult to attribute something to the Court which it never intended to do. It is true Courts have condemned the practice of executing

courts using expressions like "closed", "closed for statistical purposes", "struck off", "recorded" etc., and they also pointed out that there was no provision in the code of Civil Procedure for making such order: see Biswa Sonan Chunder Gossyamy v. Binanda Chunder Dibingar Adhikar Gossyamy; Vadlamannati Damodara Rao V. Official Receiver, Kistna; Moidin Kutty V. Doraiswami; It is not necessary to express our opinion on the question whether such procedure is sanctioned by the code of Civil Procedure or not; but assuming that the court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the Court in making an order "closed" for statistical purposes is, manifest. It is intended not to finally dispose of the application, but to keep it pending. Whether the order was without jurisdiction or whether it was valid, the legal position would be the same; in one case it would be ignored and in the other, it would mean what it is stated. In either case the execution petition would be pending on the file of the Court. That apart, it is not the phraseology used by the executing court that really matters, but it is really the substance of the order that is material whatever, terminology may be used it is for the Court to ascertain, having regard to the circumstances under which the said order was made, whether the court

intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the court. We have no hesitation, therefore, in agreeing with the High Court that E.P No.13 of 1939 is pending on the file of the executing court and that the present application is only an application to continue the same.

9. The result of the decisions may be summarized thus: An application made after 12 years from the date of the decree would be a fresh application within the meaning of Section 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition.

10. In this case, as we have pointed out, the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meaning of Section 48 of the Code. It is only an application to continue E.P No. 13 of 1939 which is pending on the file of the executing court.

11. That apart, the decree holders filed E.A. No. 142 of 1952 in E.P. No. 13 of 1939 expressly asking for the reopening of the said execution petition and for proceeding with it. As we have held that the earlier execution petition is still pending on the file of the court, the executing court will be well within its rights in proceeding on the basis of the earlier execution petition even without a new petition.

12. In the result, we hold that the order of the High Court is right. The appeal fails and is dismissed. There will be no order as to costs. "

11. By relying upon the aforesaid judgment, the learned counsel would submit that, in view of the dictum of the Hon'ble Apex Court, where it has been made clear that, there is no scope for closing the EP as the terminology, even though, if it is used, that cannot be treated as a dismissal, therefore that order cannot be tantamount to order of dismissal. It may be the intention of the Execution Court to dispose of the application to keep it aside for the time being, hence it can be restored at any point of time by filing a petition. Therefore, taking the said analogy into mind, when the application was filed to restore the EP, which was closed for statistical purpose or otherwise by

the Execution Court, the said application have been allowed, by thus, the EP got restored, therefore it does not require any interference from this Court.

12. However, Mr. P. Sunil, learned counsel appearing for the revision petitioners / judgment debtors has relied upon the decision of the Hon'ble Apex Court reported in ***AIR 2005 SUPREME COURT 3460***, in the matter of ***Damodaran Pillai and others vs South Indian Bank Limited***, where he relied upon paragraph No. 11, which reads thus:-

"11. 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 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. By relying upon the said judgment, the learned counsel would submit that, in the said judgment, especially at paragraph No. 11, the Hon'ble Supreme Court has given a complete answer to the controversy now triggered in this revision, where if at all the EP is dismissed, the dismissal is possible only under Order XXI Rule 105, otherwise the EP could have been closed on full satisfaction of the execution of the decree. Once the EP is dismissed under Order XXI Rule 105 of Civil Procedure Code, the limitation to file a petition to restore the EP, starts from the date of dismissal of the EP and not from the date of knowledge of the dismissal of the EP. Hence, the learned counsel would submit that, the principle underlined in the said decision

of the Hon'ble Apex Court has made it clear that, in order to restore the EP which was dismissed, the parties have to file a petition to restore the EP only through the route of Order XXI Rule 106, which is subject to the limitation under Sub-rule (3) of Rule 106.

14. When that being the position, herein, admittedly there has been no petition filed under Section 5 of the Limitation Act, in order to condone the delay as admittedly a restoration petition has been filed beyond thirty days from the date of dismissal i.e., closure of the EP and therefore, the Execution Court ought not have allowed the EA without having satisfaction with reason for the condonation of the delay within the meaning of Order XXI Rule 106(3). Therefore, the learned counsel appearing for the revision petitioners would submit that, the impugned order is liable to be interfered with.

15. I have considered the said submissions made by both parties and have gone through the materials placed before this Court.

16. As has been rightly pointed out by the learned counsel

appearing for the revision petitioners, if at all the EP is closed or dismissed by using the terminology "closed" or "dismissed" in the absence of the decree holder, it can only be construed as a dismissal within the meaning of Order XXI Rule 105. The said position is made clear in both judgments referred to by the learned counsel appearing for the parties.

17. Moreover, the order passed by the Execution Court dated 07.02.2017 closing the EP makes it very clear that, neither decree holders nor the judgment debtors and their counsel appeared and the decree holders have no interest to proceed with the EP, hence the EP was closed.

18. Therefore, it become obvious that, on the day when the EP was closed, neither the counsel for decree holders nor the counsel for judgment debtors appeared, therefore the procedure contemplated under Order XXI Rule 105 alone could have been invoked by the Execution Court, Order XXI Rule 105(2) reads thus:-

“ 105(2). Where on the day fixed or any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court

may make an Order that the application be dismissed.”

19. The Execution Court has closed the EP, on the ground that, the decree holders i.e., counsel for the decree holders did not appear, even though the EP has been pending for long years and the decree holders have not shown any interest. Even though the terminology "closed" was made use of by the Execution Court, the said closure can only be construed as a dismissal within the meaning of Order XXI Rule 105(2).

20. If it is a dismissal of EP under Order XXI Rule 105(2), no doubt, the decree holders i.e., the petitioners of the execution proceedings can very well file a restoration petition under Rule 106, where such application shall be made within a period of thirty days from the date of the order as per Sub-rule 3 of Rule 106. This position has been clarified by the Hon'ble Apex Court in the said judgment reported in ***AIR 2005 SUPREME COURT 3460***.

21. Here in the case in hand, admittedly there is no petition

filed under Section 5 of the Limitation Act, to condone the delay which occurred beyond the thirty days limitation period as per Sub-rule (3) of Rule 106. When such petition not being filed, since the E.A. No. 3078 of 2018 has been allowed otherwise on merits and accordingly, the EP which was closed on 07.02.2017, since has been restored, the said order, in the considered opinion of this Court, is defective and the Execution Court ought not to have entertained the said E.A. No. 3078 of 2018 without having condoned the delay in filing such application, in an appropriate application filed under Section 5 of the Limitation Act.

22. Therefore, this Court has no hesitation to hold that the impugned order is liable to be interfered with.

23. In the result, the impugned order is set aside with liberty to the respondents / decree holders to file a necessary petition under Section 5 of the Limitation Act with enabling provision i.e., Order XXI Rule 106(3) of Civil Procedure Code, within a period of fifteen days from the date of receipt of a copy of this order. Once such petition is filed by the decree holders, the same shall be entertained and be

decided only for the purpose of condoning the delay on its merits, based on the reasons to be adduced by the decree holders in said petition for such delay. While considering the same, the time consumed by the parties during the pendency of this revision petition shall be excluded.

24. The Execution Court shall take into account that, since the substantive rights of the parties are involved in the execution of the decree, a pragmatic view be taken for condoning the delay in filing the restoration petition.

25. Before parting with the case, this Court wants to remind that, as per the dictum of the Hon'ble Apex Court in the aforesaid judgment in **(1964) 6 SCR 251: AIR 1964 SC 1454**, since there is no provision in Civil Procedure Code to close the EP, in case the decree holders / petitioners in the execution proceedings is in absence, in such circumstances, the Execution Court shall borne in mind that, they shall dismiss the EP by invoking the default clause namely Order XXI Rule 105(2) and not pass any order by using the terminology "closed". The aforesaid direction shall be scrupulously followed by the Execution

Courts hereafter.

26. Registry is directed to mark the copy of this order to all the Execution Courts. With these observations and directions, this Civil Revision Petition is ordered accordingly. Consequently, connected Miscellaneous Petition is closed. No costs.

16.10.2019

Index: Yes / No
Speaking order / Non speaking order

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Note: Issue order copy by 07.11.2019

To

The learned X Assistant City Civil Court,
Chennai.

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R. SURESH KUMAR, J.

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