

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 28.09.2020	Delivered on 16.10.2020
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P(NPD).No. 1524 of 2018

Karuppa Gounder

... Petitioner

-VS-

1.Pongiyanna Gounder
2.Ganesan
3.Velusamy
4.Ponnusamy
5.Venkatachalam
6.Karuppasamy
7.Ganapathy

... Respondents

Prayer: Civil Revision Petition filed under Section 115 of C.P.C., against the fair and decreetal order dated 27.02.2018 made in E.A.No. 88 of 2017 on the file of the District Munsif Court, Sathyamangalam in E.P.No. 6 of 2010 on the file of the District Munsif Court, Sathyamangalam.

For Petitioner : Mr.M.Roshan Atiq

For Respondents : Mr.R.Thirumoorthy for R1 to R3
R4 to R7 – None appears

ORDER

This revision is by the decree holder in O.S.No. 88 of 2002 challenging the order dismissing his application for restoration of an execution petition that was dismissed for default on 28.03.2014.

2. The petitioner had sued for reliefs of declaration that the width of cart track at 12 feet, mandatory injunction directing the defendants 5 to 7 to restore the cart track and for permanent injunction restraining the defendants 1 to 4 and others from reducing the width of the cart track. The said decree dated 12.04.2008 was put in execution in E.P.No. 6 of 2010. A Commissioner was appointed by the Trial Court to carry out the exercise and the execution petition was adjourned for report of the Commissioner on several occasions. Since the Commissioner did not file his report, the Executing Court dismissed the execution petition for default on 28.03.2014. The petitioner filed an application in E.A.No. 88 of 2017 on 18.09.2015 seeking restoration of the execution petition under Section 151 of C.P.C.

3. This was opposed by the respondents / judgment debtors contending that the application under Section 151 of C.P.C is not maintainable. The order passed by the Executing court being one under Order 21 Rule 105(2) of C.P.C and application for restoration has to be made under Order 21 Rule 106(1) of C.P.C within 30 days from the date of the order as provided under Order 21 Rule 106(3) of C.P.C. It was also pointed out that Section 5 of the Limitation Act would not apply to an application under Order 21 Rule 106 of C.P.C. Therefore, the application for restoration of the execution petition itself is not maintainable. The Trial Court accepted the defence and also concluded that it is open to the decree holder to file a fresh EP as the same would be within the time allowed under law. On the above conclusions, the executing Court dismissed the petition. Aggrieved, the decree holder has come up with this revision.

4. Heard Mr.M.Roshan Atiq, learned counsel for the petitioner and Mr.R.Thirumoorthy, learned counsel for the respondents 1 to 3. Other respondents though served, are not appearing either in person or through counsel, duly instructed.

5. Mr.M.Roshan Atiq, learned counsel appearing for the petitioner would vehemently contend that the application under Section 151 is maintainable in as much as the dismissal of the execution petition is not under Order 21 Rule 105(2) of C.P.C. Drawing my attention to the language of Order 21 Rule 105(2), which reads as follows:-

“(2) Where on the day fixed or on 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.”

Mr.M.Roshan Atiq would contend that the dismissal Order 21 Rule 105(2) could be only for non-appearance of the applicant and Order 21 Rule 106 would apply only when the applicant seeks to set aside an order passed under Sub-rule 2 Rule 105 of Order 21 of C.P.C. He would further contend that if the dismissal is for any reason other than the absence of the applicant / decree holder, the dismissal not being one under Order 21 Rule 105(2), the provisions of Order 21 Rule 106 would not apply and therefore, the proper provision would be Section 151 of C.P.C.

6. The learned counsel would also draw my attention to the judgment of this Court in **Nattan Ambalam Vs. Dhanalakshmi** reported in **(2011) 4 MLJ 664** wherein, it was held that if the dismissal of the execution petition is not under Sub-rule 2 of Rule 105 of Order 21 of the Code, the restoration application cannot be under Sub-rule 1 of Rule 106 of Order 21. If the application is not one under Sub-rule 1 Rule 106 of Order 21, the limitation provided under Sub-rule 3 of Rule 106 of Order 21 will not stand attracted. Then, the Court will have the power to restore execution petition exercising its inherent powers under Section 151 of C.P.C. The period of limitation for such application would be 3 years as per Article 137 of the Limitation Act, 1963.

7. The learned counsel also drew my attention to the judgment of Madhya Pradesh High Court in **Khoobchand Jain Vs. Kashi Prasad** reported in **AIR 1986 Madhya Pradesh 66** wherein, it was held as follows:-

“17. Rule 106 of Order 21 of the Civil P.C. provides that if the Court is satisfied that there was sufficient cause for non-appearance, when the application was called for 'hearing', the Court shall set aside the

order. No such order shall be made unless the application is made within 30 days from the date of order. Rule 105 contemplates dismissal of the application on a date of 'hearing', while Rule 106 provides for restoration of application on making out sufficient cause for non-appearance, when the application was called for 'hearing'.

18. In my opinion, the date on which the execution application was dismissed for default of appearance of the decree-holders, namely, 21-8-1979 was not a date fixed for 'hearing' within the meaning of Rule 105. It was a date awaiting report as to execution of the warrant which was supposed to be issued on submission of a list of moveable property by the decree-holders within three days of the earlier order dated 21-7-1979. Consequently, the dismissal of execution application on 21-8-1979 was not under Rule 105(2) of Order 21 of the Civil P.C, and therefore, the provisions of Rule 106 are not attracted. The dismissal of the execution application in default of appearance on 21-8-1979 is referable to inherent powers of the Court."

The learned counsel for the respondents would however contend that the execution petition was dismissed for default of the petitioner and therefore restoration can be sought only under Order 21 Rule 106. I have considered the rival submissions.

8. A perusal of the docket orders passed by the Executing Court in

E.P.No. 6 of 2010 shows that a Commissioner was appointed by the Court

on 22.06.2011 and thereafter, the Execution Petition was being adjourned time and again for Commissioner's report. It is an admitted case of the parties that the Commissioner's report was not filed till the fateful day that is 28.03.2014. The Court observed that the petitioner is not ready and dismissed the execution petition. From the orders passed it is clear that it is not a dismissal under Rule 105(2) i.e., a dismissal for non-appearance of the petitioner on the day when the petition was called on for **hearing**. It was posted for filing of Commissioner's report only. I am therefore, in entire agreement with the contention of the learned counsel for the petitioner.

9. The petitioner has also explained the reasons for filing the application on 18.09.2015. The fact that the petitioner's daughter, who was affected with cancer and was under treatment and she eventually passed away on 17.11.2015 is not in dispute. Since I have held that the application filed under Section 151 of the Code is maintainable, the period of limitation for such application would be 3 years as per Article 137 of the Limitation Act, 1963. Therefore, I do not think that the Court must adopt strict approach and throw out the application for restoration. Having succeeded

in the suit and having obtained a decree, the petitioner cannot left in the lurch. The Executing Court had observed that the petitioner can file a fresh execution petition. I am unable to agree with the said view because the decree is one for mandatory injunction and three years provided for execution had lapsed, by the time when the execution petition was dismissed for default on 28.03.2014.

10. Hence, I find that the order of the Trial Court needs to be interfered with and the same is accordingly set aside, the Execution Petition will stand restored, this civil revision petition is allowed. The Executing Court is directed to dispose of the execution petition in accordance with law. Considering the fact that the decree is of the year 2008, the Executing Court will do well to expedite the execution of the decree.

16.10..2020

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Index : Yes/No

Internet: Yes/No

Speaking/Non-speaking

R.SUBRAMANIAN, J.

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To:-

The District Munsif Court,
Sathyamangalam.



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