

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9583 OF 2017

Shankarlal Govindram Zawar

PETITIONER

VERSUS

Rajendra Dattatraya Yawalkar

RESPONDENT

.....

Mr. Kishor C. Sant, Advocate for the petitioner
Mr. Anand P. Bhandari, Advocate for the respondent

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 8th JULY, 2022

ORDER :

1. The petitioner is aggrieved by order passed by the learned Civil Judge, Junior Division, Bhusawal below Exhibit-19 in Miscellaneous Civil Application No. 75 of 2015.
2. The petitioner is the original plaintiff in Regular Civil Suit No. 5 of 2013 in which *ex parte* decree was passed in favour of the petitioner on 3rd December, 2014
3. The petitioner, thereafter filed execution petition i.e.

Regular Darkhast No. 6 of 2015 on 28th April, 2015 in which the Executing Court directed for handing over of possession of the suit property to the petitioner

4. The respondent / judgment debtor, thereafter on 29th July, 2015 filed Miscellaneous Civil Application No. 75 of 2015 under Order IX, Rule 13 of the Code of Civil Procedure, for setting aside the *ex-parte* decree.

5. After appearance, the petitioner filed application Exhibit-19, contending that the Miscellaneous Civil Application filed by the respondent / judgment debtor is hopelessly barred by limitation, as the same is delayed by 204 days and no application seeking condonation of delay is filed. Therefore, preliminary issue – whether the application is barred by limitation be framed and the same may be tried.

6. The Trial Court passed order on 21st June, 2017 on the said application, holding that the decree holder and his advocate were absent when called out, issue of limitation is already decided at the time of registration of the application. The preliminary issue can be framed in a suit but not in Miscellaneous Application. It is further observed that the applicant's advocate did not approach and argue the application.

Hence, relying on order dated 3rd August, 2015, the application is rejected.

7. The decree holder opposed registration of the Miscellaneous Application on the ground of limitation. On 3rd August, 2015, Trial Court passed following order -

"Heard.

In view of Art. 123 of the Limitation Act, with due regarding with pleading of applicant indicating knowledge of decree. Case be numbered and registered."

8. The petitioner has challenged the order passed below Exhibit-19 and has prayed for allowing the said application.

9. Having heard learned advocate for the petitioner and the learned advocate for the respondent and after going through the record, this Court is of the considered view that point of limitation, which is raised by by the petitioner, will have to be taken into consideration at the time of considering Miscellaneous Application on merits. The Trial Court is justified in holding that preliminary issue can be framed in the suit but not in Miscellaneous Application. But then since the issue of limitation pertains to the maintainability of proceedings itself, it will have to be decided by the Trial Court, while deciding Miscellaneous

Application on merits.

Since the issue of limitation raises the question of maintainability of the proceedings itself, it will have to be gone into by the Trial Court, at the time of deciding the Miscellaneous Application on merits.

10. In that view of the matter, the writ petition is allowed. The impugned order dated 21st June, 2017 passed by Civil Judge, Junior Division, Bhusawal, below application Exhibit-19 in Miscellaneous Civil Application No. 75 of 2015 is quashed and set aside.

11. The issue of limitation is kept open for decision of the Trial Court at the time of deciding the Miscellaneous Civil Application on merits.

[NITIN B. SURYAWANSHI]
JUDGE