

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 5895 OF 2015

M/s. Botanium Limited & anr. .Petitioners

Vs.

Smt. Motibai Sukur Patil .Respondent
(Since deceased through Lr.)

Mr. Jaydeep Deo a/w Mr. Sanjay Gunjkar, Advocate, for the
Petitioners

Mr. Ganesh Jha, Advocate, for the Respondent

CORAM : ROHIT B. DEO, J.

DATE : 25.07.2022

P. C.

. I have heard Mr. Deo, learned counsel for the
Petitioners, and Mr. Ganesh Jha, learned counsel for the
Respondent.

2. Since the issue involved is squarely covered by
the decision in W. P. 5896 & 5897 of 2015, this Petition is
finally heard at the admission stage.

3. The challenge is to the Order dated 12.06.2014
rendered by the learned 2nd Joint Civil Judge, Senior

Division, Thane dismissing the Composite Application for condonation of delay in filing Miscellaneous Application 160 of 2008 and restoration filed by the Petitioner – Decree Holder in Regular Darkhast 5 of 1995 in R.C.S. 292 of 1983.

4. The suit which sought decree of declaration and possession was decreed on 30.06.1992 and the execution proceeding taken out came to be dismissed in default on 02.04.2004. The Decree Holder claims to have gathered knowledge of the dismissal on 01.01.2008 and preferred the Composite Application for condonation of delay and restoration of execution proceeding, on 24.03.2008. The learned Executing Court did not allow the condonation of delay Application on the premise that there is no power to condone the delay beyond the period of 30 days. Such premise is on the basis of the provisions of the O. XXI, Rule 106(3) of the Code of Civil Procedure, 1908.

5. The short submission of the learned counsel for the Petitioners – Decree Holders is that the said provision does not come into play, since the execution was not fixed for

hearing and that the Executing Court could have invoked, and committed jurisdictional error in not invoking, power under Section 151 of the CPC.

6. Perusal of the decision in W.P. 5896 and W.P. 5897 of 2015 reveal, that the facts in those Petitions, and the present Petition are identical. The Decree-Holder had filed as many as 45 execution proceedings. The employee, who was looking after 45 execution proceedings left services of the Petitioners in the year 1997 and handed over record of only 40 proceedings out of the 45 proceedings pending. The Petitioners did not have the knowledge that 5 execution proceedings, other than 40 of which the record was handed over, were also pending and it is in this view of the matter that the execution proceedings were dismissed in default. The execution proceedings which were subject matters of W. P. 5896 and W.P. 5897 of 2015 and subject execution proceedings are amongst the 5 execution proceedings of which record was not handed over.

7. While deciding W.P. 5896 and 5897 of 2015, the

Co-ordinate Bench has accepted the explanation for condonation of delay and has directed restoration of the execution proceedings.

8. I see no reason to take a different view. The Co-ordinate Bench has also held that since the execution proceedings were not fixed for hearing, O. XXI, Rule 106(3) of the CPC will not come into play. With this view too, I am inclined to agree.

9. The relevant observations in W. P. 5896 and 5897 of 2015 which apply to the present facts with equal vigor read thus :-

“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.”

10. The order impugned is set aside and the Petition is allowed in terms of prayer clause (b) which reads thus :-

“(b) Quash and set aside the Judgment and Order dated 12/06/2014 passed by the learned 2nd Joint Civil Judge, Senior Division, Thane dismissing the Application for condonation of delay in filing Miscellaneous Application No. 160 of 2008 filed in Regular Darkhast No. 4 of 1995 in Regular Civil Suit No. 290 of 1983 filed before Civil Judge, Senior Division, Thane and further hear and allow said Miscellaneous Application on merits.”

(ROHIT B. DEO, J.)