

Bhagyawant Punde

performance of contract. Suit was decreed on 13.09.1994. Petitioners filed Regular Darkhast No. 289/1994 for execution of decree. Respondents/defendants challenged the decree by filing Regular Civil Appeal No. 243/1994. Appellate Court dismissed the appeal on 11.09.2000. For want of taking steps, Executing Court dismissed the regular darkhast on 04.10.2012. Petitioners filed Civil Miscellaneous Application No. 352/2018, under section 151 read with Order 9 Rule 9 of CPC, for restoration of regular darkhast. Along with application, application for condonation of delay of 5 years 10 months in filing application for restoration of regular darkhast was also filed.

3. Respondents also filed application Exhibit-29, under Order 7 Rule 11 of CPC praying for rejection of Civil Miscellaneous Application No. 352/2018.

4. By the impugned order, Executing Court has allowed the application filed by respondents below Exhibit-29 and rejected Civil Miscellaneous Application No. 352/2018 filed for delay condonation by petitioner. Hence, the present petition.

5. Heard the learned advocate for petitioners and learned advocate for respondents. Perused the memo of writ

petition, annexures thereto, impugned order and the citations relied upon by the parties.

6. Learned advocate for petitioners by relying on *Shaikh Chand s/o Shaikh Ahmed (died) per L.Rs. SK. Pashu s/o Sk. Chand and others vs. Zaitunbee w/o Shaikhlal (died) per L.Rs. Khatoonbee w/o Sk. Amir and another*, 2018(2) Mh.L.J. 679 and *Botanium Ltd vs. Babu Raghu (since deceased) thr. Legal Heir*, 2019(2) Mh.L.J. 287, assailed the impugned orders contending that the Executing Court has erred in rejecting the delay condonation application and allowing application Exhibit-29.

7. Per contra, learned advocate for respondents by relying on *Hameed Joharan (D) and others vs. Abdul Salam (D) by L.Rs. and others*, AIR 2001 SC 3404, submits that, delay condonation application was filed beyond limitation as no fresh execution petition could have been filed by petitioners beyond period of 12 years and therefore Executing Court is justified in passing the impugned orders.

8. In application for condonation of delay, it is contended by petitioners that they have diligently filed regular

darkhast after the judgment and decree passed by the Trial Court. Thereafter, appeal filed by respondents is dismissed on 11.09.2000. Father of petitioners who was looking after the matter expired in the meanwhile and thereafter, petitioners were brought on record as legal representatives. Petitioners could not arrange the amount and therefore they failed to comply the order. Executing Court after hearing the parties has rejected the application holding that application filed by petitioners/decreed holders is barred by law of limitation. By relying on Rule 105 of Order 21 of CPC, Executing Court has held that, since this application is not filed within 30 days, as provided under Clause 3 of Rule 106 of Order 21 of CPC, application deserves to be dismissed. While rejecting the application it is observed;

"The applicants/decreed holder's application for condonation of delay is barred by law of limitation. As indicated above, the application of section 5 of the Limitation Act, is expressly barred in any application under Order XXI of the Code. When there is no express provision empowering the Court to condone the delay in filing an application under sub-rule 1 of Rule 106 of the Code and application of section 5 of the Limitation Act is also barred, the Court is apparently denuded of the power to extend time for filing an application under sub-rule 1 of Rule 106 of

the Code as per sub-rule 3 of Rule 106. It is the settled position, that in absence of any express power to condone the delay, the Court could not invoke inherent power to entertain a time barred application, nor the Court could extend the time for filing an application under sub-rule 1 of Rule 106 of the Code. Hence, for all above reasons and settled position of law and considering the aforementioned discussion, I answer to the point no. 1 in affirmative and hold that the non-applicant's application under Order VII Rule 11 of the Code is liable to be allowed and the applicants/decreed holder's application for condonation of delay is liable to be rejected. In the result, I proceed to pass the following order."

9. The Executing Court misdirected itself in making above observations which are contrary to the settled legal position. Admittedly, in the facts of the preset case, order of dismissal in default is passed in regular darkhast, for want of taking steps by decree holders and not at the stage of hearing of darkhast. Therefore, this order cannot be said to be passed under Rule 105 of Order 21 of CPC. Reasoning adopted by the Executing Court while rejecting the delay condonation application is therefore erroneous and the Executing Court has misread and misconstrued the provisions of Rule 105 and 106 of Order 21 of CPC.

10. Executing Court has further erred in holding that there is no express power to condone the delay in sub rule 3 of Rule 106. Said reasoning is in ignorance of settled legal position that where there is provision of limitation, the Court is empowered to condone the delay for sufficient cause made out by the applicant therein. In that view of the matter, finding of the Executing Court that in absence of express power to condone the delay, the Court could not invoke inherent power to entertain time barred application, cannot be sustained.

11. In Shaikh Chand (supra), learned Single Judge of this Court in similar facts has held;

"27. It requires no debate that the Decree Holders would not squander away the advantage of having achieved the decree, by neglecting their proceedings and causing delay against their own interest. The delay of one year and five months cannot be termed as being deliberate or inordinate. The Decree Holders do not achieve any advantage by delaying their proceedings. In fact, irreparable harm, serious prejudice and manifest inconvenience would be caused to the Decree Holders if the delay is not condoned. If a pedantic approach is to be taken in this matter on account of the laxity on the part of the Decree Holders, the Judgment Debtors would stand to

gain undue advantage after they have been held disentitled by an adjudicatory process leading to the judgment and decree in favour of the Petitioners herein.

28. While taking a pragmatic view in this matter, hardships suffered by the Decree Holders also need to be softened. As has been held by the Honourable Supreme Court in catena of judgments that the delay can be condoned by imposing suitable costs so that hardships suffered by the other side can be reduced."

12. In Botanium Ltd. (supra), learned Single of this Court has held;

"No specific period stipulated for filing application seeking restoration application. Delay caused as concerned person dealing with execution proceedings left services. Restoration application filed by decree holder immediately on getting knowledge of dismissal of execution application. Sufficient cause shown by decree holder for alleged delay in filing restoration application. Consequently, order refusing to condone delay is quashed and set aside."

13. Applying the aforesaid ratio to the facts of the present case, in the facts of the present case, it cannot be said that the decree holders have deliberately and intentionally caused delay in prosecuting the execution proceeding. Taking

into consideration the fact that suit is of the year 1994 in which decree in favour of petitioners is passed on 30.09.1994 and darkhast is being prosecuted by petitioners since 1994, irreparable loss and hardships would be caused to the decree holders if delay is not condoned. The Executing Court has adopted hypertechnical approach in refusing to condone the delay on wrong premise that it does not have power to condone the delay. Since approach of the Executing Court is contrary to the settled legal position that delay is to be liberally condoned, the impugned order cannot be sustained.

14. In Hameed Joharan (supra), the Apex Court has held; '*while counting limitation for execution of decree, period of 12 years begins to run from the date on which decree becomes enforceable and not when decree becomes executable.*'

There cannot be any dispute about said proposition. However, this point can be raised before the Executing Court while opposing the execution petition on merits. In the result, following order:-

ORDER

- (i) Writ petition is allowed.
- (ii) Impugned orders dated 27.01.2020, passed below

Exhibit-1 and Exhibit-29 in Civil Miscellaneous Application No. 352 of 2018, by learned 4th Join Civil Judge, Senior Division, Jalgaon, are hereby quashed and set aside.

- (iii) Delay is condoned subject to petitioners paying cost of Rs. 25,000/- to the judgment debtors in the Executing Court.
- (iv) It is made clear that this Court has not expressed any opinion on the merits of execution petition and/or its maintainability.
- (v) All the rival contentions of the parties on merits of execution petition are kept open.

[NITIN B. SURYAWANSHI, J.]