

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 27 OF 2019

IN

EXECUTION APPLICATION (L) NO. 1283 OF 2016

Union of India

...Applicant/Decree
Holder

Versus

R.K. Bagul (since deceased) & Ors.

...Judgment Debtors

Mr. Yogeshwar S. Bhate a/w Mr. D.P Singh for the Applicant.

Mr. Avinash V. Joshi for the Defendants.

CORAM : R.I. CHAGLA J

DATE : 7 February 2023

ORDER :

1. By this Chamber Summons, the Applicant/Decree Holder has sought dispensation of the objection taken by the office of this Court with regard of limitation in filing the Execution Application.

2. The Execution Application is from a decree dated 5th October 2002 which had been drawn up by the learned Civil Judge

Senior Division, Nashik (“**CJSD, Nashik**”) on 19th October 2002. The decree is in terms of an award passed by the learned Arbitrator in the year 1997 and thereafter, submitted before the C.J.S.D., Nashik for Rule of the Court. The decree was passed in Miscellaneous Civil Application No. 220 of 1997 filed by the learned Arbitrator before C.J.S.D., Nashik for passing decree in terms of the Award under Section 14(2) of the Arbitration Act, 1940.

3. There are certain ancillary facts which pertain to the demise of the original Judgment Debtor who expired on 6th July 1998 and that the Miscellaneous Civil Application No. 80 of 1998 filed by the original Judgment Debtor for setting aside the Award dated 13th September 1997 stood abated vide Trial Court order date 3rd April 2001. There were no steps taken to bring the legal heirs of the original Judgment Debtor on record. However, what is material to note is that upon the decree being drawn up by the learned C.J.S.D., Nashik the Decree Holder had taken out a Darkhasht being Special Darkhast No. 41 of 2004 in the Court of C.J.S.D., Nashik. This was thereafter pursued by the Applicant/Decree Holder in taking out the attachment Application on 28th June 2005 and distress warrant had been issued by the learned

C.J.S.D., Nashik under Order XXI Rule 43 of the Code of Civil Procedure, 1908.

4. It is further necessary to note that on 1st September 2008 a precept under Section 46 of the Code of Civil Procedure, 1908 had been filed by the Judgment Creditor for transferring the decree dated 5th October 2002 to the City Civil Court, at Mumbai for attachment of the original Judgment Debtor's Flat No. 21, Rupal CHS Ltd., 98, Dadasaheb Phalke Road, Dadar (East), Mumbai 400 014.

5. A Writ Petition had been filed by the Judgment Debtors/ Respondents herein being Writ Petition No. 804 of 2013 before this Court challenging the order and decree dated 5th October 2002 passed in Civil Miscellaneous Application No. 220 of 1997 and the order dated 10th April 2012 passed in the Application taken out by the present Judgment Debtors/Respondents herein who are the sons of the original Judgment Debtor for declaring the decree as a nullity. The Writ Petition No. 804 of 2013 was disposed of by this Court on 29th July 2013.

6. It is necessary to note that the Division Bench of this

Court had remitted the matter back to the executing Court to decide the points mentioned in paragraph 7 of the order dated 29th July 2013 by quashing and setting aside the order dated 10th April 2012 passed by the 3rd Joint C.J.S.D., Nashik. This Court had directed the parties to maintain *status quo* in respect of the properties which are the subject matter of attachment pending the decision of the Trial Court. Thereafter, the learned C.J.S.D., Nashik by order dated 18th February 2014 rejected the Civil Miscellaneous Application No. 80 of 1998 taken out by the original Judgment Debtor and decided all three issues with a reasoned order and accordingly, the *status quo* order was vacated.

7. On 20th November 2014, the C.J.S.D., Nashik directed the transfer of the decree dated 5th October 2002 to the City Civil Court, at Mumbai. The City Civil Court, at Mumbai upon holding that it had no jurisdiction, returned back the documents to the Advocate for the Decree Holder on 27th January 2016.

8. Thereafter, the present Execution Application was filed and though the Execution Application had initially been rejected for non removal of office objections on 28th September 2016, the

Application was restored on 19th September 2017. This Court by order dated 10th January 2018 granted liberty to the Judgment Creditors to take out the present Chamber Summons. It is necessary to note that in the said Order of the learned Single Judge (Coram: G.S. Patel, J.) the submission of the learned Counsel for the Applicant that because the Darkhast proceedings were initiated in 2004 in the Court of C.J.S.D., Nashik, no question of limitation arises was recorded. However, the learned Single Judge found it difficult to accept the arguments at the *prima facie* stage in the manner in which it was placed as there was no material setting up in an orderly fashion explaining the narrative and sequence of events.

9. Accordingly, the Applicant/Decree Holder has taken out the present Chamber Summons and has presented the facts prior to the filing of the Execution Application, which in my view, has now been done in an orderly fashion explaining the narrative and sequence of events.

10. The learned Counsel appearing for the Applicant/Decree Holder has submitted that the objection taken by the office of this Court on limitation is misconceived. This in view of the original

Execution Application viz. Special Darkhast No. 41 of 2004 having been filed within a period of 12 years from the decree dated 5th October 2002, which had been drawn up on 19th October 2002. He has referred to various events after filing of Special Darkhast No. 41 of 2004 and submitted that this was merely a continuity of the original Execution Application. He has submitted that the decree had also been challenged on the ground that it was a nullity which had thereafter, been rejected. A precept had been issued on 1st September 2008 and the execution proceedings were transferred to the City Civil Court insofar as the immovable property situated in Mumbai is concerned. Further, upon the City Civil Court holding that it had no jurisdiction, the papers were submitted back to the Advocates of the Decree Holder who had then filed the present Execution Application. He has submitted that the present Execution Application is also in continuity of the Special Darkhast No. 41 of 2004, being the original Execution Application filed for execution of the very same decree dated 5th October 2002.

11. The learned Counsel appearing for the Applicant/ Decree holder has relied upon the decision of the Supreme Court in

Krishna Gopal Chawla & Ors. Vs. State of U.P. & Anr.¹ wherein it has been held that an Appeal preferred from the decree, unless the earlier decree gets merged in the decree passed by the Appellate Court, the earlier Execution Application is maintainable and there is no need to file a fresh Execution Application. The Supreme Court had considered in the facts and circumstances of that case that the Appeal had been filed challenging the original Award and the Supreme Court had stayed the execution proceedings pending the disposal of the Appeal. After disposal of the Appeal, there was no impediment or bar to continue the execution proceedings on application moved by the Appellants to proceed with the execution.

12. The learned Counsel appearing for the Applicant/ Decree holder has further placed reliance upon the decision of Punjab and Haryana High Court in case of **Sita Ram Vs. Mahadi & Ors.**², wherein it was held that the period of limitation would not commence from the date of the original decree but from the appellate decree, inspite of there being no stay granted during the course of the Appeal. This in view of the Appeal being considered as

1 (2001)9 SCC 694

2 2006 SCC OnLine P&H 379

a continuation of the Suit.

13. The learned Counsel appearing for the Applicant/Decree Holder has accordingly, submitted that in the present case, there is no issue of the present original Execution Application being barred by limitation as it is in continuation of the original Execution Application which has been filed within time. Merely because the present Execution Application has been filed in this Court with respect to the immovable property situated in Mumbai, that does not mean that the original Execution Application filed within time is not to be taken into consideration.

14. In counter of these submissions, the learned Counsel appearing for the Respondents/Judgment Debtors has submitted that the initiation of the Darkhast proceedings being Special Darkhast No. 41 of 2004 in the Court of C.J.S.D., Nashik does not save limitation as the limitation would have to be considered from the purview of the present Execution Application, which has been filed beyond the period of 12 years from passing of the decree. He has submitted that the precept 2008 would also have to be taken into consideration and that the Applicant/Decree holder failed and

neglected to follow up the matter and accordingly, the Applicant/Decree holder cannot be permitted to take advantage of its own wrong.

15. Learned Counsel for the Respondents/Judgment Debtors has relied upon Article 136 of the Limitation Act which provides for execution of any decree for which the period of limitation is of 12 years, from the decree or order becoming enforceable. He has placed reliance upon the decision of the Kerala High Court in case of **Abdul Gafoor s/o Moideen Vs. The Chairman, Saktan Kuries & Loans (P) Ltd., Trichur**³. He has submitted that in that case there was an Application for transfer of decree for execution to the transferee Court which the Court considered is not an Application for execution. The Application for execution has to be filed in the transferee Court subject to the period prescribed under Article 136 of the Limitation Act, 1963 i.e. within a period of 12 years from the decree becoming enforceable failing which the decree would become inexecutable. Decree Holder is also required under the Rules of the High Court of Kerala to submit application for execution within a period of six months from the date of receipt of the decree

3 AIR 2003 Ker 235

by the transferee Court. However, this cannot override the provisions of the Limitation Act, 1963 i.e. Article 136 of the Act, which is a Central Statute enacted by Parliament. Accordingly, the Application for execution admittedly filed beyond 12 years as prescribed under Article 136 of the Limited Act was dismissed as not maintainable.

16. Learned Counsel appearing for the Respondents/Judgment Debtors has also placed reliance upon the decision of the Supreme Court in **Ram Bachan Rai & Ors. Vs. Ram Udar Rai & Ors.**⁴, wherein the Supreme Court has held that where no stay has been granted, an Application for execution cannot be considered with effect from the date of dismissal of the Civil Revision Application which had been filed in that case. It was held that the limitation started running from the date of the decree and not from the dismissal of the Civil Revision Application. This was by applying Section 136 of the Limitation Act.

17. Learned Counsel appearing for the Respondents/Judgment Debtors has also relied upon the decision of

⁴ (2006) 9 SCC 446

the Supreme Court in **Ratansingh Vs. Vijay Singh & Ors.**⁵, wherein the Supreme Court had held that in the facts and circumstances of that case dismissal of the application for condonation of delay would not amount to a decree and therefore, dismissal of an appeal as time barred would also not be a decree. The decree became enforceable from the Appellate Court's order only when the order/decreed supersedes the decree of the Trial Court. Hence, the Respondents' second appeal getting dismissed solely on the ground of delay did not amount to a decree and/or extend the limitation for filing the Execution Application.

18. Learned Counsel appearing for the Respondents/Judgment Debtors has accordingly, submitted that in the facts of the present case, the Execution Application having been filed in the year 2016 i.e. beyond the 12 years from the passing of the decree which was in the year 2002, the Execution Application would clearly be barred by limitation. He has submitted that there has been no stay of the decree other than a stay for a period of six and half months by order dated 29th July 2013 passed by this Court in Writ Petition No. 804 of 2013. Thus, the present Execution Application

⁵ (2001) 1 SCC 469

would clearly be barred by limitation.

19. Learned Counsel appearing for the Respondents has further submitted that the properties in respect of which execution has been sought by the present Execution Application is in Mumbai and that original Execution Application which had been filed in 2004 concerned properties in Nashik cannot be taken into account for saving the period of limitation.

20. Having considered the averments, in my view, the original decree having been passed on 5th October 2002 and drawn up by the C.J.S.D., Nashik on 19th October 2002 was the subject matter of Special Darkhast No. 41 of 2004 (original Execution Application) in the Court of C.J.S.D., Nashik by which execution of the decree had been sought. The proceedings which have been filed pursuant to the original Execution Application were in continuation thereof and in execution of the same decree. There had been a challenge by the Judgment Debtors to the decree on the ground of it being a nullity in Writ Petition No. 804 of 2013 filed in this Court. Further, the precept which had been filed on 1st September 2008 for transferring the decree dated 5th October 2002 to the City Civil

Court for attachment of the immovable property at Mumbai was in continuation of the execution of the original decree.

21. It is necessary to note that by the order dated 29th July 2013 passed in Writ Petition No. 804 of 2013, this Court had considered the issues *inter alia* with regard to the decree being a nullity as well as the validity of the Miscellaneous Civil Application No. 80 of 1998 taken out by the original Judgment Debtor on the grounds of limitation and whether it amounts to an objection filed to the Award passed by the learned Arbitrator. This Court considered it appropriate to set aside the order dated 10th April 2012 passed by the C.J.S.D., Nashik rejecting the Application taken out by the present Judgment Debtors being the sons of the original Judgment Debtor declaring the decree as a nullity and remanded the matter back to the Court of C.J.S.D., Nashik to decide the issue. This Court had directed the parties to maintain *status quo* in respect of the properties which was the subject matter of the attachment pending the decision of the Trial Court.

22. The *Status quo* in respect of the attachment of the properties had operated till 18th February 2014, when the learned

C.J.S.D., Nashik had rejected the Miscellaneous Civil Application No. 80 of 1998 taken out by the Original Judgment Debtors and decided the issues with a reasoned order. It has been the contention on behalf of the Respondents/Judgment Debtors that the *status quo* granted by the Appellate Court operated only for a few months and that cannot be considered to save limitation with respect to the present Execution Application filed in this Court. This submission loses sight of the fact that the *status quo* was not in respect of the original decree, but in respect of the attachment of the immovable properties and for execution of the decree there had already been an Execution Application filed viz. Special Darkhast No. 41 of 2004. Further, the contention on behalf of the Respondents/Judgment Debtors that the filing of precept under Section 46 of the the Code of Civil Procedure, 1908 for transferring the decree dated 5th October 2002 to the City Civil Court cannot be treated as an Application for execution, thus, saving limitation in respect of the present Execution Application, also loses sight of the original proceedings for execution viz. Special Darkhast No. 41 of 2004, which is for execution of the very same decree. Thus, the decision of the Kerala High Court in **Abdul Gafoor s/o Moideen** (supra) where the Application for transfer of the decree was considered to be not an Application for execution, relied upon by

the learned Counsel for the Respondents/Judgment Debtors, is inapplicable in the present case as there was already an Execution Application prior to issuance of precept.

23. In my considered view, the present Execution Application is in continuation of the original proceedings taken out by the Decree Holder for execution of the decree under Special Darkhast No. 41 of 2004 before the C.J.S.D., Nashik. The present Execution Application has been taken out merely for the purpose of attachment of the property situated in Mumbai. The fact of there being an original Execution Application for execution of the very same decree filed within limitation of 12 years cannot be ignored. Further, it was by virtue of the order of the City Civil Court that the papers had been returned back to the Advocates on 27th January 2016 on the ground that it had no jurisdiction which order was subsequent to the proceedings being transferred by the C.J.S.D., Nashik to the City Civil Court vide order dated 20th November 2014.

24. The decision relied upon by the learned Counsel for the Respondents/Judgment Debtors in **Ratansingh** (supra) is a decision where the Supreme Court held that the Execution

Application was clearly beyond 12 years from the decree and that dismissal of the Appeal as time barred would not amount to a decree to save limitation. In the facts of that case, there was no original Execution Application having been filed from the decree within limitation as there is in the present case. It was in light of these facts that the Supreme Court considered the issue as to the starting point of limitation for filing of the Execution Application and only where the decree merged with the appellate decree then in that case, the limitation would commenced from the appellate decree. This case is clearly distinguishable on facts. This would also be the case of **Ram Bachan Rai** (supra) relied upon by the learned Counsel for the Respondents/Judgment Debtors. In that case also there was no original Execution Application for execution of the decree and the Execution Application was clearly beyond 12 years from the decree and thus, barred by limitation. The dismissal of the Civil Revision Application did not save limitation.

25. The decision of the Supreme Court in **Krishna Gopal Chawla** (supra) relied upon on behalf of the Applicant/Decree Holder is required to be taken note of and particularly, considering that the Supreme Court had considered the subsequent proceedings

viz. the Appeal preferred from the decree and in that context held that unless the original decree gets merged with the Appellate decree, the earlier Execution Application is maintainable and that there is no need to file a fresh Execution Application. The execution proceedings would be continued after dismissal of the Appeal by the Court confirming the decree passed without any alteration.

26. In the present case, the proceedings which have been instituted after filing of the original Execution Application before C.J.S.D., Nashik are required to be taken into account and the proceedings in execution thereafter are in continuation of the original Execution Application. This would equally apply to the transfer of the proceedings initially to the City Civil Court and thereafter, upon the City Civil Court holding that it had no jurisdiction, the present Execution Application filed in this Court. Thus, in my view, the present Execution Application is in continuity of the original Execution Application and by virtue of the original Execution Application having been filed by way of Special Darkhast No. 41 of 2004 within the period of 12 years from the date of the decree under Article 136 of the Limitation Act, 1963, the present Execution Application will not be barred by limitation.

27. Accordingly, the objection taken by the office of this Court regarding limitation is dispensed with and the office shall accept the filing of the Execution Application.

28. Chamber Summons is accordingly, disposed of.

[R.I. CHAGLA J.]