

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.1962/2022

PETITIONER: M/s Hasnatey Burhanaiayah Fiddiayah
Decree Holder (Waqf) through its Managing Trustee
Shri Sheikh Zohair Fidvi s/o Sheikh Abdul Hussain
Fidvi aged about... yrs, Occ: Business
r/o Takli Feeder Road, Nagpur.

...VERSUS...

RESPONDENT: Kamalkishor s/o Laxminarayan Chandak
Judgment aged ... yrs Occ: Business,
Debtor r/o Behind Saraf Chambers Mount road Sadar,
Nagpur.

Mrs. Rashi Deshpande, Advocate for petitioner
Shri D.G. Paunikar, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.

Judgment reserved on : 20/10/2022
Judgment pronounced on : 03/01/2023

1. Heard Mrs. Rashi Deshpande, learned counsel for the petitioner and Shri D.G. Paunikar, learned counsel for the respondent. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties.

2. The petition challenges the order dated 23/03/2022 passed below Exh.14 by the learned Small Causes Court in Special

Darkhast No.130/2017, whereby the application filed by the judgment debtor for dismissal of the execution proceedings for execution of the *ex parte* judgment and decree dated 09/08/2004 in Regular Civil Suit No.256/2001 has been allowed on the ground that the same was filed on 09/10/2017 that is beyond the period of 12 years of passing of the decree in Regular Civil Suit No.256/2001 and therefore was beyond the period of limitation (pg.96). The petition also challenges the order below Exh.21 dated 16/03/2022 dismissing the application to treat Special Darkhast No.130/2017 as an application for restoration of Special Darkhast No.135/2005.

3. Mrs. Deshpande, learned counsel for the original decree holder/petitioner by relying upon *M/s. Botanium Limited Vs. Shri Babu Raghu, since (d) thr. Legal Heir 2018 (6) ALL MR 904, Jasraj Lalaji Oswal Vs. Raziya Mehboob Patel and another, Writ Petition No.4294/2018 decided on 18/12/2019, Chhattar Singh and another Vs. Kamal Singh and others, 1926 SCC OnLine Allahabad 258 (FB), Pentapati China Venkanna and others Vs. Pentapati Bangararaju and others AIR 1964 SC 1454, Smt. Suglabai w/o Prabhu Jaishete and another Vs. Rangrao s/o Govindrao (Since died through his L.Rs.) Sitabai w/o Rangrao and others, Civil Revision Application No.12 of*

2004 decided on 20/10/2010, Shaikh Chand s/o Shaikh Ahmed and Ors. Vs. Zaitunbee w/o Shaikh Lal and Ors., 2018 (3) ALL MR 213 (paras 27 and 28), *Debasish Sinha Vs. Sreejib Sinha and others, Special Leave Petition (C) No.4148/2020 decided on 08/03/2021, General Manager of the Raj Durbungah, under the Court of Wards Vs. Maharajah Coomar Ramaput Singh, dated 21/03/1872, Narendra Kumar Sharma Vs. Nand Kishore Sharma and others (Matters Under Article 227 No.7035 of 2015, decided on 20/05/2016) MANU/UP/0858/2016, Sanjay Sharma Vs. Ajay Sharma and others CS (OS) No.911/2007, decided on 24/01/2013*, contends that the impugned order cannot be sustained. She also places reliance upon Order 21 Rules 105 and 106 of the Code of Civil Procedure in support of her contention. It is also contended that presuming that Special Darkhast No.130/2017 was held to be not maintainable, it could be treated as an application for restoration of Special Darkhast No.135/2005, which was filed earlier in point of time (for which the application at Exh.21 was filed) and which came to be dismissed in default by the order dated 05/07/2011 for want of steps. She therefore submits that the impugned order is liable to be quashed and set aside and the application filed by the respondent/judgment

debtor was liable to be rejected. An argument is also raised, contending that the decree dated 09/08/2004, attained finality only on 12/03/2019 when Writ Petition No.4518/2018 filed by the judgment debtor/respondent, challenging the rejection of his application for condonation of delay, came to be dismissed, and therefore, on the principle of merger the application for dismissal of the execution proceedings at Exh.14 could not have been allowed.

4. Shri Paunikar, learned counsel for the respondent/judgment debtor submits that the limitation for filing execution proceedings was 12 years from the date of the decree. In the instant case the decree was passed on 09/08/2004 in Regular Civil Suit No.256/2001 and since Special Darkhast No.130/2017 was filed on 09/10/2017, the same was clearly beyond the period of 12 years and therefore has been rightly rejected by the learned Executing Court by the impugned order, which does not warrant interference. He submits that Special Darkhast No.130/2017 was a fresh execution proceeding and therefore cannot be permitted to be construed as an application for restoration of Special Darkhast No.135/2005, which was dismissed for want of steps on 05/07/2011. He therefore supports the impugned order.

5. The factual position in the proceedings is as under :-

Sr. No.	Date	Event
01.	2001	Regular Civil Suit No.256/2001 for ejectment, possession and arrears of rent filed by petitioner against respondent.
02.	09/08/2004	Decree for eviction passed <i>ex parte</i> .
03.	2005	Execution proceedings Special Darkhast No.135/2005, for execution of the decree in Regular Civil Suit No.256/2001 filed.
04.	28/03/2006	M.J.C. No.33/2006 filed by judgment debtor/respondent for setting aside <i>ex parte</i> decree and for condonation of delay.
05.	05/07/2011	Special Darkhast No.135/2005 dismissed by Small Causes Court for want of steps.
06.	27/02/2013	Application for condonation of delay in filing M.J.C. No.33/2006 rejected (pg.51).
07.	05/03/2013	Regular Civil Appeal No.129/2013 filed challenging the order dated 27/02/2013 dismissing application for condonation of delay in M.J.C. No.33/2006
08.	26/06/2016	Regular Civil Appeal No.129/2013 dismissed (pg.79).
09.	12/03/2019	Writ Petition No.4518/2018 filed by judgment debtor/respondent against judgment in Regular Civil Appeal No.129/2013 came to be dismissed.
10.	09/10/2017	Fresh executing proceedings bearing Regular Darkhast No.130/2017 filed by petitioner/decreed holder for execution of the decree passed in Regular Civil Suit No.256/2001.
11.	21/12/2018	Judgment Debtor/respondent filed application (Exh.14) for dismissal of the execution proceedings.
12.	17/09/2019	Petitioner/decreed holder filed application (Exh.21) for treating Special Darkhast No.130/2017 as

		application for restoration of Special Darkhast No.135/2005.
13.	16/03/2022	Application (Exh.21) filed by petitioner/decreed holder dismissed.
14.	23/03/2022	Application (Exh.14) filed by judgment debtor/respondent allowed and Special Darkhast No.130/2017 dismissed.

6. It cannot be disputed that Special Darkhast No.130/2017 which was filed on 09/10/2017, for execution of the decree dated 09/08/2004, in Regular Civil Suit No.256/2001, was clearly beyond a period of 12 years, as postulated by Article 136 of the Limitation Act and therefore, would be beyond limitation, considering which, the impugned order below Exh.14 cannot be assailed, on this count.

7. Insofar as the plea regarding applicability of the doctrine of merger is concerned, the doctrine of merger contemplates a challenge on merits, to the decree being decided by the Appellate Court in which case then the decree of the Trial Court merges into the decree of the Appellate Court and it is the decree of the Appellate Court which becomes executable, as has been held in ***Surinder Pal Soni Vs. Sohan Lal (Dead) through Legal Representatives (2020) 15 SCC 771***. In the instant case what is material to note is that the

original decree dated 09/08/2004 passed in Regular Civil Suit No.256/2001, was not in challenge in M.J.C. No.33/2006, which was an application for condonation of delay, and therefore, the doctrine of merger would not be applicable, for the petitioner/decreed holder, to take the benefit of dismissal of Writ Petition No.4518/2018 on 12/03/2019, which upheld the order of dismissal of the application for condonation of delay.

8. What remains to be seen is whether the application Exh.21 could have been considered by the learned Executing Court and Special Darkhast No.130/2017 could have been treated as an application for restoration of Special Darkhast No.135/2005.

9. Order 21 Rule 105 of CPC permits the Court to dismiss the execution application, for non-appearance of the decree holder, however, such dismissal can be when the case is fixed for hearing of the application. Order 21 Rule 106 of CPC permits the setting aside of the order passed under Order 21 Rule 105 (2) of CPC in case sufficient cause is shown and on such terms as to costs or otherwise as the Court thinks fit, who is then enjoined to appoint a day for further hearing of the application.

10. In the instant case, when Special Darkhast No.135/2005 came to be dismissed on 05/07/2011 admittedly it was not fixed for hearing of the application but was fixed for taking certain steps and was dismissed for want of steps.

11. In ***Pentapati China Venkanna*** (supra) while considering Section 48 of CPC as it then stood, which prevented the Court from passing any orders for execution of a decree on any fresh application presented after expiration of 12 years from the date of decree sought to be executed, it was held as under :-

“6. ----- . It is not necessary to express our opinion on the question whether such procedure is sanctioned by the Code of Civil Procedure or not; but assuming that the court has no such power, the passing of such an order cannot tantamount to an order of dismissal, for the intention of the court in making an order “closed” for statistical purposes is manifest. It is intended not to finally dispose of the application, but to keep it pending. Whether the order was without jurisdiction or whether it was valid, the legal position would be the same; in one case it would be ignored and in the other, it would mean what it stated. In either case the execution petition would be pending on the file of the court. That apart, it is not the phraseology used by the executing court that really matters, but it is really the substance of the order that is material. Whatever terminology may be used, it is for the court to ascertain, having regard to the circumstances under which the said order was

made, whether the court intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the court. We have no hesitation, therefore, in agreeing with the High Court that EP No. 13 of 1939 is pending on the file of the executing court and that the present application is only an application to continue the same.

9. The result of the decisions may be summarized thus: An application made after 12 years from the date of the decree would be a fresh application within the meaning of Section 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition.

10. In this case, as we have pointed out, the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meaning of Section 48 of the Code. It is only an application to continue EP No. 13. of 1939 which is pending on the file of the executing court.

11. That apart, the decree-holders filed E.A. No. 142 of 1952 in E.P. No. 13 of 1939 expressly asking for the reopening of the said execution petition and for proceeding with it. As we have held that the earlier execution petition is still pending on the file of the court, the executing court will be well within its

rights in proceeding on the basis of the earlier execution petition even without a new petition. ”

12. In ***M/s. Botanium Limited*** (supra) the Court was considering the question of delay in filing an application for restoration of execution application on the ground that it was not filed within 30 days of dismissal of the execution application as no steps were taken by the decree holder. While considering the provisions of Order 21 Rules 105 and 106 of CPC it was held that since the execution application was not fixed for hearing as contemplated by Order 21 Rule 105 of CPC but was dismissed on the ground that no steps were taken time of 30 days as prescribed in Sub Rule 3 of Rule 106 of Order 21 of CPC for making an application would not be attracted in such a situation and so also there would be no limitation prescribed for making such an application for setting aside the order dismissing the execution application dismissed due to the steps not being taken by the decree holder in the execution application and such application has to be filed within a reasonable period (para 13).

13. In ***Shaikh Chand*** (supra) the Court was considering a similar position as was considered in ***M/s. Botanium Limited*** (supra)

and the same view was reiterated based upon *Damodaran Pillai Vs. South Indian Bank, 2005 (5) ALL MR 961 (SC)* .

14. In *Chhattar Singh* (supra) while considering the proposition, that the decree for sale dated 07/06/1913 was put to execution on 04/01/1916 which were transferred to the Collector on 23/03/1916, another proceeding came to be filed for declaration that the property was not liable to be sold in auction which ultimately came to be decided by the High Court on 06/07/1920. In the subsequent suit, the execution proceedings before the Collector was stayed which came to be withdrawn by the judgment of the High Court dated 06/07/1920. On 17/08/1920 the Collector took up the execution proceedings and finding that no steps were taken to prosecute directed the papers to be returned to the Court of the Subordinate Judge, who on 31/08/1920 without issuing notice to either of the parties ordered the application for execution to be struck off the list of pending applications and an entry be made in the register of decided cases accordingly. On 10/01/1923 the decree-holders filed another application for execution, which came to be dismissed on account of limitation. Considering the above position, it was held that though the second application was styled as an application for

execution, in sum and substance it was an application to revive the earlier execution application and therefore since the earlier execution application was not finally decided, directed that the original application for execution should be proceeded to be decided.

15. The case in hand is similar to the one decided in ***Chhattar Singh*** (supra). ***Shaikh Chand*** (supra) also holds that it requires no debate that the decree-holders would not squander away the advantage of having achieved the decree by neglecting the proceedings and causing delay against their own interest. In the instant case also, the proceeding for setting aside the *ex parte* decree was pending in the form of M.J.C. No.33/2006, which throughout was contested by the petitioner/judgment debtor and ultimately culminated in Writ Petition No.4518/2018 being dismissed on 12/03/2019 prior to which itself Special Darkhast No.130/2017 already stood filed on 09/10/2017 in which the application at Exh.21 was also filed on 17/09/2019. That apart, the earlier execution application, i.e., Special Darkhast No.135/2005 was not decided finally, nor was it fixed for hearing as contemplated by Order 21 Rule 105 of CPC on 05/07/2011 when it was dismissed for want of steps, considering which, as held in ***M/s. Botanium Limited***

and ***Shaikh Chand*** (supra), the dismissal would not be one under Order 21 Rule 105 (2) of CPC, as a result of which Order 21 Rule 106 (1) of CPC would clearly also not be attracted and in such cases it would be permissible for the decree holder to file an application for restoration within a reasonable period of time.

In view of the above, I need not go into the other judgments referred to by the learned counsel for the petitioner/decreed holder.

16. The learned Executing Court while deciding Exh.21 merely went upon the form and not the substance as is indicated from para 4 of the order dated 16/03/2022 (pg.109). It is apt to state that whatever be the label of the application, it is the substance which governs the application and not the form and though Special Darkhast No.130/2017, was in fact an application for execution, of the decree, however in light of Exh.21, and the fact that the earlier Special Darkhast No.135/2005 was not finally decided, in sum and substance it could be termed to be a proceeding for continuing the earlier execution, considering which, the learned Executing Court ought to have considered it as such and decided it accordingly, which has not been done.

17. In view of the aforesaid discussion, the impugned order dated 16/03/2022 below Exh.21 and so also the one dated 23/03/2022 below Exh.14 are hereby quashed and set aside and the application below Exh.21 is allowed. Special Darkhast No.135/2005 stands revived and be proceeded ahead. The writ petition is accordingly allowed.

18. Rule is made absolute in the above terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar