IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 21ST DAY OF SEPTEMBER, 2017

BEFORE

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

CIVIL REVISION PETITION NO.1113/2013

Shivashankaragouda v/s. Bagalkot Udyog Ltd.

ORDER

This application is filed by the petitioners under Section 5 of the Limitation Act seeking condonation of delay of 1121 days in filing the revision petition challenging the order dated 20.08.2010 in the Execution Petition No. 53/2007 on the file of Principal Civil Judge (Jr.Dn), Bagalkot.

2. The affidavit sub-joined with the application is sworn to by the 1st petitioner. He tries to explain the delay by giving following reasons:-

i. On 07.11.2007, the respondent initiated execution proceeding, which was numbered as E.P.No.53/2007. He and other petitioners, who are the judgment debtors in the execution case, did not receive the notice issued to them, as they were issued to the wrong addresses in spite of the fact that the respondent/decree holder knew their correct addresses. Thereafter, the respondent, on 30.05.2009, made an application seeking substituted service on them by way of paper publication in a local newspaper "Vidyamana" instead of getting the notice published in newspaper like "Vijaya Karnataka" or "Samyukta Karnataka" or "Prajavani" having wide circulation. As a result, they did not

come to know about the execution case and therefore, they could not appear before the executing court.

ii. They had filed a writ petition, W.P. No.77106/2013, before this court. This court dismissed the said writ petition on 28.08.2013 as not maintainable. The petitioners wanted to challenge this order in the Hon'ble Supreme Court, but their counsel advised them that they should better challenge the two orders dated 04.08.2010 and 20.08.2010 passed in the execution case by filing a revision petition under Section 115 of C.P.C..

3. The respondent has filed statement of objections contending mainly that the petitioners were fully aware of the proceedings before the executing court. Notice was ordered to the petitioners, in the first instance, by the executing court. Since the petitioners could not be served with notice in ordinary course, the respondent/decree holder made an application seeking service of notice by way of substituted service. The newspaper "Vidyamana" has a wide circulation in the place where the petitioners are residing. When the petitioners did not appear even after publication of notice in the newspaper, executing court proceeded further to get the lease deed executed and registered through process of court by appointing a court commissioner and that ultimately on 20.08.2010, execution petition was closed for full satisfaction. It is further contended that the petitioners filed W.P.No.77106/2013 in relation to order passed by the executing court on 04.08.2010. That writ petition was not filed in relation to order dated 20.08.2010.

On 04.08.2010, the executing court directed the commissioner to get the lease deed registered. On 20.08.2010, the executing court closed the execution petition for full satisfaction. Therefore, those two orders are different. The petitioners cannot take advantage of a writ petition filed in relation to order dated 04.08.2010. It is also stated in the objection statement that the petitioners have not disclosed the date when actually they came to know about the execution proceedings. In these circumstances, the affidavit does not disclose the proper and sufficient reasons for condonation of delay. Now that execution petition has been closed, revision petition is not maintainable. Therefore, the application for condonation of delay does not survive.

4. The petitioners' counsel argued that the petitioners did not come to know about the execution petition filed against them as there was no proper service of notice on them. He also argued that the suit was one for specific performance in relation to contract of lease. When the respondent submitted the draft of the lease deed to the executing court, it was necessary that notice, as required under Order XXI Rule 34 C.P.C. should have been issued again to the petitioners along with draft of the lease deed. This is a mandatory provision. Failure on the part of the executing court to issue notice to the petitioners resulted in a lease deed being executed and registered. The interest of the petitioners have been seriously affected due to insertion of clause 10 in the lease deed. In that view of the matter, the petitioners have a right to prefer revision petition challenging the order dated 20.08.2010. Actually, any document executed and registered in violation of Order XXI Rule 34 of C.P.C. is void *ab initio* in law, and therefore, such an order can be challenged at any time and limitation does not arise

at all. In support of his arguments, he placed reliance on two judgments of the Hon'ble Supreme Court in the case of *Pratibha Singh and another v. Shanti Devi Prasad and another [(2003) 2 Supreme Court Cases 330]* and *Shivashankar Gurgar v. Dilip [(2014) 2 Supreme Court Cases 465]*. It is his argument that the application under Section 5 of the Limitation Act has been filed just by way of abundant caution. He also submitted that the petitioners were prosecuting Writ Petition No.77106/2013 before this court and the pendency of that petition was another reason for filing this revision petition after lapse of time. Therefore, he submitted that application under Section 5 of the Limitation Act is to be allowed.

5. The learned counsel for the respondent argued that the petitioners have not placed the truth before this court for seeking condonation of delay. The writ petition No. 77106/2013 was not in relation to the order impugned in this revision petition. The said writ was filed challenging the order dated 04.08.2010 in the very same execution case and it was rejected. Though it appears that the petitioners are making an effort to make out a case claiming exemption according to Section 14 of the Limitation Act since writ was in relation to another order, the said Section is not applicable, and therefore, this ground cannot be accepted.

6. The second point that the learned counsel for the respondent argued was that the petitioners have not explained the delay by giving sufficient reasons. The reason that the petitioners give that they were not served with the notice in the execution case cannot be accepted because they were the purchasers of the suit property during the pendency of the appeal before this court and that the second

appeal was also dismissed. They were aware of the proceedings. The very fact that they do not state in the affidavit the date when actually they came to know about the execution proceedings shows that they were aware of the execution proceedings and that after satisfaction of the decree, they have come up with a frivolous revision petition belatedly. When there are no sufficient grounds, this court cannot condone delay. In support of his arguments, he has placed reliance on the judgment of this court in the case of *Sri. Mohan S/o. Sadashiv Patil and others v. Bagalkot Udyog Limited in C.R.P.100025/2014*.

7. On hearing the arguments of the learned counsel for the parties, the first point that needs to be examined is, 'whether the petitioners were really not aware of the execution proceedings?' The petitioners themselves have stated in para 11 of the memorandum of revision petition that they purchased the suit properties from the erstwhile owners of the land during the pendency of the second appeal before this court. Therefore, these petitioners by virtue of devolution of interest, stepped into the shoes of their sellers, who were defendants in the suit. It is true that the notice issued to the petitioners, in the first instance, was not served on them and thereafter a paper publication was issued in a local daily "Vidyamana". After publication of notice, the executing court held the service on the petitioners sufficient and proceeded further. To this extent, there is no infirmity or flaw in the procedure followed by the executing court. If the say of the petitioners that they were not aware of the proceedings in the execution case is to be believed, they should disclose the date when and how actually they came to know about the execution proceedings. If they state simply that they were not aware, it is very difficult to believe

their stand. Their obstinate silence without disclosing the date or the occasion when they came to know about the execution proceedings only indicates that they were aware of the execution case going in the court and perhaps they might be watching the entire proceedings. The reason for drawing this inference is, petitioner No.1 is an advocate besides being an agriculturist. It is not as though he did not know that soon after dismissal of the second appeal, the decree would be put into execution. Therefore, this reason cannot be believed.

8. The learned counsel for the petitioners invoked Order XXI Rule 34 of C.P.C. as one of the reasons for seeking condonation of delay. He has also relied upon the judgment of the Hon'ble Supreme Court in the case of *Pratibha Singh (Supra)* where it is held by the Hon'ble Supreme Court that Order XXI Rule 34 of C.P.C. provides a procedure for execution of documents pursuant to decree and that after the decree holder submits to Court the draft of the document to be registered, the court shall cause a draft to be served on the judgment debtor together with a notice requiring his objections, if any, within the time fixed by the court. Indeed, this procedure is found in Order XXI Rule 34 of C.P.C. and there cannot be a second word with regard to the dictum laid by the Hon'ble Supreme Court. But what is to be mentioned here is that Order XXI Rule 34 of C.P.C. can be invoked only when the decree holder submits the draft along with the execution application. Issuance of notice to the judgment debtor along with draft is mandatory in such a situation. Practically, the procedure being followed is that draft is not usually submitted when the execution petition is filed. Generally, while executing a decree for specific performance, cause notice will be issued as contemplated under Order XXI

Rule 22 of C.P.C. to the judgment debtor. There is no bar for issuing cause notice even when execution petition is filed within two years from the date of decree. Having received notice, sometimes the judgment debtor may obey the decree and in that event, presentation of draft of the document will not arise at all.

9. The judgment debtor may respond to the cause notice or not. If the judgment debtor appears before the court responding to the notice, but does not obey the decree, draft of the document will be served on him inviting his objections. If he does not appear at all, there is no need to issue notice once again to him. There is no need to comply with Order XXI Rule 34 of C.P.C. again. Notice can be issued to the judgment debtor only one time and repeated issuance of notice to the judgment debtor at every stage as has been argued by the learned counsel for the petitioners, is unwarranted. It is better to read Order XXI Rule 22 of C.P.C. along with Order XXI Rule 34 of C.P.C. together. Therefore, this argument of the learned counsel fails.

10. As rightly argued by the learned counsel for the respondents, Writ Petition No.77106/2013 was filed challenging the order dated 04.08.2010. This writ petition is in no way connected with the order dated 20.08.2010. So this cannot be a good ground for invoking the jurisdiction of this court under Section 5 of the Limitation Act for condonation of delay. Even otherwise it can be stated that Writ Petition No.77106/2013 was dismissed by this court on 28.08.2013 and this revision petition was filed on 13.12.2013. The petitioners might have stated that they wanted to challenge the order in writ petition before the Hon'ble Supreme Court and that their counsel might have

advised them to challenge the order dated 20.08.2010. What the petitioners have stated that they wanted to challenge the order in writ petition before the Hon'ble Supreme Court is believable, but it is unbelievable that it took such a long time for them to get legal advice by their counsel at New Delhi. Therefore, there is no explanation for the delay in between the dates 28.08.2013 and 13.12.2013.

11. Yet another point argued by the counsel is that the order dated 20.08.2010 is void *ab initio* and whenever such an order is challenged, question of delay does not arise. He refers to the decision of the Hon'ble Supreme Court in the case of *Shivashankar Gurgar v. Dilip [(2014) 2 SCC 465].* The Hon'ble Supreme Court, in the context that the executing court had no jurisdiction to modify the decree, held that order of the executing court dated 23.11.2005 was without jurisdiction and hence that order was nullity. This is not the circumstance here. Hence, the said decision is not applicable. The order dated 20.08.2010 is not illegal. On that day, the executing court closed the execution petition finding that the lease deed had been executed and registered and there was nothing to be executed further. Closing the execution proceedings by entering full satisfaction is not an illegal order.

12. At the outset, it has to be stated that the petitioners have given some reasons for seeking condonation of delay and the reasons they have given cannot be brought within the scope of "sufficient cause". Rather what is forthcoming is a kind of obstinate attitude of the petitioners in getting the matter reopened again for troubling the respondent/decree holder. Negligence on their part is very much forthcoming. It is in this context, the Hon'ble Supreme Court in the case of *Pundalik Jalam Patil (Dead) by LRs v.*

Executive Engineer, Jalgaon Medium Project and another, [(2008) 17 Supreme Court Cases 448] has held as below:-

> "In our considered opinion, incorrect statement made in the application seeking condonation of delay itself is sufficient to reject the application without any further inquiry as to whether the averments made in application reveal sufficient cause to condone the delay. That a party taking a false stand to get rid of the bar of limitation should not be encouraged to get any premium on the falsehood on its part by condoning delay. [See *Binod Bihari Singh v. Union of India*]."

13. This court, in C.R.P.No.100025/2014 filed against the same respondent by one Mohan and others, did not accept the reasons for inordinate delay of 788 days in filing the Civil Revision Petition. In C.R.P.No.100025/2014 also, reference was made to W.P.No.77106/2013 and also another set of writ petitions 71977-71982/2012 for taking shelter for the delay. These reasons were not accepted. In the said revision petition, this court observed that the petitioners therein were negligent. The same yardstick is applicable to facts of this case also. The petitioners herein, besides being negligent, appear to have filed the present revision petition only for the purpose of getting the entire matter reopened. Such a conduct cannot be encouraged. Therefore, I do not find good reasons for condoning delay to entertain this application. Accordingly, application filed under Section of 5 of the Limitation Act stands dismissed. Consequently, the revision petition is dismissed.