

\$~5 (Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 460/2022 & CM APPL. 23411/2022, CM APPL.
23412/2022

MADAN LAL SURYAWANSHI Petitioner
Through: Mr. Bharat Malhotra, Adv.
with petitioner in person

versus

TARA DEVI (NOW DECEASES THROUGH ITS LRS
..... Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **12.07.2022**

1. This petition, under Article 227 of the Constitution of India, assails orders dated 7th December 2018 and 29th March 2022, passed by the learned Civil Judge in Ex. 96232/2016 (*Tara Devi v. Madan Lal Suryawanshi*).

2. The impugned orders have come to be passed in proceedings initiated by the respondent, seeking execution of a judgment and decree dated 25th May 2011. Though it is not strictly relevant for the purposes of the present petition, it may be noted that the operation of the said judgment and decree dated 25th May 2011 was stayed by the learned Civil Judge on 18th September 2015, and continued to remain stayed till 29th March 2022, on which date the impugned order came to be passed.

3. Consequent on the passing of the impugned order, the learned Civil Judge has directed issuance of warrants of attachment against the movable property of the petitioner. That, however, is not the issue in controversy in the present case.

4. The judgment and decree dated 25th May 2011, having been passed *ex-parte*, was set aside on an application of the petitioner under Order IX Rule 13 of the CPC, by the learned Civil Judge, *vide* order dated 18th September 2015, subject to the petitioner depositing a sum of ₹ 75,000/- by way of FDR before the learned trial Court.

5. The petitioner assailed the order dated 18th September, 2015, to the extent the order required the petitioner to furnish an FDR for ₹ 75,000/-, before this Court by way of CM(M) 18/2016 (*Madan Lal Suryawanshi v. Tara Devi*).

6. During the pendency of the said CM(M) 18/2016, Tara Devi expired on 25th March 2016. On 11th August 2016, when the matter was next listed before a coordinate Bench of this Court, the following order was passed:

“IN THE HIGH COURT OF DELHI AT NEW DELHI
+CM(M) 18/2016 & CM NO.938/2016

MADANLAL SURYAWANSHI Petitioner
Through Petitioner in person

versus

TARADEVI Respondent
Through Mr. Shekhar Kumar, LR for R-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

11.08.2016

Respondent is stated to have expired on 25.3.2016. Learned counsel for the respondent to place on record a list of legal heirs of the respondent to enable filing of the application to bring on record the Legal Heirs of the deceased respondent.

List on 18.11.2016.

AUGUST 11, 2016
N”

JAYANT NATH, J.

7. Subsequently, *vide* order dated 12th February 2018, a coordinate bench of this Court dismissed CM(M) 18/2016. Resultantly, the order dated 18th September 2015 whereby the judgment and decree dated 25th May 2011 was set aside subject to deposit of ₹ 75,000/- by the petitioner by way of FDR, stood revived.

8. Learned Counsel for the petitioner submits, on instructions, that the aforesaid amount of ₹ 75,000/- was not deposited by the petitioner, as a result of which the setting aside, by the order dated 18th September 2015, of the judgment and decree dated 25th May 2011 never came into effect and, therefore, the judgment and decree dated 25th May 2011 became executable.

9. It is in these circumstances that Execution 96232/2016 was again prosecuted by the respondent.

10. Tara Devi, the decree holder, expired on 25th March 2016. She was survived by her son and two daughters as her only legal heirs.

11. The aforesaid legal heirs filed an application, for being substituted in execution proceedings under Order XXII Rule 3 of the Code of Civil Procedure, 1908 (CPC). The application was accompanied by a separate application for condonation of delay in filing the substitution application.

12. In the application for condonation of delay accompanying the substitution application, filed by the respondent, for being impleaded in place of Tara Devi, it was sought to be contended that the legal heirs of Tara Devi came to know of the pendency of the proceedings initially only with respect to CM(M) 18/2016, and of the pendency of the proceedings before the learned executing Court only thereafter.

13. This specific averment to this effect, as contained in the application for condonation of delay, reads thus:

“3. That the son of the plaintiff came to know about the pendency of the petition in high court after the death of Tara Devi and later on he came to know about the pendency of present execution petition. As the civil appeal filed by the judgement debtor was pending before the Hon'ble High Court of Delhi and the present proceeding were kept pending for waiting the decision of the Hon'ble High court of Delhi in the said appeal.

4. That the civil appeal was dismissed by the Hon'ble High Court of Delhi vide Order dt. 12.02.2018. A copy downloaded from the High Court website is annexed herewith.

5. That it is pertinent to mention here that the judgment debtor has not complied with the order dt. 18.09.2015 of this Hon'ble Court and the original suit was never revived, however, the process of execution petition was stayed during

the pendency of said appeal. After dismissal of the abovesaid appeal, the Legal heir are filing the application Under Order XXII Rule 3 read with Section 151 CPC alongwith the present application after dismissing the said appeal.”

14. The learned Civil Judge, *vide* order dated 7th December 2018, even while noting that there was considerable delay in the preferring, by the respondent, of the application under Order XXII Rule 3 of the CPC, was of the view, nonetheless, that the application for condonation of delay deserved to be allowed. The learned Civil Judge accepted the contention of the legal heirs of Tara Devi, regarding lack of knowledge of the execution proceedings pending before the learned Civil Judge. Relying on the axiom that technical considerations ought not to come in the way of dispensation of substantial justice, the order dated 7th December 2018 condoned the delay in filing the application under Order XXII Rule 3 by the legal heirs of Tara Devi and, consequently, allowed their impleadment in the execution proceedings.

15. The petitioner moved an application under Section 114 read with Order XLVII Rule 1 of the CPC, seeking review of the aforesaid order dated 7th December 2018 which has also come to be dismissed by the learned Civil Judge by the order dated 29th March 2022.

16. The learned Civil Judge has also noted the fact that, in the interregnum, on 17th July, 2017, the petitioner had filed an application seeking dismissal of the main suit preferred by Tara Devi against the petitioner. This application, obviously, was thoroughly misplaced, as the suit already stood decreed on 25th May 2011 on which date Tara

Devi was alive. Any default, on the part of the legal heirs of Tara Devi, in impleading themselves in the execution proceedings, cannot, by operation of any provision of the CPC, constitute a basis for seeking dismissal of the suit which already stood decreed.

17. Be that as it may, the order dated 29th March 2022 found no case made out for reviewing the earlier order dated 7th December 2018 and accordingly dismissed the petitioner's review petition.

18. Aggrieved, the petitioner is before this Court.

19. I have heard Mr. Bharat Malhotra, learned Counsel for the petitioner at some length.

20. Mr. Malhotra initially contests the impugned orders on the ground that no case for condonation of the delay in filing the application, by the legal heirs of Tara Devi for their substitution in Ex. 96232/2016, was made out. He has invited my attention to paras 3 and 4 of the application for condonation of delay, which stand reproduced hereinabove. He submits that the Counsel who had filed CS 212/2010, by Tara Devi against the petitioner, was the Counsel who, later came to file the application under Order XXII Rule 3 of the CPC, engaged on behalf of the legal heirs of Tara Devi. He also invites my attention to the order dated 11th August 2016, passed by the coordinate bench of this Court in CM(M) 18/2016, to submit that Mr. Shekhar Kumar, the legal representative of Tara Devi, was present on the said date in Court.

21. These facts, he submits, belies the contention, in para 3 of the condonation of delay application filed by the legal heirs of Tara Devi, that they did not have the knowledge of pendency of the execution proceedings before the learned Civil Judge.

22. Besides, he submits, the application seeking condonation of delay was vague and did not disclose the date when knowledge of the execution proceedings was actually acquired by the legal heirs of Tara Devi.

23. In these circumstances, he submits, the learned Civil Judge ought not to have mechanically condoned the delay in filing the application for substitution of legal heirs.

24. I have heard and perused the record.

25. On the advisability of an Article 227 Court interfering with an order condoning delay, the Supreme Court has this to say in *Mohammad Shafeeq v. Mirza Mohammad Husain*¹:

“3. In our opinion, the High Court has taken too technical a view of the error committed by the appellant in pursuing the remedy available to him under the law. The appellant had been prosecuting his remedy diligently and there is nothing to doubt his bona fides. These aspects were taken into consideration by the learned Additional District Judge while condoning the delay in filing the revision. In our opinion, the High Court ought not to have interfered with the order of the Additional District Judge, condoning the delay in filing the revision, being an order passed in exercise of discretion

¹ (2002) 9 SCC 460

vested in the learned Additional District Judge and for that reason, was not open to interference by the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution.”

26. Ordinarily, an order condoning delay is discretionary order in nature and the Article 227 Court would be loath to interfere thereafter. On the scope of interference with discretionary orders even in appeal, the Supreme Court holds thus, in *Wander v. Antox India Pvt Ltd*²:

“13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox’s alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have”

27. It is only where, therefore, there is complete non-application of

² 1990 Supp SCC 727

mind in condoning delay which is inexorable, or where no reasons for condonation of delay are forthcoming in the order passed by the Court below, that an Article 227 Court would ordinarily interfere.

28. In the present case, the learned Civil Judge has proceeded on the premise that the legal heirs of Tara Devi did not possess the requisite knowledge of the pendency of the execution proceedings, so as to move the application under Order XXII Rule 3 of the CPC within time. He has accepted the contention, to the said effect, as contained in the application for condonation of delay.

29. The submission of Mr. Malhotra, in this regard, cannot make out a sufficient case for this Court to interfere with the decision of the learned Civil Judge in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

30. Mr. Malhotra has not relied on any positive material to indicate that the legal heirs of Tara Devi were, in fact, aware of the proceedings pending before the learned Civil Judge.

31. The fact that the Counsel who had initially filed the suit on behalf of Tara Devi against the petitioner also came, later, to file the application under Order XXII Rule 3, cannot lead to any such inference. Similarly, the fact that, in the order dated 11th August 2016, passed by the coordinate bench of this Court in CM(M) 18/2016, the presence of the legal representative of Tara Devi is recorded, can also not lead to an inevitable inference that the said legal representative

was also aware of the pendency of the execution proceedings before the learned Civil Judge. Significantly, the order dated 11th August 2016 records the fact that Tara Devi had expired on 25th March 2016, and calls on learned Counsel for Tara Devi to place on record a list of the legal heirs of Tara Devi so that they could be brought on record in CM(M) 18/2016.

32. The order dated 11th August 2016 does not record the appearance of Tara Devi and, instead, records the appearance of the legal representative of Tara Devi.

33. Holistically seen, the said order cannot justify any conclusive inference that the legal representatives of Tara Devi were in fact aware, at that stage, of the pendency of the execution proceedings before the learned Civil Judge.

34. Execution proceedings, even otherwise, are required to be accorded a treatment qualitatively different from that which is accorded to original proceedings. This aspect has been underscored by the Supreme Court in its decision in *Rahul S. Shah v. Jinendra Kumar Gandhi*³, thus.

“22. These appeals portray the troubles of the decree-holder in not being able to enjoy the fruits of litigation on account of inordinate delay caused during the process of execution of decree.

23. This Court has repeatedly observed that remedies

³ (2021) 6 SCC 418

provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Council in *General Manager of the Raj Durbhunga v. Coomar Ramaput Sing*⁴, which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in *Shub Karan Bubna v. Sita Saran Bubna*⁵, wherein it recommended that the Law Commission and Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be a handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.”

35. Once a party succeeds in a suit, and obtains a decree in her/his favour, the effort of the Court has, at all times, to see that the decree is executed and that execution of the decree is not impeded or hindered on technical considerations. The approach that the Court adopts during the course of trial in a suit is qualitatively different from the approach to be adopted while dealing execution proceedings.

36. The Supreme Court in *Rahul S. Shah*³, has also lamented at the fact that, often times, the travails of a litigant commence after he succeeds in a suit and obtains a decree in his favour.

37. Given all these considerations as well as the limited scope of the

⁴ 1872 SCC OnLine PC 16 : (1871-72) 14 Moo IA 605

⁵ (2009) 9 SCC 689 : (2009) 3 SCC (Civ) 820

jurisdiction vested in this Court by Article 227 of the Constitution of India, I do not feel that the present case calls for any interference with the impugned orders dated 7th December 2018 and 29th March 2022, passed by the learned Civil Judge in Ex. 96232/2016.

38. As such, this petition is dismissed with no order as to costs.

39. Needless to say, the petitioner would be at liberty to file objections, if he so chooses, before the learned executing Court in accordance with law.

JULY 12, 2022

dsn

C. HARI SHANKAR, J.

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