



IN THE HIGH COURT OF SIKKIM

CIVIL REVISION PETITION NOS.3, 4 and 5 OF 2004

Smt. Mala Rana Patra,
wife of late Ram Patra,
C/o Himal India Photo Offset,
Namnam, Gangtok,
resident of Development Area,
Gangtok, P.O. & P.S. Gangtok,
Sikkim. ...

**Petitioner/
Judgment Debtor.**

VERSUS

State Bank of India, a bank
constituted under the State Bank of
India Act, 1955 having its local
Head Office at No.1 Middleton Street,
Kolkata and having its branch
amongst other places at Gangtok, in
the East District of Sikkim. ...

**Opposite Party/
Decree Holder.**



For the petitioner /
Judgment Debtor

:

Mr. N. K. P. Sarraf, Advocate.

For the Opposite Party/
Decree Holder

:

Mr. A. Moulik assisted by Miss
Kessang Diki Bhutia,
Advocates.


PRESENT: THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 3rd September 2004.

J U D G M E N T & O R D E R

SINGH, J.

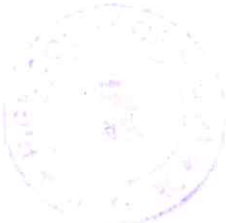
These three cases involved common question of facts and laws and interrelated each other and, that being the



position, these cases were taken up for hearing jointly and accordingly, these cases are finally disposed of with the following common judgment and order.

2. The facts of the cases, in a short compass, are as follows: -


i) The State Bank of India as plaintiffs, for short, the respondent Bank herein, initially instituted three money suits against the defendant Himalindia Photo Offset (Himalindia Publications Pvt. Ltd.) represented by the petitioner, Smt. Mala Rana Patra, for short the Judgment Debtor herein, under Civil Suit Nos.60 of 1988, 61 of 1988 and 62 of 1988 which were decreed on 21st August 2000 by the trial Court in the following order: -

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- “(i) Decree for Rs.2,85,506.04 with PI and FI @ 12.5% per annum with effect from 4.5.1988 in Civil Suit No.60 of 1988.
 - (ii) Decree on admission for Rs.1,48,537.98 plus PI and FI @ 12.5% per annum with effect from 4.5.1988 in Civil Suit No.61 of 1988.
 - (iii) Decree on admission for Rs.3,67,741.69 plus PI and FU @ 12.5% per annum w.e.f. 4.5.1988 in Civil Suit No.62 of 1988.”

ii) In the meantime, the Judgment Debtor Mr. Ram Patra, the owner and proprietor of the said Himalindia Photo Offset, died. His wife, the present petitioner namely, Smt. Mala Rana Patra and his daughter, Miss Ekta Patra were made parties in the connected execution cases, namely Civil

Execution Case Nos.7 of 2000, 8 of 2000 and 9 of 2000 respectively. In the course of the execution proceedings, the properties within the press premises were attached and in that regard, an attachment report was filed in the executing Court and thereafter, on the prayer of the decree holder (the respondent Bank herein) sale order was passed and Pleader Commissioner was appointed for inventory and valuation of the properties by an approved valuer and accordingly, the Commissioner submitted his report on 28th November 2002 and the Court below passed the proclamation of sale order in respect of the attached properties of the Judgment Debtor on 16th December 2002 and, as the property could not be sold due to shortage of time, another date of issue of fresh sale order was fixed on 24th February 2003 and apart from that the sale order was returned unexecuted and accordingly, the case was fixed on 7th March 2003 for taking steps. However, on 7th March 2003, no step was taken by the Decree Holder and therefore, those three execution cases were dismissed on the same day, i.e. on 7th March 2003. Thereafter, the Decree Holder filed applications on 16th July 2003 before the Court below for restoration of those three execution cases and those petitions were registered as C.M.C. Nos.20 of 2003, 21 of 2003 and 22 of 2003. The Judgment Debtor, petitioner herein, resisted the petitions by filing written objections. The






Decree Holder also filed another separate applications on 7th November 2003 in support of the said three restoration petitions already filed on 16th July 2003 to which the Judgment Debtor, the petitioner herein, also filed written objections.

3. Upon hearing the parties, the learned Court below passed the impugned orders dated 13th February 2004 in the connected Civil Misc. Case Nos.20 of 2003, 21 of 2003 and 22 of 2003 thus setting aside the orders dated 7th March 2003 passed in the connected Civil Execution Case Nos.7 of 2000, 8 of 2000 and 9 of 2000 respectively thus restoring the same to its original execution cases. Being aggrieved by the related impugned orders dated 13th February 2004, the Judgment Debtor, petitioner herein, filed these three revision petitions.

4. Supporting the case of the petitioner, Mr. N. K. P. Sarraf, learned counsel submitted that the learned Court below had acted illegally and with material irregularity in exercise of its jurisdiction in restoring the related execution cases which were dismissed on 7th March 2003 inasmuch as the petitions for restoration of the execution cases filed by the Decree Holder-Bank are not maintainable in the eye of law and even the Decree Holder is aggrieved by the dismissal orders, he ought to have preferred an appeal under Order





XLIII Rule 1(ja) of the C.P.C. as the case of the Decree Holder shall be covered up by the provisions of Rule 105 and 106 of Order XXI, and that such petition is to be filed within 30 days from the date when the applicant had knowledge of the order, but in the case in hand, there is 130 days delay in filing the said petitions as the same were filed on 16th July 2003 (petitions dated 15th July 2003). According to Mr. Sarraf, the impugned orders dated 7th March 2003 are final orders and as such no question of restoration or revival of the case shall ever arise and the only remedy available to the Decree Holder Bank is to file/and prefer an appeal under Order XLIII Rule 1(ja) of the C.P.C. It was also contended by Mr. Sarraf, learned counsel that there is no whisper in the said restoration applications about any provision of law under which the Decree Holder Bank sought for restoration of the related cases which were dismissed on 7th March 2003 and that in the instant cases, the Article 137 of the Limitation Act, 1963 cannot be invoked in view of the existence of related provisions of law for an appeal or for setting aside the impugned orders within the prescribed period of limitation of 30 days as laid down under Order XLIII read with Order XXI of the C.P.C. It was also contended by the learned counsel that the Decree Holder Bank took advantage on its own wrongs in filing restoration petitions which is not permissible



under the law as laid down by the **Apex Court** in **Ashok Raju v. State of Karnataka & ors.** reported in (1998) 6 SCC 342. Supporting the plea of non-availability of restoration petitions, Mr. Sarraf, learned counsel had relied upon two decisions of Apex Court rendered in **P. A. Ahammed Ibrahim v. Hind Corporation of India** reported in (1999) 7 SCC 39 and **K. R. Srinivas Rao v. Gopinath Deb & ors.** reported in (1999) 8 SCC 396.

5. At the trial, Mr. A. Moulik, learned counsel for the respondent-Deceit Holder Bank submitted that there is no infirmity or illegality or incorrectness in the impugned orders as the learned Court below rightly applied the provisions of Section 151 of the C.P.C. while passing the impugned orders. Non-mention of any specific provision of law in the restoration petitions shall not cause any prejudice to the petitioner-Judgment Debtor as the learned Court below exercised its inherent jurisdiction in the present cases as the Court below required to invoke its inherent jurisdiction in the matter, Mr. Moulik contended. It is also argued that in the instant cases, the learned Court below aims to restore the cases in exercise of its inherent power laid down under Section 151 of the C.P.C. Supporting the cases of the respondent-Deceit Holder Bank, Mr. Moulik, learned counsel has relied upon the



following decisions of the law laid down by the different High Courts of the country: -

- i) **Bajrang Rai & ors. v. Ismail Mian & ors.** reported in AIR 1978 Patna 339.
- ii) **Bhaktisara Ramanuj Das v. Bouri Bandhu Panda** reported in AIR 1963 Orissa 160.
- iii) **Smt. Bimla Devi v. Aghore Chandra Mallick & ors.** reported in AIR 1975 Calcutta 80.
- iv) **Khoobchand Jain & anr. v. Kashi Prasad & ors.** reported in AIR 1986 Madhya Pradesh 66.

6. Now, this Court is to see and examine as to whether the impugned orders dated 7th March 2003 suffer from illegality or incorrectness, or impropriety or whether, the learned Court below exercised its jurisdiction vested in law illegally or with material irregularity or, without jurisdiction and whether, the present petitioner, Judgment Debtor could make out a case to justify the interference with the impugned orders or not?

7. For just determination of the real points in controversies between the parties this Court require to see the related provision of law laid down under Order XXI C.P.C. In the cases in hand, the Chapter pertaining to resistance to delivery of possession to Decree Holder or purchaser contained in Rule 97 to 106 of Order XXI C.P.C. read with Rule 58 of it are relevant and accordingly, the related rules are quoted below: -



“ RESISTANCE TO DELIVERY OF POSSESSION
TO DECREE HOLDER OR PURCHASER

97. Resistance or obstruction to possession of immovable property

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

98. Orders after adjudication

(1)

(2)

99. Dispossession by decree holder or purchaser

(1)

(2)

100. Order to be passed upon application complaining of dispossession

.....

101. Question to be determined

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102. Rules not applicable to transferee pendente lite

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103. Orders to be treated as decrees

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104. Order under rule 101 or rule 103 to be subject to the result of pending suit

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105. Hearing of application

(1) The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.


(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application *ex parte* and pass such Order as it thinks fit.

Explanation : An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

106. Setting aside orders passed *ex parte*, etc.





(1) The applicant, against whom an Order is made under sub-rule (2) of rule 105 or the opposite party against whom an Order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No Order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.”

8. A bare reading of the above provision of law shows that the chapter deals with the matter or petitions filed by the Decree Holder or the purchaser before the executing Court complaining any resistance or obstruction to delivery of possession of the property in question, and the related orders to be passed by the executing Court after adjudication and hearing of such applications and setting aside of orders passed ex-parte etc. etc. including any claims preferred to or, any objection to the attachment of, any property attached in execution of a decree and adjudication of such claims and objections. Therefore, a plain reading of these provisions of law shows that the provisions of Rule 105 and 106 of Order XXI are not applicable in the instant case, in other words, the petitions for restoration of the execution cases filed by the respondent, Decree Holder Bank shall not be governed by the

said Rule 105 and 106 of Order XXI C.P.C. For proper adjudication of the present legal issue, this Court require to see the nature of the orders of dismissal and accordingly, it is quoted below: -

“Orders dated 7.3.2003


Decree Holder present through
Ld. Advocate Miss Kessang Diki Bhutia.
J.Ds. absent.

Today the date is fixed for taking
steps by the decree holder. However no
steps have been taken by the decree
holder. Case stands dismissed.

Pronounced in open Court.”

9. From the available materials on record as well as the orders dated 7th March 2003 mentioned above, it is seen that the executing Court had already issued proclamation and sale order in respect of the attached properties of the Judgment Debtor for which the Decree Holder was required to take steps, but, the Decree Holder did not take steps and accordingly, the cases were dismissed despite the presence of the learned counsel for the Decree Holder on 7th March 2003. According to me, there is no specific provision in the Code of Civil Procedure for recalling such type of dismissal orders or for restoration of the execution cases which were dismissed, or for setting aside the dismissal orders when the Decree Holder failed to take necessary steps as directed by the Executing Court. It may be mentioned that those related





three execution cases were not dismissed on the date fixed for hearing of any application. Considering the nature of the petitions filed by the Decree Holder for restoration of those execution cases, I am of the view that those applications should be treated as an application under Section 151 of the C.P.C. and accordingly, those petitions are maintainable in the eye of law. The submissions of Mr. N. K. P. Sarraf, learned counsel that the Decree Holder ought to have preferred an appeal under Order XLIII, Rule 1(ja) of the C.P.C. or, revisions or that, the cases of the Decree Holder shall be covered up by the provisions of Rule 105 and 106 of Order XXI and any petition in that regard is to be filed within 30 days etc. holds a little water. According to me, the case-laws cited and relied upon by the learned counsel, Shri N. K. P. Sarraf do not help the case of the petitioner-Judgment Debtor. So far the question of delay in filing those restoration petitions as contended by Mr. Sarraf, learned counsel, I am of the view that the Decree Holder had shown cogent and sufficient reasons for certain delay of about 130 days from the date of the order of the dismissal in the restoration petitions and apart from that, the cases of the Decree Holder shall be covered up by the provision of the law laid down under Article 137 of the Limitation Act, 1963 which provides and prescribes the period of limitation of 3 (three) years in respect of any



other application for which no period of limitation is provided elsewhere, when the right to apply accrues. I am also of the view that a mere omission of provisions of law or non-mentioning of specific sections of law like Section 151 of the C.P.C. in the related petitions, i.e. the restoration petitions in the instant cases shall not defeat the judicial proceedings and it shall also not cause any prejudice to the opposite party when the petitions contained the detailed facts and circumstances of the cases. The Patna High Court had also dealt with a similar matter/legal issue in a case between **Smt. Renu Kumari v. Vishwanath Chaudhary & anr.** reported in **AIR 1983 Patna 66** wherein the Patna High court held thus -

"2. The only ground, on which the executing Court has refused to exercise its jurisdiction has been given in the impugned order as the non-maintainability of the restoration application under Section 151 of the Civil P.C. (hereinafter referred to as 'the Code'). The learned Execution Munsif has been under an impression that the application for restoration would be governed by the provision of Order 21, Rule 106 (1) of the Code and therefore, Section 151 cannot be attracted. Order 21, Rule 106 (1) lays down, inter alia, that "the applicant, against whom an order is made under sub-rule (2) of R. 105 may apply to the Court to set aside the order (ex parte order), and if he satisfies the Court that there is sufficient cause for his non-appearance when the application was called on for hearing (underlining is mine for the sake of emphasis), the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application." The period of limitation of thirty days has been prescribed in sub-rule (3) of Rule 106 for the filing of an application under sub-rule (1). It is manifest from the language of Rule 106 (1) that the application contemplated by this provision is, inter alia, with regard to the setting aside of an ex parte order under the provisions of R. 105 (2). It is pertinent, therefore, to quote the language of the aforesaid provision. It reads thus: -

"Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order




that the application be dismissed." There can be no ambiguity about the interpretation of this particular statutory provision. It envisages the dismissal of an application for default if on the date fixed for the hearing of the application the applicant fails to appear. The date of dismissal therefore, in this provision is referable to the date fixed for the hearing of the application. In the instant case the date on which the execution case was dismissed namely, 2-6-1981 was not the date fixed for the hearing of any application. The execution case was dismissed simply on the ground that Talbana etc., attachment processes and sale proclamation processes had not been duly filed by the petitioner-decree holder. Mr. Tara Kant Jha, learned Counsel for the judgment-debtor opposite party contended that there was nothing to be heard and all that was to be done was a mere technical procedural requirement what had not been complied with on that date. Assuming this argument to be correct, on submissions made by the learned Counsel, it is quite clear that the dismissal on 2nd June, 1981 was not on account of any ground mentioned in Rule 105 (2), for if there was anything to be heard no date could have been fixed for hearing. But I am afraid, the argument of Mr. Jha is fallacious. It may not always be a mere technical procedural responsibility to be discharged by the petitioner, but after the filing of the valuation list, if any, the Court below may have to hear the parties on such a matter at least as provided in Rule 105. Therefore, it cannot be said that in cases of this nature, in no circumstance, can sub-rule (1) of Rule 105 be applicable.


3. Be that as it may, learned Counsel for both the parties are agreed that on the facts and in the circumstances, as discussed above, Rule 105 (2) has absolutely no application and therefore, the petitioner was not enjoined in law to file any application under sub-rule (1) of Rule 106 within the period of limitation prescribed in Rule 106 (3). The application under Section 151 of the Code is, therefore, legally maintainable and the Court below must be held to have failed to exercise its jurisdiction vested in law in not going into the merit of the application filed by the petitioner."

10. As discussed above, the related orders of dismissal dated 7th March 2003 passed by the executing Court in the connected Civil Execution Case Nos.7, 8 and 9 of 2000 are not appeal-able under Order XLIII Rule 1(ja) as the said restoration petitions cannot be treated as applications under sub-rule (1) of Rule 106 of Order XXI or, under sub-rule (1) of





Rule 105 of that Order. According to me, the executing Court rightly invoked the provision of law laid down under Section 151 of the C.P.C. while passing the impugned order dated 13th February 2004 in the connected cases and there is also no delay in filing the said restoration petitions by the Decree Holder.



11. The case records and the related documents show that the money decrees were passed about 4 years back, i.e. on 21st August 2000 and the Judgment Debtor is a defaulter who has taken public money for their business and the said decree was an admission-decree and even after the decree was passed, the present Judgment Debtor had for several times agreed to pay the decretal dues on installment basis but, she never paid as alleged by the Decree Holder which is not confronted or disputed by the Judgment Debtor and the money involved in those three execution cases is in terms of lakhs of rupees which is public money and the Judgment Debtor has not paid any money even a single paise towards the satisfaction of the decretal money. Be that as it may, suffice is made with the above observations and discussions to opine that the present Judgment Debtor, petitioner herein could not make out a case to justify interference with the impugned orders dated 13th February 2004 passed by the

executing Court below. I am of the view that there is no infirmity or illegality in the impugned orders. In the result, these three revision petitions are devoid of merit and accordingly, these are dismissed with a cost of Rs.5,000/- (Rupees five thousand), thus affirming the impugned orders passed by the learned Court below. It is made clear that the said cost of Rs.5,000/- shall be treated as part of the funds of the Bar Association of Sikkim for which the petitioner shall deposit the said cost of Rs.5,000/- with the General Secretary of the said Bar Association within 2 (two) weeks from today. Despite the dismissal of these three revision petitions, I am constrained to make the following directions and observations: -

12. The executing Court is directed to dispose of the related three execution cases expeditiously in accordance with the law and the Registry of the Court is directed to transmit the related case records to the Court below immediately.

Sd/-
(N. S. Singh)
Judge
03-09-2004

CERTIFIED TO BE TRUE COPY

Assistant Registrar
High Court of Sikkim
at Gangtok

4/9/04

