

A AARIFABEN YUNUSBHAI PATEL & ORS.

v.

MUKUL THAKOREBHAI AMIN & ORS.

(Civil Appeal Nos. 1643-1644 of 2020)

B MARCH 17, 2020

[L. NAGESWARA RAO AND DEEPAK GUPTA, JJ.]

- Code of Civil Procedure, 1908 – Or. XXI, r. 90 – Limitation Act, 1963 – s.14 and Art. 127 of Third Division, Part -I –*
- C *Objections filed by the respondents u/Or. XXI, r.90 was filed within time or not – Respondent no.3 obtained a loan from respondent no. 2-Co-op Bank and failed to repay the loan – Respondent no. 2 filed summary proceedings for recovery of the amount due to it from respondent nos.1 and 3 – The decree was passed in favour of respondent no. 2 and against respondent nos. 1 and 3 –*
- D *Respondent no. 2 filed application for execution of decree – The Court allowed the said application and Court receiver was permitted to sell the attached properties – In the auction of the properties, the appellant was the highest bidder and the Executing Court permitted the sale – The respondent no.3 sought time to file objections – Instead of filing objections, respondent no.1 filed a writ petition challenging the sale of properties – The Executing court issued a sale certificate in favour of appellants – Before the High Court, a statement was issued by respondent no.1 that a buyer is willing to purchase properties at a higher price, the High Court permitted the same – The appellants preferred a Letters Patent*
- E *Appeal and the said order of the Single Judge of the High Court was stayed – Aggrieved, respondent no.1 filed Special leave Petition – Meanwhile, respondent no. 2 had filed application before the Executing Court that it did not authorise the sale of properties – Consequent to respondent no.2 application, respondent no.1 made a statement to withdraw SLP on 21.04.2008 and filed an objection application u/Or. XXI, r. 90 of CPC on 20.06.2008 – Respondent no.1 contended that writ petition was dismissed on 17.07.2008 and the objections to the execution petition was filed on 20.06.2008 and the same was within limitation – Held: The proposition of the respondent no.1 cannot be accepted – Any person claiming benefit of s. 14 of the Limitation Act can only claim exclusion of time of*

that period for which it had been prosecuting another remedy with due diligence and in good faith – The writ petition was not filed in good faith or by due diligence because respondent no. 3 had made a statement that he would file objections to execution petition – However, assuming that these proceedings were filed in good faith after a statement was made before the Supreme Court on 21.4.2008, respondent no.1 should have immediately filed the application before the executing Court – The continuance of the proceedings before the High Court can neither be said to have been done in good faith nor in exercise of due diligence – Even by giving benefit of all days of passing of the orders then also respondent nos. 1 and 3 would be barred by limitation for filing application u/Or. XXI, r. 90 of CPC by 6 days – Since there is no power to condone such delay, the petitions are dismissed as being time-barred.

Allowing the appeals, the Court

HELD: 1. As far as the present case is concerned it is not even disputed by R-1 that it had knowledge about the sales on 18.12.2007 when counsel appearing for R-3, had sought permission to file the objection application under Order XXI Rule 90 of the CPC. The writ petition was filed on 26.12.2007. On 21.04.2008, R-1 withdrew the SLP before this Court on the ground that an application has been filed by R-2 before the executing court on 18.03.2008. The writ petition itself was dismissed on 17.07.2008. On behalf of R-1 it is urged that since the writ petition was disposed of on 17.07.2008 and the objection to the execution petition was filed on 20.06.2008, the same is within limitation. [Para 11] [952-F-G]

2. This Court is unable to accept this proposition. Any person claiming benefit of Section 14 of the Act can only claim exclusion of time of that period for which it had been prosecuting another remedy with *due diligence* and in *good faith*. This Court is *prima facie* of the view that it cannot be said that the writ petition was filed in good faith or by due diligence because on 18.12.2007 the counsel for R-3 had made a statement that he would file objections to the execution petition. However, assuming that these proceedings were filed in good faith, after a statement was made before this court on 21.04.2008,

- A **R-1 should have immediately filed the application before the executing court. The continuance of the proceedings before the High Court can neither be said to have been done in good faith nor in exercise of due diligence. [Para 12] [952-H; 953-A-B]**
- 3. Even if this Court accept the case of R-1, at best, the period from 26.12.2007 to 21.04.2008 can be excluded. If this Court excludes that period then there are 7 days in December, 9 days in April, 31 days in May and 19 days in June. Thus, by giving benefit of all days of passing of the orders then also R-1 & R-3, would be barred by limitation for filing the application under Order XXI Rule 90 of the CPC by 6 days. Since there is no power to condone such delay, the petitions had to be dismissed as being time barred. Therefore, the appeals have to be allowed on this short ground. [Para 13] [953-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1643-1644 of 2020.

From the Judgment and Orders dated 07.11.2012 and 08.11.2012 of High Court of Gujarat at Ahmedabad in Special Civil Application No. 3166 of 2010.

With

E Civil Appeal No. 1647 of 2020 AND Contempt Petition (Civil) No. 63/2020 in Special Leave Petition (Civil) Nos. 1643-1644 of Petition (Civil) 2020.

F K. V. Vishwanathan, Sr. Adv., Rishabh Sancheti, Ms. Padma Priya, Anchit Bhandari, Suyash Rawat, K. Paari Vendhan, R. Venkataraman, Nikilesh Ramachandran, Ms. Shital Upadhyaya, Navdeep Jain, Nikhil Goel, Ms. Naveen Goel, Dushyant Sarna, Vinay Mathew, Advs. for the appearing parties.

The Judgment of the Court was delivered by

G **DEEPAK GUPTA, J.**

H 1. M/s Abhilasha Construction, Respondent No.3 herein (hereinafter referred to as R-3), obtained a loan from Shree Mahalaxmi Mercantile Co-op Bank Ltd., Respondent No.2 herein (hereinafter referred to as R-2), but failed to repay the loan and R-2 filed summary proceedings for recovery of the amount due to it from R-3 and Mukul

Thakorebhai Amin, Respondent No.1 herein (hereinafter referred to as R-1), who was a partner in the said Firm. During the pendency of the suit, R-3 applied for release of 12 flats and 2 penthouses which were permitted to be released on the said respondents depositing Rs. 65 lakhs. However, Respondent Nos. 1 & 3 failed to deposit the said amount. On 12.08.2004, the adjudicating authority granted leave to the defendants to contest the suit on the condition that they would deposit 33% of the amount claimed by R-2. This amount was also not deposited. Thereafter, a decree for a sum of Rs. 1,89,94,105.50, was passed on 14.09.2004 in favour of R-2 and against the defendants which included Respondent Nos. 1 & 3. We have given the facts of Civil Appeal No.1643-1644 of 2020. As far as Civil Appeal No.1647 of 2020 is concerned, that relates to advertisement for sale of a bungalow which was issued on 13.01.2008, and sale was made on 03.03.2008.

2. The said decree dated 14.09.2004 was challenged in appeal before the Gujarat State Cooperative Tribunal. It appears no stay was granted. In the meantime, R-2 filed an application for execution of the decree before the Civil Judge, Vadodara on 01.11.2007. On the very next day, i.e. 02.11.2007, an application was filed for appointment of receiver for execution of decree. The court allowed the said application on 02.11.2007 itself and the court receiver was permitted to sell the property and report to the Court within 15 days. R-2 also filed an application for attachment of property on which orders were also passed on 02.11.2007. Advertisement for auction of the said property was published in the newspaper on 21.11.2007. The upset price was not mentioned in the said advertisement. Pursuant to the public notice for sale, the auction of the attached property was conducted on 26.11.2007, wherein the appellants offered Rs.78,25,251/- . There were only two bidders and the appellants were the highest bidders and they deposited 25% of the sale consideration on the spot. Thereafter, on 10.12.2007 R-2 applied for permission to confirm the sale and vide order dated 10.12.2007 the executing court accepted the report of court receiver and permitted him to execute the same. Thereafter, the receiver filed some application for clarification and on 18.12.2007 counsel appearing on behalf of R-3 sought time to file objections.

3. Instead of filing objections, R-1 filed a writ petition before the High Court of Gujarat challenging the sale of 12 flats and 2 penthouses pursuant to the court auction. This petition was filed on 26.12.2007. It also appears that R-1 kept appearing before the executing court and requested the executing court to stay further proceedings. Initially, the

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- A proceedings were stayed but when R-1 did not file any objections under Order XXI Rule 90 of the Code of Civil Procedure, 1908 (CPC for short), sale certificate in respect of 12 flats and 2 penthouses was issued in favour of the appellants by the executing court on 29.02.2008.
4. On 05.03.2008, a statement was issued by R-1 that a buyer
- B is ready and willing to purchase the properties for Rs.1.7 crores. The learned Single Judge of the High Court permitted the proposed buyer to deposit a sum of Rs.50 lakhs and status quo was granted. This amount of Rs.50 lakhs was deposited. Aggrieved, the appellants preferred a Letters Patent Appeal (LPA for short) and order dated 05.03.2008 was stayed by order dated 01.04.2008. Aggrieved by the order of the Division Bench, R-1 filed SLP in this Court. It appears that in the meantime, R-2 had filed an application before the executing court on the ground that it had not authorised its officer to get the property sold. Therefore, on 21.04.2008 on the statement of learned counsel for R-1, permission was given to withdraw the SLP in view of
- C the application filed by R-2 before the executing court. Thereafter, on 20.06.2008, R-1 filed an application under Order XXI Rule 90 of the CPC and the main grievance in this application was that no notice had been sent to R-1 or R-3, either of the execution petition or of the attachment of the property or before settling the terms of proclamation of sale. In addition to this, another grievance was that the property
- D had been sold for a price much less than the mortgaged price.
5. On 17.07.2008, R-1 made a submission before the High Court that it had filed an application under Order XXI Rule 90 of the CPC, before the executing court and the High Court recorded the following observation:-
- F “Mr. Majumdar, learned advocate appearing on behalf of the petitioner has submitted that even the question with respect to limitation in preferring the application for setting aside the sale might arise. Mr. Sanjanwala, learned advocate senior advocate appearing with Ms. Sonal Shah, learned advocate appearing on behalf of the contesting respondent Nos.7 and 8 and Mr. M.M. Saiyed, learned advocate appearing on behalf of the contesting Respondent No.9, have submitted that let the application for setting aside the sale be decided on merits and they will not raise the objection with respect to limitation. Mr. Sanjanwala, learned senior counsel with Ms. Sonal Shah, learned advocate appearing
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on behalf of respondent Nos. 7 and 8 and Mr. Saiyed, learned advocate appearing on behalf of the respondent No.9 have submitted for a period of one week from today, the parties will maintain status-quo.” A

6. On 25.07.2008 the LPA filed earlier was dismissed as infructuous. On 07.10.2008, the appellants herein filed an application to recall the concession not to raise the issue of limitation recorded in the order dated 17.07.2008. The High Court dismissed this application. Thereafter, the appellants approached this Court by filing SLP(C) No. 26745-26746 of 2008. These petitions were disposed of on 23.03.2009, and the relevant portion of the order reads as follows:- B

“...In these cases, what is sought to be argued on behalf of the petitioner is that the Execution Petition in which there is an allegation of fraud, in the holding of the auction sale, was time barred. This question needs to be decided by Executing Court. But even if it comes to the conclusion that the application for execution was time barred, we direct the Executing Court to give its findings as to whether there was a fraud in conducting the sale. While deciding the question of limitation the Executing Court will also decide the scope and applicability of Section 5 and Section 14 of the Limitation Act...” C

Thereafter, the matter went back to the Executing Court which by a very detailed order rejected the application of R-1 filed under Order XXI Rule 90 of the CPC. Thereafter, R-1 challenged the order of the executing court by filing a petition in the High Court which was allowed vide impugned order. The objections to the execution petition filed by R-1 were accepted and sale in favour of the appellants was set aside. The High Court went into the merits of the petition but did not decide the issue of limitation. Though the High Court noticed that the appellants had raised the plea of limitation, it did not decide the same and the observation of the High Court in this regard is as follows:- E

“29. The court has come to the conclusion that the auction of both the properties were vitiated on account of lack of notice to the judgment-debtor, and that being an error fatal to the validity of auction sale, in light of the decision of the Supreme Court the auction sale cannot be permitted to remain and they have to be quashed. Other submissions of the counsel for the auction purchasers therefore need not be elaborately dealt with, but F

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A suffice it to say that the Court is quashing the auction sale on ground of non-compliance with the mandatory provision of notice to the judgment-debtor.”

- We are constrained to observe that the High Court totally ignored the order of this Court quoted hereinabove. This Court had specifically
- B directed the executing court to decide both, the issue of limitation and objections on merits. This was obviously done with the purpose that in case later if the issue of limitation is decided in favour of the objectors, R-1 and R-3, then the matter again should not be remanded for decision on merits of the case. The issue of limitation could not have been ignored and should have been decided by the High Court.
- C 7. We may note that it has been strenuously urged by Mr. Nikhil Goel, learned counsel for the Respondents that the sale is fraudulent without following the procedure prescribed by law, but we are clearly of the view that first we have to decide whether the objections filed by the respondents were filed within time or not. In case the petition
- D is filed beyond the period of limitation it is not necessary for the Court to go into other issues.

8. Order XXI Rule 90 of the CPC reads as follows:-

“90. Application to set aside sale on ground of irregularity or fraud.-

- E (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.
- F (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.
- G (3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.”
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9. The limitation for filing an application to set aside a sale in execution of decree is 60 days in terms of Article 127 of Third Division, Part-1 of the Limitation Act, 1963 (for short the Act). Reference may also be made to Section 5 of the Act which reads as follows:- A

“5. Extension of prescribed period in certain cases.—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. B

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.” C

A bare reading of this provision clearly shows that Section 5 of the Act which deals with extension of time or condonation of delay is not applicable to proceedings under Order XXI Rule 90 of the CPC. Therefore, the delay, if any, cannot be condoned under Section 5 of the Act. D

10. That takes us to Section 14 of the Act, which reads as follows:- E

“14. Exclusion of time of proceeding bona fide in court without jurisdiction.—(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. F

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of G

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- A jurisdiction or other cause of a like nature, is unable to entertain it.
- (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
- Explanation.—For the purposes of this section,—
- C (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
- D (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;
- (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”
- E In terms of this Section the time spent by the applicant for prosecuting with due diligence other civil proceedings may be excluded if such proceedings are prosecuted in good faith in a court which, from defect of jurisdiction or other cause, is unable to entertain it.
- F 11. As far as the present case is concerned it is not even disputed by R-1 that it had knowledge about the sales on 18.12.2007 when counsel appearing for R-3, had sought permission to file the objection application under Order XXI Rule 90 of the CPC. The writ petition was filed on 26.12.2007. On 21.04.2008, R-1 withdrew the SLP before this Court on the ground that an application has been filed by R-2 before the executing court on 18.03.2008. The writ petition itself was dismissed
- G on 17.07.2008. On behalf of R-1 it is urged that since the writ petition was disposed of on 17.07.2008 and the objection to the execution petition was filed on 20.06.2008, the same is within limitation.
- H 12. We are unable to accept this proposition. Any person claiming benefit of Section 14 of the Act can only claim exclusion of time of that period for which it had been prosecuting another remedy with *due*

diligence and in *good faith*. We are *prima facie* of the view that it cannot be said that the writ petition was filed in good faith or by due diligence because on 18.12.2007 the counsel for R-3 had made a statement that he would file objections to the execution petition. However, assuming that these proceedings were filed in good faith, after a statement was made before this court on 21.04.2008, R-1 should have immediately filed the application before the executing court. The continuance of the proceedings before the High Court can neither be said to have been done in good faith nor in exercise of due diligence. A

13. Even if we accept the case of R-1, at best, the period from 26.12.2007 to 21.04.2008 can be excluded. If we exclude that period then we have 7 days in December, 9 days in April, 31 days in May and 19 days in June. Thus, by giving benefit of all days of passing of the orders then also R-1 & R-3, would be barred by limitation for filing the application under Order XXI Rule 90 of the CPC by 6 days. Since there is no power to condone such delay, the petitions had to be dismissed as being time barred. Therefore, the appeals have to be allowed on this short ground. B

14. Accordingly, we allow the appeals and set aside the judgment of the High Court dated 07/08.11.2008 in Special Civil Application No. 3166 of 2010 and uphold the order of the executing court dated 23.02.2010 in Special Petition No. 81 of 2007. In view of this judgment, Contempt Petition (Civil) No.63 of 2020, is also disposed of. Pending application(s), if any, shall also stand disposed of. C

Ankit Gyan

Appeals allowed. D

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