
(1974) 04 AHC CK 0019
In the Allahabad High Court
Case No : Ex. Second Appeal No. 2806 of 1964

Abdul Rashid	Vs	APPELLANT
Sri Sitaramji Maharaj Brajman and Others		RESPONDENT

Date of Decision : 17-04-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1908 — Article 181, 182

Citation : AIR 1974 All 275

Hon'ble Judges : Yashoda Nandan, J;M.N. Shukla, J;K.N. Srivastava, J

Bench : Full Bench

Advocate : Rajeshwari Pd, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

M. N. Shukla, J.—On account of divergence of opinion between two Division Bench decisions of this Court in (Siri) Narain Tewari and Another Vs. Brij Narain Rai and Another, and Lalji Koeri Vs. Gajadhar Koeri, this Execution Second Appeal filed by a judgment-debtor had been referred to a Full Bench.

2. The short facts of the case are that the respondent-decree-holder obtained a compromise decree on 27-1-1954 for possession over the plots in dispute after demolition of certain constructions said to have been raised by the judgment-debtor. The compromise decree provided that the judgment-debtor would remove the constructions and deliver possession of the property to the decree-holder after the latter served him with a notice giving him two months" time to remove the constructions. According to the compromise decree the decree-holder could serve notice upon the judgment-debtor whenever the former desired to make his own constructions over the said land. It was further provided in the compromise decree that in default of the judgment-debtor in removing his constructions and delivering possession on service of notice the decree-holder shall be entitled to execute the decree for possession. The decree-holder served

a notice on the judgment-debtor on 22-10-1962, asking him to deliver possession of the land as provided in the compromise decree. The judgment-debtor did not deliver possession and hence the decree-holder filed an application for execution of the decree on 2-5-1963. That application was dismissed as not maintainable in law on 22-5-1963 without notice to the judgment-debtor. On 21-6-1963 the decree-holder made an application u/s 151, CPC for recalling the order dated 22-5-1963 and for proceeding with the execution of the decree. That application was allowed by the learned Munsif on 31-8-1963 and the order dated 22-5-1963 was recalled. Notice was issued to the judgment-debtor who filed objections dated 25-1-1964 to the execution application, including the objection that the order u/s 151, CPC was not competent. The judgment-debtor's main objection however, was that the execution application, having been made after six years of the decree, was barred by limitation. The learned Munsif dismissed the objections and held that the execution application was not barred by limitation. The judgment-debtor preferred an appeal which was dismissed and the order passed by the learned Munsif was affirmed. The present second appeal is directed against the orders of the courts below.

3. It was faintly submitted by the learned Counsel for the appellant that the order of the learned Munsif u/s 151, CPC recalling his previous order dated 22-5-1963 and restoring the execution application was illegal. According to his contention the previous order was appealable and the decree-holder having failed to avail himself of the remedy of appeal, the court could not proceed u/s 151, Civil Procedure Code. This argument of the learned Counsel is completely devoid of substance. On this point it would be sufficient to say that a perusal of the order sheet of the case shows that the order dated 22-5-1963 dismissing the execution application was passed inadvertently in the routine manner without hearing the decree-holder, despite the earlier order expressly saying that the decree-holder's application be heard in the presence of the counsel. It was thus an error of the court and it is axiomatic that no prejudice should be caused to a party on account of an error committed by the court. Hence, the remedy of appeal notwithstanding, the learned Munsif could act *ex debito iustitiae* in order to correct his own error. The order dated 31-8-1963 was, therefore, perfectly valid and the execution court rightly exercised its inherent jurisdiction to recall the previous order.

4. The main point which has been canvassed on behalf of the appellant is that the orders of the courts below holding that the decree-holder's execution application was not barred by time are erroneous. His contention is that the decree-holder could have given the notice in terms of the compromise decree and could have executed the decree on the very date on which it was passed and hence the limitation started running from the date of the compromise decree itself and Article 182 of the old Limitation Act (Act No. IX of 1908) applied and the execution application having been made after six years of the decree was barred by limitation. Reliance was placed on behalf of the appellant on (Siri)

Narain Tewari and Another Vs. Brij Narain Rai and Another, . In that case a decree was obtained in 1912 by Mst. Jokhna Tewarin against Raja Bahadur Brij Narain Rai and Rai Jagdish Narain Rai. The decree passed against them was for delivery of possession of Zamindari Property but it provided that the right of possession was contingent upon the decree-holder depositing in the court to the credit of the judgment-debtors certain sum of money. No date for payment of the same was specified by the decree. The decree-holder died. She did not fulfil the condition in her lifetime nor did she apply for execution of the decree. The application for execution was made by her sons and heirs on 31-7-1928. Money was deposited in the court to the credit of the judgment-debtors in September 1928. It was held by the High Court that Article 181 of the Limitation Act applied and Limitation would be three years from the date when the right to apply for execution accrued. The rule of law was thus stated:

"Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Article 182- is clearly inapplicable and the only Article governing the execution is the residuary Article 181."

On facts, however, it was held that the decree-holder had a right to apply that the money be deposited to the credit of the judgment-debtors on the very day that the decree was passed and there was nothing to preclude the decree-holder from depositing the amount immediately and asking for possession. In these circumstances it was inferred that the limitation started running from the date of the decree. Sen, J. observed:

"Where under the terms of a decree the right of the decree-holder to recovery of possession of some property in the hands of the defendants is contingent upon the decree-holder paying certain sums of money to the defendants but no date for payment is specified, the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment had been made. The right accrues to the decree-holder immediately and at once, and the decree-holder is not entitled to prolong the date of payment by his or her inaction or laches. We hold, therefore, that the application having been made more than three years from the date when the decree was passed is clearly time-barred under Article 181."

5. In the case of (Siri) Narain Tewari and Another Vs. Brij Narain Rai and Another, the Court referred to the correct provision of the Limitation Act, namely, Article 181 and rightly stated that principle of law but was in error, if we may say so with respect, in drawing the inference on facts that the right to apply for execution accrued at once. It was rightly dissented from in the later Division Bench decision of this Court in Lalji Koeri Vs. Gajadhar Koeri, .

6. The case of Lalji Koeri Vs. Gajadhar Koeri, was also a case of compromise decree which provided that whenever the plaintiff paid a sum of Rs. 40/- to the defendant, the plaintiff would be put in possession of the property in suit and till

such payment was not made the defendant was to remain in possession. The deposit was made after more than 12 years of the compromise decree and thereafter when the plaintiff applied for execution the judgment-debtor resisted the execution on the ground that a period of more than 12 years had elapsed from the date of the decree and hence the application was barred by time. The High Court held that the compromise decree did not cast any obligation on the plaintiff to make the payment within any specified period. He had a "carte blanche" in the matter of time for making the payment and so long as this was not done, the judgment-debtor's possession had been permitted by the terms of the compromise decree. On these facts it was held that the decree-holder's right to apply for possession accrued only after he had made the payment. Hence, Article 181 of the Limitation Act came into play after the plaintiff had made the payment in terms of the compromise decree. Mukerji, J., speaking for the Court expressed himself thus:--

"We cannot in our opinion, place bars in the way of a person obtaining a relief from the court on grounds of convenience, reasonableness etc. In our view the plaintiff's right to make the payment was not hedged in by any period of limitation and that the plaintiff's right to apply for execution only accrued after he had made payment and that prior to his making the payment the decree that was passed in this suit on compromise was an inexecutable decree and therefore limitation did not run against the plaintiff in respect of such a decree from either the date of the decree or within any reasonable time of the making of that decree or even on some day within twelve years of the decree."

We respectfully concur in the view expressed above.

7. In our opinion the crucial test for applying the correct rule of limitation to the execution of or the right of applying for execution depends upon fulfilment of certain contingencies. Where the right accrues to the decree-holder immediately and at once limitation must be reckoned from the date of the decree. On the other hand, where the right to apply depends upon the fulfilment of certain conditions, it must be deemed to be in abeyance until those conditions are fulfilled. This is the essential dictum which can be culled from the decision of the Privy Council in *Rameshwar Singh v. Homeshwar Singh*, AIR 1921 PC 31 which was adverted to in *Sri Narain Tewari's case* (supra). In *Rameshwar Singh's case* Lord Phillimore ruled:

"In order to make the provisions of the Limitation Act apply, the decree sought to be enforced must be in such a form as to render it capable, in the circumstances, of being enforced."

Their Lordships of the Privy Council reached the conclusion that the decree against *Ekradeshwar* could not have been executed without a further application and that this application could not have been made till *Ekradeshwar* had come into possession of the property of *Janeshwar* and by Article 181 of the Limitation Act the period for making the application was three years from the time when

the right to apply accrued. Thus, it is the immediate executability or otherwise of a decree to be determined on the facts of a case on which would depend the period of Limitation applicable to it. Where the execution of a decree is hedged in with conditions, Article 182 of the Limitation Act would not be attracted and the execution would be governed by the residuary Article 181. Whether there are conditions inhibiting the immediate execution of a decree is an inference to be drawn from the circumstance of a particular case. Where the execution of a decree is subject to certain conditions, it follows that the right to apply does not accrue at once; it accrues on the fulfilment of those conditions and accrues only thereafter. The basic principle was formulated in the Privy Council case and it appears to be the only sound principle and leaves no room for a contrary opinion.

8. As we have already observed the basic test is whether there is a right available to the decree-holder to apply for execution immediately or the fulfilment of some condition is a condition precedent and further whether the terms of the decree cast any obligation on the decree-holder to comply with that condition within a specified period. Where no such period is specified, the execution of the decree must be deemed to remain in abeyance and the limitation would commence only from the date when the plaintiff chooses to comply with the condition. This interpretation is also in accordance with the opinion expressed in some older decisions of this Court Thus in *Chhedi v. Lalu* LR (1902) All 300 it was held by a Division Bench that a decree for pre-emption was not capable of execution until the decree-holder had paid the money for pre-emption according to the decree. Another decision to which reference may be made in this connection is *Musammatt Rukmina Kuar and Others Vs. Sheo Dat Rai and Another*, . There the decree provided that upon payment by the plaintiff of certain sum of money "in any year in the month of Jeth" he was to receive possession of certain property. The decree was passed on 22-1-1894. The money was deposited on 15-6-1915 and an application to execute the decree was made on 29-6-1916. The defendant objected that the application was barred by limitation. It was held that the decree, being indefinite as to the date on which payment was to be made, was incapable of execution on the date on which it was passed and was therefore not governed as to the period of limitation for its execution by Article 182 of the Limitation Act. It was also held that the right to execute the decree could not arise unless payment was made and that the plaintiff was, therefore, entitled to execute the decree within three years of the date when he made the payment. We are unable to agree with the contrary opinion expressed in AIR 1931 54 (Nagpur) on which the appellant relied.

9. Article 136 of the Limitation Act, 1963 (36 of 1963) appears to give a legislative approval to the view that we are taking in this regard. In the new provision "12 years" period of limitation prescribed for the execution of any decree commences from the time "when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of

which execution is sought, takes place." The principle that limitation remains in abeyance so long as the contingent condition is not performed is clearly embodied in Article 136. We are also fortified in our view by some observations made by another Division Bench of this Court in, Jugal Singh alias Jugal Kishore Vs. Lochan Singh and Others, in which Malik, J., summed up the position in these words:--

"If the court when passing a conditional decree fixes a time for payment, there can be no manner of doubt that Article 182 of the Limitation Act will not be applicable, and the Article to be applied for execution of the decree is Article 181 of the Limitation Act and the period of three years is to be calculated from the date of the deposit.

The mere fact that the court has not fixed any time for payment will not, to my mind, make Article 182 applicable. There is no reason why it should be deemed that the court intended that the deposit must be made forthwith immediately after the court pronounced the judgment. Article 181 of the Limitation Act, however, does not provide any period of limitation for a deposit. It is the residuary Article for applications and it is provided that such applications are to be made within three years when the right to apply accrues."

10. In the instant case there was a clear obstacle to the immediate execution of the decree. Under the terms of the compromise decree it was obligatory for the decree-holder to "serve two months" notice on the judgment-debtor calling upon him to remove the constructions and it was only in default, of the latter removing the constructions and delivering possession that the decree-holder was entitled to execute the decree for possession; immediate execution of the decree was therefore negated by the terms of the compromise decree. Unless the decree-holder intended to make his own constructions, he could not have served the required notice. Since no time for giving such notice was mentioned in the decree and it was left to the discretion of the decree-holder to serve two months' notice on the judgment-debtor whenever the decree-holder desired to make his own constructions over the land in dispute, the decree-holder could take his own time for serving the notice and limitation must therefore run from the date of the service of the notice and not from the date of the decree, It is manifest that the decree as such was one incapable of immediate execution and it could only be executed after the period of notice. Until that was done, the execution must be deemed to be suspended. Consequently, Article 181 of the Limitation Act applied to the facts of the present case. In the case in hand the decree-holder served the notice on 22-10-1962 when he intended to make such constructions and the limitation started running only from that date. Therefore, in our opinion the execution application was perfectly within time and the courts below applied the correct rule of limitation.

11. We find no force in this appeal and it is dismissed with costs.