

(2022) 09 GUJ CK 0180

In the Gujarat High Court

Case No : R/Civil Revision Application No.446 Of 2022

Bhagwandas Narshinhmal Sahetai

APPELLANT

Vs

Mahendra And Mahendra Seeds Pvt Ltd

RESPONDENT

Date of Decision : 29-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 136

Code Of Civil Procedure, 1908 — Section 2(2), 47, Order 21

Citation : (2022) 09 GUJ CK 0180

Hon'ble Judges : A.S. Supehia, J

Bench : Single Bench

Advocate : YM Thakkar, Chinmay M Gandhi

Final Decision : Allowed

Judgement

A.S. Supehia, J

1. The present revision application has been filed by the applicant seeking quashing and setting aside the order dated 22.07.2021 passed by the Judge, Chamber Court No.16, Ahmedabad below application Exh.1 in Execution Petition No.178 of 2018 rejecting the same.

FACTS

2. The applicant is the original plaintiff and the respondent is the original defendant of Special Civil Suit No.46 of 1994. The suit came to be instituted to recover Rs.1,85,000/- with running interest @ 18% from the respondent on the basis of the settlement of the account in May 1994. The suit preferred by the applicant came to be allowed and the counter-claim preferred by the respondent came to be rejected on 11.09.2000 by the learned 3rd Joint Civil Judge (S.D.), Godhra, below Exh.180. On the same date, a decree was also to be drawn i.e. on 11.09.2000 below Exh.181.

2.1 Being aggrieved and dissatisfied by the judgment and decree passed by 3rd

Joint Civil Judge (S.D.), Godhra dated 11.09.2000, the respondent preferred First Appeal No.2928 of 2000, which came to be disposed of vide order dated 26.07.2005 by directing the Registry to transfer the appeal to District Court, Panchmahals at Godhra in view of the Gujarat Civil Courts Act, 2005 coming into force w.e.f. 09.05.2005.

2.2 Pursuant to the order passed by this Court dated 26.07.2005, a new case number of the appeal was registered by the District Court, Panchmahals at Godhra being Civil Appeal No.141 of 2005. It is pertinent to note that the applicant also preferred a counter-claim before the Court. During pendency of the said appeal before the District Court, Panchmahals at Godhra, the applicant preferred Execution Petition No.285 of 2013 before City Civil Court at Ahmedabad for the execution of the decree dated 11.09.2000 passed by 3rd Joint Civil Judge (S.D.), Godhra. The said execution petition came to be dismissed on 21.02.2014 by City Civil Court, Court No.10, Ahmedabad, on the ground of limitation, since the execution application came to be preferred after a lapse of 12 years.

2.3 The appeal preferred by the respondent against the judgment and decree passed by 3rd Joint Civil Judge (S.D.), Godhra came to be dismissed by 7th Additional District Judge, Panchmahals at Godhra on 30.12.2017. The decree is also drawn below Exh.59 by 7th Additional District Judge, Panchmahal at Godhra. Since the decree was drawn by the first appellate court, the applicant again filed Execution Petition No.178 of 2018 for the enforcement of the decree passed by 7th Additional District Judge, Panchmahals at Godhra which has been rejected vide impugned order which is under challenge in the present application.

2.4 The respondent challenged the judgment and decree passed by 7th Additional District Judge, Panchmahals at Godhra before this Court by filing the second appeal along with the application for condonation of delay of 68 days caused in preferring the second appeal. By an order dated 14.02.2020, Civil Application (for condonation of delay) No.2 of 2018 came to be allowed, and the delay in filing the second appeal came to be condoned. The main Second Appeal No.68 of 2020 is pending before this Court and no stay is granted against the implementation of the decree passed by the lower court.

SUBMISSIONS

3. Learned advocate Mr.Thakkar appearing for the applicant has submitted that the execution petition was filed by the applicant for execution of the decree rendered by 7th Additional District Judge, Panchmahals at Godhra and, therefore, it was filed within the period of limitation. It is submitted that the executing court ought to have considered the fact that the decree, which was sought to be enforced, was passed on 30.12.2017 and the execution petition was filed on 27.07.2018, which is within the period of limitation and, therefore, it could not have disallowed the application.

3.1 It is submitted that the executing court ought to have appreciated the

doctrine of merger. It is submitted that the appellate court had entertained the appeal and passed the order after considering the rival submissions and after perusing evidence on record, and once the appellate court draws a fresh decree, the decree under challenge merges in the appellate decree and, therefore, it is insignificant that whether the appellate court had modified, reversed, or confirmed the decree under challenge before the Court.

3.2 In support of his submissions, he has placed reliance on the judgement of Apex Court in the case of Surindar Pal Soni Vs. Sohanlal, (2020) 7 S.C.C. 771 and in the case of Chandi Prasad Vs. Jagdish Prasad, (2004) 8 S.C.C. 724. Thus, he has submitted that since the decree was drawn by the Court below in Regular Civil Appeal No.141 of 2005 on 30.12.2017, the execution application filed by the applicant should not have been rejected. It is submitted that the Court below should have appreciated the provisions of Section 47 of the Code of Civil Procedure, 1908 (the Code) read with Order XXI. Thus, it is submitted that the impugned order may be set aside.

4. In response to the aforesaid submissions, learned advocate Mr.Gandhi appearing for the respondent has submitted that the execution application is barred by the limitation, as provided under Article 136 of the Limitation Act, since the earlier application filed for execution was already rejected by the concerned Court vide order dated 21.02.2014 passed in Execution Petition No.285 of 2013. Thus, in view of the aforesaid order, the applicant was barred in filing the execution petition again for implementation of the same decree.

4.1 In support of his submissions, learned advocate Mr.Gandhi has placed reliance on the judgement of the Apex Court in the case of Manohar S/o. Shankar Vs. Jaypal Singh S/o. Raj, (2008) 1 GLH 404 and in the case of Ratansingh Vs. Vijay Singh, (2001) 1 S.C.C. 469. It is thus, submitted that the impugned order may not be disturbed.

CONCLUSION

5. The facts, as narrated hereinabove are not in dispute and hence, the only issue, which requires to be examined is whether the execution petition filed by the applicant being No.170 of 2018 could have been rejected only on the ground that his earlier execution petition Execution Petition No.285 of 2013 filed for enforcing the decree dated 11.09.2000 came to be dismissed on 21.02.2014 by City Civil Court, Court No.10, Ahmedabad, on the ground of limitation.

6. Following facts are established from record.

a) The applicant, is the original decree-holder of decree passed on 11.09.2000 passed in Special Civil Suit No.46 of 1994 by 3rd Civil Judge (S.D.) at Godhra, District Panchmahals.

b) Being aggrieved and dissatisfied by the judgment and decree, the respondent preferred First Appeal No.2928 of 2000 before this Court, which came to be disposed of vide order dated 26.07.2005 by directing the Registry to transfer the

appeal to District Court, Panchmahals at Godhra in view of the Gujarat Civil Courts Act, 2005 coming into force w.e.f. 09.05.2005.

c) A new case number of the appeal was registered by the District Court, Panchmahals at Godhra being Civil Appeal No.141 of 2005.

d) During pendency of the said appeal before the District Court, Panchmahals at Godhra, the applicant preferred Execution Petition No.285 of 2013 before City Civil Court at Ahmedabad for the execution of the decree dated 11.09.2000 passed by 3rd Joint Civil Judge (S.D.), Godhra.

e) The said execution petition came to be dismissed on 21.02.2014 by City Civil Court, Court No.10, Ahmedabad, on the ground of limitation.

f) Thereafter, the appeal preferred by the respondent came to be dismissed by 7th Additional District Judge, Panchmahals at Godhra on 30.12.2017.

g) After the dismissal of the appeal filed by the respondent-applicant again filed Execution Petition No.178 of 2018 for the enforcement of the decree dated 11.09.2000, is not entertained by the impugned order dated 22.07.2021 being barred by limitation while considering the rejection of the former execution petition.

h) the respondent has challenged his rejection of first appeal in Second Appeal No.68 of 2020 which, however no stay is granted against the implementation of the decree passed by the lower court.

7. The first appeal being Civil Appeal No.141 of 2005 filed by the defendant was rejected by the judgement and decree dated 30.12.2017. Accordingly the following order was passed:

"-: ORDER :-

1. Regular Civil Appeal No.141/2005 is hereby dismissed.

2. The Judgment and Decree passed by 3rd Joint Civil Judge (SD), Godhra in Special Civil Suit No.46/1994 dated:- 11.9.2000 are hereby confirmed.

3. No order as to costs.

4. Decree be drawn accordingly.

5. Record and Proceedings of Special Civil Suit No.46/1994 is hereby ordered to be sent to the lower court."

8. Accordingly the decree was drawn confirming the judgement and decree dated 11.09.2000 passed in Special Civil Suit No.46 of 1994. The applicant, in order to get fruit of his decree, again filed

Execution Petition No.178 of 2018, which was dismissed again on the ground of law of limitation by the impugned judgement and order dated 22.07.2021 on the ground that his earlier Execution Petition No.285 of 2013 was already rejected on

the ground of limitation and hence, it was observed that the Court has no jurisdiction to entertain the execution petition.

9. At this stage, it would be apposite to refer to the Article 136 of the Limitation Act, which reads as under:

Description of suit

Period of limitation

Time from which period begins to run

For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.

Twelve years

[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:

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

Thus, as per the aforesaid article, limitation for execution has been provided as 12 years.

10. I may with profit incorporate the observations made by the Apex Court in the case of Chandi Prasad (*supra*), wherein the Apex Court has held thus:

"24. It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See *V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income-tax*, AIR 2000 SC 1623].

25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in *Kunhayammed and Others Vs. State of Kerala and Another* [(2000) 6 SCC 359] wherein this Court *inter alia* held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating:

"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of

doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-68)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

26. In *Kunhayammed* (supra), it was observed:

"12... .. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subjectmatter of challenge laid or which could have been laid shall have to be kept in view."

27. The said decision has been followed by this Court in a large number of decisions including *Union of India and Others Vs. West Coast Paper Mills Ltd. and Another* [(2004) 2 SCC 747].

28. However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. [See *Raja Mechanical Company Pvt. Ltd. Vs. Commissioner of Central Excise*, ILR 2002 (1) Del. 33] xxxxxxxx

29. In *Ratansingh* (supra), possession of a property was obtained on 14.12.1970.

The First Appeal there against was dismissed on 1.8.1973. Execution Petition was filed on 24.3.1988, i.e., beyond the time fixed by the Act. The Second Appeal preferred by the judgment debtor was rejected having regard to the fact that the delay in filing the said appeal was not properly explained.

30. Upon analyzing when a decree or order becomes enforceable vis-a-vis the definition of 'decree' in Section 2(2) of the Code this Court observed that when a dismissal of an appeal takes place on the ground of its being time barred, no decree is passed."

The observations made by the Apex Court explicitly declares that when the appellate Court passes a decree, the decree of the trial Court merges with the decree of the appellate Court and the same would supersede the decree of the trial Court. It is further observed that once a decree is sought to be enforced for the purpose of execution thereof, irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation. Thus, once the appellate Court exercises its power in entertaining appeal and after hearing both the parties, if any judgement and decree is passed, the same will "replace the judgement and decree of the lower Court for all intent and purpose" in view of the "doctrine of merger". The Apex Court has cautioned that "It is only in the case when the appeal is dismissed on the ground of delay on filing the same, the doctrine of merger will not apply". Hence as per the definition of "decree" stipulated in section 2(2) of the Code, such dismissal of appeal on the ground of delay will not amount to decree.

11. However, in the instance case, the appellate Court, after hearing the respective parties and examining the evidence on record, has passed a comprehensive judgement and order rejecting the appeal and accordingly decree was drawn on 30.12.2017 in Civil Appeal No.141 of 2005. The decree which is drawn specifically refers to the filing of Special Civil Suit No.46 of 1994 by the original plaintiff-present appellant, the decree-holder for recovery of an amount of Rs.1,85,000/-. It is also observed that counter-claim filed by the defendant below Exh.54 claiming the amount of Rs.1,37,000/- from the decree holder i.e the present appellant was also rejected and the final decree, the said judgement and decree passed by the 3rd Joint Civil Judge (S.D.), Godhra dated 11.09.2000 in Special Civil Suit No.46 of 1994 is confirmed.

12. Thus, as per the observations made by the Apex Court in the case of Chandi Prasad (supra), the Court below has fallen in error in rejecting the execution petition filed by the applicant seeking execution of the original decree, after rejection of Regular Civil Appeal, confirming the judgement and decree dated 11.09.2000 passed in favour of the applicant. Once the decree is drawn by the appellate Court by confirming the judgement and decree passed by the lower Court, the period of limitation, as provided under Article 136 of the Limitation Act will run from such date of judgement and decree. The execution petition cannot be rejected merely the first execution petition preferred was rejected on the

ground of limitation, in wake of the fact that subsequently the decree which is sought to be executed has been confirmed in appeal. The provision of Article 136 of the Limitation Act as well as the fruits of the judgement and decree of a decree-holder cannot be diluted merely because his earlier execution petition is rejected during the pendency of appeal. The limitation will commence from the judgement and decree passed by appellate Court. If the view expressed by the Court below in the impugned order is permitted to be maintained, then the judgement and decree-holder will not be able to enjoy the fruits of the judgement and decree even after having succeeding in the suit and subsequent appellate proceedings. The entire exercise of the original suit proceedings will be an exercise in futility.

13. The reliance placed by the learned advocate Mr.Gandhi upon the judgement of the Apex Court in the case of Ratansingh (supra), will on the contrary help the appellant since in paragraph No.9 of the said judgement, it is observed that " if the appeal results in a decree then that it would supersede the decree passed by the lower Court and the decree of the appellate Court becomes enforceable".

14. Thus, the impugned judgement and order dated 22.07.2021 passed by the Judge, Chamber Court No.16, Ahmedabad below application Exh.1 in Execution Petition No.178 of 2018 is hereby quashed and set aside. The matter is remanded to the Court below for fresh consideration in light of the observations made by this Court. The Execution Petition No.178 of 2018 is ordered to be restored to its original file.

15. The present application stands allowed. Rule made absolute.

Sd/- .

(A. S. SUPEHIA, J)

FURTHER ORDER

After the judgment is pronounced, learned advocate Mr.Gandhi appearing for the respondent requests for stay of the judgment for some time. The same is refused in the light of the aforesaid observations.