

(1964) 04 OHC CK 0017

In the Orissa High Court

Case No : Misc. Appeal No"s. 62, 63 and 64 of 1962

Bholanath Naik and Others

APPELLANT

Vs

Krupasindhu Naik and Others

RESPONDENT

Date of Decision : 14-04-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Limitation Act, 1908 — Section 11, 13, 15, 17, 18

Citation : AIR 1964 Ori 215

Hon'ble Judges : S. Barman, J;R.K. Das, J

Bench : Division Bench

Advocate : B. Mohapatra and Y.S.N. Murty, for the Appellant; R.N. Misra and P.V.B. Rao, for the Respondent

Final Decision : Dismissed

Judgement

Barman, J.—The point involved in these three miscellaneous appeals filed by decree-holders is limitation. These appeals arise out of certain execution cases filed by 3 decree-holders (plaintiff and legal representatives of defendant No. 3 and defendant No. 6) for recovery of possession of their respective allotments under a final decree made in a partition suit.

2. In 1927 the plaintiff filed a partition suit O. S. No. 35 of 1927 in the Court of the Subordinate Judge Berhampur. On March 30, 1929, preliminary decree was passed in the partition suit, which ultimately went to the Privy Council. On April 16, 1936 a receiver was appointed by the Subordinate Judge under an order of the High Court dated March 16, 1936. A pleader of Aska was appointed as receiver. On Aug. 23, 1947 final decree was passed in the partition suit. There was an appeal to the High Court F. A. No. 691 of 1949 which was dismissed by the High Court on November 10, 1955. The receiver was throughout in possession and continued to remain in possession until he was discharged on September 4, 1958.

3. On September 2, 1961 the three decree-holders appellants herein filed

execution cases E.P. Nos. 93, 94 and 96 of 1961 for recovery of possession of their respective allotments under the final decree. Some of the judgment-debtors filed objections MJC. 193, 194 and 196 of 1961, on that ground that the said execution cases were barred, by limitation under Article 182 of the Limitation Act, as not having been filed within three years from November 10, 1955 when the appeal from the final decree F. A. No. 69 of 1949 was dismissed by the High Court. It was also objected that the execution cases are not maintainable because there was adjustment of shares outside Court.

4. The issue of limitation was taken by the learned Subordinate Judge before going into the question of alleged adjustment. The decree-holders' contention in all these cases was that the property was in charge of the receiver under order of Court, and so there was legal impediment in applying for execution of the decree for possession; that the receiver appointed in the partition suit was not discharged until September 4, 1958 and therefore these execution proceedings filed on Sept. 2, 1961, that is to say, within three years from the date of discharge of the receiver, were within time. The judgment-debtors, who were objectors to the execution cases, on the other hand, submitted that the receiver appointed was not an official receiver in administration suit so that the properties could be deemed to have vested in him and so the running of limitation cannot be arrested because the properties were in charge of the receiver. On these respective contentions of the parties, the learned Subordinate Judge decided that mere continuance of the receiver after termination of the suit cannot be treated as an order of injunction so as to deprive the successful party from applying for execution of the decree and therefore all the execution proceedings were barred by time. Accordingly the said Misc. cases (objections by the judgment-debtors) were allowed. On December 12, 1961, the decree-holders filed three applications M. J. C. Nos. 229-31 of 1961 for review of the said decision of the learned Subordinate Judge on the grounds mentioned therein. On April 6, 1962 the said review applications were dismissed on the finding that the grounds put forth were not sufficient to justify review of the order. On the same date (April 6, 1962) in view of the orders dismissing M. J. C. Nos. 229-31 of 1961 the said execution cases E. P. Nos. 93, 94 and 96 of 1961 were dismissed as not maintainable. Hence these miscellaneous appeals filed by the decree-holders on July 5, 1962.

5. A preliminary point was taken, on behalf of the judgment-debtors respondents herein that these miscellaneous appeals, all filed on July 5, 1962, are not maintainable as barred by limitation. The judgment-debtors-respondents' point is this: These appeals have been filed against the dismissal of the E. Ps. by order dated April 6, 1962. But prior to April 6, 1962, the learned Subordinate Judge by his order dated December 5, 1961 already decided that the execution proceedings were barred by time and accordingly allowed the objections (M. J. C. Nos. 193 to 196 of 1961). The order of dismissal of the E. Ps. made on April 6, 1962 was made in view of the order dismissing the review applications (M. J. C. Nos. 229-31 of 1961) made by the decree-holders. No appeal lies from an order

dismissing an application for review. The application for review did not extend the period of limitation for filing appeal against the order passed on December 5, 1961, which was sought to be reviewed. These appeals must therefore be treated as appeals from the order dated December 5, 1961 which prima facie are barred by limitation.

6. In course of hearing of these appeals, the decree-holders filed applications to this Court to condone the delay and to treat the present appeals as appeals against the order dated December 5, 1961, in case this Court were to hold for any reason that the present appeals against the order dated April 6, 1962 are not maintainable. The decree-holders also submitted that the present appeals as filed against the order dated April 6, 1962 are maintainable. The decree-holder's point is this: The order dated December 5, 1961 was on the objections of the judgment-debtors M. J. C. No. 193 to 196 of 1961 in which the learned Subordinate Judge decided that the execution proceedings are barred by time, and the M. J. Cs. were therefore allowed. He did not allow the E. Ps. 93, 94 and 96 of 1961 until April 6, 1962. In other words the order dated December 5, 1961 was only a record of the finding that the execution proceedings are barred by time and not a final determination of all controversies between the parties. Until the order of dismissal of E. Ps. 93 to 96 of 1961 on April 6, 1962 there was no final order. The order dated December 5, 1961 was not a decree within the definition of "decree" u/s 2(2) of the Civil Procedure Code, The order dated December 5, 1961, was not a formal expression of an adjudication which conclusively determines the right of parties with regard to matters in controversy. The law does, not render it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. If the law imposed upon the suitor the necessity of so appealing from all such interlocutory orders, it would mean on the one hand harassment with endless expense and delay, and on the other inflict, upon his opponent similar calamities (*Maharajah Moheshur Singh v. Bengal Government* (1859) 19 E.R. 316 : 7 MIA 283. In the present case, I am of opinion that the appeals against the orders dated April 6, 1962 by which the E. Ps. 93, 94 and 96 of 1961 were dismissed are maintainable as not barred by limitation.

7. Assuming that the present appeals against the order dated 6, April 1962 are not maintainable even so, we accept and treat the present appeals as appeals against the order dated December 5, 1961 and condone the delay. There are good reasons for condoning the delay. The decree-holders submit that for the reasons as stated in their applications and on the advice of their lawyer the appeals were not filed against the order dated December 5, 1961 in time, though the appeals filed against the order dated April 6, 1962 were all in time. The decree-holders had acted under legal advice in good faith and have been prosecuting these appeals with due care and diligence. I am satisfied that there was sufficient cause for the decree-holders not preferring these appeals against

the order dated December 5, 1961. I am of opinion that the contention of the judgment-debtors respondents that these appeals are not maintainable as barred by limitation is not tenable.

8. Now coming to the merits of the appeals, Section 15(1), of the Limitation Act is this:-

In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution of or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

9. The question here is: Did the order of appointment of receiver made by the High Court on March 16, 1936 operate as stay of execution or as an injunction restraining the parties from executing the decree? On this point both sides cited several decisions in support of their respective contentions. It would appear that Section 15(1) was restricted in its application to a case where execution of a decree had been stayed by an injunction or order; suspension of limitation would depend on the circumstances obtaining in each case; it must be either explicit or at any rate implicit. As a general rule the mere appointment of a receiver to take charge of property in dispute will not suspend the operation of the Statute of Limitation. Each case is to be decided from the terms or intention of the order. If expressly or implicitly the order operates as stay of execution then the party will get the benefit of exclusion of time during which the proceedings are so suspended by virtue of Section 15. In the present case the relevant portion of the order of appointment of receiver dated March 16, 1936 made by the High Court is this: --

"Since the date of the final decree is stayed by order of this Court dated 20-12-35 and made herein, it is perhaps doubtful whether the lower court could appoint a receiver. In the circumstances of this case it is I think, just and convenient that a receiver should be appointed, and I order accordingly person to be appointed; the terms of the appointment, if the parties and the receiver cannot agree, will be fixed by the lower Court Nothing is stayed except the actual passing of the final decree.

It will also, appear from the recital portion of the said order that in the petition, on which the appointment of receiver was made by the High Court, the petitioner prayed that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue order directing the appointment of a Receiver to take possession of and manage the suit properties pending final decree proceedings and delivery in O. S. "No. 35 of 1927 on the file of the Court of the Subordinate Judge of Berhampur (Appeal No. 432 of 1929 on the file of the High Court).

10. It cannot be disputed that the appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them,

restraining them from interfering with the possession of the receiver except by permission of the Court. The general rule is well settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. It has been affirmed that though an attachment was levied on property before the appointment of the receiver, it, is within the sound discretion of the appointing court to refuse to permit a sale of the property thereunder. On this principle, it has been held that property in the hands of a Receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution Court. (*Fraser v. Krishnaswami Aiyar* AIR 1923 Mad 144 (2)).

11. In support of their contention that limitation was suspended until the receiver was discharged the decree-holders strongly relied on a decision of the Patna High Court in *Chottey Narain Singh v. Kedarnath Singh* ILR Pat 435 : (AIR 1922 Pat 201 where their Lordships expressed the view that the appointment of a receiver and a direction upon him to pay the interest due to the plaintiff operated in substance, though not in form as an order staying further proceedings in the suit until the disposal of the appeal by Privy Council. This case however on facts is distinguishable from the present case. In the application for appointment of a receiver the petitioners prayed to stay the passing of the final decree, and in the alternative, to stay the delivery of possession over the mortgage property on the petitioners furnishing security, and, in case of their being unable to do so, to appoint a receiver for the management of the property and to pass such order or orders as to the court appear just and proper. On that the respondent's contention, which was accepted by the High Court, was that the order for appointment of a receiver coupled with the direction to receiver to pay the interest on mortgage money operated in effect as an order staying further proceedings, and that he is, accordingly, u/s 15 of the Limitation Act entitled to exclude a certain period up to a certain date, on which date the High Court gave him liberty to apply for the final decree notwithstanding the fact that the receiver was not discharged. This decision, therefore, does not support the decree-holders' contentions on the facts of the present case.

12. There is another decision of the Patna High Court on which the decree-holders also relied *Satdeo Narain v. Radhey Kuar* AIR 1920 Pat 354. In this case the judgment-debtor had applied for leave to appeal to the Privy Council from the decree of the High Court praying the High Court to stay the execution of the decree pending the decision of the Privy Council. On that application the High Court allowed the decree to be executed upon the opposite party giving such security as the lower court might think fit for the due performance of any order which the Privy Council may make. The lower court fixed the security at Rs. 50,000/- to be furnished by the decree holder within one month. The decree holder was unable to provide the security which was a condition precedent to his right to proceed in the execution. On March 28, 1914 the Subordinate Judge

dismissed the execution proceeding on the ground that no step was taken. On October 18, 1916, the judgment-debtor's appeal to the Privy Council which had been admitted by the High Court more than two years previously, was dismissed for want of prosecution. On April 12, 1918 the decree holder filed an application for execution of the decree of the High Court made on July 4, 1913. The judgment debtor filed an objection that the execution petition was barred by expiration of more than three years. The decree-holder contended that under the provisions of Section 15 of the Limitation Act the period between the date when the High Court made the order allowing execution to proceed subject to the decree-holder furnishing security and the date when the judgment-debtor's appeal to the Privy Council was dismissed should not be taken into consideration in computing the period of limitation. The Patna High Court accepted the decree holder's contention on the facts of that case. What weighed with their Lordships of the Patna High Court was that under Order 45, Rule 14 C.P.C. it is provided that if the increased security is not furnished, the Court

"shall so far as may be, practicable, stay the further execution of the decree."

It seemed to their Lordships reasonable to gather from this that if the law requires a stay in default of part of the security, a stay must be the inevitable and necessary consequence of a default in respect of the whole security. There, in the Patna case the whole security was estimated and required, so the High Court's order necessarily implied a stay of execution in case of failure to furnish it. It was in this context, that the Patna High Court held that the order passed under Order 45, Rule 13 (2) (b) is in substance a restriction on the existing right to execute a decree; it is an inhibitory order suspending that right by an order nisi. The suspension was made absolute by the Subordinate Judge's Order dismissing the execution proceeding. This decision therefore does not also support the decree-holder's contention in the present case before us.

13. It was also submitted on behalf of the decree-holders that the very fact, that leave of court is necessary to execute the decree when receiver is in possession, -- shows that it is a clog on the decree-holder's unrestricted right of execution. The decree-holder's contention is that any restriction on their right will give them benefit of exclusion of time u/s 15. In my opinion this contention is not tenable. The test is whether in a particular case appointment of a receiver has, in fact laid restriction, fetter or clog on the decree-holder's right to execute the decree. Merely because a decree holder has to take permission of court to execute the decree where the receiver is in possession does not mean that it is a restriction, fetter or clog on the decree holder's right even to apply for leave of Court to execute.

14. In the present case it was in the ordinary course that a receiver was appointed in a partition suit. There is nothing express or even implied in the order of appointment to indicate any restriction on the right of the parties to execute the decree. In any event there was no restriction on the decree-holders to apply for leave of the Court to execute the decree. If the decree-holders had

applied for leave to execute and the Court refused such leave position would have been different. Section 15 does not operate to save limitation in cases where the suit could have been instituted on complying with a preliminary requisite in that behalf, namely the obtaining of leave to sue from the Court. In a Division Bench decision of the Madras High Court in *Ramaswami Pillai v. Govindaswami Naicker* AIR 1919 Mad 656 it was argued that the order of adjudication under the Provincial Insolvency Act, 1907 was tantamount to an order to stay all further proceedings in the matter. Their Lordships, on the reading of Section 16, Clause (2) of the Provincial Insolvency Act III of 1907 which in pari materia is the same as Section 28(2) of the present Provincial Insolvency Act XX of 1920,--held that what the order of adjudication effects is not an absolute stay, but a direction that before a suit is brought a condition precedent should be complied with, namely, the obtaining of leave to sue from the Court. In their Lordships' opinion, Section 15 does not operate to save limitation in cases where the suit could have been instituted on complying with the preliminary requisite in that behalf. This view was later on reiterated by the Madras High Court in *Akkayya v. Appayya* AIR 1947 Mad 238. In that decision the very Bench, (Leach C. J. and Lakshmana Rao J.) which decided the case, reiterated their view in an earlier decision in *M.N.S.T. Chidambaram Chettiar Vs. A.L.M. Meyyappa Chettiar and Others*, , where it was held that the injunction or order contemplated by Section 15 is an injunction or order which specifically stays the execution of the decree. As their Lordships had indicated, they did not regard even a preliminary decree passed in an administration suit as amounting to an injunction or order within the meaning of the Section. So long as there is no legal impediment, to apply for leave to execute earlier, time cannot be excluded. No equitable grounds for the suspension of a cause of action can be added to provisions of the Limitation Act.

15. It will thus be seen from the decisions cited herein that the scope of the provisions of Section 15 is confined only to an absolute stay granted by Courts. The principle underlying the section is apparent. If the execution of the decree was stayed, it would be an unnecessary burden on the decree-holder and an empty formality if he should be compelled to file execution application at the risk of his decree otherwise getting barred. A decree, which has been stayed, cannot obviously be executed. The reason cannot hold good if the decree-holder is not prevented from executing the decree. If he has a right to execute the decree and has failed to exercise that right, it can only be at his own risk. In my opinion, in, the present case, the decree-holder's right to apply for leave of Court to execute the decree was not affected in any way by the appointment of a receiver.

16. The judgment-debtor's contention that in this case the decree-holders were not entitled to the exclusion of time u/s 15 finds support in certain decisions of the Privy Council. In AIR 1945 5 (Privy Council) it was held that the question whether in a particular case a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order, or the decree, made in the case. There, in a suit for declaration and possession, a

temporary injunction which was subsequently confirmed by the decree restrained the defendant from interfering with plaintiff's possession; the defendant was also not to cause obstruction in any way to the plaintiff in removing the crops grown by him or in accepting or recovering the amount of rent of the said lands from the tenants; the decree was ultimately set aside by the Privy Council. On these facts, their Lordships held that there was no prohibition, either express or even implied, in the injunction or the decree which restrained the defendant from instituting a suit for possession; the institution of a suit could not be said to be futile, if it would thereby prevent the running of limitation only because the title of the parties was involved in the suit : subsequent suit by defendants after 12 years from the date of dispossession was barred by limitation; Section 15 did not entitle defendant to exclude the time between the plaintiff's suit and the decision of the Privy Council. Their Lordships reiterated this view in another decision in AIR 1933 52 (Privy Council) where a receiver appointed in an administration suit was ordered to pay a decree-holder a certain amount half-yearly in respect of the judgment debt obtained by him against the judgment-debtor in another suit, whose property was the subject matter in the administration suit; the receiver paid nothing and the decree holder put in an application in the administration suit asking the receiver either to pay the debt or that he might take an execution against the property in his hands. The Court ordered the decree-holder to wait for some time; but this order was set aside on appeal. On the date when the lower court passed its order, there was no application for execution of the decree pending. On these facts their Lordships held that the order of the Court in the administration suit asking the decree-holder to wait was not a stay of the execution within the meaning of Section 15.

17. The judgment-debtors in support of their contention also relied on a Division Bench decision of the Patna High Court in Maharajadhiraj Sir Rameshwar Singh Bahadur Vs. Hitendra Singh, where it was held that an order appointing a receiver of the property of the judgment-debtor does not operate as a stay of execution and therefore the mere fact that the decree-holder consented to the appointment of a receiver does not estop him from afterwards seeking to enforce his decree by execution.

18. In the ultimate analysis, therefore, it is quite clear that in this particular case the appointment of a receiver did not operate as a stay or injunction suspending limitation. Their Lordships of the Privy Council laid down, and subsequently the Supreme Court also reiterated in their recent decisions that the provisions of the Limitation Act must be strictly and grammatically construed. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide. The Limitation Act is consolidating and amending statute relating to the limitation of suits, appeals and certain types of application to courts and must therefore, be regarded as an exhaustive Code. It is a piece of adjective or procedural law and not of substantive law. Rules of procedure,

whatever they may be, are to be applied only to matters to which they are made applicable by the legislature expressly or by necessary implication. They cannot be extended by analogy or reference to proceedings to which they do not expressly apply or could be said to apply by necessary implication. It would, therefore, be not correct to apply any of the provisions of the Limitation Act to matters which do not strictly fall within the purview of those provisions. The provisions of sections 3 to 28 of the Limitation Act cannot be applied to situation which fell outside their purview. These provisions do not adumbrate any general principles of substantive law nor do they confer any substantive rights on litigants and, therefore, cannot be permitted to have greater application than what is explicit or implicit in them. Suspension of limitation in circumstances of the kind obtaining in these appeals is neither explicit nor implicit in Section 15 upon which reliance is placed on behalf of the decree-holders in the present case *A.S. Krishnappa Chettiar and Others Vs. Nachiappa Chettiar and Others*, .

19. In this view of the case, I am of Opinion that the decree-holders are not entitled to the benefit of exclusion of time u/s 15 of the Limitation Act.

20. In the result, therefore, these Miscellaneous appeals are dismissed. As regards costs, in the circumstances of the case and in view of the nature of the points involved each party will bear own costs throughout.

R.K. Das, J.

21. I agree.