
(1955) 03 PAT CK 0010

In the Patna High Court

Case No : A.F.O.O. No's. 213 and 267 of 1950

Birendra Pd. Sukul and Others

APPELLANT

Vs

Shyam Nandan Sahai and Others

RESPONDENT

Date of Decision : 24-03-1955

Acts Referred:

Limitation Act, 1908 — Article 182, 182(2)

Citation : AIR 1955 Patna 333 : (1955) 3 BLJR 307

Hon'ble Judges : Das, C.J.;Choudhury, J

Bench : Division Bench

Advocate : R.S. Chatterji and Angad Ojha, in No. 213 and Rai T.N. Sahai, in No. 267, for the Appellant; Mahabir Prasad and Tarkeshwar Nath, for the Respondent

Final Decision : Allowed

Judgement

Choudhury, J.—These two appeals arise out of two miscellaneous cases, namely, Misc. Case No. 42 of 1950 and Misc. Case No. 44 of 1950, which were heard together and were disposed of by one judgment on 7-7-1950. The two appeals are by two sets of judgment-debtors, whose objections u/s 47, Civil P. C. to the execution of a mortgage decree passed against them and several other persons were overruled by the learned Subordinate Judge of Muzaffarpur by his judgment referred to above. Both these appeals have been heard together, and this judgment will govern them both.

2. The only question that arises for consideration in these two appeals is one of limitation. The point to be considered is whether the application for execution of the mortgage decree is barred by time. In order to appreciate the question raised before us, it will be necessary to give, in short, the facts of the case out of which the two appeals arise.

3. The decree-holders-respondents instituted a mortgage suit, No. 19 of 1935, against the appellants and several other persons on the basis of three mortgage bonds. The suit was decreed after contest by judgment dated 31-3-1937. As in

accordance with this judgment substituted securities had to be fixed and the court had to wait for the report of the commissioner fixing such securities, the drawing up of the preliminary decree was postponed for a long time. In the meantime, defendant 1 filed, on 22-2-1940, an application u/s 7, Bihar Money-Lenders Act for the reduction of interest decreed in favour of the plaintiffs which was rejected on 13-8-1940. On the same day an order was passed for drawing up the preliminary decree in accordance with the report of the commissioner with regard to substituted securities. Thereafter, on 21-8-1940, defendant 1 filed another application praying that the decree in the suit be prepared according to the Money-Lenders Act. This application again was dismissed on the ground that the preliminary decree having been passed before the enactment of the Bihar Money-Lenders Act, the provisions of Section 7 of that Act could not be invoked for reducing the amount of interest already decreed.

The preliminary decree was actually drawn up on 3-12-1940, and it was sealed and signed on 9-12-1940. Against this decree a first appeal was preferred in this court. It appears that in connection with the consideration of the court-fee matter it was discovered that there was some mistake in the calculation of the amount of the decree that was prepared by the court, and, therefore, the decree was sent down for correction, which was corrected on 21-1-1942. Thereafter, the deficit court-fee not having been paid, the memorandum of appeal was rejected by this Court on 1-3-1943, and the result was that the preliminary decree that was passed by the court below became final. On 1-9-1943, the decree-holders made an application for making the preliminary decree final. An objection on behalf of the judgment-debtors was raised to this application. During the pendency of this application, an application was made on 2-12-1944, by some of the judgment-debtors under Sections 151 and 152, Civil P.C. and amongst others, a prayer was made for reducing the amount of interest in accordance with the provisions of the Bihar Money-Lenders Act. This application was registered as Misc. Case No. 94 of 1944.

Similarly, on 6-1-1945, another set of judgment-debtors filed another application making a similar prayer as was made in Misc. Case No. 94 of 1944. This application was registered as Misc. Case No. 1 of 1945. The objection to the preparation of the final decree as well as these two miscellaneous cases were heard together. The learned Subordinate Judge, by his order, dated 7-6-1945, overruled the objection of the judgment-debtors and dismissed the two miscellaneous cases. He held that the prayer of the defendants with regard to the reduction of interest u/s 7, Bihar Money-Lenders Act had already been rejected by the court and that the provisions of the said Act with regard to the reduction of interest were not applicable to a decree which had already been passed prior to the enactment of the said Act. Accordingly, the learned Subordinate Judge passed an order for drawing up of the final decree, which was actually prepared on 19-7-1945, and sealed and signed on 25-7-1945.

Against the order of the learned Subordinate Judge, dated 7-6-1945, three civil

revision applications were filed in this Court, namely C. Rule 763 of 1945, Civil Revn. No. 794 of 1945 and Civil Revn. No. 966 of 1945. They were dismissed on 8-4-1947, 10-4-1947 and 26-4-1948, respectively. It was held by this Court in those civil revision cases that the remedy of the judgment-debtors was by way of appeal and the revision applications were not maintainable. It was also observed that since the appeal that was preferred against the preliminary decree failed on account of nonpayment of deficit court-fee, the decree awarding interest became final. The decree-holders, thereafter, filed an application for execution of the decree on 25-11-1948, which was returned to their pleader for removing certain defects. As the application was not refiled after removing the defects, the execution case was struck off on 10-1-1949. The decree-holders, thereafter, filed another application for execution of the decree on 10-3-1949, and it is this application which gives rise to the present appeals.

4. The appellants of the two appeals objected to the execution of the decree by two applications on various grounds one of which, with which alone we are concerned, was that the execution was barred by limitation. The learned Subordinate Judge overruled this objection of the appellants and rejected their application by his order dated 7-7-1950, and against that order they have come up in these two appeals before this Court.

5. The only point, pressed before us, as already observed, is that the application for execution filed on 10-3-1949, is barred by limitation. The contention raised by Mr. Charterji on behalf of the appellants is that the final decree having been passed in July, 1945, the execution application is hopelessly barred by time as having been filed more than three years after that date. The contention of Mr. Mahabir Prasad appearing on behalf of the decree-holder-respondents is that the period of three years within which the application for execution had to be made, will be counted from the dates on which the civil revision applications were dismissed by this Court and the application is within time.

6. The case is governed by Article 182, Limitation Act which provides a period of three years for the execution of a decree like the present one from the date of the decree, or, where there had been an appeal, from the date of the final decree or order of the appellate court or the withdrawal of the appeal. In this case, admittedly, there has been no appeal from the final decree, and it was conceded that if this period of three years is to be counted from the date of the final decree, the application is barred by time. Similarly, it is also conceded that if this period has to be counted from the dates on which the civil revision applications were dismissed by this Court, the application is within time. The point that has to be determined is whether the period is to be counted from the date of the final decree or from the dates on which those civil revision applications were dismissed.

7. The argument put forward by Mr. Mahabir Prasad for the decree-holder-respondents is that the word "appeal" in Clause (2) of Col. 3 of Article 182, Indian Limitation Act, 1908, includes appeals from collateral proceedings as well

as applications made to an appellate court which are in the nature of appeals imperilling the decree sought to be executed, and on this interpretation of the word "appeal", his contention is that the civil revision applications referred to above were in the nature of appeals inasmuch as they imperilled the decree sought to be executed, and, if they had been allowed, the decree would have been varied and no useful purpose could have been served by an earlier execution. Mr. Chatterji appearing for the appellants, on the other hand, contends that the word "appeal" in this article on a true grammatical construction, means only appeals from the decree sought to be executed and not appeals or any application in the nature of appeals from any collateral proceedings.

8. In -- AIR 1932 165 (Privy Council) it was held by their Lordships of the Judicial Committee that any application by a party to an appellate court to set aside or revise a decree or order of a court subordinate thereto is an "appeal" within the meaning of Article 182(2), Indian Limitation Act, 1908, even though it is irregular or incompetent or the persons affected by the application to execute were not parties, or it did not imperil the whole decree or order. In the course of the judgment Sir Dinshah Mulla, who delivered the judgment of the Board, observed as follows :

"Where there has been an appeal, time is to run-from the date of the decree of the appellate-court". There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. 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, their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question "sub judice" between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

Relying on this passage of their Lordships of the Judicial Committee, Mr. Mahabir Prasad has contended that by filing civil applications in this Court, the question with regard to the amount of the decree was made "sub judice" between the decree-holders and the appellants, and if the civil revision applications had been allowed, any earlier execution could lead to no advantage. He, therefore, has contended that the actual dates from which the period of three years should be counted, must be the dates on which those civil revision applications were dismissed. The argument, though attractive, has no legs to stand. In the Privy Council case the question that we have to decide did not arise for consideration. In that case Madanmohan and certain other persons obtained a preliminary mortgage decree. Madanmohan made an application for the preparation of the final mortgage decree, and in his application he made (it may be noted that he had unsuccessfully made such claims at the previous stage also) a claim that

some of the decree-holders had assigned their interest in the mortgage to him and prayed that an order should be made to that effect. This prayer was disallowed, and a final decree was passed for the sale of the mortgaged properties.

Madanmohan, thereafter, presented an application to the High Court purporting to be an appeal from the order of the Subordinate Judge. His objection in the appeal was only with respect to his claim of assignment and he, therefore, joined as parties to the appeal only the other decree-holders and not the judgment-debtors. The appeal was apparently irregular, and it was also insufficiently stamped. Nevertheless, it was admitted and heard, and ultimately the appeal was dismissed both on the ground of irregularity and upon the merits. Thereafter, an application for execution of the decree was made, and it was opposed by some of the judgment-debtors as having been barred by Article 182, Limitation Act. The contentions raised were (1) that Madanmohan's application was by reason of its irregularity not an appeal, but merely an abortive attempt to appeal: (2) that an appeal, in order to save limitation under Clause (2) of Article 182, Limitation Act must be one to which the persons affected, that is, the judgment-debtors, were parties; and (3) that it must also be one in which the whole decree was imperilled. Their Lordships of the Judicial Committee rejected all these contentions, and held as stated above. Thus it appears that in that case there was an appeal, though irregular in form, from the decree that was sought to be executed, and, therefore, the case was clearly covered by Article 182(2), Limitation Act.

9. In an earlier decision of this Court in -- Rai Brijraj Vs. Nauratan Lal, , it was held that the word "appeal" in Clause (2) of Article 182, Limitation Act referred to an appeal from the decree in the suit and to nothing else. After the decision of the Privy Council referred to above, the matter came to be considered by this Court in -- Firm Dedhraj-Lachminarayan Vs. Bhagwan Das and Others>, . In that case a money suit was dismissed by the trial court, but on appeal by the plaintiff the suit was decreed "ex parts" against the defendant on 7-8-1931. The defendant made an application for restoration under Order 41, Rule 21, Civil P.C., which was dismissed on 19-11-1941. The defendant preferred an appeal against the order of dismissal, but that appeal was dismissed on 1-9-1933. An application for execution of the decree was made on 15-11-1934, and the question arose whether the application was barred by time as having been made beyond three years from the date of the "ex parte" decree passed on 7-8-1931.

The contention of the decree-holder was that the period of three years under Article 182, Limitation Act would be counted from the 1-9-1933, on which date the appeal against the order passed on the application under Order 41, Rule 21, Civil P.C. was dismissed and the application for execution was, accordingly, in time. Relying on the observation of Sir Dinshah Mulla in the Privy Council case of "Nagendranath Dey (A)", referred to above, their Lordships held that the case of Rai Brijraj Vs. Nauratan Lal, , must be considered as overruled, and, with regard

to the date from which the period of limitation had to be reckoned, it was held that the period of three years had to be counted from the date of disposal of the appeal in the matter of restoration. In coming to that decision their Lordships made the following observation :

"In applying that principle to the case before us we find that there was in fact an appeal to the High Court in the matter of the judgment-debtor's application for restoration. Had the judgment-debtor been able to shew that he had good grounds for not being present when the suit was decreed ex parte, the Subordinate Judge would have set aside the original ex parte decree and would have heard the case on its merits after hearing the judgment-debtor. That is to say, the original decree was by the application for restoration put in peril. Similarly until the appeal of the judgment-debtor to the High Court from the Subordinate Judge's decision was decided, the suit was still in peril. Clause (2) of Article 182 does not state, in its strict grammatical construction, that the appeal must be against the decree in the suit. These are words which we are asked to read into the Article by implication and I see no ground in principle for so reading them. In conformity with the Privy Council decision that the matter must be decided on the plain words of the Article and applying the principle of the rule stated by Privy Council so as to make it intelligible, the order of the appellate court of the 1-9-1933, should be held the proper date from which the period of limitation should start."

The judgment of the learned Subordinate Judge in the present case overruling the objections of the appellants is based on this case. This case has, however, been overruled by a Full Bench of this Court in -- Rameshwar Prasad Sahu Vs. Parmeshwar Prasad Sahu and Others, . In that Full Bench decision the question that arose to be considered was whether the, word "appeal" in Clause (2) of Col. 3 of Article 182, Limitation Act included an appeal from collateral proceedings such as an appeal from an order refusing to set aside an ex parte decree, and it was held that the word "appeal" in that article did not include an appeal preferred against the order refusing to set aside an ex parte decree in computing the period of limitation for execution of the decree passed in a suit as the word "appeal" "in the clause meant an appeal only from the decree or order sought to be executed. The case of Rai Brijraj Vs. Nauratan Lal, , was held to have been rightly decided, and the decision in the case of Firm Dedhraj-Lachminarayan Vs. Bhagwan Das and Others>, , was held not to be good law.

10. A Division Bench of the Calcutta High Court in -- "Haris Chandra v. Dines Chandra AIR 1946 Cal 375 has also held that the words "the final decree or order of the appellate court" in Article 182(2), Limitation Act, mean the final decree or order passed on appeal from the decree which is sought to. be executed and do not include the final decree or order that may have been passed on appeal from an order in a collateral proceeding. In that case a preliminary decree for partition was passed on 3-4-1938, and it was made final on 13-8-1938. On 11-11-1938, one of the defendants presented an application for setting aside the decree under

Order 9, Rule 13, Civil P.C. That application was dismissed on 6-10-1939, and against the order of dismissal an appeal and a civil revision application were filed in the High Court both of which were dismissed on 23-7-1943. When an application for execution of the decree was made, it was resisted on the ground that it was barred by time as having been made more than three years after the passing of the final decree.

The contention put forward on behalf of the decree-holder was that under Article 182(2), Limitation Act time was to run from 23-7-1943, when the final order was made, in the appeal and the civil revision application, by the High Court. The contention raised by the decree-holder found favour with the executing court, but on appeal it was overruled by the High Court. Before their Lordships an argument similar to the one advanced before this Court in *Firm Dedhraj-Lachminarayan Vs. Bhagwan Das and Others*, was advanced that the earlier decisions of the Court which had taken the view that the word "appeal" in Article 182, Limitation Act meant only an appeal from the decree sought to be executed, were no longer sound and have been impliedly overruled by the decision of the Privy Council in AIR 1932 165 (Privy Council) . Mukherjee J. (as he then was), who delivered the judgment of the Court, Sharpe J. concurring with him, repelled that contention with the following observation:

"It is not disputed that their Lordships of the Judicial Committee were not called upon to decide a case like the present where the appeal was not from the decree sought to be executed or a portion of it, but from an order made on an application to set aside the decree which was passed ex parte. Their Lordships laid particular stress on the fact that in the case before them the appeal was against the mortgage decree dated 24-6-1920. In their opinion, the character of the appeal was altogether immaterial; it was also immaterial as to who were made parties to it and whether or not it imperilled or affected the entire decree. It was enough that there was an appeal in the sense that the appellate tribunal was invited to set aside a decision of a subordinate court and therefore it attracted the operation of Clause (2) of Article 182, Limitation Act. In our opinion this decision is no authority for the proposition that the appeal contemplated by Article 182(2), Limitation Act, need not be directed against the decree which is the subject-matter of execution or a portion of it and it is enough if there was an appeal from an order passed in a separate or independent proceeding the result of which might affect the decree in any event. The doctrine of imperilling the decree upon which the decision of the Judges of this Court rested was expressly reversed by their Lordships of the Judicial Committee."

A similar view has been taken by a Bench of the Allahabad High Court in -- *Kunwar Bahadur Singh Vs. Sheo Shankar*, , wherein it has been held that the word "appeal" in Article 182 (2), Limitation Act means an appeal from the decree sought to be executed and no other appeal. Referring to the observation made by Sir Dinshah Mulla in the aforesaid Privy Council case as quoted above Seth J. observed as follows :

"These observations have been understood in some cases as laying down some rule of law, as to the application of Article 182(2), Limitation Act, and it has been said, that according to these observations any appeal, which imperils the decree sought to be executed, is an appeal within the contemplation of that article. I am unable to concur in this view, since it is obvious that these observations were made in justification of a rule of limitation, and not with the object of formulating any rule of limitation or interpretation. The rule definitely formulated is, that rules of limitation (and Article 182(2) is a rule of limitation) should be construed strictly according to grammar and I am by no means satisfied that words, "which imperils the decree sought to be executed" can be read into the clause according to any rule of grammar, by whatever other rule it may be possible to read these words into it. I have already indicated my reasons for the conclusion that the only words that can be read into this clause, according to the rules of grammar, are "from the decree" or "therefrom" after the word "appeal".

The observations of their Lordships are confined to the parties to the appeal and to its character. Their Lordships were not called upon to consider the character of the decision appealed from. Under these circumstances I do not find it possible to accept the contention that by the observations already quoted their Lordships intended to overrule the view which had prevailed in this country, almost without dissent for over half a century when AIR 1932 165 (Privy Council) came to be decided. In my opinion, therefore, AIR 1932 165 (Privy Council) has no bearing on the question under consideration."

11. While interpreting the word "appeal" used in Art. 182(2), Limitation Act the Supreme Court in -- Bhawanipore Banking Corporation, Ltd. Vs. Gouri Shankar Sharma, has taken the same view and has held that the word "appeal" in Article 182(2), Limitation Act does not cover an appeal from an order passed in a collateral proceeding or having no direct or immediate connection with the decree under execution.

12. On a careful consideration of the authorities referred to above as well as on a pure grammatical construction of the article, the only conclusion to which I could come is that the word "appeal" used in Clause (2) of col. 3 of Article 182, Limitation Act means only an appeal from the decree sought to be executed and does not include any appeal or any application in the nature of an appeal arising out of collateral proceedings. In this view of the matter, the contention raised on behalf of the decree-holders that the period of limitation has to be counted from the dates on which the civil revision applications were dismissed, fails, and the execution having been levied more than three years after the passing of the final decree is barred by time.

13. In the result, the appeals succeed and are allowed with costs. The judgment and order of the court below dated 7-7-1950, passed in Misc. Case Nos. 42 and 44 of 1950 are set aside and the application for execution is dismissed as being barred by time. There shall be only one set of hearing fees for both the cases.

Das, C.J.

14. I agree.