

(1972) 08 OHC CK 0024

In the Orissa High Court

Case No : Miscellaneous Appeal No. 1 of 1967

Iswar Naik and Others

APPELLANT

Vs

Sambaru Naik and Others

RESPONDENT

Date of Decision : 23-08-1972

Acts Referred:

Limitation Act, 1963 — Article 182, 182(4)

Citation : (1973) 39 CLT 101

Hon'ble Judges : S.K. Ray, Acting C.J.; S. Acharya, J

Bench : Division Bench

Advocate : N.V. Ramdas, for R.C. Misra and A.K. Padhi, for the Appellant; R.N. Sinha, S.N. Sinha and J.K. Tripathy, for the Respondent

Judgement

S. Acharya, J.—This miscellaneous appeal is filed by the decree-holders against the order passed by the Subordinate Judge, Sambalpur in Misc. Case No. 14 66 dismissing the execution Case No. 57 of 1964, holding the same to be barred by limitation and the decree, which is sought to be executed, is otherwise not executable.

2. The execution proceeding in question in which the impugned order has been passed relates to a decree passed in a suit for partition (Title Suit No. 159). That suit was decreed on compromise on 11-5-1960. In the decree drawn up in that case it was stated that the suit was preliminary decree on compromise on 11-5-1960 by the Subordinate Judge, Sambalpur. On 23-1-1963 the Plaintiffs filed a petition to draw up the final decree. On 19-2-1963 the Court rejected the aforesaid petition stating that the suit had been simply decreed and there was no question of drawing up of a final decree. On 9-4-1963 the decree-holders filed a petition to make the order consistent with the prayer in the compromise petition and to add the word "final" to the decree as prayed for in the compromise petition. The aforesaid prayer for the amendment of the decree to the above extent and effect was allowed on 22-2-1964 and the word "final" was added in the penultimate paragraph of the decree. The Court signed the said final decree

on 28-8-1964 and thereafter the decree-holders (Appellants herein) filed the execution petition on 7-10-1964. Against the aforesaid order of amendment, the judgment-debtors preferred Civil Revision No. 144 of 1964 in this Court, which was dismissed on 25-6-1965.

3. Mr. Ramdas, the learned Counsel for the Appellants, contends that the finding of the Court below that the amendment ordered on 22-2-1964 not being a substantial one, it cannot be said that the decree has been amended on that date, and so that amendment cannot be taken into account for the purpose of limitation, is bad in law. Mr. Sinha, the learned Counsel for the Respondents, refutes the above contention stating that the order passed on 22-2-1964 did not in any manner effectively and substantially amend the decree, and as such it was no amendment at all, and so the time for the execution of the decree would not run from that date, but would run from the date of the passing of the decree on 11-5-1960, on which date the suit was decreed on compromise.

4. In *Allada Lakshmikanta Rao Vs. Nadella Ramayya*, reported in a Division Bench of the Madras High Court held:

The fact that the final decree had already become barred or that the amendment applied for was unnecessary were matters to be dealt with by the Court to which the application had been made for the amendment and we agree with the view of the District Judge that the effect of Article 182(4), Limitation Act must be that it is an answer to any objection taken with regard to the plea of limitation so far as the earlier final decree is concerned. The words of Article 182(4), Limitation Act, are where the decree has been amended, the period of three years limitation is given starting from the date of the amendment of the decree. It was the amended decree that the decree holder sought by his subsequent application to execute. We propose to give the words of that Article of the Limitation Act their plain meaning following the principle of construction laid down by the Privy Council in 1932 P.O. 165 (1). The head note of that reads as follows:

Under the Limitation Act, Article 182 Clause 2, where there has been an appeal" time for execution of the decree runs from the date of the decree of the appellate Court. The words of the Article are plain and without it any qualification either as to the character of the appeal or as to the parties to it. Held, therefore, that where an appeal, irregular in form and insufficiently stamped, was dismissed both on the ground of irregularity and upon the merits, that it was nevertheless an appeal within the meaning of Article 182 Clause 2 and though the judgment debtors against whom the execution was now sought were not parties to the appeal time only ran against the decree holders from the date of the appellate Court's decree dismissing the appeal. Equitable considerations are out of place in the construction of the statute of limitation and strict grammatical meaning of the words must be given effect to. On p. 334 (of 63 M.L.J) Sir Dinshah Mulla in delivering the judgment of their Lordship's Board says:

Their Lordships think that nothing would be gained by discussing these varying

authorities in detail. They think that the question must be decided upon the plain words of the article; "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.

In the case of Harihar Prosad Singh and Others Vs. Ganga Singh and Others, , Narayan, J. in effect approves the view that whether the amendment is substantial or not the terminus a quo would be deemed to be the date of the amendment and not of the original decree. In this decision he has reviewed the Privy Council decision in AIR 1932 165 (Privy Council) and some other decisions of the Patna and other High Courts. He has referred with approval to a previous decision of the Patna High Court and states:

In Magan Lal v. Sitaram 16 Pat. 290, Wort, J. after reviewing the authorities on the point came to the conclusion that where a decree was amended more than three years after it was passed and the judgment debtor objected to the execution of the amended decree, the terminus a quo would be deemed to be the amendment and not the original decree. His Lordship further pointed out that it was not open to the executing Court to go behind the order of amendment and to enquire if the decree was really barred on the date of amendment or not.

Narayan, J. in paragraph 5 of the aforesaid decision, referring to. Fazl Ali, J's observations on an analogous question in Rameshwar Narain Misra Vs. Raghunandan Purbey and Others, , states:

In Rameshwar Narain v. Raghunandan 16 Pat. 453, Fazl Ali, J. (as he then was) and Madan, J. no doubt expressed some doubt as to whether in all cases of amendment of the decree, fresh terminus a quo was available to the decree-holder for the execution of the decree. But with the utmost respect, I would point out that whatever their Lordships have said in this case must be regarded as Obiter dicta.

Referring and discussing the above-mentioned decision of the Privy Council, which has been relied upon in various decisions of the different High Courts, Narayan, J. states:

Undoubtedly, their Lordships were not dealing with a case under Clause (4) of Article 182, Limitation Act, but the rule of construction which their Lordships have laid down is binding on us and has been applied in several authorities to a case under Clause (4) of Article 182.

In Mohammad Jabir and Others Vs. Narain Prasad Daruka and Others, , a Division Bench of the Patna High Court has observed:

We do not consider that it is open to the executing Court to go behind the order of amendment and to enquire whether the amendment was a substantial amendment or merely an amendment of a clerical or arithmetical nature. It is also not open to the executing Court to go into the question whether the amendment was necessary or not necessary or whether the Court of the Munsif was competent to make the amendment or not. In our opinion, the language of Article 182 must be given a strict grammatical meaning and equitable considerations are out of place. That is the view expressed by the Privy Council in AIR 1932 165 (Privy Council) , which involved an analogous question as to the construction of Article 182(2) of the Limitation Act.

In expressing the above view in the matter their Lordships have taken into consideration the following decisions of their own and other High Courts which support the above view:

- (1) Gouri Kant Prasad Vs. Rambilas Narain and Others, .
- (2) AIR 1941 131 (Lahore) .
- (3) Manohar Chandra v. Kali Priya Ray 41 Cal.W.N. 1330.
- (4) Allada Lakshmikanta Rao Vs. Nadella Ramayya, .

Their Lordships have also taken into consideration the view expressed by Fazl Ali, J. in the above mentioned Rameshwar Narain's case 5, and they have said:

The observations of Fazl Ali, J. in Rameshwar Narain's case that the amendment contemplated by Article 182(4) must be a real amendment of the decree and not a mere correction of some clerical error or some arithmetical error is an obiter dictum and was not necessary for the decision of the particular case.

In Thomas George v. Raman Pillai Kesava Pillai AIR 1954 TC 450 it has been held that the amendment of the decree gives a fresh starting point of limitation even if the amendment is a formal one and unnecessary and the decree is executable in its unamended form.

In the case reported in Mala Devi Vs. Priyamani Devi, . Ray C.J. sitting with Jagannath Das, J. observed that even though the Civil Revision in the High Court was incompetent still the date that counts for the purpose of starting the period of limitation is the date of the order of the High Court. Their Lordships have quoted with approval the above-mentioned view of the Privy Council in the decision reported in AIR 1932 165 (Privy Council) , and also the Full Bench decision of the Madras High Court reported in P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, .

5. On the preponderance of legal pronouncement on this question we are satisfied that the Court below (the executing Court) was not justified in entering into the discussion as to whether the aforesaid amendment was a substantial one or not, and to base its impugned order on the finding that the said amendment,

made on 22-2-1964, was not a substantial one.

6. In disposing of the Civil Revision Order 144, 64, filed in this Court by the judgment debtors, Ahmed C.J. considering the aforesaid order dated 22-2-1064, passed by the trial Court, has stated that as in the original order the word "final" was not used, it led to certain confusion between the parties and therefore subsequently a petition was filed by the decree holder to make the order consistent with the prayer made in the compromise petition and to amend the order to that extent. The Court on hearing the parties allowed the prayer made in the petition and amended the original order passed by it. He also finds that the original order has been amended by the addition of the word "final" therein; and by that the position is clarified. It is evident from the above that the aforesaid amendment was necessary for the purpose of clarifying the confusion in the Court's order. In this view of the matter it cannot be said that the amendment of the decree, consequent upon the aforesaid amendment of the Court's order, was entirely unnecessary in this case.

7. On the above consideration we are of the opinion that it was not open to the executing Court, the Court below, to enquire as to whether the amendment was a substantial amendment or not. Factually we find that the decree was actually amended on 22-2-1964 as stated above, and so a fresh terminus a quo for the execution of that decree was available to the decree-holders, Appellants in this case, from the date of the amendment i.e. from 22-2-1964. Accordingly, the petition for execution of the decree filed on 7-10-1964 is not time barred.

8. Mr. Sinha, the learned Counsel for the Respondents, has also urged that the decree passed in the suit on the basis of the compromise petition is not executable, as it is merely a declaratory decree, declaring only the shares and interest of the respective parties in the properties described in the compromise petition and there is no provision for delivery of possession in accordance with the declaration made therein. There is no weight and or substance in Mr. Sinha's above contention.

In paragraph 19 of the decision of the Supreme Court in Bhavan Vaja's case 1972 S.C.D. 361 their Lordships have laid down:

It is true that an executing Court cannot, go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the Court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it.

The Plaintiffs-decree-holders in the present case instituted the suit for partition of the properties described in the schedules attached to the plaint, with a prayer to divide the said properties into three equal shares, allotting one-third share to

Plaintiffs 1 to 4, one-third to Plaintiffs 5 to 8 and the rest one-third to the Defendants, through a Court-commissioner. In that suit the a above-mentioned compromise petition executed by the parties was filed. The Plaintiffs, who instituted the suit for the above reliefs, entered into that compromise certainly with the intention and idea of getting exclusive possession of their respective shares as agreed upon mutually between the parties, so that they would thereafter peacefully enjoy the same. In the preamble to the said compromise petition it is stated that the parties have compromised the suit on the terms stated therein and pray that a final decree for partition be passed in accordance with the said terms. In paragraph 4 of the said petition, apart from other things, it is stated that "parties agree for the allotment of the suit lands in the way as noted in paragraphs 1 to 3 above subject to the alienations and encumbrances already made in respect of them." This sentence sufficiently indicates that it was the intention of the parties that the properties as separately apportioned in favour of the different parties in the said compromise petition should be allotted to them in an effective manner so that they can enjoy their respective shares. Paragraphs 5 and 6 of the compromise petition are as follows:

5. That the Defendant will get the whole of the compensation money as noted in Schedule "M" of the plaint.

6. That the parties will get "Bandha" and "Munda" which stand in their respective share of lands and alike the trees standing in their respective share of lands.

A careful perusal of the compromise petition in the context and perspective of the averments and prayer in the plaint shows that the parties entered into the said compromise with the definite intention that they would thereafter be able to enjoy in peace their respective shares in the properties as mutually agreed upon by all of them. The compromise petition was drawn up in accordance with the aforesaid mutual agreement. Certainly therefore the parties did not enter into the said compromise merely for the purpose of getting a declaration of their right and title to their respective shares in the suit properties, without intending to effectively enjoy the same. In my opinion the absence in the compromise petition of a specific provision in so many words enabling the parties to get delivery of possession of their respective shares is just a slip and an inadvertent mistake in the drafting of the petition and as such it cannot nullify the aforesaid intention of the parties and the purpose for which the compromise was arrived at.

10. On the above considerations I am satisfied that the decree drawn up in accordance with the said compromise petition can be executed in accordance with law for the purpose of getting delivery of possession as per the allotment of properties made therein in favour of the different parties. There is, therefore, no substance in this contention either.

11. On the above discussions and considerations I find that the execution petition filed in the Court below is not barred by time and the aforesaid decree passed in

the suit is executable in accordance with law as stated above.

12. In the result, therefore, the appeal succeeds and the impugned order passed by the Court below is set aside. There will, however, be no order as to costs of this appeal.

The lower Court records be sent back immediately. The Court below should proceed with the execution proceeding in accordance with law, in an expeditious manner.

S.K. Ray, Ag. C.J.

13. I agree that this appeal shall be allowed.

1. The relief claimed in the suit was for a declaration of right, title and interest over the suit-properties to the extent of 2 3rd and to divide the same into 3 equal shares allotting 1/3rd to the Plaintiffs 1 to 4, 1 3rd to the Plaintiffs 5 to 8 and the rest 1 3rd to the Defendants through a Court-commissioner. It meant creation of lots of shares, division of them into value and lastly assignment of shares to the different allottees which meant putting them in possession of their respective shares.

2. The compromise petition which formed part of the decree merely created lots of shares and declared which lots have been allotted to which share-holders, and which share-holder or group of share-holders is in possession of his respective allotted lot or part of a lot. When parties wanted a final decree to be passed in terms of the compromise petition they meant carving out of those specific lots and delivering possession of them to the respective share-holders, except those in respect of which any share-holder is declared in the compromise petition to be in possession. This appears to be the true meaning and intention of the parties incorporated in the compromise petition as will be apparent from a comparison of the language contained in para 8 of that compromise petition with the other provisions therein. Paragraph 8 specifically provides that so far as the house property is concerned, the parties are in separate possession of their respective shares in the house, and it is therefore, no longer liable to be divided by metes and bounds followed by delivery of possession in accordance with such division. Similar recital has not been made in respect of other portions of the joint family property. Of the various things wanted to be done by Court in the relief claimed in the suit, the parties by themselves created lots and assigned them to various share-holders and declared present possession of the share-holders in respect of some of the allotted shares, and by praying for passing of a final decree they obviously desired that the last thing of dividing the properties by metes and bounds and delivering possession should be done by Court, if not amicably effected.

3. In my opinion, the compromise petition unambiguously contemplated delivery of possession of different lots to different share-holders, on a proper and true construction of the entire terms thereof in the context of the relief claimed in the

suit.