

(1997) 11 PAT CK 0036
In the Patna High Court
Case No : Civil Revision No. 81 of 1996 (R)

Most. Munni Devi and Others

APPELLANT

Vs

Viswakarma Mandir Trust and Others

RESPONDENT

Date of Decision : 04-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (1998) 3 BLJR 2185

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Judgement

P.K. Deb, J.—This Revision petition has been preferred against the Order dated 21.12.1995 passed by the Munsif, Ranchi in Misc. Case No. 2 of 1993 arising out of the Execution Case No. 1 of 1992, where by the application filed u/s 47 of the CPC challenging the executability of the decree has been rejected.

2. The Title Suit No. 205 of 1973 was filed by Viswakarma Mandir Trust through its then President, Baldeo Viswakarma for eviction of the petitioners and for delivery of possession of the suit property. The suit was decreed vide judgment dated 31.1.1976. It should be mentioned here that during the pendency of the suit, Baldeo Viswakarma died. Then Lakshman Viswakarma in capacity of its President had continued the suit. After the decree was passed the petitioners preferred Title Appeal No. 32 of 1976 and the appeal was allowed by the 1st Appellate Court and the decree for eviction as granted by the original Court was set aside vide judgment and decree dated 25.1.1978. Then the plaintiffs of the suit i.e. Viswakarma Mandir Trust filed Second Appeal No. 74 of 1978 (R) before this Court and the said appeal was allowed vide judgment and decree dated 5.9.1985 and the Eviction decree was granted.

3. Although, the eviction decree was granted in the Second Appeal in the year 1985 the decree holder levied execution case after seven years being Execution Case No. 1/92 and the date of levying was 10.1.1992. The executability of the decree was challenged by the petitioners by filing a petition u/s 47 of the Code of

Civil Procedure, which was registered as Misc. Case No. 2 of 1993. There were three fold grounds in challenging the executability of the decree namely :

(i) The plaintiff of the suit or the decree holder being a trust property and when all trustees have not joined then the suit and in consequence of it the decree is void in the eye of law;

(ii) The present Execution case has been levied for and on behalf of Viswakarma Mandir Trust, who has no authority under the law to levy the execution;

(iii) That the execution case is hopelessly barred by limitation.

4. Before the Court below, both parties adduced evidence in support of their contentions and all three points raised have been rejected by the learned Executing Court, hence this revision petition has been preferred.

5. While admitting this revision petition, vide order dated 14.3.1996 this Court has formulated two points, namely, whether the Execution application can be filed by a person who is not the party in the suit and whether the execution application has been filed beyond the period of 12 years from the date of the decree.

6. Mr. M.S. Akhter appearing on behalf of the petitioners did not press the point of trustees being not joined in the suit and practically this point cannot be raised by him also as that was a matter to be fought out in the suit itself and when this Court in the Second Appeal had held that the suit was maintainable in its present form, the said question cannot be raised before the Executing Court.

Regarding the second ground of representing Viswakarma Mandir Trust by Basant Viswakarma from the side of the decree holder, it could be proved that after the new trust was created in the year 1992, Basant Viswakarma vide a Resolution was made the President and as such there was no illegality in levying the execution by Basant Viswakarma for and on behalf of Viswakarma Mandir Trust. Lakshman Viswakarma, who was the previous President and who continued the suit had deposed in favour of the petitioners-judgment debtors regarding the compromise being arrived at between the parties and the petitioners were paying rent on the basis of the compromise. This deposition of Lakshman Viswakarma has been rejected by the learned Court below as after 1992 he had no authority to represent the Viswakarma Mandir Trust and no document can be produced regarding such compromise being arrived at.

7. When a lawful decree is in existence, until and unless such compromise recorded as per provisions of Order XXI of the C.P.C., such oral evidence of compromise being arrived at, has rightly been rejected by the learned Court below. Mr. Akhter has also not pressed this point at the time of argument.

His main rust is on the question of limitation.

8. It has been argued by Mr. V. Shivnath, appearing on behalf of the Opposite Parties-Decree Holders that in a subsequent suit. Basant Viswakarma was found

to be the President and as such this question of non-representation of trust by Basant Viswakarma cannot be questioned by the judgment debtors-petitioners.

9. On the point of limitation, it is the contention of Mr. Akhter that under Article 136 of the Limitation Act, after the amendment of old Article 182 in the year 1963, the wordings has been changed and the period of computation should be started from the date when the decree was enforceable. According to him, the decree was granted on 31.1.1976 and the limitation must be computed from that date and it can be only upto the month of January, 1988 and when the execution has been levied in the year 1992 the same is totally barred by limitation. In support of his contention, he has referred to a Special Bench decision of the Calcutta High Court as reported in Hari Mohan Dalal and Another Vs. Parameshwar Shau and Others, . In that case, the trial Court had dismissed the suit and the 1st Appellate Court had granted the decree and the same was confirmed by the Second Appellate Court and it was held that the limitation for execution of the decree would start from the date of judgment of 1st Appellate Court. The case was governed under the Old Act. The question of hardship of the decree holder as he awaited the decision of the Second Appeal was not considered as in computation of limitation, the question of hardship would not come into play and it was held that true interpretation must be found out from the wordings of the Old Article 182 to find out the intention of the legislature.

10. That case can be very well distinguished from the present circumstances of the case. The decree granted by the original Court has already been set aside by the 1st Appellate Court and the decree granted by the original Court has been merged with the dismissal of the suit as held by the 1st Appellate Court. In that view of the matter, till the 1st Appellate Court's judgment, although the decree was in vogue but the said decree become nonest in the eye of law after the 1st Appellate Court decree was granted dismissing the Eviction suit. Decree could have been levied by the decree holder during the period of First Appeal as the decree was alive till the same was set aside vide judgment dated 25.1.1978 by the appellate Court, but the decree was not levied and when after 1978 there was no decree in the eye of law then question of levying decree of the original Court dated 31.1.1976 does not arise and during that period 12 years as per the new Article 136 of the Limitation Act was not applicable. Hence, it can be found that the decree was practically granted by the Second Appellate Court and hence limitation can be computed only from the decree granted by the Second Appellate Court. Moreover, the decree in question before the Calcutta High Court was a Money Decree and the old Article 182 was in vogue when the word "enforceable" appearing in the new Article 136 of the Limitation Act was not available them.

11. On the same analogy, Mr. Akhter has referred to a judgment of the Full Bench of this High Court as reported in Rameshwar Prasad Sahu Vs. Parmeshwar Prasad Sahu and Others, .

That judgment is also quite distinguishable from the present circumstances of

the case. In that reported case, in a partition suit, preliminary decree was granted and on the basis of that final decree was also arrived at but against the preliminary decree, an appeal was pending and the ex-parte preliminary decree was upheld by the Appellate Court. In that case, it was held that the executable decree was the final decree and not the preliminary decree and in executing the final decree, the decree holder cannot wait for the decision of the preliminary decree which was finalised in appeal and date of computation must be from the date of final decree and not the preliminary decree. This Full Bench decision was re-considered by another Full Bench of this Court as reported in Sidheshwar Prasad Singh and Others Vs. Ram Saroop Singh and Others, . Before the Full Bench, the case was of a Mortgage suit. The preliminary decree for sale in a mortgage suit was passed and then an appeal was preferred against the preliminary decree and the same was made also final and then execution was filed of the final decree but the execution was dismissed. When the mortgage estate was vested in the State, then appeal was preferred and it was found that the vesting was not proper and hence finality of the decree was again been affirmed. In that case, it was held that the date of computation of limitation would start from the final decree.

12. Another decision was cited by Mr. Akhter of the Allahabad High Court as reported in Harihar Prasad Singh v. Bern Chand AIR 1951 All. 79. This case is totally on different context. A suit was decreed and against that an appeal was preferred but the said appeal was rejected and the learned Appellate Court refused to register the appeal for non-payment of Court fees. Then, it was held that the appeal had no existence in the eye of law and hence for the purpose of computation of period of limitation it should start from the date of the decree and not from the dismissal of the appeal. This case has got no bearing with the present case.

Then another case of this High Court has been referred to being a Division Bench judgment as reported in Shri Chandra Mouli Deva v. Kumar Binaya and sons of others 1976 BBCJ 124. This judgment refers to both the old and new Articles of the Limitation for the purpose of computation in levying execution of a decree. A Money decree was obtained by the decree holder but the decree was prepared on a belated date and time taken for the preparation of decree was said to be excluded from computation of levying decree and the date of the judgment was considered to be the date of decree for the purpose of levying execution under Article 136 of the Limitation Act. This judgment has got no bearing in the present circumstances of the case. But, it was observed in para-6 of the judgment that there may be cases when the decree becomes enforceable on some future date and on happening of certain specified event. But, it is stated the expression "enforceable" would mean the immediate enforcing after the decree is granted even if the same is set aside or otherwise held in the Appellate Court. Such sort of observation must be construed as an obiter dicta. That point was never before the Division Bench, in the nature and circumstances of that case.

13. Another case has been cited by Mr. Akhter, as reported in Kali Prasad Bajpayee and Ors. v. Bhagat Prasad and Ors. 1981 B.L.J.R. 86. In that case, a money decree was obtained by the decree holder on 23.5.1957 and execution case was filed in the year 1960 but a third party made an application under Order XXI, Rule 58 of the C.P.C. and the Executing Court allowed that claim and thereafter the decree holder did not proceed with that Execution case. Then a Title Suit was filed by the decree holder under Rule 63 of Order XXI C.P.C. against the said claimant Vishwanath Prasad. That suit was ultimately decreed and the appeal preferred by Vishwanath Prasad was also dismissed and after the dismissal of the appeal preferred against the judgment under Order XXI, Rule 63, fresh execution case was levied being Execution Case No. 158 of 1970. This case was also dismissed for default. Then another fresh execution case was filed in the year 1972 and then a petition u/s 47 of the C.P.C. was filed to the effect that executability of the decree has been lost by limitation under Articles 136 and 137 of the Limitation Act. In that case decree was always executable within the period of limitation against the judgment debtor. The decree holder cannot wait regarding the result of the suit filed by decree holder against a fraudulent claimant and the period of limitation was rightly held to be computed from the date of decree dated 23.5.1957. But, the present case stands completely on different footing. Definitely, a decree of eviction was passed in the year 1976, but the said decree becomes a nullity by the 1st Appellate Court in the year 1978 and the decree was practically passed in the Second Appeal in the year 1985 and if it is computed from 1985 the execution case is definitely within the period of limitation. Even if the period from 1976 to 1978 is added when the decree of eviction was alive till the dismissal was recorded by the 1st Appellate Court from the final decree dated 5.9.1985 of the Second Appellate Court then also the Execution case is within the period of limitation, because from 25.1.1978 i.e. the dismissal recorded by the 1st Appellate Court till 5.9.1985, the decree granted by the Second Appellate Court, there was no existence of Eviction decree in the eye of law.

14. Mr. V. Shivnath has referred to a judgment of the Supreme Court as reported in Collector of Customs, Calcutta v. East India Commercial Co. Ltd. AIR 1963 SC 122, wherein although in difference context, it has been enunciated on principle that the appellate order is the operative order after the appeal is disposed of and the same is the basis of the rule that the decree of the lower Court merges in the decree of the Appellate Court.

In that view of the matter, it is the submission of Mr. V. Shivnath that the original decree of eviction passed by the 1st Court had merged into the dismissal recorded by the 1st Appellate Court and thus decree can be said to be granted only by the Second Appellate Court in the year 1985 and hence levying of the decree in the year 1992 is within the period of limitation. The enforceability of the decree comes only after the Second Appeal was disposed of by this High Court and before that there was no decree in the eye of law as the original decree passed by the 1st Court had already been merged with the dismissal

order recorded by the 1st Appellate Court.

15. The aforesaid judgment, as referred to by Mr. V. Shivnath, was referred to by the Allahabad High Court in Abdul Razzaq Vs. Izzat Ali, . In that case, the decree granted by the Original Court was retained by the Appellate Court while recording the dismissal of the appeal and it was held on the principle enunciated by the Supreme Court that the decree of the first Court has been merged into the appellate decree and the starting point of limitation under Article 136 would start from the date of the appellate decree.

16. Mr v. Shivnath has also referred to another judgment of the Calcutta High Court as reported in Shyama Pada Choudhury Vs. Saha Choudhury and Co. and Others, . Suit filed by the plaintiff was dismissed with cost and on appeal being preferred, the dismissal of the suit with cost was upheld and it was held that the execution for the purpose of realisation of cost would start from the date of decree of the Appellate Court and not of the trial Court.

17. The facts of the case have already been stated and after consideration of the ratio of all the judgments, I arrive at the finding that there was no existence of the original decree of the original Court after the dismissal was recorded by the 1st Appellate Court and the decree was granted only by the 2nd Appellate Court and hence execution levied by computing the period of limitation from the date of Second Appellate decree is proper and it cannot be said to be barred under Article 136 of the Limitation Act. Hence, this revision petition has got no force and as such the same is rejected. No order as to costs.