

(1974) 09 BOM CK 0003
In the Bombay High Court
Case No : Appeal No. 179 of 1965

Narayan Thunaji

APPELLANT

Vs

Mahadeo Ragho

RESPONDENT

Date of Decision : 05-09-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1974) MhLj 903

Hon'ble Judges : C.S. Dharmadhikari, J

Bench : Single Bench

Advocate : S.R. Kolarkar, for the Appellant; Shankar Anand, for the Respondent

Final Decision : Allowed

Judgement

C.S. Dharmadhikari, J.—The plaintiff filed a suit for possession of the suit fields and for recovery of amount of Rs. 500/- on account of mesne profits. According to the plaintiff, he was the owner of the suit fields as he has purchased them under the sale-deeds dated 13th August 1957 and 26th September 1957. He further contended that he was placed in possession of these fields in pursuance of these sale-deeds and he cultivated them thereafter. In October 1959 the respondent began to cause obstruction to the cultivation of these fields and since dispute arose between them, the appellant-plaintiff made a report to the police. On his report proceedings u/s 145 of the Code of Criminal Procedure were started in the Court of Sub-Divisional Magistrate, Bhandara. The learned Sub-Divisional Magistrate vide his order dated 2nd July 1960 upheld the possession of the respondent over those fields. The appellant filed revision petition against the order to the District Magistrate, Bhandara, who rejected the revision petition on 10th October 1960. Therefore, the plaintiff filed the present suit for a declaration and for possession of the suit fields as well as mesne profits. It was contended by the plaintiff that the cause of action for the suit arose on 10th October 1960 when the District Magistrate, Bhandara, dismissed the revision petition.

2. The defendant filed preliminary written statement and raised a contention that

the suit is barred by limitation because it was filed on 9th October 1963, i.e., more than three years from 2nd July 1960 the date of order passed by the Sub-Divisional Magistrate. According to the defendant, under Article 47 of the Limitation Act, 1908, period of limitation is three years from the date of final order and since the final order in the instant case was passed by the Sub-Divisional Magistrate on 2nd July 1960, the suit is barred by time. This objection raised by the defendant prevailed with the lower Court and, therefore, the suit filed by the plaintiff was dismissed on the ground that it was barred by time under Article 47 of the Limitation Act. Being aggrieved by this judgment and decree passed by the 2nd Joint Civil Judge, Junior Division, Bhandara, the plaintiff filed an appeal which was heard and decided by the District Judge, Bhandara. The District Judge, Bhandara, vide his judgment dated 9th December 1964, also held that the suit was barred by limitation and, therefore, dismissed the appeal filed by the plaintiff. Against these judgments and decrees the present second appeal has been filed by the original plaintiff.

3. Shri Kolarkar, the learned counsel for the appellant, contended before me that the learned Judges of both the Courts below committed an error in holding that the suit was barred by limitation. According to Shri Kolarkar, cause of action for filing the present suit arose on 10th October 1960 when the revision petition was dismissed by the District Magistrate, Bhandara. It is contended by Shri Kolarkar that the order passed by the District Magistrate, Bhandara, in revision petition is the final order in the case, as contemplated by Article 47 of the Limitation Act. As the plaintiff filed the suit within the period of three years from the said order of the District Magistrate, the suit filed by the plaintiff is within time. For this proposition Shri Kolarkar has relied upon the decision of this Court in *Shri Mandir Mahabir v. Watu* 1970 Mh. LJ Note 16.

4. On the other hand, it is contended by Shri Shankar Anand that the phraseology used in Article 47 of the Limitation Act, viz., "the date of final order in the case" in the context of the proceedings u/s 145 of the Code of Criminal Procedure means the final order passed by the Sub-Divisional Magistrate. According to Shri Shankar Anand, the words "final order" are used in contra distinction with the words "preliminary order" as contemplated by the provisions of section 145. Therefore, according to Shri Shankar Anand, the suit must be filed within three years from the date of final order passed by the Sub-Divisional Magistrate under sub-section 4 of section 145 of the Code of Criminal Procedure. In support of this contention Shri Shankar Anand has relied upon the decision of the Patna High Court in *Pitambar Chaudhury Vs. Achoki Chaudhury and Others*, and *Moksha Gundam v. Pasam* AIR 1946 Mad. 444. Shri Shankar Anand further contended that the decision of this Court in *Shri Mandir v. Watu Balu* is based on earlier decision of the Patna High Court in *Rampal Singh Vs. Mansukh Rai Khemka*, . According to Shri Shankar Anand the decision of the Patna High Court in *Rampal v. Mansukh* is no more good law in view of the subsequent decision of the same High Court in *Pitambar v. Achoki*, and the said decision was not brought to the notice of this Court as other side was not represented. Therefore,

it is contended by Shri Shankar Anand that the decision of this Court in Civil Revision Application No. 292 of 1966 *Shri Mandir Mahabir v. Watu* and other deserves to be reconsidered. It is further contended by Shri Shankar Anand that in the decision in *Shri Mandir Mahabir v. Watu Balu* this Court has only relied upon the decision of Patna High Court in *Rampal v. Mansukh* and has not given any independent reasons. Therefore, according to Shri Shankar Anand, the said decision of this Court which is based on an earlier decision of Patna High Court is no more good law in view of the subsequent decision of the Patna High Court. It is not possible for me to accept this contention of Shri Shankar Anand. Provisions of Article 47 of the Limitation Act, 1908 read as under:

47. By any person bound by an order respecting the possession of Three years The date of the final order in the case.

Immovable property made under the Code of Criminal Procedure, 1898, (V of 1898), or the Mamlatdar's Courts Act, 1906 (Bom. II of 1906), or by any one claiming under such person, to recover the property comprised in such order."

Any decision given by the Sub-Divisional Magistrate in proceedings u/s 145 of the Code of Criminal Procedure is open for challenge before higher Courts under Chapter XXXII of the Code of Criminal Procedure. u/s 438-A of the Code of Criminal Procedure it is open to the District Magistrate to entertain revision petition against an order passed by the Sub-Divisional Magistrate u/s 145 of the Code of Criminal Procedure and if he thinks that the order made in such proceedings should be reversed or altered, he has to report the matter for the orders of the High Court. Therefore, it is quite clear from the provisions of the Code of Criminal Procedure, 1898, that revision petition lies against an order passed by the Sub-Divisional Magistrate u/s 145 of the Code of Criminal Procedure.

5. It is no doubt true that an application also lies to the High Court under subsection (4) of section 435 of the Code of Criminal Procedure. But as observed by this Court in *Lallubhai Dayaram Bhatt Vs. Karimbhai Dattekhani and Another*, , before a party approaches the High Court, he should first apply to the District Magistrate or the Sub-Divisional Magistrate, as the case may be, under subsection (2) of section 435, Criminal Procedure Code. Further in view of the provisions of the Code of Criminal Procedure as amended by the Bombay Acts of 23 of 1951 and 39 of 1955, revision against the order of such Magistrate lies to the District Magistrate. See *Ramchandra Nagoji Kandam Vs. State of Maharashtra*, . Therefore, it is open for the party aggrieved by the order of the Sub-Divisional Magistrate u/s 145 of the Code of Criminal Procedure to file a revision petition before the District Magistrate against the said order. In the present case the plaintiff had filed such a revision petition before the District Magistrate which was disposed by the District Magistrate by his order dated 10th October 1960. The District Magistrate rejected that petition. Therefore, the provisions of Article 47 of the Limitation Act will have to be construed in this context. The phraseology used under Article 47 of the Limitation Act is "the date

of final order in the case." Filing of a revision petition by the person aggrieved before the District Magistrate or subsequently before the High Court is merely a continuation of the case instituted u/s 145 of the Code of Criminal Procedure. It is well settled that the statute of limitation is a statute of repose and is inspired by a desire not to keep indefinitely alive controversies. Dictates of substantial justice demand such a course. It is however, not permissible to strain or stretch the language of the Limitation Act with a view to bar a suitor.

Therefore, the provisions of Limitation Act call for a strict construction in favour of right to proceed if the language on plain reading permits it. In this context, in my opinion, the words "final order" in Article 47 will mean, where there is revision filed by the parties, the "final order as made in the revision application". Such a view has already been taken by this Court in *Shri Mandir Mahabir v. Watu*. In that case this Court has followed the decision of the Patna High Court in *Rampal v. Mansukh*. Similar view seems to have been taken by the Orissa High Court in *Bingi Kurmayya and Others Vs. Wona Bhimayya Subudhi and Others*, . After referring to the decision of Patna High Court in *Rampal v. Mansukh* and the subsequent decision of Patna High Court in *Pitambar v. Achoki*, the Orissa High Court further observed:

As pointed out by the Supreme Court in *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, , the right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side, it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC and section 435 read with section 439, Criminal Procedure Code only circumscribe the limits of that jurisdiction. But the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We are not here concerned with a case where the High Court dismissed a revision application in limine, without entertaining it and we are not called upon to decide whether in such a case limitation for the purpose of Article 47 of the Act would count from the date of the final order passed by the Magistrate or the date on which the revision application is dismissed in limine. We are dealing with a case where the High Court in exercise of its powers of revision had entertained the revision application and after hearing it on merits has dismissed it. Although it is a case of not disturbing the order passed by the Magistrate still it appears to us that the final order passed by the Magistrate has been merged in the order passed by the High Court in revision. When, therefore, the only subsisting order in the case is not the order passed by the Magistrate but the order passed by the High Court in which the Magistrate's order is merged, limitation for the purpose

of Article 47 of the Act should count from the date of the order passed by the High Court. Looked at from another angle, this also appears to be the correct view. An illustration would make it clear. When a Magistrate passes a final order u/s 145 Criminal Procedure Code and one of the parties is aggrieved by that order it is open to him to file a revision application in the High Court. If the High Court entertains the application, the party filing the application is entitled to await the decision of the High Court because if his grievance is redressed by the High Court it would no more be necessary for him to file a suit to recover possession of the property. If, in any particular case, the High Court takes more than three years to dispose of the revision application and ultimately by its order rejects it, the aggrieved party would be left without a remedy, if the view propounded in the Madras case referred to above is accepted as correct. The Legislature while providing a remedy by way of revision to an unsuccessful party in a proceeding u/s 145 of the Code could not have contemplated that in some cases where, if the revision application is dismissed, he would be left without any further remedy. Such a contingency can be avoided if those cases where a revision application is entertained by the High Court the date of its disposal is held to be the starting point of limitation for a suit, under Article 47 of the Act. In other words, where against an order passed in a proceeding u/s 145 of the Code, the High Court entertains a revision petition the final date of the order for the purpose of Article 47 of the Act is the date on which the High Court passes the order in the revision application. In our opinion, the law has been correctly stated in *Rampal Singh Vs. Mansukh Rai Khemka*, .

In my opinion, these observations will also apply when the revision petition is entertained by the District Magistrate and not by the High Court. As observed by this Court in *Dr. Lallubhai Dayaram Bhatt v. Karimbhai*, before a party approaches the High Court he should approach the District Magistrate or Sub-Divisional Magistrate, as the case may be, under sub-section (4) of section 435 of the Code of Criminal Procedure. As per Rule 14 of Chapter XXVI of the Appellate Side Rules of the High Court of Judicature at Bombay, in the absence of special circumstances the High Court will not entertain the application for revision where an application for revision might have been but has not been made to the lower revisional Court. Therefore, it is obligatory on the part of a party aggrieved by the decision of the Sub-Divisional Magistrate in the proceedings u/s 145 of the Code of Criminal Procedure that he must first approach the District Magistrate before he could approach the High Court u/s 435 or 439 of the Code of Criminal Procedure. If, therefore, the provisions of law require and prescribe that it is obligatory on the part of the aggrieved person to approach the District Magistrate by filing a revision petition, then in my opinion, the order passed by the District Magistrate in his revisional jurisdiction u/s 438-A or 435 of the Code of Criminal Procedure will be the starting point for computing the period of limitation for the purposes of Article 47 of the Limitation Act. As observed by the Supreme Court in *State of U.P. v. Mohammad Noob* AIR 1958 SC 86, so far as the provisions of Article 47 of the Limitation Act are concerned, the

order passed by Sub-Divisional Magistrate will merge in the order of the District Magistrate for the limited purpose of the computing the period of limitation. In the said case the Supreme Court was dealing with the orders passed in the departmental enquiries and in that context it was observed by the Supreme Court:

There appear to be two answers to the foregoing contention. As we have already observed an order of dismissal passed on a departmental enquiry by an officer in the department and an order passed by another officer next higher in rank dismissing an appeal therefrom and an order rejecting an application for revision by the head of the department can hardly be equated with any propriety with decrees made in a civil suit under the CPC by the Court of first instance and the decree dismissing the appeal therefrom by an appeal Court and the order dismissing the revision petition by a yet higher Court, as has been sought to be done by the High Court in this case, because the departmental tribunals of the first instance or on appeal or revision are not regular Courts manned by persons trained in law although they may have the trappings of the Courts of law. The danger of so doing is evident from what has happened in the very case now before us. In the next place, while it is true that a decree of a Court of first instance may be said to merge in the decree passed on an appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purposes of computing the period of limitation for execution of the decree as in AIR 1914 65 (Privy Council) , or for computing the period of limitation for an application for final decree in a mortgage suit as in AIR 1926 93 (Privy Council) .

(Italics by me.)

In *Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat*, , while dealing with the order passed by the High Court in its revisional jurisdiction u/s 115 of the Code of Civil Procedure, it was observed by the Supreme Court:

The right of appeal is one of entering a superior Court and invoking its aid and inter position to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider, and larger sense.

6. It is no doubt true that u/s 435 or 438-A of the Code of Criminal Procedure it is not open for the District Magistrate to dispose of the matter finally, but he has to make a reference to the High Court if he finds that the order passed by the

Sub-Divisional Magistrate should be reversed or altered. However, in view of the provisions of the Code of Criminal Procedure as well as the Appellate Side Rules framed by the High Court of Judicature at Bombay, a person is obliged to approach the District Magistrate before he approaches the High Court under its revisional jurisdiction. Therefore, in substance it is one of the steps necessary for invoking the jurisdiction of the High Court's under the provisions of the Code of Criminal Procedure. In this view of the matter, in my opinion, for the purposes of limitation the order passed by the District Magistrate in the revision petition will be the "final order in the case" where no further proceedings are taken by either parties before the High Court thereafter. The order passed by the District Magistrate is the only subsisting order in the case. In this view of the matter, in my opinion, the decision of this Court in *Shri Mandir Mahabir v. Watu Balu* requires no reconsideration. In the said decision of this Court, namely, *Shri Mandir Mahabir v. Watu* also a view was taken by this Court that for the purposes of Article 47 of the Limitation Act, limitation will start from the date of the order passed by the District Magistrate rejecting the revision petition. Therefore, in my opinion, the law laid down in the said case will aptly apply to the present case also.

7. The trial Court as well as the appellate Court had dismissed the suit filed by the plaintiff only on the ground of limitation. In the view which I have taken, therefore, it is obvious that the judgments and decrees passed by both the Courts below are obviously erroneous and are liable to be set aside. In the result, therefore, the present appeal is allowed. The judgments and decrees passed by both the Courts below are set aside and the suit is remanded back to the Second Joint Civil Judge, Junior Division, Bhandara, for deciding it on merits in accordance with law. However, in the circumstances of the case there will be no order as to costs in this appeal.