
(2011) 03 KL CK 0293
In the High Court Of Kerala
Case No : C.R.P. No. 1222 Of 2003

Neela Chinna and others

APPELLANT

Vs

Gangadharan Pillai and others

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 9 Rule 13, 2(2)
Limitation Act, 1963 — Section 5

Citation : (2012) 3 ILR (Ker) 11 : (2012) 3 KLJ 47

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : T.K. Kurikesu and Sri Thomas Kurikesu, for the Appellant; K. Subash Chandra Bose, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Justice K.T. Sankaran

1. The petitioners are the decree-holders in O.S. No. 148 of 1979, on the file of the Munsiff's Court, Kottarakkara. The Execution Petition filed by them as E.P.No.91 of 2000 was dismissed on the ground of limitation, which is under challenge in this Revision. The decree was passed on 20-12-1986. The defendants filed appeal. The appeal was dismissed for default on 6-3-1996. The decree-holders filed an Execution Petition on 31-3-1999, which was dismissed for default on 26-5-2000. Later, the present Execution Petition, namely, E.P.No.91 of 2000 was filed on 21-8-2000. The Execution Petition was dismissed by the order dated 21-10-2002 on the ground that it is barred by limitation. On 18-11-2002, the decree-holders filed a Review Petition as E.A.No.217 of 2002. That Review Petition was dismissed on 4-11-2003. Meanwhile, the order dated 21-10-2002 was challenged in Revision on 30-5-2003.

2. Sri T.K. Kurikesu, learned counsel appearing for the decree-holders submitted that the period of limitation for the Execution Petition is to be computed from 6-3-1996, the date on which the appeal was dismissed for default. He submitted

that under Article 136 of the Limitation Act the period begins to run when the decree becomes enforceable. He stated that even if the dismissal of the appeal was for default, it is nevertheless a decision in the appeal and, therefore, time has to be computed from that date. Sri Kurikesu relied on the decisions in *Kamamma v. Trivandrum Permanent Bank* 1986 KLT 1181 *Shyam Sundar Sarma v. Pannalal Jaiswal* 2005 (1) KLT 198 (S.C.) *Meenakshi Amma v. Rama Kurup* 1973 KLT 489 *Sheodan Singh Vs. Smt. Daryao Kunwar*, and *Palichavla Venkataramana Reddy v. Chittamuru Subbarami Reddy and another* 1969 (1) ALTR 332.

3. Sri K. Subhash Chandra Bose, learned counsel appearing for the respondents/judgment-debtors, contended that since the appeal was dismissed for default, there could be no merger of the decree in the order dismissing the appeal for default. The order dismissing the appeal for default would not be a decree within the meaning of Section 2(2) of the Code of Civil Procedure. If there is no merger, unless the execution of the decree is stayed or otherwise the decree-holder is prevented from executing the decree, time will begin to run from the date of the decree. Admittedly, the Execution Petition was filed beyond the period of twelve years from the date of the decree of the trial court. Sri K. Subhash Chandra Bose relied on the decisions in *Ratansingh v. Vijaysingh* 2001 (1) KLT 327 (S.C.) - (2001) 1 S.C.C. 469 *Chandi Prasad and Others Vs. Jagdish Prasad and Others*, and in *Manohar v. Jaipalsingh* 2008 (1)K.L.T. 832 (S.C.). The counsel also submitted that even the Execution Petition filed by the decree-holders earlier on 31-3-1999 was barred by limitation and that Execution Petition was filed much after the dismissal of the appeal. The learned counsel also pointed out that at the time when the Revision was filed, the order impugned in the Revision was sought to be reviewed on the application of the revision petitioners and that Review Petition was subsequently dismissed on 4-11-2003. It is submitted that the Revision itself is not therefore maintainable.

4. In *Ratansingh v. Vijaysingh* 2001 (1) KLT 327 (S.C.) - (2001) 1 S.C.C. 469 the trial court passed the decree on 14-12-1970 and the appeal filed by the defendant was dismissed on 1-8-1973. The Execution Petition was filed on 24-3-1988, which was beyond the period of twelve years from the date of the appellate court decree. It was contended that the Second Appeal filed by the defendant was dismissed by the High Court on 31-3-1976 as it was time barred and the period of twelve years had to be computed from that date. Negating the contention of the decree-holder, the Supreme Court held:

8. When does a decree become enforceable? Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression "enforceable" has been used to cover such decrees or orders also which become enforceable subsequently.

9. Filing of an appeal would not affect the enforceability of the decree, unless the Appellate Court stays its operation. But if the appeal results in a decree that

would supersede the decree passed by the lower court and it is the Appellate Court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no suspension and hence the lower court decree continues to be enforceable.

10. * * * * *

11. In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court [S.P. Mitra, C.J., Sabyasachi Mukherjee, J.(as he then was) and S.K. Datta, J.] has held in *Mamuda Khateen and Others Vs. Beniyan Bibi and Others*, that "if the application under S.5 of the Limitation Act was rejected the resultant order cannot be a decree and the order rejecting the memorandum of appeal is merely an incidental order". The reasoning of the Full Bench was that when an appeal is barred by limitation the appeal cannot be admitted at all until the application under S. 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law.

12. In such a situation the mere fact that the Second Appeal was dismissed as a corollary to the dismissal of application for condonation of delay has no effect on the decree passed by the First Appellate Court.

5. In *Chandi Prasad and Others Vs. Jagdish Prasad and Others*, the matter was considered by a three Judge Bench on a reference doubting the correctness of the decision in *Ratansingh v. Vijaysingh* 2001 (1) KLT 327 (S.C.) : 2001) 1 S.C.C. 469. In *Chandi Prasad's* case, a final decree for partition was passed on 7-5-1968. The appeal against the decree was dismissed. In the Second Appeal, the case was remanded to the appellate court. The First Appellate Court again dismissed the appeal on 4-1-1974. The Second Appeal therefrom was dismissed by the High Court on 18-4-1985. Execution Petition was filed on 26-3-1997. It was contended that the Execution Petition was barred by limitation. Though the executing court held that it was barred by limitation, that order was reversed by the appellate court and confirmed by the High Court. It was contended before the Supreme Court that a second appeal against an appellate decree being

entertainable only on limited ground, namely, on a substantial question of law, doctrine of merger will have no application and, therefore, the period of limitation would commence from the date of the first appellate decree and not from the date of disposal of the second appeal. The Supreme Court repelled this contention and held:

21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See *U.J.S. Chopra v. State of Bombay*)

22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a SLP is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See *V.M. Salgaocar and Bros. (P) Ltd. v. CIT*].

The Supreme Court also referred to the decision in *Kunhayammed and Others Vs. State of Kerala and Another*, . The Supreme Court in *Chandi Prasad's* case held that the decision in *Ratansingh's* case had no application to the facts of that case.

6. In *Manohar Nale and Others Vs. Jaipalsing Rajput and Others*, the suit was dismissed by the trial court and the First Appellate Court. The Second Appeal filed by the plaintiff was allowed and the suit was decreed. The defendants filed a Review Petition to review the judgment in the Second Appeal. The Review Petition was dismissed. The Civil Appeal filed against that order before the Supreme Court was also dismissed. In the Execution Petition, the judgment-debtor raised a contention that it was barred by limitation. It was contended that the judgment in the Second Appeal merged in the order dismissing the Review Petition and time would begin to run from that date. The Supreme Court rejected this contention and held:

13. It is also incorrect to contend that in a case of this nature, namely, where a

review petition was dismissed, the doctrine of merger will have any application whatsoever.

14. It is one thing to say that the respondent was entitled to file an application for review in terms of S. 114 read with O.47, R. 1 of the Code of Civil Procedure, but it is another thing to say that the decree passed in favour of the respondent merged with the order dismissing the review application. Matter might have been different, if the review application had been allowed either wholly or in part in terms whereof an application for execution of the decree could have been filed only in terms of the modified decree.

7. In *Kamalamma v. Trivandrum Permanent Bank* 1986 KLT 1181 it was held that where a decree of the trial court is taken up in appeal and the appellate court disposes the appeal confirming the decree, the decree to be executed is only the decree of the appellate court and not of the trial court.

8. In *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, the Supreme Court held:

10. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior Court, if subjected to an examination by the Superior Court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior Court loses its identity by its merger with the judgment of the superior Court.

9. The learned counsel for the petitioners relied on the decision of the Supreme Court in *Shyam Sundar Sarma v. Pannalal Jaiswal* 2005 (1) KLT 198 (S.C.) to support his contention that even if the appeal was dismissed for default, computation of the period of limitation for the purpose of Execution Petition would start from the date of dismissal of the appeal for default. On a careful reading of the decision of the Supreme Court in *Shyam Sundar Sarma v. Pannalal Jaiswal* 2005 (1) KLT 198 (S.C.) I am not in a position to agree with the contention put forward by the learned counsel for the petitioners. In *Shyam Sundar Sarma's* case, an ex parte decree was passed in a title suit on 11-10-1996. On 16-11-1996, the first defendant filed an application under Rule 13 of Order IX of the CPC accompanied by an application u/s 5 of the Limitation Act, for setting aside the ex parte decree and to condone the delay in filing the application. On 21-11-1996, the first defendant filed an appeal against the ex parte decree along with an application for condoning the delay in filing the appeal. On 17-9-1998, the trial court allowed the application for condoning the delay in filing the application under Order IX, Rule 13 of the Code of Civil Procedure. Though the plaintiff challenged that order in Revision, it was dismissed. On 21-1-2000, the application for condoning the delay in filing the appeal against the decree was dismissed for default and later on 6-3-2000, the appeal itself was dismissed for default. Later, the application under Order IX, Rule 13 of the CPC came up for hearing. The plaintiff contended that in view of

the Explanation to Order IX, Rule 13 of the Code of Civil Procedure, the application was not maintainable as the first defendant had filed an appeal against the decree. The first defendant contended that since the appeal against the decree was dismissed for default, as a consequence of the application for condoning the delay in filing the appeal having been dismissed for default, the Explanation to Order IX, Rule 13 of the CPC would not apply. In that context, the Supreme Court held that dismissal of an appeal consequent on the refusal to condone the delay is nevertheless a decision in the appeal and, therefore, the application under Order IX, Rule 13 of the CPC would not be maintainable in view of the Explanation thereof. It was also held that a dismissal of the appeal for default cannot be equated with withdrawal of an appeal within the meaning of the Explanation to Rule 13 of Order IX of the Code of Civil Procedure. The decision in Shyam Sundar Sarma's case would not apply in the matter of computation of the period of limitation under Article 136 of the Limitation Act. The Supreme Court in Shyam Sundar Sarma's case, after referring to the decision in *Ratansingh v. Vijaysingh*, (2001) 1 SCC 469 held that the dictum laid down therein was in the context of Article 136 of the Limitation Act. The decisions in *Meenakshi Amma v. Rama Kurup* 1973 KLT 489 *Sheodan Singh Vs. Smt. Daryao Kunwar*, and *Palichavla Venkataramana Reddy v. Chittamuru Subbarami Reddy* and another 1969 (1) Andhra Law Times Reports 332 relied on by the learned counsel for the petitioners, are not applicable to the facts of the present case.

10. The Execution Petition was filed beyond the period of twelve years from the date of the decree. The appeal filed by the defendants was dismissed for default on 6-3-1996, i.e., before the expiry of twelve years from the date of decree of the trial court. Even the first Execution Petition filed by the decree-holders on 31-3-1999 was beyond the period of twelve years from the date of the decree of the trial court (20-12-1986). That Execution Petition was dismissed for default on 26-5-2000. The present Execution Petition was filed on 21-8-2000. It is well-settled that the decree of the trial court will merge in the decree of the appellate court when the appeal is decided on the merits and the period of limitation for execution can be computed from the date of the appellate decree. If the appellate court passes an order of stay of execution of the decree, necessarily Section 15 of the Limitation Act would apply and the period during which the stay was in force should be excluded from the period of limitation provided under Article 136 of the Limitation Act. In the present case, there was no stay of execution. Had the appellate court dismissed the appeal on the merits, time would have begun to run from the date of the appellate decree, for computing the period of limitation for filing the Execution Petition. A decree-holder can legitimately take note of the principle of merger and desist from filing an Execution Petition during the pendency of the appeal from the decree, though there is no bar for him to file an Execution Petition during the pendency of the appeal. If the appeal is disposed of on the merits after the expiry of the period of twelve years from the date of the trial court decree, still an Execution Petition

can be filed within twelve years from the date of the appellate court decree, since there would be merger of the trial court decree in the appellate decree. But the decree-holder would run a risk if a tactful appellant gets his appeal dismissed for default after the expiry of twelve years from the date of the trial court decree. In such cases, since the principle of merger does not apply, the Execution Petition filed beyond the period of twelve years from the date of the trial court decree would be barred by limitation. The belief of the decree-holder that the Appeal filed by the defendant would be decided on the merits and thus he would get further time to file Execution Petition, has no relevance in computing the period of limitation for filing an Execution Petition. The question to be considered is whether the Execution Petition is within time. If it is not within time, the belief entertained by the decree-holder that the appeal would be decided on the merits, in which case he would get a further period of twelve years from the date of the appellate decree is not relevant at all. So long as there was no merger of the trial court decree in the order passed by the appellate court dismissing the appeal for default, the contention raised by the decree-holders that the Execution Petition was filed within time cannot be accepted.

For the aforesaid reasons, I concur with the findings of the executing court that the Execution Petition is barred by limitation. The Civil Revision Petition is, accordingly, dismissed.