

**(1958) 04 PAT CK 0012**

**In the Patna High Court**

**Case No : A.F.O.O. No's. 66 of 1952 and 161 and 162 of 1955**

Pandey Aklu Singh and Others

APPELLANT

Vs

Ram Prit Tewary and Others

RESPONDENT

**Date of Decision : 08-04-1958**

**Acts Referred:**

Limitation Act, 1908 — Article 182

**Citation : AIR 1959 Patna 109 : (1958) 6 BLJR 327**

**Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J**

**Bench : Division Bench**

**Advocate : A.B. Saran and K.N. Chatur, in Appeal No. 62/52 and Jaleshwar Prasad, in Appeal Nos. 161 and 162/55, for the Appellant; Jaleshwar Prasad, (in Appeal No. 62/52) and Raghosaran Lall, (in Appeal Nos. 161 and 162/55), for the Respondent**

## Judgement

R.K. Choudhary, J.—These three miscellaneous appeals arise out of the execution of a decree for mesne profits. After the preliminary decree for mesne profits was passed, an application was made by the decree-holders for ascertainment of the amount of mesne profits, and on 31-5-1947, the court disposed of that application. The order shows that the court gave a direction for the determination of the mesne profits taking the yield at the rate of 10 maunds of paddy per bigha by kuchha weight and that the sale rate was to be the gazette rate. The plaintiffs decree-holders were also directed to file court-fees on the ascertained amount.

On 4-7-1947, they were ordered to file court-fees on the ascertained sum for preparation of the decree. Nothing seems to have been done thereafter and for the first time, on 25-4-1950, an application was filed on behalf of the decree-holders for calculation of the mesne profits at the gazette rate and ultimately the gazette sale rate having been ascertained, calculation of the amount of mesne profits was made on 8-8-1950.

On necessary court-fees having been filed by the decree-holders, a decree was

drawn up and signed on 7-5-1951. Thereafter, the decree-holders made an application for execution of the decree on 24-7-1951, in execution case No. 28 of 1951. Some of the judgment-debtors raised objection to the execution of the decree u/s 47 of the Civil Procedure Code, which gave rise to Miscellaneous Case No. 35 of 1951.

The objection was, however, dismissed by the court below and those judgment-debtors filed Miscellaneous Appeal No. 66 of 1952 in this Court. Further proceeding in the execution case was stayed by this Court. Thereafter another execution petition was filed by the decree-holders on 6-5-1954, in Execution Case No. 24 of 1954. Two sets of objections were filed u/s 47, Civil Procedure Code, by the Judgment-debtors which gave rise to Miscellaneous cases Nos. 27 and 31 of 1954. Both these cases were heard together and the court below held that the execution was barred by time and allowed the objection.

The decree-holders, therefore, preferred the other two appeals, namely, Miscellaneous Appeals 161 and 162 of 1955. All the three appeals, with the consent of the parties, have been heard together and this judgment will govern all of them.

2. The only point that arises for consideration in these appeals is whether the two execution petitions filed in Execution cases Nos. 28 of 1951: and 24 of 1954 were barred by time. The Article of the Limitation Act applicable to the execution petition is Article 182, according to which, so far as these appeals are concerned, the period for the execution of the decree is three years from the date of the decree,

There is no dispute as regards the applicability of this Article, but the only question that has been raised is as to what, in the particular circumstances of the present case, the date of the decree will be. The contention on behalf of the judgment-debtors is that the date of the decree is 31-5-1947, when the order directing the ascertainment of mesne profits was passed and if the period of three years is counted from that date, both the execution petitions are barred by time.

On the other hand, it has been contended on behalf of the decree-holders that by order dated 31-5-1947, a direction was given for calculating the price of the paddy at the gazette rate which was actually calculated and accepted by the court on 8-8-1950 and that should be the date of the decree for the purpose of computing the period of limitation. Accordingly, it is submitted that the application for the first execution having admittedly been made within three years from that date was well within time.

3. "Decree" has been defined in Section 2(2) of the CPC to mean the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It is further provided in the explanation to that section that a decree is preliminary

when further proceedings have to be taken before, the suit can be completely disposed of and it is final when such adjudication completely disposes of the suit. Order 20, Rule 7 Civil Procedure Code, provides that the decree shall bear date the day on which the judgment was pronounced.

4. It is contended on behalf of the decree-holders that in the present case the order that was passed on 31-5-1947, directing the mesne profits to be given at the rate of 10 maunds per bigha by Kuchha weight, the price of which had to be determined according to the gazette rate, did not amount to a final decree and the final decree was really passed on 8-8-1950, when the amount of mesne profits was ascertained on calculation at the gazette rate.

The argument is based on the ground that in order to finalise the decree for mesne profits calculation had to be made at the gazette rate and until that calculation was made there was no finality to the order. I am unable to agree with this argument. The rights between the parties as regards the ascertainment of mesne profits was finally determined by the order dated 31-5-1947. The calculation of the amount at the gazette rate had to be made by the office and it did not require any further adjudication by court. Therefore, the question regarding the ascertainment of mesne profits was completely disposed of by the court by its order dated 31-5-1947. As the decree bears the date of the judgment, the decree sought to be executed, in the present case, must, therefore, be dated 31-5-1947. The applications for execution made beyond three years of that date were clearly barred by limitation.

5. The above view gains support from various authorities. In *Surajdco Narain Singh v. Musahroo Raut* 1 Pat LJ 359: AIR 1916 Pat 235 judgment in a redemption suit was pronounced on 27-7-1909 but the decree was not actually signed until 23-2-1910, because an account had to be taken through a Commissioner. The amount was definitely ascertained on 29-2-1910, when the decree was signed. An application for execution was made on 29-1-1913, which was within 3 years from the date on which the decree was signed but beyond three years from the date on which the judgment was pronounced.

It was held that the application was barred. In reply to the argument that it was necessary in order to the preparing of the decree made upon the judgment to take an account through a Commissioner and ascertain the exact amount for which the property in suit might be redeemed and, therefore, limitation should run from the date on which the amount was ascertained. Their Lordships observed that the Judgment dated 27-7-1909, set forth clearly the exact method of ascertaining the sum to be paid in redemption and the calculation of that sum was a matter purely of office routine and it would have been unnecessary for the District Judge to pass any further orders on the matter at all.

This case is in all fours to the present case. In *Hira Lal Sahu v. Jamuna Prasad Singh* 5 Pat LJ 490: AIR 1920 Pat 111 though the judgment was pronounced on 1-5-1915, the decree was signed on 15-5-1915. The application for execution

was filed on 13-5-1918, and it was held that the application was barred by limitation as it was filed more than three years, after 1-5-1915, on which date the judgment was pronounced.

The above cases and several other cases of other High Courts were considered by a Bench of this Court in Mohammad Sadique Mian Vs. Mahabir Sao, . In that case after a preliminary decree for mesne profits had been passed, a Commissioner was appointed to ascertain the amount. The Commissioner submitted his report which was accepted by the court on 6-1-1936, and a final decree was directed to be prepared on terms thereof.

There was a further direction that the decree shall not be prepared unless deficit court-fees are paid on 10-9-1938, the plaintiff filed an application for assessment of the deficit court fees and for preparation of the final decree. The amount of deficit court-fees was assessed on 26-10-1938, on which date the court passed an order directing the plaintiff to pay the assessed court-fees by 19-11-1938. On 1-12-1938, the plaintiff deposited the deficit court fees and on 3-12-1938, order for drawing up the final decree was passed.

The decree was actually drawn up on 30-1-1939, and signed on 8-2-1939. The application for execution was filed on 17-1-1940. It was held that the execution was barred as having been made more than three years after 6-1-1936, when the court accepted the report of the Commissioner ascertaining the mesne profits. The same view was taken in the case of Hakim Md. Idris and Others Vs. Md. Kabir, .

It was held therein that where the amount of mesne profits is finally determined by the court which further directs that no decree shall be prepared unless the deficit court-fee is paid, the direction only means that the formal drawing up of the decree is postponed until the court-fee is paid. It was further held that the order determining the mesne profits amounts to a final decree and no fresh final decree is necessary to be prepared on payment of the deficit court-fee and that the question of court-fee is a matter of mere calculation with reference to the Court-fees Act and no further adjudication by the court is necessary to determine the amount of court-fee. It was held, therefore, that the time for execution will run from the date of the order determining the amount of mesne profits.

6. On behalf of the decree-holders reliance has been placed on the cases of Kaluram Pirchand v. Gangaram Sakharamshet ILR 38 Bom 331 : AIR 1914 Bom 23 and AIR 1925 271 (Nagpur) . In none of these two cases the question at issue in the present case was under consideration. In the Bombay case there was a suit for accounts and the court after recording certain findings on certain preliminary issues ordered accounts to be taken on the basis of those findings. No preliminary decree was drawn up by the court and none was asked for by the plaintiffs pleader.

The accounts were next taken by a Commissioner and a decree was passed in accordance with his report, dismissing the suit. The plaintiff appealed against the

final decree and urged objections against findings on preliminary issues. It was contended that the appeal was barred as having been made out of time if the time is to be calculated from the date on which the findings were given. It was held that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues because his right to appeal arose only when there was a decree based on those findings. In the Nagpur case the court dismissed a suit as plaintiff was not ready with his witnesses as he had not paid the process fee in time but the court drew up a decree after 17 months of such dismissal and that too after it was directed by the High Court so to do.

It was held that the appeal filed within time computed "from the drawing up of the decree was in time. These cases are cases of appeal for which there is different provision in the Limitation Act. Section 12(3) of the Limitation Act provides that in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the decree, sentence, or order appealed from shall be excluded.

In a Full Bench decision of this Court reported in Gabriel Christian Vs. Chandra Mohan Missir and Another, it was held that in cases where the decree of the trial Court has to follow upon the judgment without the parties being required to do anything in the interval, the appellant is entitled to the exclusion of the time between judgment and the date on which the decree is signed. Section 12(3) of the Limitation Act on its terms is not applicable to an execution case and it has been held so by a Bench decision of this Court in Ram-das v. Gangasagar ILR 24 Pat 421 that the period of limitation for an application for execution of a decree runs from the date of the judgment and not from the date on which the decree is signed. Thus the principle of law involved in the above Bombay and Nagpur cases can have no application to the case of an execution.

7. On consideration of the authorities referred to above my concluded opinion is that both the applications for execution made as referred to above are barred by time as having been made more than three years after 31-5-1947, on which date the court passed an order for mesne profits, as stated above.

8. The result, therefore, is that Miscellaneous Appeal No. 66 of 1952, is allowed and the judgment and order of the court below rejecting the objection raised by the Judgment-debtors to the execution of the decree, is set aside. The objection raised by the judgment-debtors is thus allowed and the execution is held to be barred by time. So far as the other two appeals are concerned, namely, Miscellaneous Appeals Nos. 161 and 162 of 1955, it appears that the order of the Court below holding the execution to be barred by time is correct and therefore, there is no merit in these two appeals which are accordingly dismissed. In the circumstances of the case, however, there will be no order as to costs of this Court.

V. Ramaswami, C.J.

9. I agree.