

(1988) 10 BOM CK 0015

In the Bombay High Court

Case No : Civil Revision Application No. 1237 of 1984

Ramkrishna Bajirao Gotmare

APPELLANT

Vs

Kanhaiyalal Tribhuwanlal Shah

RESPONDENT

Date of Decision : 17-10-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 35, Order 41 Rule 5, 48
Limitation Act, 1963 — Article 136, 182, 183, 15, 28

Citation : AIR 1990 Bom 361

Hon'ble Judges : V.A. Mohta, J

Bench : Single Bench

Advocate : C.W. Moharir, for the Appellant;

Judgement

1. What is the starting point of limitation to file an application under Art. 136 of the Limitation Act, 1963, for execution of a decree affirmed in appeal and when there was no stay, is a point to be determined in this civil revision application. That under the old Limitation Act, 1908, starting point was the date of appellate decree in such a situation, is not disputed before me. Contention is that the new Act has brought about a change in the legal position by which time begins to run from the date of passing of the original decree, since it is enforceable from that very date. Art. 136 is worded as under :

(see table)

2. Basic facts lie within a narrow compass. A money decree for a sum of Rs. 6,0000/- and odd was passed by the trial Court on 30-7-1968. Appellate Court affirmed the said decree on 17-10-1969 and no stay under 0.41, R. 5 of the C.P. Code was even

For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil Court.

Twelve years.

When the decree or order; becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place :

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

applied for by the judgment debtor. Application for execution was filed on 30-4-1981. Judgment debtor contended that starting point of limitation would run from the date of original decree and thus the application was beyond limitation under Art. 136 of the new Act. That objection is overruled on a view that starting point would be the date of appellate decree and not the original decree. Aggrieved thereby the present civil revision application is filed.

3. Section 48 C.P. Code (now deleted) and Arts. 182 and 183 of the old Act covered the subject of limitation to execute various decrees. They read thus:--

Section 48(I). Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from--

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree".

Article 182

For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908.

Three years; or where a certified copy of the decree or order has been registered, six years.

1. The date of the decree or order, or
2. (where there has been an appeal) the date of the final decree or order of the Appellate Court or the withdrawal of the appeal, or
3. (where there has been a review of judgment) the date of the decision passed on the review, or
4. (where the decree has been amended) the date of amendment, or
5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the

proper Court for execution, or to take some step in aid of execution of the decree or order, or

6. (in respect of any amount, recovered by execution of the decree or order, which the decree holder has been directed to refund by a decree passed in a suit for such refund) the date of such last mentioned decree or in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the appeal, or

7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

Explanation I. Where the decree ,pr order has been passed severally in favour of more persons than one, distinguishing portions of the subject matter as payable or deliverable to each, the application mentioned in clause 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of the, or against his or their representatives, shall take effect against them all.

Explanation II - "Proper Court" means the Court whose duty it is to execute the decree or order."

Article 183:

To enforce a judgment,decree or order of any Court established by Royal Charter in the exercise of its ordinary civil jurisdiction, or an order of the Supreme Court.

Twelve years

When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right :

Article 183 dealt with decrees or orders of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of the Supreme Court and provided a period of 12 years for filing the application for their execution. Art. 182 read with S. 48 of the Code dealt with decrees of all other civil courts. S. 48 of the Code provided outer limit of 12 years for filing fresh application and Art. 182 governed the first and successive applications as step-in-aid to be made within a period of three years from various points of time referred to in the said Article. Absence of any one of the requirements rendered the application time barred.

4. Law Commission of India in its III Report 1956 on examining various provisions of the old Act and the abundance of conflict of case law, suggested that there was no justification either to continue the distinction between the types of decrees or orders made in Arts. 182 183, or to allow the subject to be dealt with by two different enactments or to retain the requirement of keeping the application alive every three years. The relevant part of the Report says:

"There exists a provision already in S. 48 of the CPC that a decree ceases to be enforceable after a period of 12 years. In England also the time fixed for enforcing a judgment is 12 years. Either the decree holder succeeds in realising his decree within this period or he fails and there should be no provision enabling the execution of a decree after that period. To this provision an exception will have to be made to the effect that the Court may order the execution of a decree upon an application presented after the expiration of the period of 12 years, where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within the twelve years immediately preceding the date of the application. S. 48 of the CPC may be deleted and its provisions may be incorporated in this Act. Art. 183 should be deleted and the decrees of the High Court must be placed on the same footing as decrees of other courts. There is no justification for making a distinction between decrees or orders passed by the High Court in the exercise of their original civil jurisdiction or orders of the Supreme Court and other decrees"

The Statement of objects and reasons attached to the Bill virtually reproduces the above part of the Report. By S. 28 of the new Act, S. 48 of the Code was deleted and one consolidated Art. 136 governing the subject was introduced. Art. 136 is thus a package prepared out of assorted provisions of Arts. 182 and 183 of the old Act and old S. 48 of the Code. Close examination of the Report, the statement of objects and reasons attached to the Bill, S. 48 of the Code. Arts. 182 and 183 of the old Act and Art. 136 of the new Act do not indicate the letter and/or spirit of S. 48(1) of the Code of Article 183 of the old Act was in any way intended to be tinkered with. The only intention was to do away with separate limitations for different types of decrees, to do away with the requirement of taking step-in-aid every three years for keeping the decree alive and to incorporate the whole law on the subject in one enactment and in one Article. The similarity in the expression "the date of the decree sought to be executed" used in S. 48 of the Code and "when a present right to enforce the judgment, decree or order" used in Art. 183 of the old Limitation Act and "when the decree or order becomes enforceable" used in Art. 136 of the new Act is of great relevance. All that Art. 136 aims at is to provide only one period of limitation with a single terminus a quo which is the date when the decree or order becomes enforceable.

5. Since there are many decided cases on the question under the old Act and they have taken consistent view, it will be but proper to notice a few of them, because, it will have to be presumed that Law Commission as well as the

Parliament were aware of the crystalized legal position then prevailing. I begin with an old Division Bench decision of this Court in the case of Harilal Dalsukhram Saheba v. Mulchand Ashram AIR 1930 Bom 225 wherein it is observed :

"The principle relied on by Mr. Thakor is, that when once an appellate decree is passed, whether it confirms, varies or reverses that of the original Court, it is the only decree which can be executed for it has been substituted for that of the original Court."

In the case of AIR 1932 165 (Privy Council) it is held :

"It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those affected shall not be compelled to pursue the softest thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying which he owes into Court."

Above decisions are based on the doctrine of merger and/or incorporation. After all appeal is continuation of the suit. Though not in the context of a civil court decree but in the context of an order passed under the Income Tax Act in the case of Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , the Supreme Court observed (at p. 871) :

"There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision of law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirm the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."

In the case of Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.,

"It is this principle, viz., that the appellate order is the operative order after the appeal is disposed of, which is in our opinion the basis of the rule that the decree of the lower court merges in the decree of the appellate Court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision whether of reversal or modification or mere confirmation."

If despite consistency in applying the doctrine of merger of appellate decree/order in the original decree/order, any change was intended by the Legislature it would have been made by using the express words. Not only, there is no such indication either in the new Act, the statement of object and reasons attached to

the Bill, or the Report, but words almost similar to those in section 48(1) of the Code or Article 183 of the old Act have been used in Article 136. It is pertinent to notice that Article 136 used the expression "any decree" and not "original decree". After the new Act came into force the Supreme Court in the two cases (i) Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, and (ii) Lakshmi Narayan Guin and Others Vs. Niranjana Modak, , both rendered under the W. B. Premises Tenancy Act, reiterated its view that the trial Court decree merges in the appellate decree and it is that decree alone whether affirming, varying or modifying which rules.

6. Thus the conclusion is inevitable that consistent legal position has been that an appellate decree supersedes the original decree on the basis of doctrine of merger, only that superseded decree is enforceable; and the new Act has not brought about any change in the above crystalized legal position. Such result would ensue even on the effect of O. 41, R. 35 of the Code which deals with the decree in appeal. Even if there is any doubt on the question its benefit must go to the decree-holder for whom obtaining a decree is generally a difficult task and realizing the fruits of the decree a distant dream. In this connection useful reference may be made to the case of Anandilal and Another Vs. Ram Narain and Others, , wherein in the context of section 48 of The Code, it is observed (at p. 1387 of AIR):

"It is also true that in construing statutes of limitation considerations of hardship and anomaly are out of place. Nevertheless, it is, we think permissible to adopt a beneficent construction of a rule of limitation if alternative constructions are possible."

7. It is contended that absence of provision like Article 182(2) in the new Act indicates that extension of time upto the date of the appellate decree was not intended-in the new Act. I do not think that to be a deciding factor. True it is that the original decree is enforceable despite pendency of appeal if there is no stay, but that aspect is beside the point. Crux of the matter is, once it merges into the appellate decree, it ceases to rule. It is also contended that in that view of the matter, section 75 of the new Act would be rendered otiose. Those provisions provide for exclusion of time during which order of stay operates. I do not see how the said section is rendered otiose. Stay referred therein is not confined to the stay granted by the appellate court. Moreover, such provision existed even in the old Act. Sect. 15 operates upon altogether different field and circumstances.

8. My attention was drawn by Shri Moharir, the learned counsel for the judgment debtor to the following observations in the case of Ouseph Vs. Lona, , which no doubt to some extent supports the contention raised by him (para 4 of AIR) :

"Section 48 of the Civil P.C. was found to be no longer necessary when Article 182 of the repealed Act was replaced by Article 136 of the Present Act. That is why section 48 of the Civil P.C. was repealed by Section 28 of the Present Act. The principle of S. 48 C.P.C. is now embodied in Article 136 of the present Act

which provides for a 12 year period of limitation for the execution of a decree. The period begins to run from the date on which the decree became enforceable and that in the present case was the date of the decree itself. Although the decree underwent a change with its amendment on 24-7-1962, until the date of the amendment, the decree in its original form was enforceable as from the date on which it was passed, that is, 28-6-1961. It was that date which is crucial for computing the period of limitation as provided under Article 136. That being the case the execution petition filed on 23-2-1974 is out of time."

and so also to the case of Kali Prasad Bajpayee and Others Vs. Bhagwat Prasad and Another, . In those cases no submissions based on doctrine of merger seem to have been advanced.

9. Though case law on Article 136 does not appear to be unanimous, preponderance of view seems to favour the conclusions reached by me Patna decision Kali Prasad Bajpayee and Others Vs. Bhagwat Prasad and Another, has been overruled in the case of Jokhan Rai Vs. Baikunth Singh, and there seems to be a conflict of opinion on the subject in Kerala High Court, for in the subsequent decision in the case of Nanikutty Amma Kamalamma Vs. The Trivandrum Permanent Bank, , a different note is struck. It appears that the earlier decision was not brought to the notice of the learned Judge in the latter case. The other supporting decisions are (1) Shyama Pada Choudhury Vs. Saha Choudhury and Co. and Others, ; (2) S. Kharak Singh v. Harbhajan Singh (1978) 80 PLR 634; (3) Posani Ramchandraiah v. Dagguoati Sheshamma AIR 1978 AP 142 and (4) Abdul Razzaq Vs. Izzat Ali, .

10. In the ultimate analysis, I hold that the application for execution was not beyond time and there is no merit in this civil revision. I dismiss it and discharge the rule but with no order as to costs. Execution to proceed.

11. Revision dismissed.