

(1979) 09 PAT CK 0015
In the Patna High Court
Case No : M.A. No. 118 of 1970

Ramlal Golcha and Another		APPELLANT
	Vs	
The Union of India and Another		RESPONDENT

Date of Decision : 25-09-1979

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 36
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 10, Order 21 Rule 11(2), Order 41 Rule 5, Order 9 Rule 13, Order 9 Rule 9
Constitution of India, 1950 — Article 136, 182
Limitation Act, 1963 — Section 14, 14(2)

Citation : (1980) PLJR 63

Hon'ble Judges : S. Shamsul Hasan, J; Lalit Mohan Sharma, J

Bench : Division Bench

Advocate : Sidheshwari Prasad, R.K. Verma, N.K. Agrawal and Awadh Bihari Lal Srivastava, for the Appellant; S.C. Ghosh, K.K. Ghosh and Sukumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Lalit Mohan Sharma, J.—This appeal arises out of an application filed by the respondent u/s 144 of the Code of Civil Procedure. A suit was filed by the appellants in 1949 in the court of the Subordinate Judge, Purnea, for a money decree amounting to Rs. 1,24,556/- against the Union of India impleaded both as defendant nos. 1 and 2 (present respondent nos. 1 and 2) and it was transferred to the court of the Additional Subordinate Judge, Purnea, and was decreed on 31st July, 1954. The Union of India filed an appeal in the High Court which was registered as F.A. 487 of 1954 and an application under Order 41 Rule 5 of the CPC for stay of Execution Case no. 53 of 1957 started by the decree holders in the court below was filed. On 5.1.1957 this court passed an order of stay of the execution on the condition that the judgment debtor deposited the entire decretal amount within three months from the order which the decree holders could withdraw on furnishing security to the satisfaction of the executing court.

On 7.2.1958, the judgment debtor-appellant deposited the decretal sum amounting to Rs. 1,77,245-75 and the decree holders took some time in furnishing the required security. Ultimately, they withdrew the amount on 9.9.1958. On 9.7.1960 the First Appeal was allowed and the suit was dismissed with costs throughout. The plaintiffs filed an application for certificate to appeal to the Supreme Court which was numbered as Supreme Court Appeal 115 of 1960. It has been stated at the bar that although leave was refused by the High Court, the Supreme Court granted permission under Article 136 of the Constitution and an appeal was lodged, heard and ultimately dismissed on 24.9.1965. In the meantime, the defendant judgment debtor-respondent filed an application for restitution u/s 144 of the CPC on 27-4-62, which was numbered as M.C. 6 of 1962. On 26-9-1964, this miscellaneous case was dismissed by the Additional Subordinate Judge on the ground that it should have been filed in the permanent court and the Additional court had no jurisdiction to entertain the case. Thereafter on the 14th December, 1964; the judgment debtor filed another application for restitution which was registered as M.C. 47 of 1964 giving rise to the present appeal. The decree-holders appellants challenged the maintainability of this case and pleaded limitation. They also alleged that the impugned claim by the judgment-debtor was inflated and no interest could be granted. By the impugned order, the court below has over-ruled the objections and held that the judgment debtor was entitled to the reliefs. Mr. Prasad, appearing in support of the appeal raised the following points:--

(a) the prayer for restitution as contained in M.C. 47 of 1964 is barred by limitation.

(b) the respondent is not entitled to interest and, in any event, Interest could not be granted for the period commencing on the date of the deposit by it in the execution case the calculation should be made with effect from the date of withdrawal by the decree holder: and

(c) the respondent is not entitled to ask for realisation of the decree of costs granted by the High Court in its application for restitution.

2. The main arguments addressed on behalf of the parties have been in regard to the question of limitation. It has been urged on behalf of the appellants that under the provisions of the old Indian Limitation Act, 1908, which held field till 31-12-1963 and applied to the miscellaneous case, the period of limitation had expired before the new Act came on 1-1-1964 and the present restitution application must be held to be barred by limitation by virtue of clause (a) of Section 31 of the new Act, which is in the following terms:--

"31" Provisions as to barred or pending suits etc. Nothing in this Act shall--

(a) enable any suit, appeal or application to be instituted, preferred or made for which the period of limitation prescribed by the Indian Limitation Act, 1908 expired before the commencement of this Act.

The judgment of the High Court having been delivered on 9-7-1960, it is contended, that, the prayer for restitution should have been made within three years from that date as prescribed by Article 182(1) of the Indian Limitation Act, 1908.

3. There has been divergence of opinion amongst the High Courts on the nature of an application for restitution for the purpose of limitation, but so far as Patna High Court is concerned, it was settled long back as in 1934 in (i) Bhaunath Singh. V. Kedar Nath Singh (A.I.R. 1934 Patna 246 (d) F.B.) that an application for restitution is one in execution of decree within the meaning of Article 182 of the Constitution. This view has been confirmed by the Supreme Court in (2) Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, . I, accordingly, hold that Article 182 of the old Limitation Act applied to a petition for restitution till 31.12.1963.

4. The case of the appellants is that the period of limitation available to the respondent had expired before the commencement of the new limitation Act and consequently the provisions of the new Act cannot come in its aid. It is contended that Article 182 (1) of the old Limitation Act applied to the case as soon as the judgment of the High Court was delivered in 1960. The article (omitting clauses 6 & 7) is in the following terms:--

182. Discription of Period of Time from which the period

The contention is that the second clause of the third column will not apply to this case because the appeal in the Supreme Court was pending and was not disposed of when the old Act was repealed by Section 32 of the new Act. The existence of a final decree or order of the appellate court (or an order of withdrawal of the appeal) is said to be a condition precedent for the application of clause 2. If on this interpretation, this clause is assumed not to apply to the case, it will have to be held that the application till 31.12.1963 was governed by clause 1, and the period of limitation must be held to have expired on the 9th July, 1963. The appellants are right that if the period of limitation expired in 1963, the remedy being barred on the date, the new Limitation Act came into force, could not be revived in view of Section 31 (see. Ram Chandra Sahu Vs. Dharendra Mohan Bhadra and Another,). The question, therefore, is as to whether the second clause of Article 182 applied to the case or the first clause.

5. Mr. Prasad relied upon the decision in (3) Mela Ram and Others Vs. Dharam Chand Amrit Lal, in support of his contention that once the period of limitation started running after the decree of the High Court, it could not be halted subsequently and the affirmation of the decree by an appellate court could not start a fresh period of limitation for enforcing the right of restitution. I am afraid, this case, cannot be of any use to the appellants. The view taken by the decision that an application for restitution was governed by Article 181 of the Limitation Act and not Article 182 was over-ruled by the Supreme Court in Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, and the view of the

Patna High Court as expressed in Pathak Bhaunath Singh and Others Vs. Thakur Kedar Nath Singh and Others, was accepted as correct. The observation by the Punjab High Court having been made in a different context, not approved by the Supreme Court, the decision is not helpful. The decision of this court. In (4) Dharm Nath Prasad Vs. Hari Dusadh, cited on behalf of the appellants is again of no assistance. In that case the application for restitution had admittedly been filed within three years of the date of the decree in question and no plea of limitation was raised and decided. Mr. Prasad also relied upon the decisions in (5) Haris Chandra Chowdhury Vs. Dines Chandra Chowdhury and in (6) Kunwar Bahadur Singh Vs. Sheo Shankar, . In neither of those cases the question with which we are concerned arose for determination. The High Courts were concerned with finding out as to the effect of an application under Order 9 Rule 13 of the CPC for setting aside an ex parte decree, on the question of limitation for executing the decree, and it was held that the period had to be reckoned from the date of the decree. An application under Order 9 Rule 13 of the CPC or for that matter an appeal from the judgment on such application is not an appeal from the decree itself and the Calcutta and Allahabad High Courts refused to apply the second clause of Article 182 on this ground. In the present case, an appeal was filed before the Supreme Court directly from the decree of the High Court and it cannot, therefore, be suggested that Article 182(2) is excluded on the ratio of the aforementioned Calcutta and Allahabad decisions. The next case relied upon by Mr. Prasad was a Division Bench decision of this court in (7) Rameshwar Narain Misra Vs. Raghunandan Purbey and Others, . In that case, the High Court was concerned with interpreting Clause 4 of Article 182 and it was held that it was only an amendment in the real sense of the term which gave a fresh start to limitation under that clause. That aspect is irrelevant for the case before us, for a proper appeal in every sense of the term was admittedly filed here before the Supreme Court and was ultimately dismissed in 1965. Another question was noted in Rameshwar Narain Misra's case, namely, whether the application for amendment on the basis of which Article 182(4) could be relied upon, had to be filed within three years from the date of the decree and the observation made by Fazl Ali, J. (as he then was) so far it goes, does not help the appellants and instead, lends some support to the case of the present respondent.

6. On a perusal of the language of Article 182(2) I am of the view that it applied to the present case and since the appeal before the Supreme Court remained pending till after the new Limitation Act came into force the period available under the old Act did not expire earlier. If the new Act had not come in the field at all, it could not have been suggested that the proceeding for restitution would be barred before September, 1968. The respondent would have been perfectly justified under the old law in not starting a proceeding for restitution till the Supreme Court finally decided the matter. Can it be said that merely as a result of the change in law by introduction of a new Act, the respondent must suffer without any fault of its own. Can the law be so interpreted as to rob a party of

his just remedy, after he is lulled in inactivity by the law applicable for the time being. I think, the answer must be in the negative. Although there is no direct decision in support of this view. I would like to mention here the observations of the Privy Council to (8) AIR 1932 165 (Privy Council) . The Judicial Committee was considering as to the nature of an appeal which could make clause (2) of Article 182 applicable and it was held that any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court is an appeal within the ordinary acceptation of the term and that it is no less an appeal because it is irregular or incompetent. Two further questions were argued on behalf of the judgment debtor in that case, namely, (1) that an appeal, in order to save limitation under Clause 2, should have been one to which the persons affected were parties and (ii) that it must also be one in which the whole decree was imperiled. While dealing with these questions, the Privy Council observed as follows:--

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 so often 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 that he owes into court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain and that there having been in the present case an appeal from the mortgage decree of 24th June, 1920, time only ran against the appellants from 24th August 1922, the date of the appellate court's decree.

(Emphasis is mine)

Similarly Rankin C. J. in (9) Nagendra Nath Banerjee Vs. Ambica Charan Chakrabarty and Others, held that there was no ground in logic or in the language of the Limitation Act for refusing to supply the broad general principle that a decree operates as *res judicata*, but when it is appealed from, the matter becomes again sub judice, and for execution purposes the party, although he is allowed to levy execution notwithstanding an appeal, is not, as a matter of limitation, required to do so until the appeal has been disposed of. The Chief Justice proceeded to say:--

It never is the case of execution purposes that an appeal by itself operates as a stay. There is the right to execute the moment a decree is passed but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. So the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues but is postponed in cases where there is an appeal.

The observations quoted above, appear to be of general application while construing Article 182 (2) and, to my mind help the view I am taking in this case.

7. Mr. Prasad referred to the Full Bench decision of this court in Rameshwar Prasad Sahu Vs. Parmeshwar Prasad Sahu and Others, and the observations made in (10) Bhawanipore Banking Corporation, Ltd. Vs. Gouri Shankar Sharma, for distinguishing the case reported in AIR 1932 S.C. 165. The case of Haris Chandra Chowdhury Vs. Dines Chandra Chowdhury and Kunwar Bahadur Singh Vs. Sheo Shankar, and it was held that the word "appeal" in column 3 of clause 2 of Article 182 did not include an appeal preferred against the order refusing to set aside on ex parte decree. The Full Bench held, and if I may say so respectfully that the observations made by the Privy Council in AIR 1932 S.C. 165 were confined to cases in which the appeal were filed directly from the decrees under execution. It was observed towards the end of paragraph 3 of the judgment of Shearer, J. as follows:--

It is quite clear that no issue arising in the suit again becomes sub judice between the parties when application is made for an ex parte decree to be set aside or when an appeal is preferred against an order rejecting such an application.

I do not see how the force of the observations of the privy council is whittled down in their application to cases where appeals are preferred directly from decree under execution and the present case is one of them. In Bhawanipore Banking Corporation, Ltd. Vs. Gouri Shankar Sharma, a preliminary mortgage decree was passed in 1940 and an application u/s 36 of the Bengal Money Lenders Act was made by the judgment debtor for reopening the preliminary decree. This application was dismissed for default in 1941. The judgment debtor made an application for its restoration under Order 9 Rule 9 of the CPC and the restoration application was dismissed in 1942. The judgment debtor then appealed before the Calcutta High Court and the appeal was dismissed in 1944. In 1945, the decree holder started execution of the decree and wanted to save limitation on account of pendency of the proceeding u/s 36 of the Bihar Money Lenders Act. Referring to the language of Clause 3 of Article 182, the Supreme Court held that the subsequent proceedings taken by the judgment debtor did not involve review of the decree under execution nor could they for the purpose of application of Clause 2 of Article 182 be treated as appeal from the order. Prasad drew our attention to the observation made in Paragraph 4 of the judgment that before a case can be brought under Article 182(3) it must be shown firstly that the court had undertaken to review the relevant decree or order and, secondly, that there has been a decision on the review. The emphasis is on the second condition in regard to a decision on review. It was contended by Mr. S.C. Ghosh appearing for the respondent that this observation was made for the purpose of holding as to when the time would begin to run as would be clear by the concluding words just before the quotation in Paragraph 3 of the judgment. I agree with Mr. Ghosh that the observation cannot be used in the manner in which the learned counsel for the appellants has suggested.

8. For the reasons mentioned above, I over rule the argument addressed on

behalf of the appellants that the application for execution filed by the respondents in the court below is barred by limitation.

9. Mr. Ghosh, appearing for the respondents, has advanced an alternative argument on the question of limitation. He contended that even if it be assumed that Article 182(1), and not Article 182(2) of the Old Act, applied to the case, the present restitution application cannot be held to be barred by limitation as the respondent should be given the benefit of Section 14(2) of the Limitation Act, 1963. The respondent-applicant had bona fide filed the earlier application for restitution which was registered as Misc. case No. 6 of 1962 on 27-4-1962 in the court of the Additional Subordinate Judge who had passed the decree and the proceeding was dismissed on 26th September, 1964, on the ground of having been instituted in a wrong court. If this period is taken into consideration the present application must be held to have been filed in time. The objection to this argument on behalf of the appellants is that the point was neither pleaded nor pressed in the court below ; and good faith and due diligence with which an earlier proceeding (sic) had to be prosecuted u/s 14 (2) have not been established. It has also been urged that the provisions of Section 14 (2) are not applicable to an application for execution.

10. I do not see any warrant for holding that Section 14(2) is not applicable to execution cases. The language of the sub section, in its widest term, refers "any application". In (11) Bhishundeo Narain Missir and Others Vs. Raghunath Prasad Missir, the provision was held to apply to applications for execution.

11. So far as the pleading is concerned, the fact about the tiling of the earlier application has been mentioned in paragraph 17 of the application in the court below and it has been stated that the respondent applicant was under the belief that the then 1st Additional Subordinate Judge, Shri J.P. Singh had come in place of and had taken up the office of Shri C.M. Prasad. In paragraph 18, it is further mentioned that Shri J.P. Singh after hearing the applicant's counsel was pleased to direct the filing of requisites for notices to be served on the opposite party and the applicant diligently and in good faith complied with all the orders of the court. The other necessary facts, giving the result of Misc. Case No. 6 of 1962, are mentioned in paragraphs 19 and 20. The appellant correctly appreciated the pleading of the respondent applicant in this regard, as is evident from his objection petition, paragraphs 26, 27 and 28. The paragraph 28 is in the following terms.

"28. That Section 14 Limitation Act is not applicable to the facts of the same".

I therefore, hold that the respondent cannot be estopped from making this argument in the present appeal before us which is a first appeal.

12. In support of his contention that good faith and due diligence must be inferred in this case in favour of the respondent in filing the earlier case in the court of the Additional Subordinate Judge, Mr. Ghosh placed before us the decision in (12) Baldeo Choubey V. Salyed Abdul Wahab (1965 B.L.J.R. 682--F.B.)

holding that there was no distinction between the court of Subordinate Judge and that of the Additional Subordinate Judge for the purpose of execution of a decree and the court of Additional Subordinate Judge could also entertain an application for execution. The point on merits, having been decided against the respondent in Misc. Case No. 6 of 1962 has become conclusive, as pleaded in paragraph 27 of the appellants' objection petition in the court below, but in view of this decision and the facts of the case before us, it must be held that the respondent-applicant in filing its application before the Additional Subordinate Judge's court and pursuing the same acted bona fide and in good faith. So while computing the period of limitation, the duration for which Miscellaneous Case 6 of 1962 remained pending must be taken into account and if that is done, the present restitution application will be clearly within time.

13. The next point taken on behalf of the appellants relates to payment of interest and can be divided into two sub points. In connection with the first objection, it is contended that the total decretal amount of 175245.25 included a sum of Rs. 35006/- by way of interest for the period 17th June, 1949 to 31st July, 1954 and so no interest should be allowed on this amount. I do not find any merit in this point. The principle that interest should not be allowed on interest has no application whatsoever to the present case. The respondents were made to pay the said amount under the decree which was later reversed and the interest which has been allowed by the court below is on this amount deposited by the respondents in pursuance of the decree and withdrawn by the appellants and utilised for all these years. The fact that this amount was claimed by the appellants by way of interest is wholly irrelevant and I over-rule the argument of the appellants in this regard.

14. The next objection is in regard to the period for which interest has been allowed by the Court. It has been mentioned earlier that in pursuance of an order passed by this court in F.A. 487 of 1954, on an application by the respondents, the decretal amount was deposited on 7-2-1958 but the appellants could not withdraw the amount before 9-9-1958 on account of a condition mentioned in the High Court's order. The court below however has allowed interest from the date of the deposit of the money which does not appear to be correct. Mr. S.C. Ghosh contended that a party is entitled to interest on a sum of money from the very date from which he is made to pay the same as he is deprived of its benefits. I do not think that this proposition in its general terms, as put by the learned counsel, is of universal application. While granting interest, the court has to weigh the equities between the parties and while so doing, it is further necessary to consider as to whether the amount deposited was available to the other side to be withdrawn. If he is not permitted to withdraw the deposit and make use of the amount, due to an obstacle put by the depositor, no interest should be granted. In the present case, the appellants could not withdraw the deposited amount before 9-9-1958 on account of the obstacle put in their way at the instance of the respondents and they are, therefore, not liable to pay any interest before that date. From that date, however, the money being in their

pocket; there is no reason as to why interest should not be granted. This will be consistent with the ratio in (13) Gauridutt Ganesh Lal Vs. Madho Prasad and Others, . I, therefore, hold that the respondent is entitled to interest from 9-9-1958. The learned counsel for the appellants also objected to the grant of the maximum rate of 6 p.c. p.a. Interest permissible in law. Having regard to the high rate of interest; payable in the commercial world, during the period in question, as the rate paid by the Banks, and by Government on Government securities, I do not think any exception can be taken to the rate allowed.

15. Mr. Prasad lastly argued that the prayer on behalf of the respondent in regard to the realisation of the decree for costs allowed by the High Court should have been rejected as the same cannot be covered by the provisions of Section 144 of the Code of Civil Procedure. It is true that the decree for costs passed by the High Court has to be executed in an ordinary manner, but for that reason, there does not appear to be any ground to refuse the remedy in the present case. It has been seen that an application for restitution u/s 144 of the Code of Civil Procedure, Is, in substance, an application for execution and, therefore, a prayer for execution of the costs can be permitted to be combined with a prayer for restitution. In the application filed in the court below, such a prayer has been made towards the end of the relief portion and the details of the costs are mentioned in the schedule of the claim at the bottom of the petition. The learned counsel has strenuously urged that a prayer for execution has to be in a special form mentioned in the CPC and in absence thereof, the court should have refused to execute for costs. Reference was made to the provisions of Order 21 Rule 10 and Rule 11(2) along with certain forms mentioned in the schedule. The objection is based on mere technicalities and does not have any substance. The prayer for execution is already on the record along with the original application and I am of the view that it should not be refused on the sole ground that printed form has not been supplied, although all necessary facts have been given in the application.

16. The appellants no. 2 Smt. Chand Kumari Devi, had executed a hypothecation bond (Ex. 6) in respect to her properties as security for the amount deposited by the respondent and had undertaken that her hypothecated properties would be sold for the satisfaction of any claim in the event of a decision against the decree holder appellant no. 1. There was some argument addressed on her behalf in the court below as to the maintainability of the claim against her in the present restitution application, which was rejected by the court in Paragraph 11 of the judgment. This question has not been further agitated before us. The court has rightly observed that if the amount claimed by the respondent is not deposited within the period indicated, the hypothecation bond would be enforced. In the result, I hold that the respondent is not entitled to interest for the period up till 8th September, 1958 and to this extent the appeal is allowed. Interest from 9th September, 1958 onwards will be however payable. All other points raised on behalf of the appellants are rejected. The appeal, subject to the aforesaid modification fails and is dismissed but without costs.

S. Shamsul Hassan, J.

I agree.