

(1951) 09 OHC CK 0013
In the Orissa High Court
Case No : M.A. No. 39 of 1947

Ratikanta Padhi and Others

APPELLANT

Vs

Ramesh Chandra Mohanty and Others

RESPONDENT

Date of Decision : 25-09-1951

Acts Referred:

Limitation Act, 1908 — Article 182, 182(3)

Citation : AIR 1953 Ori 85

Hon'ble Judges : Ray, C.J.; Jagannadhadas, J

Bench : Division Bench

Advocate : R.K. Das, for the Appellant; L.K. Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal arises in execution of a mortgage decree and raises a question of limitation. The facts are as follows. The decree-holder is the appellant. The preliminary decree was passed on 4-1-39 against a father and his four sons. By the date of the final decree, the father, Chintamani died and one of the sons, Radha Charan also died. The decree-holder apparently was not aware of the latter's death. He obtained the final decree on 20-4-40, against the four sons, including the deceased Radha Charan who had died a few days prior thereto on 1-4-40. Thereafter the decree-holder applied in Execution Case No. 314/40 to execute the decree. Radha Charan's son, Harish Chandra intervened by an application u/s 47, C.P.C. in which he raised the objection that the final decree which was passed against his deceased father was not binding on him. The learned Munsif heard the objection in Misc. Case No. 98/41 and allowed it. He directed the execution to proceed only against the interests of the other three sons of Chintamani and not against the interest of Radha Charan, the father of Harish Chandra. The decree-holder thereupon filed an application for amendment of the final decree for the purpose of including the name of Harish Chandra as one of the judgment-debtors. But later on 26-11-41, he filed an application for review and withdrew the application for amendment. This application for review

was heard by the learned Munsif, who while holding the review to be competent dismissed it on 23-11-42 on the ground that it was barred by limitation, since it was filed after 90 days from the date of appellant's knowledge of Radha Charan's death.

Against that decision of the Munsif, an appeal was taken to the learned District Judge who held that, in substance, the application was one for amendment and that the learned Munsif erred in thinking that the limitation of 90 days from the date of the knowledge of the death of Radha Charan applies to the facts of this case. He was of the opinion that the decree-holder had three years from the date of the preliminary decree for taking the necessary steps since this was really an application for the passing of a revised final decree as against Harish Chandra also. He accordingly allowed the appeal and directed the passing of the fresh final decree showing the applicant Harish Chandra also as a judgment-debtor. As against that appellate decision of the learned District Judge, a revision was taken to the High Court which was numbered as C. R. 192 of 1945. On appeal, the learned Judge of the Circuit Court, differed from the view taken by the learned District Judge and restored the decision of the Munsif thereby rejecting the review application. This was on 20-1-47. Thereafter the present execution petition was filed on 3-2-48 praying for execution of the decree against the interests of the three other brothers in the mortgage-decree. The question is whether this application is beyond title.

2. It is now necessary to state the history of the execution applications between the date of the final decree which was passed on 24-4-40 and the date of the present execution petition which was filed on 3-2-48. In between these dates there were two execution applications, viz., E. C. 314/40 and E. C. 144/46. Execution Case No. 314/40 was filed on the footing of the final decree as originally passed. That execution application appears to have been struck off on 26-10-41 after the decision of the Munsif dated 15-9-41, wherein he held that the interests of Radha Charan could not be sold in execution of the decree. Again, after the learned District Judge passed his order directing the passing of the fresh final decree and after the final decree in pursuance of that order of the District Judge was passed on 7-3-45, the decree-holder applied in Execution Case No. 144/46 for execution on the footing of the fresh final decree so passed. That execution was stayed by an order of the High Court dated 27-7-46 but was ultimately struck off on 19-11-47 after the decision of the High Court.

The contention of the judgment-debtor is that the 2nd . Execution Case No. 144/46 was filed five years after the disposal of the Execution Case No. 314/40 and that therefore it was beyond time and that accordingly the present Execution Case No. 37 of 1948 filed on 3-2-48 is also beyond time. The judgment-creditor contended that since the proceedings taken by him for getting impleaded Harish Chandra, the son of deceased Radha Charan against whom the final decree was wrongly obtained were pending from 26-11-41 upto 20-1-1947, the whole of that period is to be excluded and also that the limitation for execution

commences on 20-1-47 the date of the High Court's order in C. R. 192 of 1945, and that on that view the present execution application is in time.

3. Both the Courts below have accepted the judgment-debtor's contention and rejected the decree-holder's plea. They held that the execution was time-barred and hence the present appeal to this court.

4. It appears to us that both the courts below have taken an unduly narrow view of the position between the parties as it emerges from these various proceedings. The Courts below acted on the view that there was no impediment to the execution of the decree as against the other three judgment-debtors during the pendency of the proceedings taken by way of application for review in order to get the name of Harish Chandra included as a party-judgment-debtor. It does not appear to us that this is a correct view to take. The decree is a joint mortgage-decree against the father and his sons. If in pursuance of the order of the Munsif dated 15-9-41 holding that the execution should proceed only as against the three brothers, he proceeded to execute and if he simultaneously pursued his trials to get Harish Chandra also impleaded and ultimately he succeeded in persuading the Court to implead Harish Chandra also as a judgment-debtor, the continuance of the execution as against these three brothers alone might conceivably be a bar for execution as against Harish Chandra. If he succeeds in getting him impleaded, it is difficult to say that there would be no objection, by way of splitting up of the decree and of the non-maintainability of partial execution against different judgment-debtors.

Whether this objection would be ultimately tenable or not, it appears to us to be quite clear that no decree-holder can be expected to take the risk involved in proceeding with, partial execution and he cannot be said to be wanting in diligence if he waited for clarification of the position as regards the judgment-debtors against whom he may proceed before he can solely continue to proceed against them all. But apart from the merits of this, aspect, which have very much weighed with the Courts below, it appears to me that on the wording of Article 182, Clause 3, Limitation Act, the date of the disposal by the High Court on the application made by the decree-holder to the Munsif furnishes a fresh starting point for limitation. The courts below relying on the decision in -- Sheikh Mohammad Nagir and Others Vs. Sheikh Alauddin Ahmad and Another, and --"Bengali Mal v. Baijnath Prasad", AIR 1942 All 338, have held that since in the present case the review application was finally rejected by the High Court, the date of the High. Court's order cannot furnish a fresh starting point for limitation. It is true that Article 182, Clause 3 of the Limitation Act has been construed as applicable only to cases where a review has been granted and not where it has been rejected. But the later decision in AIR 1942 All 338 which follows the decision, in Sheikh Mohammad Nagir and Others Vs. Sheikh Alauddin Ahmad and Another, clearly shows that what is meant by granting of the review is not that the decree, as originally passed, should be modified, or reversed, but that a rehearing should have been granted. It makes no difference to the

application of this principle that on rehearing the original decree was affirmed without variation.

The question, therefore, that has to be decided in the present case, is whether taking all the proceedings in the present case, and looking at the matter broadly, this is not a case where a rehearing was granted though ultimately the original order was affirmed. Now looking at the proceedings from that point of view what has happened in the present case is this. The final decree was in the first instance passed against four persons of whom one died at the time, the decree-holder not having been aware of the fact of his death. This objection was brought to the notice by the son of the deceased person when the decree was put under execution. On the objection raised by his son, the learned Munsif decided that the execution cannot proceed against him.

Thereupon, the decree-holder applied for review of the final decree by praying that the name of the son of the deceased judgment-debtor should also be incorporated as a party-judgment-debtor. This review application was heard by the learned Munsif, but he refused to modify the decree by granting the prayer for insertion of the name of D-1 on the ground that the application was barred by limitation. That was a question that has been decided on the merits and it may be presumed that there the rehearing was granted but that the application was rejected on the merits. On appeal, which may or may not be competent, the learned District Judge came to a different conclusion. On revision therefrom, the High Court not only held that the app was incompetent, but also went into merits and held that the review was rig rejected by the learned Munsif. Thereof taking all the proceedings before the Co-together, it is quite clear that this was a case in which a review was granted in the sense that a rehearing was granted, but the High Court ultimately agreed with the view of the Munsif on its merits. On that view, "the review which was granted was finally decided on 23-11-47 and hence the limitation under Article 182 Clause 3 starts on that date. Hence the present execution case filed on 3-2-48 was quite within time.

5. The view taken by the courts below must be set aside and the appeal must accordingly be allowed with costs throughout.

Ray, C.J.

6. Apart from my accord with the reasons given by my learned brother, I have a different line of approach, pursuing which, I arrive at the same result.

7. I hold that the application by the de-tree-holder for substitution of legal representatives of Eadha Charan after setting aside the abatement of the suit against them is an application for passing the final decree. In this connection, I rely on a Bench decision of the Patna High Court in the case of -- Barju Biswal Vs. Kunja Behari Mahapatra, , their Lordships Wort and Momammad Noor JJ., held that, where the sole defendant dies after the preliminary decree, but before the application for final decree, and his legal representative is not brought on record in time, an order declaring the suit to have abated and refusing to pass a

final decree is a decree and is appealable as such and reference under Order 46, Rule 1 is not competent. The compelling rule that all persons interested in the equity of redemption shall be impleaded as party defendants "applies to the stage of final decree in a mortgage suit.

8. In this particular case, the executing court had come to a finding that the suit had abated as against Radha Charan and his heirs and therefore there had been no decree passed against them. In fact, the decree-holder was left in the same position in which he should have been, had he applied for a final decree, without impleading all the mortgagors. Therefore, the attempt that was made by the plaintiff-decree-holder to implead the legal representatives of the deceased Radha Charan, one of the mortgagor-judgment-debtors was to get a valid final decree against all. Appeal lay to the learned District Judge as against that order in which the learned Munsif dismissed the petition and it was a competent appeal. As against the said appeal, the defendant preferred a Civil Revision to the High Court which was disposed of by Beevor J. The learned Judge reversed the order of the District Judge and restored that of the Munsif dismissing the plaintiff's application for impleading Radha Charan's legal representative and in fact restored and thus brought into existence a final decree for sale against some of the judgment-debtors of a part of the mortgaged property.

It is beside the point, whether Beevor J, had jurisdiction to dispose of the matter before him as a Civil Revision; even though it is incompetent, still the date that counts for purpose of starting the period of limitation is the date of the order of the High Court. So is the case with the appeal to the District Judge as its competency or otherwise. In the case of "Nagendra Nath v Suresh Chandra". in 59 Ann 283, corresponding to AIR 1932 PC which was followed by a Full Bench decision of the Madras High Court in the case of -- P.P.P. Chidambara Nadar Vs. C.P.A. Rama Nadar (deceased) Pichaimani alias Arunachalam by guardian Thillai Ammal as L.R. of the deceased and Others, , it was observed by their Lordships of the Privy Council that

"any application by a party to an Appellate Court to set aside or revise a decree or order of a court subordinate thereto is an "appeal" within the meaning of the above provision (Article 182, Clause 3 (a)), even though (a) it is irregular or incompetent, or (b) the persons affected by the application to execute were not parties or (c) it did not imperil the whole decree or order."

Then Lordships further observed

"there is no definition of "appeal" in the Code of Civil Procedure, but their Lordships had no doubt 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 acceptance of the term, and it is no less an appeal because it is irregular or incompetent."

9. With these observations, I agree that the appeal should be allowed with costs throughout.