

CASE NO.:
Appeal (civil) 5323 of 2007

PETITIONER:
Manohar S/o Shankar Nale and others

RESPONDENT:
Jaipalsing S/o Shivilalsing Rajput and others

DATE OF JUDGMENT: 20/11/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T
[Arising out of SLP(C) No. 25959 of 2005]
S.B. SINHA, J.

1. Leave granted.

2. Applicability of the provisions of Article 136 as contained in the Schedule appended to the Limitation Act, 1963 is in question in this appeal which arises out of a judgment and order dated 26.7.2005 passed by a learned Single Judge of the Bombay High Court, Nagpur Bench at Nagpur in Writ Petition No. 5927 of 2004 affirming an order dated 26.10.2004 passed by the Civil Judge, Junior Division in Regular Darkhast No. 32 of 2001.

3. Shivilalsing, predecessor-in-interest of the respondents filed a suit in the Court of Civil Judge, Junior Division, Malkapur. The said suit was marked as Regular Civil Suit No. 250/1965. It was dismissed on 24.12.1968. An appeal preferred thereagainst was also dismissed. However, a second appeal filed by the plaintiff-decree holder was allowed upon setting aside the judgment and decree of the Courts\022 below, the operative portion whereof reads as under :

\023For the reasons stated in the accompanying judgment, the court allows the appeal, sets aside the decrees of both the courts below dismissing the suit and instead. The Court orders that the plaintiffs suit for possession of 32 gunthas area, as shown in the copy of the map Exh. 30, from out of Survey No. 59/1 area 3 acres 12 gunthas, shall stand decreed with costs throughout. The appellant-plaintiff is also entitled to an enquiry under the provisions of the Order XX Rule 12(1) C.P.C. for mesne profit in respect of the suit land from the date of the suit till the actual delivery of possession.\024

4. An application for review thereof was filed by the predecessor-in-interest of the appellants herein. The said review petition was dismissed by an Order dated 12.8.1985. Appellants preferred a special leave petition thereagainst before this Court and leave having been granted, the matter was marked as Civil Appeal No. 1836 of 1986.

5. By an Order dated 21.3.1988, this Court passed an order of stay in the following terms :

\023The Application for Stay above mentioned being called on for hearing before this Court on the 21st day of March, 1988 upon hearing Counsel for the parties herein. This Court Doth Order that the order of this Court dated the 8th May, 1986 passed in Civil Miscellaneous Petition No. 10447 of 1986 be and is hereby confirmed and that pending the hearing and final disposal by this Court of the appeal above mentioned, the operation of the Order dated the 1st July, 1985 of the High Court of Judicature at Bombay (Nagpur Bench) Nagpur in Miscellaneous Civil

Application No. 134 of 1984 in Second Appeal No. 158 of 1972 be and is hereby stayed and the Civil Judge, Junior Division, Malkapur, Maharashtra be and is hereby directed to ascertain the amount of mesne profits which shall be deposited by the appellant herein.\024

6. The said appeal, however, came to be dismissed as being incompetent by this Court opining that no appeal lay in terms of Order 47 Rule 7 of the Code of Civil Procedure rejecting a review application.

7. Admittedly, an application for executing the said decree was filed by the decree holder only on 10.12.2001. Appellant, having been noticed in the said execution proceeding, inter alia, raised a contention about maintainability thereof on the premise that the same was barred by limitation. The Executing Court by an Order dated 26.10.2004 rejected the said contention holding :

\023It is only a disputed point as to whether the decree was stayed by Hon\022ble Apex Court. If it was stayed, the Darkhast would be within limitation and if not, it would not be Record of original darkhast is called for copy of writ in respect of stay is on the said record, from Hon\022ble Apex Court stayed the effect and operation of the order passed by Hon\022ble High Court while deciding review petition against the order passed in Second Appeal. It is submitted by Shri Tarkase, learned counsel for the J.D. that the original decree was not stayed. It is submitted by Shri Rawant, learned counsel for the D.H. that the said order had the effect of staying the original decree as it merged into the orders passed by Hon\022ble High Court. I am in agreement with this submission of Shri Rawant. Shri Tarkase, learned counsel for the J.D. placed his reliance on the decision in the case of Ram Ratan Choudhary \026Vs- Upendra Chondru Das, A.I.R. 1923 Col. 288. But, there was to stay is that case (sic) and hence the ratio is not applicable to the facts of the present case. Hence, there is no substance in the submission that the execution is not within limitation. Hence, I hold that the execution is well within limitation as an order of stay to the order of Hon\022ble High Court was operating.\024

8. As noticed hereinbefore, a learned Single Judge of the Bombay High Court, Nagpur Bench, Nagpur by reason of the impugned judgment dated 26.7.2005 dismissed the writ petition preferred by the appellant thereagainst stating;

\023The learned trial court while rejecting the application has found that the judgment and decree dated 02/09/1983 had merged into the order of this Court while rejecting review dated 01/07/1985. He, therefore, submits that the effect of the stay granted by the Apex Court was to stay the execution of the decree and as such the execution of the decree cannot be proceeded till vacation of the stay by the Apex Court. The execution of proceedings have been filed within a period of 12 days from the date on which the Apex Court had vacated the stay.

In that view of the matter, I do not find any perversity or infirmity in the jurisdiction exercised by the learned trial court so as to warrant any interference of this court in the extraordinary jurisdiction under Article 227 of the Constitution of India. Hence the petition is rejected.\024

9. Mr. Satyajit A. Desai, learned counsel appearing on behalf of the appellant in support of the appeal would submit that the learned Courts

below acted illegally and without jurisdiction in passing the impugned judgment insofar as they failed to take into consideration that no order having been passed by this Court staying execution of the proceedings or operation of the judgment and decree, the impugned judgment must be set aside being wholly unsustainable in law.

Mr. Makarand D. Adkar, learned counsel appearing on behalf of the respondents, on the other hand, would submit that a composite decree having been passed by the High Court and furthermore in view of the fact that this Court in its order dated 21.3.1988 clearly directed computation of mesne profit, the execution case was not barred by limitation.

It was further submitted that the remedy of review being a statutory remedy available to an aggrieved party, an Order passed in such proceedings would merge with the main judgment and decree.

10. The decree passed by the High Court in the aforementioned Second Appeal No. 158 of 1972 is in two parts. The Court granted a decree for possession in respect of an area measuring 32 gunthas, as delineated in the map Exh. 30, out of Survey No. 59/1 measuring 3 acres 12 gunthas. Respondent was also found to be entitled to an enquiry in terms of Order 20 Rule 12 of the Code of Civil Procedure in regard to computation of mesne profit from the date of the institution of the suit, till the date of the actual delivery of possession. It is therefore, not correct to contend that the decree was a composite one. The proceeding for computation of mesne profit required to be undertaken in terms of Order 20 Rule 12 of the Code of Civil Procedure was subject to institution of a proceeding but, by reason thereof, the execution of the decree in regard to the possession of 30 gunthas of land was not required to be awaited till the outcome.

11. 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.

It is one thing to say that the respondent was entitled to file an application for review in terms of Section 114 read with Order 47 Rule 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.

It is not the contention of the respondent that any order of stay was passed in the review application. There was, thus, no bar in proceeding with the execution case.

12. Keeping in view the aforementioned factual backdrop, we may notice the law applicable herein.

Article 136 of the Limitation Act reads as under:-

Description of
application
Period of
limitation
Time from which period
begins to run
136
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 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

13. The decree of possession passed in favour of the respondent became enforceable immediately on its passing. An execution petition therefor was required to be filed within a period of 12 years.

In *W.B. Essential Commodities Supply Corpn. v Swadesh Agro Farming & Storage Pvt. Ltd.*, [(1999) 8 SCC 315], this Court opined;

“A decree or order is said to be enforceable when it is executable. For a decree to be executable, it must be in existence. A decree would be deemed to come into existence immediately on the pronouncement of the judgment. But it is a fact of which judicial notice may be taken of that drawing up and signing of the decree takes some time after the pronouncement of the judgment; the Code of Civil Procedure itself enjoins that the decree shall be drawn up expeditiously and in any case within 15 days from the date of the judgment. If the decree were to bear the date when it is actually drawn up and signed then that date will be incompatible with the date of the judgment. This incongruity is taken care of by Order 20 Rule 7 CPC which, inter alia, provides that the decree shall bear the date and the day on which the judgment was pronounced.”

“(2) Rule 6-A enjoins that the last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment. It has fixed the outer time-limit of 15 days from the date of pronouncement of the judgment within which the decree must be drawn up. In the event of the decree not so drawn up Rule 1 of Order 41 CPC without filing a copy of the decree appealed against and for that purpose the last paragraph of the judgment shall be treated as a decree. For the purpose of execution also, provision is made in clause (b) of the said sub-rule which says that so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be a decree. Clause (b) has thus enabled the party interested in executing the decree before it is drawn up to apply for a copy of the last paragraph only, without being required to apply for a copy of the whole of the judgment. It further lays down that the last paragraph of the judgment shall cease to have the effect of the decree for purposes of execution or for any other purposes when the decree has been drawn up.”

(3) \023It follows that the decree became enforceable the moment the judgment is delivered and merely because there will be delay in drawing up of the decree, it cannot be said that the decree is not enforceable till it is prepared. This is so because an enforceable decree in one form or the other is available to a decree-holder from the date of the judgment till the expiry of the period of limitation under Article 136 of the Limitation Act.\024 \024

See also Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and Ors. [(2007) 2 SCC 355]

14. In Raghunath Rai Bareja and Anr. Vs. Punjab National Bank And Others [(2006) 13 SCALE 511], this Court opined; \0239. Under Article 136 to the Schedule of the Limitation Act, 1963 the period for applying for execution of any decree is 12 years from the date when the decree becomes enforceable. Since in the present case the final decree was passed and became enforceable on 15.1.1987, the period of limitation for filing an execution application expired on 15.1.1999\024

15. The order of purported stay passed by this Court in terms of its Order dated 21.3.1988 is also of no assistance to the plaintiff-decree holder. The Special Leave Petition was filed only against the Order dated 1.7.1985 refusing to review its judgment and decree dated 2.9.1983. The stay of operation of the Order dated 1.7.1985 for all intent and purport was meaningless as the review petition already stood dismissed.

16. Further direction of this Court that computation of mesne profit would go on and the same would be deposited by the appellant is of no consequence inasmuch as by reason thereof neither proceeding was stayed nor the operation of the judgment and decree had been stayed. In fact, it was an order passed in favour of the decree holder. The said direction did not come in his way to execute the decree for possession.

17. We, therefore, do not see any reason to hold that the said order could be construed to be one passed in favour of the decree holder-respondent as was contended or otherwise.

Mr. Adkar relies upon the decision of this Court in Rekha Mukherjee v. Ashis Kumar Das and Others [(2005) 3 SCC 427] which has no application in the present case.

18. We, therefore, are of the opinion that the Executing Court as well as the High Court committed a manifest error in opining that the Execution Petition was not barred by limitation. The appeal is allowed. The impugned judgment is set aside with costs. Counsel fee quantified at Rs. 5,000/-.