

Somnathappa Vs. Motilal and Others

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Court : Mumbai Aurangabad

Decided On : Mar-08-2013

Judge : S.S. Shinde

Appeal No. : Writ Petition No.1360 of 2012

Appellant : Somnathappa

Respondent : Motilal and Others

Judgement :

Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. This writ petition takes exception to the order dated 15th December, 2010 (Annexure-F) passed by the Joint Civil Judge, Junior Division, Parali Vaijinath, below Exhibit115 in Regular Darkhast No. 55 of 2004 and order dated 15th December, 2010 (AnnexureH) passed by the Joint Civil Judge, Junior Division, Parali Vaijinath, below Exhibit1 in Regular Darkhast No. 44 of 2004 thereby dismissing the Execution Petition on the point of limitation. It is further prayed that, Regular Darkhast No. 55 of 2004 may be restored to its original position. .

The petitioner herein, is the plaintiff in Regular Civil Suit No. 271 of 1976.

3. It is the case of the plaintiff herein, that, on 15th December, 1973 father of petitioner namely Nagnathappa s/o Tatyappa Halge had allotted property worth Rs. 2,00,000/to his son Prabhuappa Halge out of his self acquired property but the

aforesaid Nagnathappa had enjoyed the possession over the suit plot. It is further case of the petitioner that, on 25th December, 1973 Prabhuappa Halge and one Kamalbai w/o Govindlal Goud had taken illegal possession of the above said plot. It is further case of the petitioner that, on 17th September, 1976 the father of the petitioner namely Nagnathappa had filed Regular Civil Suit NO. 271 of 1976 in the Civil Court at Ambejogai against Prabhuappa Halge and Kamalbai w/o Govindlal Goud for recovery of possession of suit plot. In the above said suit, Prabhuappa Halge had raised a defence against his father Nagnathappa that, in view of compromise in Regular Civil Suit No. 218 of 1965, the suit was not maintainable and the principles of 'estoppel' and 'resjudicata' are applicable.

It is further case of the petitioner that, on 9th April, 1984 after considering oral and documentary evidence on record, the learned 2nd Joint Civil Judge, Junior Division, Ambejogai vide its judgment and order decreed the aforesaid suit with costs directing that, the present petitioner (plaintiff's L.R.1/4 PW1) be put in possession of suit plot by dispossessing Prabhuappa and Kamalbai Goud. It is further case of the petitioner that, on 20th June, 1984 against the aforesaid judgment and decree, only Kamalbai w/o Govindlal Goud had filed Regular Civil Appeal in the District Court, Beed alongwith Civil Misc. Application No. 137 of 1984 for condonation of delay of 42 days in filing the said appeal. On 6th June, 1988 the learned Additional District Judge, Beed vide its order below Exhibit1 in the aforesaid Civil Misc. Application No. 137 of 1984 condoned the delay in filing the appeal on payment of cost. As such, Regular Civil Appeal came to be registered bearing No.181 of 1988 and subsequently came to be transferred to the Court of Additional District Judge at Ambejogai.

4. It is further case of the petitioner that, on 23rd January, 2002 after hearing both the sides, the learned 2nd Additional District Judge, Ambejogai vide its judgment and order dismissed the said appeal by confirming the impugned judgment and decree therein, subject to payment of deficit court fees by the L.Rs. of the deceased plaintiff/respondent therein. It is further case of the petitioner that, being aggrieved and dissatisfied with the judgment and decree passed by the lower appellate Court, the present respondents/L.Rs. of deceased Kamalbai Goud filed Second Appeal No. 1446 of 2004 before this Court. On 20th December, 2004 the

petitioner/decreed holder filed application for execution of decree bearing Regular Darkhast No. 55 of 2004 in the Civil Court at Parali Vaijinath. It is further case of the petitioner that, on 16th July, 2005 in view of the aforesaid directions, the petitioner/decreed holder deposited deficit court fees of Rs.332/before the lower Court vide Application (Exhibit25) in Regular Darkhast No. 55 of 2004.

5. It is further case of the petitioner that, on 16th August, 2005 after hearing both the sides, the High Court summarily dismissed the second appeal. On 22nd August, 2005 Civil Application (Review Petition) No. 10028 of 2005 came to be filed by the respondents in the abovesaid second appeal alongwith separate Civil Application No. 2593 of 2009 for bringing on record certain documents and Civil Application No. 10554 of 2005 for stay. On 6th March, 2009 after hearing both the sides, High Court was pleased to dismiss the civil application for review alongwith other two civil applications. It is further case of the petitioner that, on 18th December, 2009 the petitioner herein, filed Misc. Civil Application No. 65 of 2009 in Regular Civil Appeal No. 181 of 1988 for directions to the Court office to take note of the deposit of deficit court fees made by the petitioner in the Court of the Civil Judge, Junior Division, Parali Vaijinath. .

It is further case of the petitioner that, on 21st December, 2009 the learned District Judge², Ambejogai vide its order below Exhibit1 in Misc. Civil Application No. 65 of 2009 directed the Record Keeper of Ambejogai District Court to take note of payment of deficit court fees in the record of proceedings of Regular Civil Appeal No. 181 of 1988.

6. It is further case of the petitioner that, on 18th October, 2010 the respondent No.2 Kailash filed application (Exhibit115) in Regular Darkhast NO. 55 of 2004 for rejecting the Execution Petition on the point of limitation. The petitioner herein, filed his say to the said application. On 15th December, 2010 said application came to be rejected by holding that, the decreed holder has not filed execution petition within limitation and that doctrine of merger would not be applicable in the present case. On 15th December, 2010 in view of the aforesaid order, the Executing Court vide its impugned order below Exhibit1 in Regular Darkhast No. 55 of 2004, dismissed the Execution Petition by observing that, the Execution

Petition would not survive in view of the order below Exhibit 115, as the Execution Petition is filed beyond the period of limitation of 12 years. Hence, this writ petition.

7. The learned Counsel appearing for the petitioner invited my attention to the pleadings in the petition, grounds taken therein, annexures thereto and submitted that, Regular Civil Appeal No. 181 of 1988 was filed by the respondents and same was pending and finally it was decided on 23rd January, 2002. The petitioner herein, filed Execution Proceedings in the year 2004. The limitation for filing the Execution Petition is 12 years in view of the provisions of Article 136 of the Limitation Act. It is submitted that, the decree passed by the trial Court is merged in the decree of the District Court. It is submitted that, whether there was stay order during pendency of the appeal or not, is not relevant to consider the merger theory.

8. The learned Counsel appearing for the petitioner invited my attention to the Larger Bench judgment of the Supreme Court in the case of Chandi Prasad vs. Jagdish Prasad reported in 2004(7) Supreme 121, and submitted that, the Supreme Court has taken a view that, when the appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court. The merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial Court. Therefore, according to the learned Counsel for the petitioner, in the present case the first appeal is decided by the lower appellate Court in the year 2002. Therefore, at the most, the limitation to file Execution Petition will start from the year 2002.

9. On the other hand, the learned Counsel appearing for respondent No. 2 submitted that, during pendency of the Regular Civil Appeal No. 181 of 1988, there was no any stay granted by the lower appellate Court, therefore, the decree was enforceable and limitation would start from the date of passing of the decree by the trial Court. In support of his contention that, if there is no stay granted by the lower appellate Court, the law clearly postulates that, the decree once passed becomes enforceable unless it is stayed by the competent Court. The learned Counsel appearing for the respondent No. 2 pressed into service the judgment of this Court in the case of Sopan Rambhau Musale and another vs. Baban

Bhagwanta Khade reported in 2006(5) Bom. CR 448. Therefore, relying upon the said judgment, contents of the application which was filed by the respondents raising objection that, the execution proceedings are not within limitation, the Counsel for the respondent No. 2 would submit that, this writ petition may be dismissed.

10. I have heard the Counsel appearing for the parties. With the able assistance of the Counsel appearing for the parties, I have carefully perused the entire material placed on record. In view of provisions of Article 136 of the Limitation Act, the execution proceeds are required to be filed within 12 years from the date of passing of such decree.

11. The larger Bench of the Supreme Court in the case of ChandiPrasad(supra), has considered the following question.

What would be the date from which a decree becomes enforceable for execution thereof within the meaning of Article 136 of the Limitation Act, 1963? .

The Supreme Court has interpreted Article 136 of the Limitation Act, in the case of ChandiPrasad (supra) and held in paragraph10 that, where a statutory appeal is provided for, subject, of course to the restrictions which may be imposed, it is continuation of suit. It is further observed in paragraph10 that, it is also not in dispute that when a higher forum entertains an appeal and passes an order on merit, the doctrine of merger applies. The relevant discussion on Article 136 of the Limitation Act is in paragraph Nos. 18 to 24 of the judgment in the case of ChandiPrasad(supra). Said paragraphs read thus:

18. The reasons for bringing on the statute book, the present Article 136 may be noticed. By reason of the said amendment, the filing of the execution petition has been simplified and the difficulties faced for computation which used to arise for grant of stay or not has become immaterial. In terms of Article 136 of the Act, thus, a decree can be executed when it becomes enforceable.

19. Article 136 substantially reproduces the provisions of Section 48(1) of the Code of Civil Procedure which by reason of the Act stands repealed. In that view

of the matter, the Parliament thought it fit to provide for one period of limitation for an application for execution in stead and place governing each of the several execution applications which the decree holder can make within a period of 12 years.

20. It is not disputed that all decrees; be it original or the appellate, are enforceable. Once a decree is sought to be enforced for the purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment or money or delivery of any property at a certain date would be considered to be the starting period of limitation.

21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See U.J.S. Chopra v. State of Bombay, AIR 195 SC 5633).

22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

MERGER:

23. The Doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulate that there cannot be more than one operative decree governing the same subject matter at a given point of time.

(Underlines supplied).

24. It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial Court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial Court. When a special leave

petition is dismissed summarily doctrine of merger does not apply but when an appeal is dismissed, it does. (See V.M. Salgaoncar and Bros. Pvt. Ltd. v. Commissioner of Incometax. AIR 2000 SC 1623). (Underlines added).

12. Therefore, upon reading above reproduced paragraphs, it is abundantly clear that, decree of the trial Court merges with the decree of the appellate Court. Merger of the decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial Court.

In the facts of the present case, the decree is passed by the trial Court on 20th June, 1984. It is not in dispute that, original respondent Kamlabai Goud filed Regular Civil Appeal No. 181/1988 in the District Court, Beed alongwith Misc. Civil Application No. 137 of 1984 for condonation of delay. Said application came to be decided on 6th June, 1988. R.C.A. No. 181 of 1988 was contested by the parties. The necessary points were framed by the District Court and thereafter, after full hearing the said appeal is finally decided on 23rd January, 2002. Though the appeal is dismissed, the decree passed by the trial Court has been merged in the decree of the lower appellate Court. The lower appellate Court has directed the petitioner herein, to pay deficit court fees. Therefore, the decree of the lower appellate Court is confirmed subject to payment of deficit court fees by the petitioner herein.

13. The petitioner herein, filed application for execution of the decree bearing Regular Darkhast No. 5 of 2004 in the Civil Court, Parali Vaijinath on 20th December, 2004. Therefore, on dismissal of the first appeal i.e. 23rd January, 2002, the said application for execution is filed within limitation. Therefore, in my opinion, the court below was not correct in holding that, the execution application is not filed within limitation. In view of the judgment of the Supreme Court in the case of ChandiPrasad (supra), in view of the merger of the decree of the trial Court in the decree of the lower appellate Court, the limitation would start running from 23rd January, 2002 and upon depositing deficit court fees as directed by the lower appellate Court. As observed by the Supreme Court in ChandiPrasad (supra), it does not matter whether the decree is modified or merged. In the

present case, the first appeal is fully heard. Parties were given full opportunity of hearing. Points were framed for determination and thereafter, the first appeal is finally decided. The first appeal is continuation of the suit. The lower appellate Court has not only confirmed the decree passed by the trial Court, but in addition, the lower appellate Court directed the petitioner to pay deficit court fees.

14. Therefore, for the reasons aforesaid, the impugned orders below Exhibit-115 and below Exhibit-1 in Regular Darkhast No. 55 of 2004 passed by the Joint Civil Judge, Junior Division, Parali Vaijinath on 15th December, 2010 are quashed and set aside. Regular Darkhast No. 55 of 2004 is restored to its original file.

15. The writ petition is allowed to the above extent. Rule made absolute on above terms. The writ petition is disposed of.

At this stage, the learned Counsel appearing for respondent No. 2 prays that, the effect, implementation and operation of the judgment and order pronounced today may be stayed for a period of four weeks so as to enable him to take appropriate remedy. The learned Counsel appearing for the petitioner vehemently opposed this prayer. However, in the interest of justice, the effect, implementation and operation of the judgment and order pronounced today shall stand stayed for four weeks from today. On expiry of four weeks period from today, the stay granted by this Court will stand automatically vacated. During the period of aforesaid 4 weeks the respondents shall not create any third party rights in the suit property.

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