

Suba Rai Vs. Bindeshwar Rai and ors.

Suba Rai Vs. Bindeshwar Rai and ors.

SooperKanoon Citation : sooperkanoon.com/127882

Court : Patna

Decided On : Oct-03-2007

Judge : S.N. Hussain, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 136; Code of Civil Procedure (CPC) - Sections 47

Appeal No. : Civil Revision No. 884 of 2006

Appellant : Suba Rai

Respondent : Bindeshwar Rai and ors.

Disposition : Petition dismissed

Judgement :

S.N. Hussain, J.

1. This civil revision has been filed by the defendant-judgment debtor-petitioner against order dated 25.03.2006 by which the learned Civil Judge I (S.D.), Vaishali at Hajipur disposed of Miscellaneous Case No. 11 of 2001 filed by the petitioner under Section 47 of the Code of Civil Procedure (hereinafter referred to as 'the Code' for the sake of brevity) and rejected his claim for dismissing the execution petition bearing Execution Case No. 05 of 2000 filed by the plaintiff-decree holder-opposite parties as not maintainable.

2. Partition Suit No. 35 of 1952 (12/1964) was filed by opposite party 1st set for partition of the suit properties, which was decreed on 27.01.1964 and a preliminary decree of partition was prepared, which was challenged by the defendant-petitioner in First Appeal No. 445 of 1964, which was dismissed by this Court on 11.08.1970. Thereafter, final decree was also prepared by the learned Additional Subordinate Judge, 1st Court, Muzaffarpur, on 14.12.1975, which was challenged by the defendant-petitioner in First Appeal No. 160 of 1977 but the same was dismissed by this Court, which order/judgment was upheld by the Division Bench of this Court in L.P.A. and also by the Hon'ble Supreme Court in S.L.P.

3. Thereafter, the plaintiff-opposite parties filed Execution FCASE No. 05 of 2000 for execution of the said decree, in which the defendant-petitioner filed Miscellaneous Case No. 11 of 2001 under the provision of Section 47 of the Code challenging the executability of the decree in question on two grounds, namely, that there was conflict between the preliminary decree and the final decree and that there were inherent anomalies in the final decree due to which it was not capable of being executed. After considering the matter in detail the learned executing court dismissed the said miscellaneous petition by order dated 23.07.2004.

4. Against the said order of the learned executing court, the defendant-petitioner filed Civil Revision No. 1893 of 2004, which was heard on 04.08.2005 (Annexure 2) and this Court arrived at the following findings:

(i) The Commissioner's report and the final decree cannot be challenged at this stage after the defendant having lost up to the highest court.

(ii) It is the duty of the executing court to look into the execution petition as to whether it is in accordance with the final decree.

(iii) If the execution petition is in accordance with the final decree, then the miscellaneous case under Section 47 of the Code has to be rejected on merits and if it is not in accordance with the final decree then the said miscellaneous case has to be allowed.

(iv) The claim of the opposite parties is that after amendment of the execution petition it is exactly similar to the final decree.

(v) In the said circumstances, this matter had to be considered by the executing court but the impugned order was passed without considering the same.

(vi) The impugned order is set aside and the matter is remitted to the executing court to decide the matter afresh in accordance with the observations made above and also in accordance with the provisions of law.

(vii) The Civil Revision is allowed.

5. Thereafter, the executing court again heard the matter and by the impugned order dated 25.03.2006 disposed of the aforesaid miscellaneous case holding that the application for execution of the final decree is in accordance with the final decree prepared in the partition suit and earlier there were some defect in the description of land, but it has been removed and now on perusal of the final decree, it transpired that the application for execution was in accordance with the final decree prepared in the partition suit. The said order of the executing court has been challenged by the defendant-judgment debtor-petitioner in this civil revision on two grounds, namely, (i) that the final decree was defective and it was not executable and (ii) that the execution case filed in the year 2000 for execution of the final decree of 1976 was barred by the provision of Article 136 of the Limitation Act.

6. The first ground taken by the petitioner's learned Counsel is that the Commissioner's report, on the basis of which final decree was prepared, was not according to the description of the disputed lands as mentioned in the plaint and that some lands allotted to the parties were not mentioned in the execution case as per the final decree. It appears that by the said ground, the defendant-petitioner is trying to raise two objections; the first objection is that the final decree itself is illegal as it is against the preliminary decree and the second objection is that the execution petition does not contain the correct position of allotment of land as per the final decree.

(a) So far the first objection is concerned, it is with respect to the maintainability and validity of the final decree itself. The said final decree having been affirmed up to the Hon'ble Apex Court, there was neither any occasion nor any authority for the executing court to differ with the same. Furthermore, this issue had been raised by the defendant-petitioner in the earlier civil revision and had already been decided by his Court vide order dated 04.08.2005, which was never challenged and had attained finality.

(b) So far the second objection is concerned, the matter was remitted by this Court to the executing court for ascertaining the said position and after verification the executing court has specifically found that the execution petition is completely in accordance with the final decree prepared in the partition suit. The petitioner has failed to adduce any material whatsoever to show that the said finding of the executing court was erroneous and incorrect.

In the said circumstances, the first ground, taken by the petitioner that the final decree was not executable and the execution petition was defective, is absolutely baseless having no merit at all.

7. The second ground taken by the petitioner is with regard to limitation which was never raised by the defendant-petitioner earlier at any stage and is being raised for the first time in this civil revision. Learned Counsel for the petitioner averred that according to Article 136 of the Limitation Act, the period of limitation for filing an application for execution of any decree is 12 years from the date when the decree/order becomes enforceable. He submits that final decree became enforceable on the date of its preparation i.e. on 14.12.1976, whereas, the execution case was filed much later in the year 2000 beyond the period of 12 years as prescribed in law. He relies upon several decisions of the Hon'ble Apex Court, namely, (i) A.I.R. 1982 S.C. 1337 Rani Choudhary v. Suraj Jit Choudhary, (ii) 2005 (1) P.L.J.R. (S.C.) 346 Chandi Prasad v. Jagdish Prasad, (iii) 2006 (3) P.L.J.R. (S.C.) 193 Ram Bachan Rai v. Ram Udhar Rai, (iv) A.I.R. 2001 S.C. 279 Ratan Singh v. Vijay Singh and (v) : [1962]2SCR747 Hira Lal Patni v. Sri Kali Nath.

8. So far the decisions of the Hon'ble Apex Court in the case of Rani Choudhary (supra) as well as in the case of Chandi Prasad (supra) are concerned, it was only held that the appeal being dismissed for default, the appellate decree will not merge in the decree of the trial court and that the main question is as to when the rights of the parties were conclusively determined. So far decision of the Hon'ble Apex Court in the case of Ram Bachan Rai (supra) is concerned, it is only held that the date of dismissal of the civil revision cannot be reckoned for the calculation of period of limitation. So far the decision of the Hon'ble Apex Court in the case of Ratan Singh (supra) is concerned, it is held that the period of limitation starts running from the date when the decree becomes enforceable. So far the decision of the Hon'ble Apex Court in the case of Hira Lal Patni (supra) is concerned, it is with respect to the validity of the decree due to absence of territorial jurisdiction, which did not go to the root of the jurisdiction and it cannot be challenged on that ground in execution proceedings. Hence these decisions relied upon by the learned Counsel for the defendant-petitioner are either with respect to the merger of the decree of the trial court in the decree of the appellate court or with respect to the dismissal of civil revision or with respect to the enforceability and validity of a decree in the absence of territorial jurisdiction.

9. It is not in dispute that the final decree was prepared by the learned trial court on 04.12.1976 and the execution case was filed in the year 2000 much after 12 years. It is also not in dispute that the first appeal bearing F.A. No. 160 of 1977 filed by the defendant-petitioner against the said final decree was dismissed on 03.01.1990. Though the said first appeal was dismissed for default, but the said order was affirmed by a Division Bench of this Court on 24.09.2001 passed in L.P.A. No. 1057 of 2001. It was also affirmed by the Hon'ble Apex Court in an S.L.P. filed by the petitioner as admitted by the petitioner in paragraph 5 of his civil revision petition.

10. In the instant matter, the relevant dates are the date of preparation of the final decree in Title Suit No. 35 of 1962 i.e. 04.12.1976 and the date of dismissal of first appeal bearing F.A. No. 160 of 1977 i.e. 03.01.1990 as well as the date of filing of Execution Case No. 5 of 2000, which had, admittedly, been filed in the year 2000. Article 136 of the [Limitation Act, 1963](#) specifically provides that the time from

which the period of limitation begins to run is when the decree or order becomes enforceable. Here the decree in question is a final decree prepared by the trial court, which was challenged in a first appeal and it is a settled law that the first appeals are continuation of the title suit itself. In a case where the decree of the lower courts is challenged in the first appeal, which results into a decree passed in a first appeal then the decree of the court below merges with the decree of the appeal, which becomes enforceable and the period of limitation under Article 136 of the Limitation Act is to be counted from the date of the judgment and decree in the first appeal. Even when the first appeal is dismissed on any preliminary matter or is dismissed for default, it would naturally amount to confirmation of the judgment and decree of the learned trial court, which would attain finality only thereafter and hence the final disposal of the matter would be when the first appeal, which is continuation of the suit, is disposed of in what sever manner it may be and the decree of the trial court could be legally treated as final and enforceable only thereafter. It would, thus, be absolutely immaterial that no order of stay was passed in the appeal staying execution of the decree and that the decree of the trial court could have been executed by the decree holder immediately after the said decree.

11. This Court in the case of *Uma Shankar Sharma v. The State of Bihar and Ors.* reported in 2005 (1) P.L.J.R. 541, has held as follows:

9. The view of Sir Dinshah Mulla, which was agreed to by Lord Blanesburgh, Lord Tomlin, Lord Russel and Sir George Lownders while sitting in Privy Council AIR 1932, P.C. 165 is very clear in this regard that there was no definition of appeal in the Code of Civil Procedure but there is no doubt that any application by a party to an appellate court asking it to set aside or revise a decision of the subordinate court is an appeal within the ordinary acceptance of the term and that it is no less an appeal because it is irregular or incompetent.

10. Furthermore, so long as there is any question subjudice between the parties, those affected shall not be compelled to persue the so often thorny path of execution which, if the final result is against them, may lead to any disadvantage. Nor in such case as this is the judgment-debtor prejudiced as he has indeed

obtained a boon of delay which is so dear to debtors and if the judgment-debtor is virtuously inclined, there is nothing to prevent his paying what he owes into court, specially when in this case the judgment-debtor is a welfare State.

12. In the instant matter, the defendant-petitioner (or his father) after losing in the trial court had himself filed the aforesaid first appeal and for reasons best known to him he allowed the first appeal to be dismissed for non-compliance of the court's order and hence he kept the matter sub-judice and hanging in uncertainty for his own benefit, which must have been to the chagrin of the plaintiff-decree holder-opposite parties. Hence, it does not lie in the mouth of the defendant-judgment-debtor-petitioner now to turn around and say that the dismissal of the first appeal should not be taken into account.

13. In the said circumstances. I hereby hold that the decree of the trial court became enforceable after the first appeal, which was filed against it and which had kept the matter sub-judice, was dismissed on 03.01.1990 and that from that date the period of limitation of 12 years as prescribed in Article 136 of the Limitation Act shall begin to run. Hence the execution case filed in the year 2000 was well within the period of limitation. Apart from the aforesaid facts, this point of limitation was never raised by the defendant-judgment-debtor-petitioner at any earlier stage and not even before the learned court below when the impugned order was passed and in the civil revision petition also no such point has been taken by the petitioner and his learned Counsel raised it only at the time of final hearing of the civil revision clearly as a last ditch effort to keep the litigation of partition of 1962 pending even after 45 years.

14. In the aforesaid facts and circumstances. I do not see any illegality in the impugned order of the learned court below nor do I find any merit in this civil revision, which is, accordingly, dismissed.