

Sri Kant Vs. Bansraj Singh

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Court : Allahabad

Decided On : Jan-30-1985

Reported in : AIR1986All5

Judge : N.N. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 10 and 15;
[Limitation Act, 1963](#) - Schedule - Article 136

Appeal No. : Civil Revn. Nos. 602 and 603 of 1984

Appellant : Sri Kant

Respondent : Bansraj Singh

Advocate for Def. : R.N. Singh, Adv.

Advocate for Pet/Ap. : S.N. Agarwal, Adv.

Disposition : Revisions dismissed

Judgement :

ORDER

N.N. Sharma, J.

1. Both these revisions are being disposed of by this common order as these involve common question of law based on similar facts. Revision No. 602 of 1984

is directed against the order D/- 4-9-1984 recorded by Addl. Civil Judge, Bulandshahr in Execution Case No. 12 of 1984 arising out of original suit No. 83 of 1933.

2. Civil Revision No. 603 of 1984 is directed against the order D/- 4-9-84 (of the same date) recorded by the same Judge in Execution case No. 13 of 1984. Objections preferred by judgment-debtor-revisionists were repelled by the impugned order drawn by learned Addl. Civil Judge, Bulandshahr. Both these execution cases arose out of Original suit No. 83 of 1933.

3. Suit No. 83 of 1933 was filed by predecessor in interest Thakur Basdeo Sahai, Thakur Gurdit Singh, Thakur Karan Singh and Thakur Ganpat Singh claiming relief of possession over the property in suit and a decree for mesne profits. List of the property as well as the reliefs sought against various defendants were specified in the plaint along with Schedule-A, B, C and D appended to it.

4. Plaintiffs case was that one Kundan Singh happened to be the original owner of the entire property. He died in 1836 leaving Durga Prasad as his son and Bal Kishan as his grandson. Durga Prasad died in 1838 and Bal Kishan in 1851. After the death of Bal Kishan, his widow Smt Rukko Kunwar took possession of the property. Her daughter was Mehtab Kunwar who was married to Bhagirath Das. Out of that wedlock two sons viz. Ganga Prasad and Har Narain were born. Ganga Das expired in 1908 leaving his son Ravi Shankar. Smt. Jamna Kunwar, defendant 3 was the widow of Ganga Das and Smt. Javitri, defendant 4 was the widow of Ravi Shankar. Plaintiffs claimed their title through Smt. Rukkoo Kunwar, widow of Bal Kishan. On the death of Smt. Rukko Kunwar in 1924 they based their title as they alleged to be the nearest reversioners of Bal Kishan, the last male holder. Pedigree was also laid in the plaint.

5. Initially there were 108 defendants who contested the suit on various grounds which are not necessary to be detailed for the disposal of this revision. The trial Court decreed the suit on 18-3-1938. The matter was carried up in appeal to this Court. Various first appeals viz. Nos. 275 of 1938, 195 of 1938, 273 of 1938 and 277 of 1938 were preferred by defendants judgment-debtors. These first appeals were disposed of by a Division Bench of this Court on 11-8-1976. That judgment

became final,

6. In appeal No. 273 of 1938 preferred by Janki Prasad, one Karan Singh, decree-holder-respondent expired in 1970. An application for substitution of his heirs was filed by Janki Prasad along with an application under Section 5, Limitation Act. This application was rejected on 10-3-1971. Thus this appeal abated in 1970. That appeal also related to shops in dispute. These appeals were also directed against the decree of learned trial Judge ordering payment of Rs. 2,250/- by plaintiffs-decree-holders to defendants-judgment-debtors prior to the filing of the execution application. That amount remained undeposited within 12 years from the date of the original decree. Execution application was filed by one Bansraj Singh and three others on 4th July, 1984 in the Court below.

An objection was preferred by the revisionist on the ground that the execution application was barred by time. The appeal had abated in 1970 and so limitation started running from 1970 and not from the date of appellate decree on 11-8-1976.

7. The plea of limitation was further raised about non-payment of the sum of Rs. 2,250/- by the decree-holder within 12 years of the filing of the execution application.

8. It was further urged that Bansraj Singh, one of the co-decree-holders was not entitled to file execution application on behalf of other co-decree-holders. So the execution application was not maintainable. It was a joint decree against defendants 12 to 14 and the execution was being sought against defendant 12 only and so such application was not maintainable.

9. As regards Civil Revision No. 603 of 1984, the grounds set out were that First Appeal No. 277 of 1938 filed by Jamna Das, judgment-debtor and others abated on 3-5-1954.

10. In First Appeal No. 277 of 1938 preferred by Jamna Das, judgment-debtor and others, Jamna Das expired in 1952 and his three sons viz. Kishori Lal, Vishambhar Dayal and Babu Ram were substituted timely. However, Kishori Lal expired in 1953 and his heirs were not brought on record within the statutory period and so

the appeal was ordered to have abated on 3-5-1954.

11. Thus in this case also the execution application D/- 4th July, 1984 was alleged as barred by time,

12. The next ground raised in the objection was that the decree-holders were liable to pay Rs. 1000/- as a condition precedent for filing the execution application and that amount remained unpaid within 12 years from the date of the decree of trial Court and so the execution application was not maintainable.

13. The grounds were similar as put forward in the objection giving rise to Civil Revision No. 602 of 1984.

14. All these points were repelled by learned trial Judge by the impugned order.

15. I have heard learned counsel for the parties and perused the record.

16. The main legal objection related to question of limitation flowing from abatement of the aforesaid appeals in 1970 and 13-5-1954 respectively. Thus it has to be seen as to whether time shall start running from the date of abatement order or from the date of appellate decree viz. 11-8-1976.

17. There is no dispute on the point that relevant Article applicable to the execution application is Article 136, Limitation Act (No. 36 of 1963), which provides a period of 12 years for execution of any decree or order of any civil Court except a decree granting a mandatory injunction. The decree or order becomes enforceable if it directs any payment of money or the delivery of any property to be made on a certain date or at recurring periods when default in making payment or delivery in respect of which execution is sought takes place.

18. My attention was invited to Order 22, Rule 4, C.P.C., which provides that on the death of one of several defendants or the sole defendant procedure laid therein has to be followed to bring legal representatives of the deceased defendant on record so as to proceed with the suit. Under Order 22, Rule 4, sub-rule (3), C.P.C. if such substitution does not take place within the time limited by law the suit or appeal was liable to abatement against the deceased-defendant

subject to operation of Sub-rules (4) and (5), C.P.C. There is also no dispute on the point that such substitution has to be made within 90 days from the date of death of deceased-defendant vide Article 120, Limitation Act. Limitation runs from the date of death and not from the date of knowledge of death.

19. The contention was that in the absence of substitution proceedings abatement takes place automatically and is not postponed till the order of the Court to that effect

20. Order 22, Rule 9 of the aforesaid Code, provides for the effect of abatement or dismissal. The contention was that there was no prayer on behalf of decree-holder to set aside that abatement and that order became final by judgment of this Court on 3-5-1954. This order was taken into account by this Court while disposing of these appeals on 11-8-1976.

21. In this connection reliance was placed upon Churya v. Baneshwar, reported in : AIR1926 All217 where it was held that abatement was automatic and no order of the Court was necessary.

22. There were specific orders of abatement prior to the date of final judgment and so limitation would start from the date of these specific orders as given above.

23. On behalf of the respondents reliance was placed upon Smt. Tarakdasi Debi v. Paresh Chandra Saha reported in : AIR1967 Cal332 which lays down : --

'Article 182(2) refers to a decree or a final order disposing of the appeal as the new starting point of limitation. An order, declaring an abatement or recording an abatement is at any rate, a final order, disposing of the appeal for purposes of Article 182(2) and the period of Limitation for executing the decree in such case commences from the date of that order and not from the date when the decree-holder has died.'

24. In that case decree was one for ejectment and costs. In second appeal by judgment-debtor decree holder died in January 1956 and judgment-debtor in 1957. Appeal, however, remained on the file of the court till it was disposed of on 17-3-1959. The execution application was filed on 9-6-1961. The contention that

the execution application was time barred, if time was to run from the date of abatement, was repelled.

25. No direct authority was cited before me on the point that limitation shall start from the date of death of the party concerned and not from the date when such enforceable order was drawn by appellate Court

26. In this connection I may refer with advantage to *Gojer Brothers (P.) Ltd. v. Ratan Lal Singh*, reported in : [1975]1SCR394 . It was observed at page 1383 :--

'We are also not concerned to determine whether the decree passed by a trial Court can merge in an unspeaking order passed by the higher Court while summarily dismissing the proceedings because the High Court has given a considered judgment after a contested hearing. The principle, therefore, that there is no decree as such of the Appellate Court if it dismisses the appeal for default of appearance or for want of prosecution or on the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in Order 41, Rule 10, Civil P.C., can have no application to the instant case.'

On the other hand it was posited at page 1380 :-

'Where the decree of the trial Court is carried in appeal and the appellate Court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate Court and not of the trial Court. The reason for this Rule is that in such cases the decree of the trial Court is merged in the decree of the appellate Court.

27. Thus, the time shall not start running from the date of death of deceased party or of the earlier order of abatement which was not enforceable order but from 11-8-1976 when the appeals were finally disposed of and an enforceable order from which time shall start running under Article 136, [Limitation Act, 1963](#) was drawn. So the first contention is repelled.

28. The next contention was that a sum of Rs. 2,250/- was awarded to the judgment-debtor by decree of the trial Court. That time had not been enlarged by

the trial Court. That time had not been enlarged by the decree of the appellate Court. There is no question of merger of the decree of trial Court in such case with the decree of the appellate Court.

29. In this connection reliance was placed upon Dr. Ram Kumar v. Mahadeo Lal reported in where it was laid :--

'Where time is prescribed by the decrees of the trial Court for the performance of a condition precedent and the appellate court simply confirms the decree of the lower Court. it cannot be assumed that the time for performing the condition has necessarily been enlarged. Where the judgment of the appellate Court does not enlarge the time fixed under the decree of the trial Court the time for the performance of the condition will be reckoned from the decree of the trial Court even though that decree has merged in the decree of the appellate Court.'

30. It appears that in that case order of trial Court was for deposit of Rs. 257/- by defendant 2 by 29-5-52 failing which decree for mandatory injunction was to become absolute. That amount remained undeposited and had not been enlarged by the appellate Court. It is significant to note that in the instant case such conditional order was not drawn. The payment of that amount was simply a condition precedent to the execution of the decree. So it shall not operate as a bar specially when it is well established principle that when there is appellate Court decree it is that decree which alone is executable. The period of limitation according to Article 136, Limitation Act, will commence to run from the date of appellate Court and not from the date of trial Court's decree. So when the decree of the trial Court is merged in the decree of this Court time will begin to run from the date of decree D/- 11-8-1976 for deposit of the said sum of Rs. 2,250/-.

31. The next contention was that Bans Raj Singh alone was not entitled to file the execution application on behalf of the other co-decree-holders specially when the decree was joint and other co-sharers had not partitioned the shop in question. This contention also has been rightly repelled by the learned trial Court on the ground that it was open to one decree-holder to file an execution application for the benefit of other decree-holders vide Order 21, Rule 15, C.P.C.

32. So I do not find any merit in both these revisions which appear to have been filed simply to prolong this long drawn litigation which is pending from 1933.

33. Thus both the revisions are dismissed with costs. Interim order D/- 27-9-1984 in Civil Revision No. 602 of 1984 and interim order D/-21-9-1984 in Civil Revision No. 603 of 1984 are vacated herewith. Send the records at once to the court below for a quick dispatch.

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