

**Chandi Prasad and Others Vs. Addl. District and Sessions Judge, Hapur and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/466396](http://sooperkanoon.com/466396)

**Court :** Allahabad

**Decided On :** Mar-30-2001

**Reported in :** 2001(2)AWC1313

**Judge :** Sudhir Narain, J.

**Acts :** [Limitation Act, 1963](#) - Schedule - Article 136

**Appeal No. :** C.M.W.P. No. 8954 of 2001

**Appellant :** Chandi Prasad and Others

**Respondent :** Addl. District and Sessions Judge, Hapur and Others

**Advocate for Def. :** Pramod Kumar Jain, S.C.

**Advocate for Pet/Ap. :** Pankaj Mithal, Adv.

**Judgement :**

**Sudhir Narain, J.**

1. This writ petition is directed against the order dated 22.11.2000 whereby the appellate court held that the execution application filed by the contesting respondents was within time.

2. Briefly stated the facts are that the petitioners filed Suit No, 260 of 1959 for partition against defendant-respondents No. 2 to 8. The Court passed a preliminary decree on 25.4.1962. The final decree was prepared on 7.5.1968.

3. The defendant-respondents applied for execution of the final decree on 6.8.1968, which was registered as Execution Case No. 279 of 1968. The plaintiff-petitioners filed Civil Appeal No. 502 of 1968 against the judgment of the trial court. The appeal was dismissed on 21.3.1969. The petitioners preferred Second Appeal against this order. The High Court allowed the appeal and remanded the case to the appellate court to decide the appeal afresh. The lower appellate court, after remand of the matter, again dismissed the appeal on 4.1.1974. During the pendency of the above appeal, the Execution Application No. 279 of 1968 was rejected by the executing court on 19.4.1971.

4. The petitioners preferred Second Appeal No. 281 of 1974 against the judgment of the lower appellate court dated 4.1.1974. The second appeal was dismissed by the High Court on 18.4.1985. The decree in pursuance of the judgment of the High Court was drawn on 30.10.1986.

5. The defendant-respondents filed application for execution of the decree, passed by this Court, on 26.3.1997. The petitioners filed objection to this application on the ground that it was barred by limitation. The executing court rejected the application vide order dated 1.5.1999 on the ground that the application was barred by time. The respondents preferred appeal against the said order before the Court below. Respondent No. 1 has allowed the appeal by the impugned order dated 21.11.2000 holding that the execution application filed by the defendant-respondents was within time.

6. I have heard Sri Pankaj Mithal learned counsel for the petitioners and Sri Pramod Kumar Jain learned counsel for the contesting respondents.

7. The final decree in the partition Suit No. 260 of 1959 was prepared on 7.5.1968. The provisions of [Limitation Act, 1963](#), will be applicable for the purpose of counting the limitation. Article 136 shall be applicable for submitting execution application before the executing court. Article 136 reads as under :

'-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 of delivery in respect of which execution is sought, takes place :

Provided that an Application for Execution of a Decree granting a Perpetual injunction shall not be subject to any period of limitation.

8. The contention of the learned counsel for the petitioner is that lower appellate court had dismissed the appeal on 4.1.1974. The petitioners preferred Second Appeal No. 481 of 1974 against the judgment of the lower appellate court. The High Court dismissed the second appeal on 18.4.1985. The High Court had not passed any order staying the operation of the decree passed by the courts below and therefore, the limitation started running from 4.1.1974 for filing the execution application and as the execution application was filed on 26.3.1997, it was barred by time.

9. The question is whether the decree drawn in pursuance of the judgment of the High Court passed on 18.4.1985 shall be taken as the date when the decree becomes enforceable or the date of the Judgment of the lower appellate court delivered on 4.1.1974. Similar controversy was raised in *M/s. Banshidhar Durga Dutta v. Loonkaran Sethia*, 1983 ALJ 557, where the execution application was filed after the judgment of the appellate court, the Division Bench of this Court held that the decree becomes enforceable after the judgment of the lower appellate court. In this case, the appeal was dismissed as not pressed and the judgment-debtor raised the contention that as the appeal was not pressed and the judgment was affirmed and as there was no stay of the operation of the decree of the trial court, the execution application became time barred. This contention was not accepted on the reasoning that once the appeal has been filed against the decision of the lower appellate court, it is open to the decree-holder to wait for the

decision of the appeal and thereafter to file application for execution of the decree. It was observed :

'It follows from the law laid down by the Privy Council that if the Court's order furnishes a cause of action, then similarly the lower court's decree also furnishes a cause of action. The time from which the limitation begins to run is the point when the decree or order becomes enforceable. The expression 'enforceable' means 'to put into execution, to cause to take effect'. In case of a decree of the trial court being affirmed, the appellate decree becomes enforceable and that can be put into execution. The judgment debtor's contention that since there was no stay order, the decree holder could not take advantage of the time spent in prosecution of the appeal, does not appeal to us to be tenable. A judgment-debtor does not lose by the decree holder's not putting his decree into execution. The decree-holder has the choice to wait for the decision of the appeal. The law does not cast any duty on him to put the decree into execution immediately after its being passed. It had not been denied that in case of a decree being modified or varied, the period of limitation would start from the date of passing of the decree in the appeal. If that so, there is no reason to take contrary view in respect of a decree which is confirmed in appeal. There is no logic in holding a decree of the latter category to have become barred by time if the execution of the same is not made immediately after its being passed by the trial court. If the principle of merger applies, the decree of the trial court would get merged with that of the appellate court and it is that decree which will become enforceable.'

10. The principle of doctrine of merger was applied by the Supreme Court in *Kunhayammed and others v. State of Kerala and another*, AIR 2000 SC 2587. It was clarified that so far as principle of merger is concerned, on principle there is no distinction between order of reversal or modification and order of confirmation passed by the appellate court . As in all the three cases, the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision--whether of reversal or modification or only confirmation. The Court relied upon the following observation of the Supreme Court in *U.J.S. Chopra v. State of Bombay*, AIR 1955 SC 633:

'A judgment pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgment of the lower court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Courts below.'

11. The learned counsel for the respondents has placed reliance on the decisions *Ramlal and others v. Rewa Coalfields Ltd.*, AIR 1962 SC 361, and *Calcutta Municipal Corporation, v. Pawan Kumar Saraf*, AIR 1999 SC 738, wherein the Apex Court laid down the principles which should be taken into consideration while deciding an application to condone the delay. These decisions have no application to the facts of the present case.

12. In view of the above, the application filed by defendant-respondents for execution of the partition decree was within time as it was filed within 12 years from the date of the judgment of the High Court in Second Appeal referred to above.

13. The writ petition fails and is hereby dismissed.