

Bherulal and ors. Vs. Mohd. Jamil and ors.

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Court : Madhya Pradesh

Decided On : May-03-2006

Reported in : 2006(2)MPLJ597

Judge : W.A. Shah, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 136; Code of Civil Procedure (CPC) - Sections 115 - Order 9, Rule 13

Appeal No. : Civil Revision No. 66/2006

Appellant : Bherulal and ors.

Respondent : Mohd. Jamil and ors.

Advocate for Def. : S.M. Dagaonkar, Adv.

Advocate for Pet/Ap. : G.M. Chaphekar, Sr. Adv. assisted by ;S.K. Pawnekar, Adv.

Disposition : Petition allowed

Judgement :

ORDER

W.A. Shah, J.

1. The petitioners have filed this revision under Section 115 of the Code of Civil Procedure ('Code' hereafter) as they are aggrieved by the order dated 7-3-2006 passed by learned XIIth Civil Judge, Class-I, Indore, in Civil Execution Case No. 38-A/82x2000, where by the application of the petitioners to challenge the execution application as barred by limitation has been rejected.

The present petitions arises out of the following facts:

2. The deceased Mohammad Jamil had filed a Civil Suit No. 38-A/82 against deceased Bherulal for ejectment and possession of the disputed house in 1982. In the said suit deceased Bherulal was proceeded ex parte and the suit was decreed ex parte on 27-7-1982. An application for execution of the said decree was filed on 22-6-2000. Meanwhile on behalf of the deceased/defendant Misc. Judicial Case No. 21/84 for setting aside the said decree under Order IX Rule 13 of the Code was filed on 14-12-1984 and the same was dismissed on 25-11-1989. Against the said dismissal, the defendants/judgment-debtors filed appeal. That appeal was registered as Misc. Appeal No. 10/89 and the same was re-registered later at No. 1/01 and was decided on 14-8-2001 on the ground that it was preferred beyond period of limitation, i.e., 30 days from the date of the order dated 25-11-1989. The petitioners filed objections to the execution on 4-9-2003. They raised several objections. They also submitted that there was no stay of execution of the decree dated 27-7-1982, hence the execution application was time barred. They had also submitted that the disputed land has been acquired by Indore Vikas Pradhikaran for Scheme No. 38 and the decree holders have no right to take possession from the petitioners. The learned Execution Court rejected the same on 20-2-2004 and found that the application for execution was filed within limitation as according to the learned Executing Court the ex parte decree under reference became final only on 14-8-2001 the date on which the appeal against the order rejecting the application to set aside the ex parte decree was dismissed. The petitioners, therefore, filed a Revision Petition No. 96 of 2004 before this Court. This Court vide order dated 13-10-2005 directed the learned Execution Court to decide the matter afresh after going through the records and on consideration of relevant provisions of law and keeping in view the decisions of the Apex Court vide AIR 2001 SC 3404. The learned Execution Court heard the matter and vide order

dated 7-3-2006 reached the conclusion that the execution application was not barred by limitation. Hence the present revision.

3. Learned Senior Counsel for the petitioners submitted that under Article 136 of the [Limitation Act, 1963](#) in the circumstances of the case the learned Execution Court was in error when it reached the conclusion that the execution application was within limitation. In support of his contention he relied upon : AIR 2001 SC3404 [Hameed Joharan (Dead) and Ors. v. Abdul Salam (Dead) by L.Rs. and Ors. and : AIR 2005 SC2564 [Dr. Chiranji Lal (D) by L. Rs. v. Hari Das (D) by L. Rs.]. In this counter arguments, learned Counsel for the respondents submitted that in the face of doctrine of merger the order under attack does not suffer any illegality. In support of his argument, he relied upon : (2004)8SCC724 [Chandi Prasad and Ors. v. Jagdish Prasad and Ors].

4. It is appropriate to refer to Hameed Joharan (supra), first at this stage, therein it is held that Article 136 of the [Limitation Act, 1963](#) provides that limitation period for execution of decree begins to run from the date of decree which is the date when rights stand crystallized and decree becomes enforceable. The same view has been reiterated by a Larger Bench in Dr. Chiranji Lal (supra).

5. Now I proceed to mention what Chandi Prasad and others (supra), lays down, therein it is stated that the doctrine of merger postulates 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. However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. I may add that on a careful reading of the above, the doctrine of merger applies where the decree of the Superior Court supersedes the decree passed by Inferior Court. In the present case, after the ex parte decree an application under Order IX Rule 13 of the Code formed the subject matter of the appeal and not the ex parte decree itself. Therefore, the doctrine of merger does not apply as they

were co-lateral proceedings only. As such Chandi Prasad and others (supra), cannot be pressed into service.

6. In the circumstances of the case the ex parte decree under reference became enforceable right from the time it was passed. Article 136 provides that the execution application is to be moved within 12 years from enforceability and not from execution ability. The ex parte decree became enforceable right at the time when it was passed and, therefore, when admittedly the application for execution under reference was moved beyond 12 years from the date of the passing thereof, the same is barred by time and the doctrine of merger not being applicable, the limitation is not saved. I reached this conclusion after thoughtful consideration of the above referred decisions.

7. In the result, the impugned order passed by the learned Execution Court suffers from material irregularity in the exercise of jurisdiction leading to failure of justice. Hence this revision is allowed. The impugned order is quashed. The execution application under reference is held to be barred by time and is, therefore, ordered to be dismissed. However, in the circumstances of the case, I make no order as to costs.