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Court : Rajasthan

Decided On : Oct-23-2002

Reported in : 2003(1)WLC655; 2003(2)WLN159

Judge : B.S. Chauhan, J.

Appeal No. : S.B. Civil Revision Petition No. 727 of 1993

Appellant : Moman

Respondent : Munshi and ors.

Advocate for Pet/Ap. : Mr. K.N. Joshi, Mr. Dinesh Maheshwari

Disposition : Petition allowed

Judgement :

B.S. Chauhan, J.

1. The revision has been filed against the order dated 14.9.1993 passed in Execution Case No. 10/1993, by which the application under Section 47 of the Code of the Civil Procedure, 1908 (for short, 'the Code') filed by the petitioner has been rejected.

2. The facts and circumstances giving rise to this revision are that plaintiff/non-petitioners filed a suit against the defendant-petitioner seeking the relief of

perpetual injunction. The suit was decreed on 21.5.1982 by the trial Court. The appeal against the said judgment and decree was dismissed by the First Appellate Court on 28.11.1989 and the second appeal was dismissed by this Court vide judgment and order dated 16.3.1993. During pendency of the first and the second appeals, no interim injunction had been granted. Plaintiff/non-petitioners filed an Execution Application on 4.5.1993 for enforcement of the mandatory decree, i.e. removal of the wall from the suit property. Defendant-petitioner filed objection under Section 47 of the Code on the ground that in view of the specific provisions of Article 135 of the Limitation Act, 1963 (for short, 'the Act, 1963'), mandatory decree could be executed within the period of three years from the date the decree becomes executable from the date fixed by the Court for the performance of such decree. The Executing Court rejected the said objection. Hence this revision.

3. Mr. K.N. Joshi, learned Counsel for the petitioner, has raised the issue that in view of the specific provisions of Article 135 of the Act, 1963, the mandatory decree could be enforced only within the period of three years from the date of the decree of the trial Court for the reason that there has been no stay of execution of that decree by the First or the Second Appellate Courts.

4. On the contrary, Mr. Dinesh Maheshwari, learned Counsel for the plaintiff/non-petitioners, has submitted that as the judgment and decree of the trial Court has merged into the judgment and decree of the First and the Second Appellate Courts, though the said Courts may have merely affirmed the judgment and decree of the trial Court, the decree becomes executable from the date of dismissal of the second appeal in spite of the fact that there had been no interim stay of execution proceedings by the First and the Second Appellate Courts and, therefore, no interference is called for in the revision.

5. I have considered the rival submissions made by the learned counsel for the parties and perused the record of the case.

6. Article 135 of the Act, 1963 specifically provides that the application for execution of mandatory decree can be filed within three years from the date of the decree and that requires to be read with Section 15(1) of the Act, 1963, which reads as under:

In computing the period of limitation for any suit or application for execution of a decree, the institution or execution of which has been stayed by mention or order, the time of continuance of the injunction or order the date on which it was issued or the day on which it was withdrawn, shall be executable.

If both the provisions are read together, it makes it clear that in case the interim stay has not been granted by the Appellate Court(s) the decree of the trial court becomes executable. Construing the provisions otherwise would render the provisions of Section 15(1) of the Act, 1963 nugatory, which is not permissible. It leads to the conclusion that mere pendency of an appeal would not permit the decree-holder to sleep over the matter and wake up after the decision of the appeal(s). Even in absence of the provisions of Section 15(1) of the Act, 1963, excluding the period, for which the proceedings had been stayed, is to be understood as implied in it as held by the Hon'ble Supreme Court in the Director of Inspection of Income Tax (Investigation), New Delhi and Anr. v. Pooran Mall and Sons and Anr. : [1974]96ITR390(SC) , wherein the Apex Court held that it is well established principle of judicial procedure that where any proceedings are stayed by an order of the Court or by an injunction issued by any Court, that period should be excluded in computing the period of limitation laid down in the law.

7. A Division Bench of Patna High Court, in Kali Prasad Bajpayee and Ors. v. Bhagwat Prasad and Anr. 0065/1980 : AIR1980 Pat280 considered a similar case, though under Article 136 of the Act, 1963, and held as under:

Once the temporary bar to the execution proceedings had come to an end, the decree-holders were obliged to apply for the prosecution of the application. The filing of an appeal by the claimant was of no consequence and do not impose any bar in the way of the decree holders inasmuch as no stay order was passed against them. The provisions contained in Rule 5 of Order 41 of the Code, also, in this connection, may be noticed. It says that an appeal shall not operate as stay of proceedings under a decree or order appealed from, except so far as the Appellate Court may order, nor the execution of a decree has to be stayed by reason only of an appeal having been preferred from the decree.

8. A contrary view has been taken by the Allahabad High Court in Abdul Razzaq v. Izzat Ali, : AIR1979 All23 , wherein, applying the theory of merger, the court held that the limitation should run from the date of decision of the Appellate Court, observing as under:...the order of the original authority merges into the order of the Appellate Court whatsoever its decision whether of reversion or modification or mere confirmation. Thus, the original decree, having been merged in the appellate decree, the limitation was to be counted from the date of the appellate decree....

9. this Court has, also, reiterated the same view in Sayed Abdul Rauf v. Nurul Hussain and Ors., AIR 1992 Raj. 3, wherein the Court applied the theory of merger irrespective of the fact as to whether the appellate Court affirms, modifies or reverses the lower Court's decree, and held that even if there was no interim order by the Appellate Court, the limitation should be computed from the date of the appellate court's decree. With all due respect, this Court as well as the Allahabad High Court, in the aforesaid cases, have not considered the scope of the provisions of Order 41 Rule 5 of the Code, which specifically provide that mere filing of an appeal shall not operate as a stay order, nor shall execution of the decree be stayed. In both the said cases, scope of the provisions of Section 144 of the Code, which provide for restitution etc. in case the decree of the Court below is varied or reversed in appeal. Thus, to that extent, both the judgments are per incurium.

10. In Ratan Singh v. Viyay Singh and Ors., AIR 2001 SC 279, the Hon'ble Supreme Court considered a large number of judgments of various High Courts in a case where the second appeal was dismissed as being time-barred, but considering the provisions of the Limitation Act, observed as under:

Filing of an appeal would not affect the enforceability of a decree unless the Appellate Court stayed its operation. But if the appeal results in decree, that would supersede the decree passed by the lower Court and it is the appellate court's decree which becomes enforceable. When the appellate order does not amount to a decree, there would be no supersession ... Hence the lower Court's decree continues to be enforceable ... As no decree was passed by the High Court in second appeal, the decree of the First Appellate Court remains unaffected and the

enforciability once commences remains undisturbed for a period of twelve years therefrom. The execution process initiated by the appeal long after expiry of twelve years from 1.8.1973 is, thus, irretrievably barred.

11. Thus, in view of the above, it can be summarised that by virtue of the provisions of Order 41 Rule 5 of the Code, merely filing of an appeal would not amount to stay or mere institution of the appeal does not prevent the decree-holder to execute the decree and unless the Appellate Court puts an embargo, the decree is executable. Even if the Appellate Court reverses the decree in view of the provisions of Section 144 of the Code, there can be restitution without any hinderance and if the Appellate Court had stayed the execution proceedings, the period of stay is to be computed and excluded from the period of limitation for execution of the decree.

12. If the instance case is examined in view of the aforesaid settled legal proposition, it becomes evident that for want of any interim order by the Appellate Court, the decree had become executable from the date of its enforcement given by the trial Court within the period of three years under the provisions of Article 135 of the Act, 1963 and the execution proceedings had not been filed within the said statutory period. The judgment of the Coordinate Bench of this Court providing otherwise is binding upon this Court and the appropriate course could have been to refer the matter to the Division Bench for proper adjudication in view of the fact that in the said case, this Court did not consider the scope of Order 41, Rule 5 and Section 144 of the Code. However, as the matter stands squarely covered by the judgment of the Hon'ble Supreme Court in *Ratan Singh*, (supra) the said course is not desirable and in view of the said judgment, the petition deserves to be allowed.

13. The petition succeeds and is allowed. The impugned order dated 14.9.1993 is hereby set-aside so far as the execution of the decree for mandatory injunction is concerned. In the facts and circumstances of the case, there shall be no order as to costs.