

A. Krishnaraj Vs. T. Vasantha Gopal and Others

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Court : Chennai

Decided On : Dec-09-1988

Reported in : AIR1990Mad83

Judge : Ratnam, J.

Acts : [Limitation Act, 1963](#) - Sections 15(1) - Articles 135, 136 and 182(2)

Appeal No. : C.R.P. No. 2051 of 1983

Appellant : A. Krishnaraj

Respondent : T. Vasantha Gopal and Others

Advocate for Def. : V.V. Lakshminarayanan, Adv.

Advocate for Pet/Ap. : S. Ettikkan, Adv.

Judgement :

ORDER

1. The second defendant in O.S. No. 1247 of 1975, District Munsif's Court, Coimbatore is the petitioner in this Civil Revision Petition, which is directed against the order of the executing Court overruling the objection raised by the petitioner that E.P.R. No. 265 of 1982 in O.S. No. 1247 of 1975 filed by the first respondent herein on 12-10-1981 was barred by time.

2. On 7-7-1978, in O.S. No. 1247 of 1975, the first respondent herein obtained an ex parte decree against the petitioner and respondents 2 and 3 herein for a mandatory injunction directing them to demolish the walls at CD and CH noted in the plaint plan and for a permanent injunction as well restraining them from putting up constructions on the walls CD and CH, An application in I.A. No. 1433 of 1978 was filed under O. 9, R. 13, Civil P.C., praying to set aside the ex parte decree so obtained by the first respondent. Along with that, another application in I.A. No. 1434 of 1978 was also filed praying for stay of execution of the decree in O.S. No. 1247 of 1975 till the disposal of I.A. No. 1433 of 1978. In I.A. No. 1434 of 1978, no order for stay was passed but ultimately, both the applications were dismissed on 21-9-1979. Against the dismissal of I.A. No. 1433 of 1978, an appeal was preferred in C.M.A. No. 157 of 1979 before the District Court, Coimbatore. Pending disposal of that appeal, an application in I.A. No. 2406 of 1979 was filed praying for stay of execution of the decree in O.S. No. 1247 of 1975 till the disposal of C.M.A. No. 157 of 1979. On 19-12-1979, interim stay of execution of the decree in O.S. No. 1247 of 1975 was granted in I.A. No. 2406 of 1979 and that stay enured till 14-4-1980, when C.M.A. No. 157 of 1979 was dismissed and consequent upon the dismissal of the appeal, the interim stay granted already in I.A. No. 2406 of 1979 was vacated and that application was also dismissed on the same day. Therefore, the first respondent filed E.P.R. No. 548 of 1981 on 10-7-1981 and that petition was eventually dismissed on 18-6-1982. Later, on 12-10-1981, the first respondent filed E.P.R. No. 265 of 1982 in O.S. No. 1247 of 1975 praying that a Commissioner be appointed to carry out the relief of mandatory injunction granted under the decree for the demolition of the walls CD and CH noted in the plaint plan. In columns 3 and 4 of the execution petition, the first respondent had given the date of the decree as 7-7-1978 and also the date of the decree in C.M.A. No. 157 of 197.9 as 14-4-1980.

3. In the counter filed by the petitioner, he raised the objection that the execution petition filed by the first respondent was barred by limitation. Besides, the petitioner also stated that by giving the relief prayed for by the first respondent, he would be put to serious hardship and loss and that the prayer of the first respondent was vague and incapable of execution.

4. The executing Court overruled the objections raised by the petitioner and appointed a Commissioner to carry out the relief of mandatory injunction by demolition of the walls CD and CH as noted in the decree and BA and BJ as noted in the Commissioner's plan and directed him to submit a report. It is the correctness of this order that is questioned by the petitioner in this Civil Revision Petition.

5. Learned counsel for the petitioner first contended that the decree for mandatory injunction was passed on 7-7-1978 and under Art. 135 of the [Limitation Act, 1963](#), such a decree should have been put into execution within three years from the date of the decree and as the execution petition in this case was filed only on 12-10-1981, beyond three years from the date of the decree, the execution petition was barred. It was also pointed out that the proceedings taken to have the ex parte decree set aside and the termination of those proceedings on appeal on 14-4-1980 cannot avail the first respondent to claim that the execution petition is in time, as the appeal in CM.A. No. 157 of 1979 was not against the decree in O.S. No. 1247 of 1975, but against other collateral proceedings in I.A. No. 1433 of 1978 to set aside the ex parte decree. Strong reliance in this connection was placed by the learned counsel for the petitioner upon the decisions in *Jabarkhan v. Rahimkhan*, 68 Ind Cas 728 : AIR 1922 Nag 197(1) *Pateshwari Prasad v. Aditya Prasad*, : AIR1963 All398 and *Palaniammal v. S. Periasamy*, (1985) 98 Mad LW 294. On the other hand, learned counsel for the first respondent submitted that though normally a decree for mandatory injunction ought to be put into execution within three years from the date of the decree, in this case, owing to proceedings initiated by the petitioner and others, the execution of the decree in O.S. No. 1247 of 1975 had been stayed and, therefore, the first respondent would be entitled to exclude the period of time during which the execution of the decree in O.S. No. 1247 of 1975 was stayed under S. 15(1) of the [Limitation Act, 1963](#), and if that period is removed out of reckoning and excluded in computing the period of limitation prescribed for filing the execution petition, the petition, though filed on 12-10-1981, was well within time.

6. Before proceeding to consider the contentions raised, it would be necessary to set out a few undisputed facts. The first respondent obtained on 7-7-1978 an ex

parte decree for mandatory injunction directing the demolition of the walls CD and CH in the plaint plan and under the decree, no date was fixed for performance. The steps taken by the petitioner and others to set aside the ex parte decree in I.A. No. 1433 of 1978 and the appeal therefrom in C.M.A. No. 157 of 1979 proved futile, though during the pendency of C.M.A. No. 157 of 1979, there was an order of interim stay of the execution of the decree in O.S. No. 1247 of 1975 between 19-12-1979 and 14-4-1980.

7. The question now is, whether in the backdrop of above undisputed facts, the execution petition filed on 12-10-1981 was barred as claimed by the petitioner. It is in this context that the effect of the initiation of proceedings to set aside the ex parte decree in I.A. No. 1433 of 1978 and the appeal there, from in C.M. A. 157 of 1979 has to be noticed. It is not in dispute that no appeal as such against the decree in O.S. No. 1247 of 1975 had been preferred either by the petitioner or by respondents 2 and 3 herein and, therefore, the question of the decree of the trial Court merging in the appellate decree does not arise. Under Art. 182(2) of the Limitation Act, 1908, the question had arisen whether the word 'appeal' occurring in column 3 of clause (2) of Art. 182 of the Limitation Act, 1908, would comprehend only an appeal from the decree in the suit and would not include an appeal against an order refusing to set aside an ex parte decree. *Sriramachandra Rao v. Venkateswara Rao*, : AIR1939 Mad157 ruled that where the success of an appeal against an order refusing to set aside an ex parte decree has precisely the same effect in regard to execution as a successful appeal against that decree itself, the word 'appeal' should be taken to mean an appeal which is likely to affect the decree sought to be executed and, therefore an appeal against an order refusing to set aside an ex parte decree is an appeal within the meaning of Art. 182(2) of the Limitation Act, 1908. This view, however, was overruled by the decision of the full Bench in *Sivarama-chari v. Anjaneya Chetty*, : AIR1951 Mad962 where it has been pointed out that though the word 'appeal' is a general word, it must bear a restricted meaning and the appeal contemplated should be an appeal from the original decree or order, an appeal from a decree following a review of judgment and an appeal from an amended decree and that the true test is that the decree of the appellate Court in the appeal must be the decree which is sought to be executed and in the case of an appeal against an order refusing to

set aside an ex parte decree, that test will remain unsatisfied, for, it is not the order passed in that appeal that is sought to be executed, but the original decree itself. In so holding, the full Bench relied upon the following observations of Fazl Ali, J., in *Bhawani-pore Banking Corporation Ltd. v. Gouri Shankar Sharma*, : [1950]1SCR25 :

'This argument also is highly far fetched one because the expression 'where there has been an appeal' must be read with the words in column 1 of Article 182, viz., 'for the execution of a decree or order of any Civil Court....', and, however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution.'

Thus, in view of the pronouncement of the Supreme Court followed in the decision of the Full Bench referred to above in relation to Art. 182(2) of the Limitation Act, 1908, the word 'appeal' has to be limited in its application only to an appeal against the decree itself and not any other appeal arising out of interlocutory proceedings, like setting aside an ex parte decree, etc. However, the different situations contemplated in the third column of Art. 182 of the Limitation Act, 1908, are no longer found in the [Limitation Act, 1963](#) especially after Art. 136 providing for a period of twelve years for the execution of any decree, other than a decree granting a mandatory injunction, the time commencing from the date 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 or delivery in respect of which execution is sought, takes place, etc. Thus in view of Art. 136 of the [Limitation Act, 1963](#), it may not be now necessary to consider whether an appeal arising out of the dismissal of an application to set aside an ex parte decree could still be regarded as an appeal against the decree, for, the decree contemplated in the third column of Art. 136 of the [Limitation Act, 1963](#), is only either a decree of the trial Court or the appellate Court or even the second appellate Court, as the case may be. but all arising out of the decree in the suit itself. This is the view that has been taken in the decision reported in *Palaniammal v. S. Periasamy*, (1985) 98 Mad LW 294 Even this view may not be of any

assistance in this case, for, there is a special provision under Art. 135 of the [Limitation Act, 1963](#), to the effect that within three years from the date of the decree, an execution petition has to be filed for enforcing a decree for mandatory injunction. Considering the date of the decree in O.S. No. 1247 of 1975, i.e., 7-7-1978 and the date on which the execution petition was filed, viz., 12-10-1981, prima facie it may appear that the execution petition was barred when it was filed. However, if the circumstance that during the pendency of C.M.A. No. 157 of 1979, interim stay of execution of the decree in O.S. No. 1247 of 1975 had been granted and that remained in force between 19-12-1979 and 14-4-1980 is taken into account, then, that period has to be excluded under S. 15(1) of the [Limitation Act, 1963](#). S. 15(1) of the [Limitation Act, 1963](#) states as follows :

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

It had already been noticed that the execution of the decree in O.S. No. 1247 of 1975 had remained stayed by order passed in I.A. No. 2406 of 1979 in C.M.A. No. 157 of 1979 between 19-12-1979 and 14-4-1980. In *Siraj-ul-Haq v. The Sunni Central Board of Waqf*, : [1959]1SCR1287 , it has been pointed out that for excluding the time under S. 15, it must be shown that the institution of the suit in question had been stayed by an injunction or order; in other words, the section requires an order or an injunction which stays the institution of the suit and in cases falling under S. 15, the party instituting the suit would by such institution be in contempt of Court and if an express order or injunction is produced by a party that would clearly meet the requirements of S. 15. *A.S.K. Krishnappa Chettiar v.S. V. V. Somiah*, : [1964]2SCR241 points out that from the terms of S. 15(1) of the [Limitation Act, 1963](#), it is clear that it is restricted in its application to a case where the execution of a decree has been stayed by an injunction or order. Again, in *The Director of Inspection of Income-tax (Investigation) v. Pooran Mall and sons*, : [1974]96ITR390(SC) , the Supreme Court has ruled that it is a well established principle of judicial procedure that where any proceedings are stayed by an order of a Court or by an injunction issued by any Court that period should be excluded

in computing any period of limitation laid down by law. In this case, as seen already, the order staying the execution of the decree in O.S. No. 1247 of 1975 enured between 19-12-1979, when it commenced, till 14-4-1980, when it terminated, and that there was an order of stay passed by the District Court is also clearly established by Exhibit A-1 and, therefore, in terms of S. 15(1) of the [Limitation Act, 1963](#), the entire period of 118 days between 19-12-1979 up to and inclusive of 14-4-1980, has to be removed out of the reckoning and excluded in computing the period of three years for filing the execution petition under Art. 135 of the [Limitation Act, 1963](#). If so done, the first respondent could have filed the execution petition for enforcing the decree for mandatory injunction till 5-11-1981, but he had actually filed it on 12-10-1981, well within time. In view of the applicability of S. 15(1) of the [Limitation Act, 1963](#), the decision relied on by the learned counsel for the petitioner does not have any application.

8. Learned counsel for the petitioner next contended that in the process of directing the execution of the decree for mandatory injunction, the executing Court had varied the decree by directing the demolition of the walls BA and BJ instead of CD and CH as found in the decree. There is absolutely no substance in (his contention, for, it is seen from a consideration of the report of the Commissioner marked as Exhibit C-2 that BA and BJ therein correspond to CD and CH in Exhibit A-3. In other words, though referred to differently as CD and CH and BA and BJ, the identity of the walls directed to be demolished is the same and the executing Court has not in any manner departed from the decree or given any direction contrary to that. The Court below was, therefore, right in overruling the objections raised by the petitioner and in appointing a Commissioner for carrying out the decree for mandatory injunction. Consequently, the Civil Revision Petition fails and is dismissed with costs of the first respondent.

9. Petition dismissed.