ALLAHABAD HIGH COURT

Prem Narain

Vs

Ganga Ram

(Sulaiman, J.)

11.02.1931

JUDGMENT

Sulaiman, J.

1. This is a judgment-debtors' appeal arising out of an execution proceeding consequent upon the passing of an ex parte mortgage decree dated 24th January 1924 which was made absolute on 10th January 1925. An application for execution was filed on 7th August 1925 and while it was pending the judgment-debtors applied for the setting aside of the ex parte decree on 13th October 1925. There was an interim order staying execution passed on that date. On 24th April 1926 the decree-holder and the judgment-debtors compromised and agreed that the judgment-debtors should be given three months' time to pay up the amount by selling a part of the mortgaged property and that if they failed to pay the amount within the time allowed the execution should proceed. This was a written compromise filed in Court and was verified by the parties on 12th May 1926.

2. On 22nd May 1926 the Court passed an order striking off the application for the setting aside of the ex parte decree on the ground that the matter had been compromised. Subsequently on 4th June 1926 the office put up a report before the Court referring to the purport of the compromise and pointing out that the decree was to remain in execution for the time being and that the decree-holder would be entitled to sell the property if the amount was not paid within three months. On this the Court ordered:the execution case be struck off for the present without payment being entered. The costs to be borne by the judgment-debtors.

3. There is nothing to suggest that the decree-holder agreed to the striking off of his application or that he was informed of it on that date.

4. The judgment-debtors did not deposit the amount within the period which expired on 24th July 1926. The present application purporting to be an application for execution of the decree was filed by the decree-holder on 24th July 1929. The judgment-debtors took the objection that it was

barred by time. The execution Court has held that the application is in time, although it has not given its reasons in full. It is quite clear that under the compromise between the parties it was agreed that the execution proceedings should remain pending and not that the application for execution would be struck off. The matter was to be taken up and proceeded with after the expiry of the period of three months allowed to the judgment-debtors to pay up the amount. The Court therefore was quite wrong in striking off the case for the time being. At the same time it is quite clear that the use of the expression "for the time being" indicates that the Court was not disposing of the application finally but was merely shelving the matter, or striking off the application as a temporary measure. There was no -default on the part of the decree-holder and there was no justification for the dismissal of his application for execution. The application must therefore be deemed to have remained pending and only provisionally shelved.

5. It is also clear that during the period of three months which the decree-holder had allowed to the judgment-debtors he could not proceed with the execution of the decree and attempt to get the mortgaged property sold. The execution was necessarily postponed or suspended for that period. His application for execution therefore remained in abeyance for that period. There was no subsequent order passed by the Court dismissing the application finally. This being so it followed that it was open to the decree-holder to apply to the Court to revive and carry through the pending execution suspended by no act or default of the decree-holder, and that it was not incumbent upon him to file a fresh application to initiate a new execution, *Qamaruddin Ahmad v. Jawahar Lal*[1] The view expressed by their Lordships of the Privy Council in the case quoted above has been applied by the Full Bench of this Court in two cases which arose under the new Civil Procedure Code: *Chhattar Singh v. Kamal Singh*[2] and *Baij Nath v. Ram Bharose*[3]

6. The present application is no doubt ostensibly a fresh application for execution, but the previous history is fully set forth. The majority of the learned Judges in the first Full Bench case interpreted a similar application as being in substance one for revival. There seems to be no reason why the present application cannot similarly be treated as one for revival. It was assumed by four out of the five Judges in that Full Bench case that an application for revival would be one governed by the residuary Article 181, Lim. Act. There was previous authority for that view- But assuming that Article 181 is applicable to this application the time would begin to run from the date when the right to apply accrued,

7. As pointed out above the decree-holder could not possibly proceed with the execution during the period of three months which had been allowed to the judgment-debtors. His right to get the proceedings revived and proceeded with accrued only after the expiry of that period of grace. Even assuming that the period of three years was to be counted from the date of the original compromise and not from the date of its verification, that period expired on 24th July 1926. The present application was made just within three years of that date. It therefore seems to me that the decree holder did apply for revival of the application for execution which had merely been kept in abeyance within three years of the date when the right to apply accrued to him. In this view of

the matter it is not beyond time.

Niamatullah, J.

8. I entirely agree. The first application for execution of the decree should be deemed to be pending throughout. The compromise dated 24th April 1926 clearly contemplated that the application for execution should remain pending. It was not open to the Court executing the decree to dismiss it contrary to the agreement of the parties. The Court did not in fact dismiss the application for execution, but ordered it to remain in abeyance as held by my learned brother. Nothing happened subsequently to make the first application for execution otherwise than as a pending application. It follows that on the date of the second application the execution proceedings initiated by the first application though in abeyance were pending. It may be 'convenient to call an application praying that action betaken in proceedings initiated by the first application for execution as an application "to revive" execution proceedings. Such application was so styled in *Qamaruddin Ahmad v. Jawahir*[4] In substance however it is not reviving proceedings which ex hypothesi are pending. It is only an application moving the Court to proceed with the execution proceedings "before it. But whether the subsequent application be regarded as an application to revive execution proceedings previously taken or only as an application moving the Court to proceed with pending execution proceedings, there can be no doubt that it cannot in law be regarded as an application for execution the previous one being still undisposed of. The decree-holder never intended by what he agreed to in the compromise that the first application for execution should be dismissed, and as I read the order of the Court, it did not intend to dismiss it but allowed it to remain pending till the resumption of execution proceedings became necessary in the contingency provided for by the compromise. A second application for execution even though the decree-holder intended it to be such, is superfluous and may be disregarded, except in so far as it prays for action being taken on the first application to execute the decree.

9. It is not in my opinion necessary that a formal application for reviving the proceeding should be made. It is the duty of the Court to proceed to conclusion in a matter pending before it, even though it may be to dismiss the application in default of prosecution. Assuming that an application to 'revive' proceedings is essential I have no doubt that the second application fulfils, in substance, all the requirements of an application for 'reviving' execution proceedings in abeyance.

10. Where it is the duty of the Court to do something or to take some action, Article 181, Lim. Act, does not govern an application asking the Court to do such thing or to take such action. For instance an application for correction of decree so as to make it in conformity with the judgment has been held not to be within the purview of Article 181-as already stated it is the duty of a Court and no application by an interested party reminding the Court of the necessity of taking further action can be barred by limitation.

11. Assuming Article 181 is applicable to a case of this kind the starting point of limitation is the time "when the right to apply accrues." When proceedings are pending the right to apply is a recurring one and any application made during the pendency of the proceedings cannot be barred by Article 181. This view finds support from *Kedar Nath Dutt v. Harra Chand Dutt*[5] and *Puran Chand v. Roy Radha Kishen*[6]

12. In cases decided by this Court, most of which are quoted in Chhattar Singh v. Kamal Singh and Baij Nath v. Ram Bharos, it was assumed rather than decided that Article 181 applies and that limitation begins to run from a certain point of time only. The questions which I have referred to were not considered probably because the application was within time in any view of the matter. For the reasons given by my learned brother and these additional reasons I agree in dismissing the appeal.

Cases Referred.

1[1905] 27 All. 334
2A.I.R. 1927 All. 16
3A.I.R. 1927 All. 165
4[1905] 27 All 334
5[1882] 8 Cal. 420
6[1892] 19 Cal. 132 (F.B)