

ORISSA HIGH COURT

Krishna Chandra Sahani

Vs

Anem Peda Siva Paravatamma

M.A. No. 47 of 1947

(Narasimham and Mohapatra, JJ.)

03.09.1952

JUDGMENT

Mohapatra, J.

1. This appeal of the judgment-debtor No.6, arising out of an execution proceeding, is against the judgment of Sri R.C. Misra, Subordinate Judge of Berhampur, rejecting his petition under section 47, Civil Procedure Code, taking up an objection of limitation. The decree, under execution, is a mortgage decree, the preliminary decree being dated 7-1-32 and the final decree being dated 2-11-32. The present execution petition was filed on 11-9-45, clearly beyond 12 years from the date of the final decree.

2. The original decree-holder was one Anem Tatayya. He had two sons, Anem Basanna and Anem Narasimhulu. Anem Narasimhulu is alive and has transferred his share in the decree to the 6th judgment-debtor, Krishna Chandra Sahani. Anem Basanna having died, his widow, Anem Peda Siva Paravatamma, has filed the present execution petition. Judgment-debtors 1 to 5 have no more interest inasmuch as they have sold their interest in the mortgage property and the sale proceeds have been paid towards the decree. The judgment-debtors 6 and 7 were subsequent purchasers in respect of some of the mortgage properties. The 7th judgment-debtor is dead and his two sons are judgment-debtors 8 and 9. Judgment-debtor No.6 is the present appellant.

3. Anem Basanna filed Execution Petition No.54/35 praying for sale of the properties in the possession of judgment-debtors 6 and 7. Judgment-debtor No.7 filed a counter objecting to the sale of the properties. The objections having been overruled, judgment-debtor No.7 filed an appeal (A.S.No.7/47) and obtained a stay order and consequently the sale in E.P. 54/35 was stayed. The interim stay order was passed on 21-4-38 and it was made final on 18-9-36. The stay having been made absolute, the Executing Court made an order on 16-10-36 "Stay made absolute. Petition closed". The appeal was dismissed on 8-3-39.

4. The main point, urged before us, is that the execution is barred by 12 years' limitation as provided for under section 48, Civil Procedure Code, which runs as follows :

"48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from -

(a) the date of the decree sought to be executed, or

(b) 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, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed -

(a) to preclude the Court from ordering the execution of a decree upon an application presented after expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(b) to limit or otherwise affect the operation of article 183 of the First Schedule to the Indian Limitation Act, 1908."

5. The learned advocate, appearing on behalf of the decree-holder, very much relies upon the provisions of Section 15 of the Limitation Act and contends that the period during which the execution case was stayed by an order of the appellate Court has got to be excluded in the matter of computation of period of limitation of 12 years. The stay order having been obtained on 21-4-36 which was made absolute on 18-9-36, it continued till the date of the final disposal of the appeal which is 8-3-39. Therefore, he is entitled to the period covered between 21-4-36 to 8-3-39. If he is entitled to this period, the execution petition is manifestly within time.

6. Mr. H. Mohapatra, appearing on behalf of the appellant, contends that section 48, Civil Procedure Code, is a self-contained section and is not controlled by section 15 of the Limitation Act. The important question, therefore, that arises for determination, is whether section 48, Civil Procedure Code, is controlled by the provisions of section 15, Limitation Act. Section 15 of the Limitation Act provides that in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order shall be excluded.

7. In the case reported in - '*Subbarayan v. Natarajan*', it was held that section 48, Civil Procedure Code, contains an unqualified prohibition, subject to certain exceptions mentioned in the section itself, and that the section is not controlled by section 15 of the Limitation Act. The reason given was that the words "the period of limitation prescribed for any suit or application for execution of a decree", appearing in section 15, mean "prescribed in First Schedule of the

Limitation Act." This 12 years' limitation, not being prescribed by the provisions of the Limitation Act? Section 15 does not refer to Schedule at all, (but ?) in general terms, simply uses the expression "period of limitation prescribed". The omission of reference to Schedule in the Limitation Act in section 15 is significant and indicates that the words "limitation prescribed", appearing in section 15, refer to the period of limitation prescribed under any law whatsoever and not merely as provided for in the Schedule to the Limitation Act. It is further pointed out that in Article 181 of the Schedule to the Limitation Act, we find

"applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Civil Procedure Code, 1908."

and in Article 182, we find

"for the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Civil Procedure Code, 1908."

These two Articles make it perfectly clear that section 48, Civil Procedure Code , provides for a period of limitation as contemplated under section 15 of the Limitation Act. The reasons given in the Full Bench decision of the Allahabad High Court - (*Durga Pal Singh v. Pancham Singh*²), seem to us to be very sound and substantial. We, therefore, with great respect, follow the said decision and find that section 48, Civil Procedure Code , is controlled by section 15 of the Limitation Act. The Full Bench decision of the Allahabad High Court has also been fully discussed and the same principle has been followed in - *Ramgopal Bhutada Firm v. Sidram Aunayya*³, - *Sitaram v. Chunnilalsa Bhagchandsa*⁴, corresponding to ILR (1944) Nag 250. It is also relevant to refer to a decision of the Patna High Court reported in - *Kirtyananda Singh v. Prithichand Lal*⁵, It was observed in this case :

" In this view of the case, it is not necessary to consider the argument of the learned counsel for the appellants that section 48, Civil Procedure Code is controlled by section 15, Limitation Act..... Had it been necessary to come to a finding on the point I would have inclined to take the view that section 43, Civil Procedure Code is not controlled by section 15 of Limitation Act and that the only exception to sub-section 1 is that contained in sub-section 2. But as it is not necessary to decide the point in the present appeal I refrain from considering the question in the present case."

This observation clearly indicates that it is in the nature of an obiter only and it cannot, therefore, be used as any precedent.

8. Mr. Mohapatra, appearing on behalf of the appellant, very strenuously contends that inasmuch as the execution case was struck off on 16-10-36, the decree-holders are not entitled to execution of the period of limitation upto the date of disposal of the appeal. He contends that when there

was no execution pending, the stay order of the appellate Court was infructuous beyond 16-10-36. But as a matter of fact, on examination of records of EP 54/35, we find that the order passed in the execution

case was not that "the execution case was struck off" but that the "petition closed." This is in accordance with the Rules of the Madras High Court contained in The Civil Rules of Practice And Circular Orders which were governing the Berhampur Courts at the time. Under the Rules of the Madras High Court, when an order for stay is made absolute by the appellate Court, the executing Court ought to close the execution case for statistical purposes. It is, therefore, clear that the order passed in the execution case as having been closed is not a judicial order striking off the execution case on account of default on the part of the decree-holder. Further the stay order passed by the appellate Court will amount, in law, to stay of execution of the decree as provided for under Order 41, Rule 5, Civil Procedure Code and not merely for the stay of the particular execution case. To us, as it appears, in face of the stay order, passed by the appellate Court, it would (sic) be competent for the decree-holder to proceed with the execution either in the execution case No.54/35 or in any other execution case. As such, in our view, the decree-holder is entitled to add to the period of 12 years' limitation, provided for under section 48, Civil Procedure Code, the period between 21-4-36 to 8-3-39.

9. A further point has been taken by Mr. Mohapatra, appearing on behalf of the appellant, that admittedly Narasimhulu and Anem Basanna were joint at the time when Anem Basanna died. So Narasimhulu is one of the decree-holders, and it not having been in the execution petition that the execution was also on behalf of Narasimhulu, the execution petition ought to be dismissed. He contends that even though Narasimhulu has parted with his eight annas interest in the decree, he not having transferred his share in the joint family properties is still entitled on the death of Anem Basanna as a coparcener to the interest of the latter along with his widow. On a reference to the execution petition we find that Narasimhulu's name appears as one of the decree-holders. It is also mentioned that the execution is not only on behalf of the widow, who has applied for execution, but also on behalf of judgment-debtor No.6. Narasimhulu's name having appeared in the list of decree-holders and he (Narasimhulu) not having objected to the execution at any stage whatsoever, we find that the execution is substantially in compliance with the provisions of Order 21, Rule 15, Civil Procedure Code.

10. Both the objections having failed, the judgment of the learned Court below is, therefore, confirmed.

11. It has to be observed further that the learned advocate, on behalf of the decree-holder, has also relied upon section 48(2)(a), Civil Procedure Code His contention is that as the decree-holder was prevented by fraud or force of the judgment-debtor, that is, the judgment-debtor having objected to her execution of the decree, she (the decree-holder) is entitled to extension under section 48(2)(a), Civil Procedure Code In fact of the view that we have already taken that the decree-holder is entitled to the extension of time on account of the provisions of section 15 of

the Limitation Act, we need not decide the point "whether she is entitled to extension of time also under section 48(2)(a), Civil Procedure Code "

12. The appeal, therefore, is dismissed with costs.

Narasimham, J.

13. I agree.

Appeal dismissed.

Cases Referred.

¹ AIR 1922 Mad 268

² AIR 1939 All 403 (FB)

³ AIR 1943 Bom 164

⁴ AIR 1944 Nag155

⁵ AIR 1929 Pat 597