

PATNA HIGH COURT

Maksudan Prasad

Vs

Lakshmi Devi

A.F.O.O. No.237 of 1974

(Hari Lal Agrawal and S. Shamsul Hasan, JJ.)

07.10.1982

JUDGEMENT

Hari Lal Agrawal, J.

1. In this appeal by the judgment-debtor whose objection under Section 47 of the Civil Procedure Code had been rejected, the question is as to what would be the 'date of decree' within the meaning of Article 182 of the old Limitation Act for the purpose of computing the period of limitation for executing the same. The decree under execution is a final decree in a suit for partition.

2. The partition suit was instituted in the year 1945, and the judgment was delivered on 28-11-1949. The preliminary decree was thereafter passed on 3-1-1950 and a commissioner was appointed to prepare the final decree in terms of the rights of the parties declared under the preliminary decree. On 18-5-1955 the trial Court accepted the commissioner's report and passed the following order.

"The suit is decreed finally in terms thereof (commissioner's report). The report shall form part of the decree. Parties should file non-judicial stamps for preparation of the final decree".

Immediately thereafter a miscellaneous case was filed for making certain corrections in the preliminary decree itself and by order dated 24-8-1957 the Court came to the conclusion that the preliminary decree was not drawn up in accordance with the judgment and it ordered corrections as pointed out by the applicant. The decree was accordingly amended, which was substantial in nature. It further appears that some other miscellaneous cases, including one for preparation of the final takhtabandi were filed. A pleader commissioner was also appointed to carve out the takhtabandi etc., and ultimately by the order dated 18-2-1964 the court ordered :

"Therefore no further action in this case is necessary now. Let final decree be prepared immediately to enable the parties to proceed with their execution cases. Recall the writ

from the commissioner. The case is, therefore, finally disposed of."

3. The present execution case was filed on 23-8-1966 and then the application under Section 47 of the Code taking the objection of limitation was filed on the ground that the 'date of decree' would be the 'date of judgment' within the meaning of Order 20 Rule 7 of the Code and limitation would be computed right from 28-11-1949, the date of the judgment. And, therefore, the application was barred by limitation.

4. The stand of the decree-holder, on the other hand, in the executing Court as well as in this Court was that the above principle did not apply to a final decree in a partition suit and the period of limitation could not start to run until the final decree was made ready for execution.

5. The executing Court, on consideration of the various facts and circumstances mentioned in its order has come to the conclusion that on account of the filing of a large number of miscellaneous cases in between the passing of the preliminary decree and the final decree the decree-holders could not take steps for filing the non-judicial stamps for drawing up and preparation of the final decree and, therefore, they being not at fault the execution application cannot be said to be barred by the law of limitation. It accordingly rejected the objection of the appellant.

6. It was not disputed before us that the case would be governed by Article 182 of the old Limitation Act. The relevant part of that Article runs as follows:

"Description of application	Period of limitation	Time from which period begins to run
182, -For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years; or, where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order.

The expression "date of the decree" has been explained in Rule 7 of Order 20 of the Code according to which "the decree shall bear the date, the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree". It is, therefore, obvious, that expression "date of the decree or order" mentioned in the third column of Article 182 is referable to its meaning given in Rule 7 of Order 20.

7. Mr. Kailash Roy, appearing for the decree-holder argued at length that in suits where the judgment has to be followed with a preliminary decree and thereafter a final decree, if this meaning of the date of decree was to be given, then it was bound to cause irreparable loss to the

decree-holder and in most of the cases the period of 3 years was bound to elapse before the decree which in fact was to be executed becomes available to the decree-holder for putting the same in execution. The argument advanced on behalf of the decree-holder appears to be persuasive and *prima facie* acceptable, but before recording any conclusion a series of authorities and certain provisions of the Civil Procedure Code have got to be examined.

8. It has already been seen that under Rule 7 of Order 20 of the Code the date of decree has got to be the date of judgment. In decrees which become executable on being drawn up in accordance with the judgment difficulty is not called for and there is an unanimity in all the High Courts of India that the limitation by section 48 of the Civil Procedure Code, 1908. for executing such decree would be from the date of the judgment. Difficulty, however, arises in cases where after the judgment the Court has still to make some further inquiries in terms of the directions of the judgment or, for that matter, a preliminary decree, and thereafter to draw up another decree which is called the final decree. In a suit for partition it is obvious that the preliminary decree simply declares the rights of the parties and no execution is called for of such a decree. The executable decree would be only the final decree engrossed on stamp paper to be prepared after the allotment of specified and specific properties in terms of the declarations usually on the report of a pleader commissioner. In this regard sub-rule (2) of Rule 18 of Order 20 of the Code provides as follows:

"If and in so far as such decree relates to any other immoveable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required." Then Rules 13 and 14 of Order 26 would also be relevant in this regard which deal with 'commissions to make partitions'. According to Rule 13 "where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation". The procedure of commissioner is laid down under Rule 14, who "shall, after such inquiry as may be necessary, divide the property into as many shares, as may be directed by the order under which the commission was issued, and shall allot such shares to the parties". He has then to prepare and sign his report. The Court after hearing any objection which the parties may make to the report; "shall confirm, vary or set aside the same" and thereafter "it shall pass a decree in accordance with the same" unless the report is set aside and in that event a new commission is to be issued or some other order as may be deemed fit is to be made.

9. Now I would take up for consideration in the first instance the authorities of our own High Court. The case of *Suraj Deo Narayan Singh v. Musahro Raut*¹, arose out of a redemption suit. The preliminary decree was passed on 27-7-1909 and after the appointment of commissioner to find out the exact amount to be paid the final decree was signed on 23-2-1910 which was put into execution. It was held that the time commenced to run from the date when the decree was pronounced on 27-7-1909. In the case of *Somar Singh v. Deonandan Prasad Singh*², which was again a case arising

out of a mortgage suit where an appeal had been filed against a preliminary decree and during the pendency of the appeal the final decree had been drawn, it was observed that for an application for execution of the final decree which was passed on 28-10-1922, limitation would begin to run from 29-10-1925, the date of the dismissal of the appeal against the preliminary decree inasmuch as on account of the pendency of the appeal the decree sought to be executed was in peril. In this case at least it is clear that in such a suit limitation would run from the date of the final decree and not from the date of the preliminary decree. The case of *Banwari Narain Tewary v. Ramhari Narain Tewary*³, was also with respect to a partition suit where a compromise decree was passed on 5-1-1929 and thereafter a dispute arose as to whether certain lands were raiyati or bakasht. Ultimately a declaratory suit was filed for this purpose in which further proceedings in the partition suit were stayed. A final decree was drawn up on 2-5-1931, but the preparation of the final decree was stayed until the disposal of the second appeal in the declaratory suit and ultimately the final decree was signed and sealed on 7-1-1939. The Court found that the decree-holder had slept over the matter even after the decision of the High Court for making an application for drawing up the final decree, and relying upon a Bench decision of the Calcutta High Court in *Kishore Mohan Pal v. Provash Chandra Mondal*⁴, it was held that the delay in signing the decree on account of the non-filing of the proper stamp paper would not inure to the benefit of the decree-holder. Reliance was also placed on the following observation of the Privy Council in the case of *Rameshwar Singh v. Homeswar Singh*⁵,

"When the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language read with its context refers only toan order or decree made in such a form as to render it capable in the circumstances, of being enforced."

The above case was strongly relied upon by Mr. Kailash Roy and he contended that the cases of this Court prior to the authority of the Privy Council, taking any other contrary view, cannot be said to be good law. I, however, need not enter into this question as from the authorities mentioned above it is clear that in suits where a final decree has to be prepared in terms of the directions and instructions given in the preliminary decree, the "date of the decree" within the meaning of Article 182 would be the date when the Court finally orders for drawing up the final decree. This proposition was also not disputed by Mr. Jugal Kishore Prasad, appearing for the appellant.

10. In the new Limitation Act of 1963 the position has been made all the more clear as the corresponding Article 136, prescribes for the running of the period of limitation from the date "when the decree or order becomes enforceable". It is obvious that in a partition suit the enforceable decree is the final decree which alone is capable of execution.

11. There is another Bench decision of this Court in *Mohammad Sadique Mian v. Mahabir Sao* at page 410 of the same Report of 1942 (supra). This was a case of a preliminary decree for mesne profits and the preliminary decree was passed and the Court accepted the commissioner's report on 6th January, 1936 and directed for preparation of the final decree in terms thereof. The decree was drawn on 30-1-1939 and signed on 8-2-1939 after the deficit court-fee was assessed and the necessary stamp was filed. It was held that the date of the final adjudication between the parties regarding the amount of the mesne

profits was 6th of January, 1936 and, therefore, that date must be taken to be the date of the decree. The subsequent events regarding the assessment of the deficit court-fee and filing of the stamp by no means determine any matter in controversy between the parties.

12. Mr. Kailash Roy further placed reliance upon the case of *Jotindra Mohan Tagore v. Bejoy Chand Mahatap*⁶ where it was held that a decree for partition to be operative must be engrossed on the stamp paper as required by the Stamp Act and until the Judge signs the decree so engrossed it cannot be said that the suit had terminated. That observation was made in reference to an order for addition of certain parties and not with reference to the effect of the signing of the final decree on stamp paper for the purpose of computing the period of limitation. The argument of Mr. Kailash Roy however finds full support from the decision of the Andhra Pradesh High Court in *Smt. Kotipalli Mahalakshamma v. Kotipalli Ganeswara Rao*⁷, where a somewhat similar view was taken and it was held that it was the duty of the Court when passing final decree for partition to call upon the parties to furnish the requisite stamp paper for engrossing the decree on such stamp paper. The decree-holder cannot be made to suffer for the omission of the Court in making such direction. And in the case of *Ram Krishna Tarafdar v. Nemai Krishna Tarafdar*⁸, it has been observed that delay in drawing up of decree due to circumstances beyond control of the parties is to be excluded while computing the limitation for the execution petition. I also do not find any reason to take a different view, particularly in view of the language used in Article 182 of the Limitation Act.

13. Mr. Jugal Kishore Prasad also cited certain authorities such as *Jagdeo Sao v. Basudeo Narain Singh*⁹, and following the same, another decision in *Rajeshwar Rai v. Shankar Rai*¹⁰, to the effect that filing of an execution petition after pronouncement of a judgment without preparation of a formal decree was legal inasmuch as Order 21, R.II does not contemplate the filing of the decree. We are 'however' not concerned with this question in this case in any detail. He further sought to take support from a single Judge decision of this Court in *Devi Kant Mishra v. Shri Kant Pathak*¹¹, which appears to be a case under the new Limitation Act (Article 136) and arising out of a partition suit in which a compromise decree was passed on 15-1-1940 which not only defined the shares of the parties but also made the allotment of specific properties to different parties. No further step was taken for a long time until 27-7-1965 when defendant No. 6 filed an application for preparation of the final decree and it was signed on 28-8-1965 bearing the date as 15th January, 1946, which was put into execution when plea of limitation was raised on behalf of the judgment-debtor. The learned Judge accepted the plea of limitation mainly on the ground that on 25th January, 1946 when the judgment was delivered specific shares were allotted to the different parties and, therefore, that would be the date of the decree. I, however, do not find much discussion on the question which has fallen for consideration in the case before us save and except the reference to Article 136 of the new Limitation Act, instead of Article 182 of the old Limitation Act, which is, however, an accidental error and nothing would turn upon it.

14. It has already been seen that the execution case in question was filed on 23-8-66 and even the pleader commissioner's report was accepted on 18-5-55 and direction was given for preparation of the final decree. That should be the 'date of the decree' within the meaning of column No. 3 of Article 182 of the Limitation Act. The executing court has, however, taken into consideration the date of the drawing up of the final decree and signing on 11-3-1964 as the starting point of

limitation for filing the execution case. It has also purported to explain the delay in filing the stamp duty after several years of the acceptance of the pleader commissioner's report on account of the institution of various miscellaneous cases in the proceeding. On reference to the order-sheet of the trial court it appears that in spite of the order of the acceptance of the pleader commissioner's report, some or the other parties have been filing applications after applications giving rise to several miscellaneous cases for either modifying the preliminary decree itself or changing the allotments made by the pleader commissioner. By order dated 24-8-57 the preliminary decree itself was modified and other cases such as Misc. Cases Nos. 45 of 1963 and 15 of 1964 were pending until 1964 and the decree-holder filed the non-judicial stamp on 10-1-64 in compliance with the court's order. It was then that the final decree was prepared on 22-2-64 and signed on 11-3-64. The execution case was levied on 23-8-66. The process of filing applications for amendment continued even after the filing of the execution case and by order dated 6-5-1968 the final decree was again amended directing for making certain inventory to form part of the said decree. In view of these facts and circumstances it can be safely said that although the date of the decree would be 18-5-55 or 24-8-57 when it was amended, the final decree on the stamp paper could not be drawn up on account of the circumstances beyond the control of the appellant and certainly he was misled due to the pendency of the miscellaneous cases wherein the parties were agitating for modification and amendment of the schedules allotted under the final decree. Mr. Kailash Roy, therefore, rightly urged that on the facts of the present case time for levying execution would start running from the date the decree was drawn up.

15. The contentions of Mr. Kailash Roy find ample support from the cases of the Calcutta and Andhra Pradesh High Courts already referred to earlier. In the cases of this Court which have been discussed earlier, this question did not fall for specific consideration, but I may refer to the case of Banwari Narain Tewary (supra) where reliance had been placed on the case of *Kishore Mohan Pal v. Provash Chandra Mondal*¹², The quotation from the Calcutta case which was referred to by the learned Judges of this Court with approval although converse in nature may be usefully extracted here:

"The delay in signing the decree was due not to any fault of the Court or to any cause beyond the control of the parties but solely to the delay of the parties in supplying the requisite stamp paper. Any party desiring to have the decree executed might have furnished the stamp paper at any time leaving the expenses of providing it to be adjusted by the Court in connection with the costs of the execution."

In my view, the above quotation also lends sufficient support to the contention of Mr. Roy. Similarly, the case of the Judicial Committee in Rameswar Singh (supra) also lends equal support to the above contention.

16. I, however, may not be misunderstood to lay down as a universal proposition that in each and every case the decree-holder will be entitled as a matter of right to the grant of the time taken for drawing up the final decree on the stamp paper. All that I want to emphasise is that in a case where delay is committed by him on account of some circumstances beyond his control or by which he is misled then certainly he is entitled to claim advantage on this account. Taking any other view is bound to create great prejudice and irreparable loss and injury to the decree-holders

who have to litigate for decades, particularly in a partition suit to reach the stage of drawing up of the final decree on the stamp paper.

17. For the aforesaid reasons, I do not find any merit in this appeal which is dismissed, but in the circumstances I shall make no order as to costs.

S. SHAMSUL HASAN, J.

18. I agree,

Appeal dismissed.

Cases Referred.

¹ AIR 1916 Pat 235

² AIR 1927 Pat 215

³ AIR 1942 Pat 335

⁴ AIR 1924 Cal 351

⁵ AIR 1921 PC 31

⁶(1905 ILR 32 Cal 483)

⁷ AIR 1960 And Pra 54

⁸ AIR 1974 Cal 173

⁹ AIR 1954 Pat 92

¹⁰ AIR 1962 Pat 39

¹¹ AIR 1972 Pat 429

¹² AIR 1924 Cal 351