

RAJASTHAN HIGH COURT

Rajendra Singh Bhandari

Vs.

Harpreet Singh

Civil Revn. Petn. No.123 of 2006

(Dalip Singh, J.)

07.05.2008

ORDER

Dalip Singh, J.

1. This is a revision petition by the judgment-debtor by which the objections filed by the judgment-debtor-petitioner were dismissed by the impugned order dated 22-7-2006. The objection which has been raised is that the execution application was filed beyond the period of limitation as prescribed by Article 136 of the Limitation Act, 1963.
2. A few salient facts may be taken note of. The plaintiff-respondent filed a suit for recovery of money being Civil Suit No. 29/ 1990 which came to be decreed *ex parte* on 5-10-1991. An application for setting aside the *ex parte* decree came to be filed by the defendant on 14-10-1991 under Order 9, Rule 13, Civil Procedure Code in which there was also a prayer that the execution of the decree may be stayed. The aforesaid application was opposed by the plaintiff-decree-holder and the learned trial Court by its order dated 10-12-1991 dismissed the said application.
3. The learned trial Court after hearing the parties also dismissed the application filed under Order 9, Rule 13, Civil Procedure Code filed by the defendant- petitioner herein vide order dated 10-12-1991.
4. It may be mentioned here that the plaintiff-decree-holder consequent upon the dismissal of the application under Order 9, Rule 13, Civil Procedure Code submitted an application for execution of the decree dated 5-10-1991 before the learned executing Court on 11-12-1991.
5. The petitioner-defendant being aggrieved by the order dated 10-12-1991 dismissing

the application under Order 9, Rule 13, Civil Procedure Code preferred S.B. Civil Misc. Appeal No. 1/1992 before this Court. This Court vide its judgment dated April 22, 1992 allowed the appeal filed by the petitioner-defendant herein setting aside the impugned judgment dismissing the application under Order 9, Rule 13, Civil Procedure Code dated 10-12-1991 and remanded the case to the learned trial Court with the direction that the parties are directed to appear before the learned trial Court on 14-5-1992 and an opportunity be granted to the parties to file their respective affidavit and decide the application under Order 9, Rule 13, Civil Procedure Code afresh. The said appeal was allowed, on payment of cost of Rs. 1,100/-.

6. In the meanwhile, the execution application, filed by the decree holder/non-petitioner was sent by the executing Court to the Court at *Jaipur* where the properties of the judgment-debtor were situated.

7. After the remand of the case by this Court vide judgment dated 22-4-1992 to the learned trial Court for deciding the application under Order 9, Rule 13, Civil Procedure Code afresh, the parties appeared before the learned trial Court on 14-5-1992 and the cost was paid. However, before the learned trial Court no progress could be made in the hearing of the application under Order 9, Rule 13, Civil Procedure Code as the record of the suit which had been summoned by this Court somehow came to be misplaced and lost and did not reach the learned trial Court after the decision of the appeal by this Court on 22-4-1992. It may also be mentioned here that the learned trial Court in view of the above ultimately ordered for reconstitution of the record of the suit vide order dated 21-12-1999 i.e. after more than 7 years which were consumed in this process. In the meanwhile, on account of the fact that the appeal filed by the defendant- judgment-debtor against the dismissal of the application under Order 9, Rule 13, Civil Procedure Code praying for setting aside the *ex parte* decree had been allowed by this Court and the case remanded to the learned trial Court vide judgment dated 22-4-1992 the plaintiff-decree-holder did not pursue the execution application which was ultimately withdrawn by him in view of the subsequent developments which have been mentioned hereinabove.

8. After the remand order passed by this Court on 22-4-1992 and the file having been ordered to be reconstituted by the learned trial Court vide its order dated 21-12-1999, the matter remained pending for the defendant-judgment-debtor to file his affidavit and ultimately on the failure of the judgment-debtor to prosecute the application filed under Order 9, Rule 13, Civil Procedure Code the said application came to be dismissed vide order dated 6-7-2001 for non-prosecution and the application under

Order 9, Rule 13, Civil Procedure Code was consequently ordered to be consigned to record. It may also be stated here that during this period the file of the execution case No. 67/1991 was tagged with the file of the application under Order 9, Rule 13, Civil Procedure Code.

9. In view of the fact that the defendant-petitioner did not pursue his application under Order 9, Rule 13, Civil Procedure Code which came to be ultimately dismissed for non-prosecution by the learned trial Court vide order dated 6-7-2001, the plaintiff/decreed holder filed the present execution application on 16-12-2003 for executing the decree dated 5-10-1991.

10. After the above execution was filed on 16-12-2003, the judgment-debtor/petitioner filed an objection that Article 136 of the Limitation Act, 1963 prescribes a period of 12 years for the execution of the decree as limitation from the date when the decree became executable. It was contended that the decree having been passed on 5-10-1991, it became executable soon thereafter and the application filed on 16-12-2003 was beyond the period of limitation and, therefore, the decree could not be executed.

11. The learned Court below taking into consideration the facts and circumstances of the case as have been mentioned hereinabove came to the conclusion that on account of the pendency of the application under Order 9, Rule 13, Civil Procedure Code and more particularly on account of the remand of the case by this Court vide judgment dated 22-4-1992 to the trial Court with a direction to decide the application after affording the parties an opportunity to file their respective affidavits and on failure of the defendant to file the same and pursue the application, the same came to be dismissed only on 6-7-2001 the execution application filed in the year 2003 could not be said to be beyond the period of limitation as the period spent for pursuing the remedy by the defendant/judgment-debtor by way of the application under Order 9, Rule 13, Civil Procedure Code deserves to be excluded and the decree became executable after 6-7-2001 when the application under Order 9, Rule 13, Civil Procedure Code was dismissed after the order allowing the appeal by the High Court and remanding the case to the trial Court.

12. Being aggrieved by the aforesaid order passed by the learned Court below dismissing the objections vide order dated 22-7-2006, the judgment-debtor has filed the present revision petition.

13. The submission of the learned counsel for the petitioner is that in the instant case

the decree became executable on 5-10-1991 itself as there was no appeal against the aforesaid decree and there was no stay operating against the same and, therefore, clearly the application filed on 16-12-2003 was beyond the period of 12 years, as prescribed under Article 136 of the Limitation Act, 1963. It has also been submitted that under Order 41, Rule 5, Civil Procedure Code the statute specifically provides that mere filing of the appeal does not operate as stay to the execution and, therefore, relying upon the judgment of this Court, reported in (*Suresh Kumar v. Virendra Kumar*)¹ it was submitted that the revision petition be allowed and the application for execution filed beyond the period of limitation from the date of the passing of the decree dated 5-10-1991 be dismissed as barred by limitation.

14. Learned counsel for the decree-holder-respondent, on the other hand, submitted that in the instant case the decree-holder/plaintiff who had already filed the execution application on 11-12-1991 was prevented from executing the decree on account of the fact that the defendant/judgment-debtor/petitioner herein had himself moved an application for setting aside the *ex parte* decree dated 5-10-1991 on 10-12-1991 and after the same was dismissed on 10-12-1991, the order passed by the learned trial Court dated 10-12-1991 was challenged before this Court in S.B. Civil Misc. Appeal No. 1/1992 which came to be allowed vide judgment dated 22-4-1992 and the case remanded to the learned trial Court for decision of the application afresh after affording the parties an opportunity to file their respective affidavits before the learned trial Court in the proceedings under Order 9, Rule 13, Civil Procedure Code. It submitted that after the decision of the Civil Misc. Appeal by this Court remanding the matter to the learned trial Court for decision of the application under Order 9, Rule 13, Civil Procedure Code afresh, the plaintiff-decree-holder who had already filed the execution application earlier on 11-12-1991, the same was dismissed as not pressed keeping in view the orders passed by this Court dated 22-4-1992 allowing the appeal and remanding the matter for decision afresh. It is submitted that even though there was no order of stay of the execution but keeping in view the order passed by the High Court remanding the case to the learned trial Court, the plaintiff/decree-holder who had been vigilant and had already preferred the execution application chose not to press the same till such time the application under Order 9, Rule 13, Civil Procedure Code filed by the defendant/judgment-debtor is not decided. It has also been submitted by the learned counsel for the respondent that in any case the decree dated 5-10-1991 became executable only after the application filed under Order 9, Rule 13, Civil Procedure Code by the defendant for setting aside the same came to be dismissed vide order dated 6-7-2001 and, therefore, looking to the above fact the same

became executable in the light of the provisions of Article 136 of the Limitation Act after 6-7-2001. The learned counsel in this behalf has relied upon a decision of this Court reported in the case of *Syed Abdul Rauf v. Nurul Hussain, reported* ² in and of the Hon'ble Supreme Court in the case of *Ratan Singh v. Vijay Singh, reported in* ³

15. I have considered the rival submissions.

16. In the instant case, it cannot be said that the plaintiff/decreed-holder has been sleeping over his rights in any manner. The Hon'ble Supreme Court in the case of *Ratan Singh (supra)* while holding that the execution of the decree was beyond the period of limitation, has stated in para No. 2 as follows :-

"2. A decree-holder after securing a decree went into slumber and remained as such for a pretty long period like a Rip Van Winkle. When he awoke he realized that his decree became rust corroded and lost its enforceability due to efflux of a number of years. In his search to find out at least a straw to cling on he came across an order of the High Court by which a Second Appeal preferred by this opposite party was dismissed as time barred."

17. It is in this background that the facts of *Ratan Singh's case (supra)* may be taken note of. The learned trial Court in *Ratan Singh's case (supra)* had passed a decree on 14-12-1970. Against the aforesaid decree the defendant preferred a first appeal which came to be dismissed on 1-8-1973. Against the dismissal of the first appeal, second appeal was preferred before the High Court by the defendant which came to be dismissed on 31-3-1976 as the same was barred by limitation and the application filed for condonation of delay was dismissed resulting into dismissal of the appeal vide aforesaid order dated 31 -3-1976. The plaintiff/decreed-holder filed an execution application on 24-3- 1998 taking 31-3-1976 as the date for the decree "to have become executable. In *Ratan Singh's case (supra)*, therefore, an objection was raised by the defendant/judgment-debtor that the execution filed on 24-3-1998 was beyond the period of limitation i.e. w.e.f. 1-8-1973 which was the date of dismissal of the appeal and after which the decree became executable on account of the fact that the second appeal was not even maintainable and was not entertained by the High Court having been filed beyond the period of limitation and, therefore, the starting point of the limitation and executing the decree is 31-3-1976, the date of the order passed by the High Court dismissing the defendant's appeal against the original decree dated 14-12-1970. The execution application was accordingly rejected as having been filed beyond the period of limitation, prescribed under Article 136 of the Limitation Act. Against the aforesaid order of the High Court dismissing the application, the plaintiff preferred

S.L.P. before the Hon'ble Supreme Court and by the aforesaid judgment the Hon'ble Supreme Court dismissed the appeal. The Hon'ble Supreme Court in para No. 16 held as follows:-

"16. So the end result is this: The decree became enforceable on 1-8-1973 when the appellate Court passed the decree which superseded the decree of the trial Court. As no decree was passed by the High Court in the second appeal the decree of the first appellate Court remained unaffected and the enforceability once commenced remained undisturbed for a period of 12 years there from. The execution process initiated by the appellant long after the expiry of 12 years from 1-8-1973 is thus irretrievably barred. Hence no interference is called for. The appeal is accordingly dismissed."

18. However, before coming to the aforesaid conclusion the Hon'ble Supreme Court in para No. 14 of the aforesaid report has also taken note of the fact that in the case of *Anandilal v. Ram Narain*, reported ⁴ in the Hon'ble Supreme Court has laid down as follows :-

There is no justification for placing a rigid construction on the provisions of the Limitation Act. But we must remind ourselves of the other profile that in construing statutes of limitation, considerations of hardships are out of place. What is needed is a liberal and broad based construction and not a rigid or narrow interpretation of the provisions of the Limitation Act."

19. The decision of the Hon'ble Supreme Court in the case of *Union of India v. West Coast Paper Mills Limited*, reported in ⁵ may also be taken note of. In the aforesaid case the judgment passed by the learned Railway Rates Tribunal was challenged before the Hon'ble Supreme Court by way of SLP and the Hon'ble Supreme Court granted leave but refused to pass stay order against the judgment of the Tribunal dated 18-4-1966. Ultimately the SLP came to be dismissed. The company then filed a writ petition which too was dismissed on the ground of availability of alternative remedy of filing a suit. The company then filed two suits on 12-12-1973 and 18-4-1974.

20. Before the learned trial Court, the appellants raised an objection that despite the pendency of the S.L.P. and there being no stay granted by the Hon'ble Supreme Court, the suits filed beyond three years of limitation period from the judgment of the Tribunal dated 18-4-1966 were time-barred. The Hon'ble Supreme Court in the aforesaid case held that once the petition under Article 136 had been filed, it was open for the Supreme Court to have either endorsed the findings given by the learned Tribunal order set aside the same. Accordingly it held that the starting point of

limitation for filing the suit for enforcement of right under the judgment of the Tribunal was the date of order passed by the Hon'ble Supreme Court.

21. On the analogy of the above, it can safely be inferred that once an application under Order 9, Rule 13, Civil Procedure Code had been filed and the same had been entertained, though dismissed by the learned trial Court, but on appeal having been preferred before this Court, the order of the learned trial Court dismissing the application having been set aside and the case remanded to the learned trial Court for deciding the application afresh, the matter remained pending on the said application from 10-12-1991 to 6-7-2001 and on the said application it was open for the Court to either accept the said application and set aside the *ex parte* decree or dismiss the said application. As observed by the Hon'ble Supreme Court in the case of *Union of India v. West Coast Paper Mills Limited*, (AIR 2004 Supreme Court 1596) (supra), the period of limitation in that event would commence from the date of order when the proceedings under Order 9, Rule 13, Civil Procedure Code came to be finally decided. That is so on account of the fact that in the event of the decree dated 5-10-1991 being set aside the question of execution of the same would not arise. The judgment of the Hon'ble Supreme Court in the case of *West Coast Paper Mills Limited* (supra) also assumes importance on account of the fact that before the Hon'ble Supreme Court in the S.L.P. against the judgment of the learned Tribunal dated 18-4-1966 there was no order of stay as in the present case and despite the above fact the Hon'ble Supreme Court has held that the starting point of limitation would be the date on which the SLP came to be decided by the Hon'ble Supreme Court and not the date of the judgment of the Tribunal.

22. Similarly, in the case of *Ratan Singh* (AIR 2001 Supreme Court 279) (supra) the Hon'ble Supreme Court has clearly stated that the period of limitation would be 1-8-1973, the date on which the appeal came to be dismissed against the decree of the trial Court dated 14-12-1970. Even in the aforesaid case, there is no mention of the fact that there was any order of stay operating against the judgment and decree of the learned trial Court dated 14-12-1970. Thus, clearly the Hon'ble Supreme Court laid down that the period of limitation would be the date of the order by which the judgment and decree passed by the learned trial Court which was under challenge as the rights of the parties against the decree of the learned trial Court have come to be adjudicated irrespective of the fact whether or not there was any order of stay granted by the Court below.

23. In the case of *Syed Abdul Rauf* (AIR 1992 Rajasthan 3) (supra), the learned

single Judge of this Court in somewhat similar circumstances relying upon the report of the Law Commission and after a careful consideration of the provisions under Section 48, Civil Procedure Code and Article 136 of the Limitation Act, 1963 held in para No. 10, as follows :-

"As I have already observed, on the recommendation of the Law Commission, the Parliament enacted the present Article 136 which substantially re-produces the repealed Section 48, Civil Procedure Code and replaces Article 182 of the old Limitation Act. This was done with a view to overcome the difficulty which used to be faced by the litigants and the Court. Enactment of Article 136 has simplified the controversy and has provided that for the execution of any decree or order of any Civil Court, the period of limitation would be twelve years. This period of limitation begins to run "when the decree or order becomes enforceable". Whether there was a stay order or not, that was not material for the purposes of calculating the period of limitation and giving effect to the phrase 'when it becomes enforceable'."

24. Having held so, the learned single Judge came to the conclusion that the decree became executable w.e.f. the date of judgment of the appellate Court.

25. It would, however, be relevant to mention and take note of the decision in *Suresh Kumar v. Virendra Kumar*, reported in ⁶ of this Court where the learned single Judge of this Court has taken a contrary view and held on the basis of the Rule 5 of Order 41, Civil Procedure Code in para No. 15 as follows :-

"15. Order 41, Rule 5(1) unambiguously makes it clear that the decree becomes operative and executable from the date on which it has been passed. Unless, the decree becomes executable, there cannot arise question of seeking any stay against execution. Not only this, but there is statutory restriction upon the Court of appeal against staying the execution of decree merely by reason of appeal having been preferred to challenge the decree. Order 41, Rule 5(1), Civil Procedure Code, therefore, clearly suggests that the decree becomes executable forthwith unless its operation is deferred by the decree itself or by the order of the appellate Court. Further the decree becomes executable even before limitation to challenge the decree expires which is clear from sub-rule (2) of Rule 5 of Order 41, Civil Procedure Code. Once the decree becomes executable, it can be stayed only in accordance with law. For this purpose, not only provision has been made for obtaining stay from the appellate Court but even before preferring appeal, stay against execution of decree can be sought

from the executing Court itself under sub-rule (2) of Rule 5 of Order 45, Civil Procedure Code which provides that where an application for stay before the expiry of time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown, order execution to be stayed. Therefore, from sub-rule (2), it is clear that even before expiry of period of limitation expiry of which makes the decree final, the decree is executable and its stay can be granted by the executing Court even during the period of appeal."

26. In my humble opinion while deciding the aforesaid case, the earlier decision of the learned single Judge of this Court in the case of Sayed Abdul Rauf (AIR 1992 Rajasthan 3) (supra) was not brought to the notice of the learned single Judge. Be that as it may, it may also be stated that the aforesaid decision also runs contrary to the judgment of the Hon'ble Supreme Court rendered in the case of West Coast Paper Mills Limited (AIR 2004 Supreme Court 1596) (supra) where the Hon'ble Supreme Court has clearly laid down in para Nos. 13, 14, 15 and 16, as follows :-

"It may be true that by reason of Section 46-A of Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.

Article 136 of the Constitution of India confers a special power under this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition pending, excluded for computing the period of limitation. In that view of the matter, the Civil suit was filed within the prescribed period of limitation."

27. A reading of the above judgment of the Hon'ble Supreme Court shows that the Hon'ble Supreme Court has clearly held that the decree became executable only after it attained finality with the disposal of the appeal. The Hon'ble Supreme Court then went on to hold that the period spent by the plaintiff in that case in filing the writ petition which was not entertained on the ground of alternative remedy was also liable to be excluded. Thus, it cannot be said that there is a strict rule of rigid consideration for the period of limitation.

28. In the present case against the *ex parte* decree for money dated 5-10-1991 the defendant had two remedies either to prefer an appeal under Section 96, Civil Procedure Code and get it set aside or to file an application under Order 9, Rule 13, Civil Procedure Code and get it set aside. The effect of both the remedies if it results in favor of the defendant is the same and the decree dated 5-10-1991 would not be executable, as has been held by the Hon'ble Supreme Court the decree becomes executable only on the appeal having been decided on the same analogy in the facts and circumstances of the present case the decree became executable on the application filed by the defendant being finally decided on 6-7-2001.

29. In the instant case, the decree-holder had been vigilant and soon after the decree dated 5-10-1991 was passed, he filed the execution application dated 11-12-1991 and the same was prosecuted till such time as this Court allowing the appeal filed by the petitioner remanded the matter to the learned trial Court for decision of the application under Order 9, Rule 13, Civil Procedure Code afresh after affording an opportunity to both the parties to lead evidence on the same vide its judgment dated 22-4-1992. The aforesaid appeal having been allowed, the decree-holder, therefore, proceeded to withdraw the execution application and did not press the same on account of pendency of the proceedings under Order 9, Rule 13, Civil Procedure Code as in the event of the said application having been allowed the entire exercise in the execution would have become futile and it can also be said that the same was in deference to the order passed by this Court. The defendant/ judgment-debtor, on the other hand, despite the order passed by this Court in his favor on 22-4-1992 was not at all interested in prosecuting the application filed under Order 9, Rule 13, Civil Procedure Code which ultimately came to be dismissed for non-prosecution as the defendant/judgment-debtor failed to file the necessary affidavits before the learned trial Court in support of the application under Order 9, Rule 13, Civil Procedure Code for nine years after the order dated 22-4-1992 and consequently the learned trial Court dismissed the said application dated 10-10-1991 vide its order dated 6-7-2001 i.e. after ten years.

30. The aforesaid period in the light of the judgment of the Hon'ble Supreme Court in the case of West Coast Paper Mills Limited (AIR 2004 Supreme Court 1596) (supra) contained in para No. 16 deserves to be excluded.

31. Consequently, there appears to be no merit in the revision petition and the same is accordingly dismissed.

Revision dismissed.

Cases Referred.

1. 2007 (2) WLC 724: (AIR 2007 Rajasthan 117)
2. AIR 1992 Raj 3
3. AIR 2001 SC 279
4. AIR 1984 SC 1383
5. 2004 (2) SCC 747: (AIR 2004 SC 1596)
6. 2007 (2) WLC 124: (AIR 2007 Raj117)