Chandi Prasad & Ors vs Jagdish Prasad & Ors on 1 October, 2004

Author: S.B. Sinha

Bench: N. Santosh Hegde, S.B. Sinha, Tarun Chatterjee

CASE NO.:
Appeal (civil) 599 of 2003

PETITIONER:
Chandi Prasad & Ors.

RESPONDENT:
Jagdish Prasad & Ors.

DATE OF JUDGMENT: 01/10/2004

BENCH:
N. Santosh Hegde,S.B. Sinha & Tarun Chatterjee

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

INTRODUCTION :

What would be the date from which a decree becomes enforceable for execution thereof within the meaning of Article 136 of the Limitation Act, 1963 (the Act) is the question involved in this appeal which arises out of a judgment and decree dated 30th March, 2001 passed by the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 8954 of 2001.

FACTS A suit for partition was filed by the Respondents herein against the Appellants wherein a preliminary decree was passed on 25.4.1962. A final decree proceeding was thereafter initiated whereupon the final decree was prepared on 7.5.1968. On or about 6.8.1968 an execution case marked as Execution Case No. 279 of 1968 was filed by the Respondents. As against the said final decree, however, in the meanwhile a First Appeal had been filed which was marked as Civil Appeal No. 502 of 1968. It was dismissed by an order dated 21.3.1969. A Second Appeal thereagainst was preferred by the Appellants which was allowed and the matter was remitted back to the Appellate Court for determining the merit of the appeal afresh.

The first Appellate Court again dismissed the appeal on 4.1.1974. In the meanwhile, the said execution petition was dismissed, presumably because the Second Appeal

filed by the Appellants was allowed. Against the judgment and decree dated 4.1.1974 passed by the Appellate Court in Civil Appeal No. 502 of 1968, the Appellants herein preferred a Second Appeal before the High Court which was marked as Second Appeal No. 481 of 1974. The said appeal was dismissed by the High Court on 18.4.1985. A formal decree pursuant thereto was drawn on 30.10.1986. An application for execution of the decree was filed by the Respondents on 26.3.1997. Contending that the said execution application is barred by limitation, the Appellants filed an application under Section 47 of the Code of Civil Procedure (the Code) which was dismissed by the Executing Court by an order dated 1.5.1999. The Respondents preferred Misc. Appeal No. 32 of 1999 against the order of Executing Court before the Additional District & Session Judge, Hapur which was allowed holding that the said execution application was not barred by limitation. The Appellants herein filed a writ petition before the High Court questioning the correctness of the said order. The said Writ Petition has been dismissed by the impugned order dated 30.3.2001. Hence this Appeal.

REFERENCE :

When the matter was placed before a 2-Judge Bench of this Court, a decision in Ratansingh Vs. Vijay Singh & Ors. [(2001) 1 SCC 469] was relied upon by the Appellants. Doubting the correctness thereof, the said Division Bench by an order dated 9.1.2003 referred the matter to a 3-Judge Bench.

SUBMISSIONS :

Mr. M.N. Krishnamani, learned senior counsel appearing on behalf of the Appellants submitted that the High Court as also the first Appellate Court committed a manifest error in passing the impugned orders insofar as they failed to take into consideration the purport and object of amending old Article 182 by reason of Article 136 of the Act.

The learned counsel would contend that in terms of old Article 182 of the Act the date of the final decree or order of the Appellate Court or the withdrawal thereof would be the starting point for limitation for computing the period in terms thereof but the very fact that now in stead and place of seven different dates specified therefor for filing an execution petition only one date viz., where the decree or order becomes enforceable, is substituted, it must be held that in absence of any order of stay granted by the Appellate Court, the date of decree of the trial court/first Appellate Court would be the enforceable date for the purpose of Article 136 of the Act; as by reason thereof the period of limitation has been enhanced from 3 years to 12 years, Mr. Krishnamani would contend, the Parliament thus intended to provide that the date of the decree of the first Appellate Court would be the starting period of limitation.

> In any event, the learned counsel would contend that a Second Appeal against an appellate decree being entertainable only on limited ground, namely, on a substantial question of law, doctrine of merger will have no application in relation thereto and in that view of the matter, limitation to file an execution application will be deemed to have been running only from 4.1.1974 and not with effect from 18.4.1985.

Ms. Sandhya Goswami, learned counsel appearing on behalf of the Respondents, however, supported the impugned judgment.

CHANGE IN LAW:

> A decree is defined in Section 2(2) of the Code to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. As against a judgment and decree unless otherwise restricted, a First Appeal would be maintainable under Section 96 of the Code and a Second Appeal under Section 100 thereof. A decree within the meaning of Section 2(2) of the Code would be enforceable irrespective of the fact whether it is passed by the trial court, the first Appellate Court or the second Appellate Court.
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> Where a statutory appeal is provided for, subject, of course to the restrictions which may be imposed, it is a continuation of suit. It is also not in dispute that when a higher forum entertains an appeal and passes an order on merit, the doctrine of merger applies.
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> Before, however, adverting to the aforementioned doctrine, Article 136 of the Act vis-`-vis Article 182 of the old Limitation Act may be noticed.

In the old Limitation Act, not only the date of disposal of the appeal or the withdrawal thereof, the date of the review of the judgment, the date when the decree which has been amended or other factors specified therein were considered to be the starting period of limitation. The period provided for execution of a decree under the Act is a statutory one.

Under the old Limitation Act, law relating to limitation for execution was to be found in Section 48 of the Code (since repealed) and Articles 182 and 183 thereof.

Section 48 of the Code and Article 182 of the old Limitation Act applied to the execution of decrees or orders passed by the courts other than those established by Royal Charter and of the Supreme Court whereas Article 183 applied to execution of decrees and orders of courts established by Royal Charter and Supreme Court. Section 48 of the Code provided for a maximum period of 12 years before the expiry of which any fresh application for execution had to be made. The period of limitation provided under Section 48 of the Code used to be controlled by Articles 182 and 183 of the old Limitation Act. (See Lalji Raja Vs. Farm Hansraj, AIR 1971 SC 974).

Section 48 of the Code of Civil Procedure was also used to be controlled by Section 15(1) of the old Limitation Act.

The substance of Section 48, thus, continues to be the law. It is also trite that the provisions of the Code of Civil Procedure as also the Act have all along been considered to be supplemental to each other. It is also well- settled that execution of the decree would mean the enforcement of the decree by what is known as process of execution. All processes and proceedings in aid to or supplemental to execution would come within the meaning of the word "execution" within the meaning of Section 15(1) of the Limitation Act. [See Anandilal and Another Vs. Ram Narain and others, AIR 1984 SC 1383].

Keeping in view the fact that the first execution petition was maintainable at different stages of same proceedings but the same used to be filed within a period of 12 years under the Code of Civil Procedure and such application was required to be made in a period of 3 years from various points of time as specified in Article 182 of the old Limitation Act, the Parliament thought it expedient to carry out an amendment.

The reasons for bringing on the statute book, the present Article 136 may be noticed. By reason of the said amendment, the filing of the execution petition has been simplified and the difficulties faced for computation which used to arise for grant of stay or not has become immaterial. In terms of Article 136 of the Act, thus, a decree can be executed when it becomes enforceable.

Article 136 substantially reproduces the provisions of Section 48(1) of the Code of Civil Procedure which by reason of the Act stands repealed. In that view of the matter, the Parliament thought it fit to provide for one period of limitation for an application for execution in stead and place governing each of the several execution applications which the decree holder can make within a period of 12 years.

It is not disputed that all decrees; be it original or the appellate, are enforceable. Once a decree is sought to be enforced for the purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation.

It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. [See U.J.S. Chopra Vs. State of Bombay, AIR 1955 SC 633] When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

MERGER:

> The doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make a distinction between

an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income-tax, AIR 2000 SC 1623] The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed and Others Vs. State of Kerala and Another [(2000) 6 SCC 359] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating:

"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68)

43.We may look at the issue from another angle.

The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is

> impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

In Kunhayammed (supra), it was observed:

> "12 Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-
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> matter of challenge laid or which could have been laid shall have to be kept in view."

The said decision has been followed by this Court in a large number of decisions including Union of India and Others Vs. West Coast Paper Mills Ltd. and Another [(2004) 2 SCC 747].

However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. [See Raja Mechanical Company Pvt. Ltd. Vs. Commissioner of Central Excise, ILR 2002 (1) Del. 33] RATANSINGH:

> In Ratansingh (supra), possession of a property was obtained on 14.12.1970. The First Appeal thereagainst was dismissed on 1.8.1973.

Execution Petition was filed on 24.3.1988, i.e., beyond the time fixed by the Act. The Second Appeal preferred by the judgment debtor was rejected having regard to the fact that the delay in filing the said appeal was not properly explained.

Upon analyzing when a decree or order becomes enforceable vis-`-vis the definition of 'decree' in Section 2(2) of the Code this Court observed that when a dismissal of an appeal takes place on the ground of its being time barred, no decree is passed.

Ratan Singh (supra), therefore, has no application in this case as admittedly herein the High Court upon dismissal of the Second Appeal had drawn up a formal decree on 30th October, 1986.

For the reasons aforementioned, we are of the opinion that no case has been made out for interference with the impugned judgment. There is no merit in this appeal which is dismissed accordingly. No costs.