Sita Ram Goel vs Sukhnandi Dayal & Anr on 20 September, 1971

Equivalent citations: 1972 AIR 1612, 1972 SCR (1) 836, AIR 1972 SUPREME COURT 1612, 1973 ALL. L. J. 145, 1973 BLJR 175, 1972 (1) SCR 836, ILR 1973 2 ALL 146

Author: C.A. Vaidyialingam

Bench: C.A. Vaidyialingam, P. Jaganmohan Reddy

PETITIONER:
SITA RAM GOEL

Vs.

RESPONDENT:
SUKHNANDI DAYAL & ANR.

DATE OF JUDGMENT20/09/1971

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
REDDY, P. JAGANMOHAN

CITATION:
1972 AIR 1612 1972 SCR (1) 836
1972 SCC (3) 488

ACT:
Code of Civil Procedure (Act 5 of 1908),ss.47, 105 (2), O.21, rr.1 and 2 (as in force in Allahabad), O. 41, r. 23 and O. 43, r. 1 (u)-Scope of-Application by judgment debtor under O. 21, r. 2-Question of limitation decided and matter remanded regarding factum of payments--Decision by both subordinate courts in favour of judgment debtor--Whether question as to payments were in accordance with O. 21, r. 1, C.P. C. could be gone into by High Court in second appeal.

HEADNOTE:
The respondent, who was the landlord under whom the appellant was a tenant, obtained a decree for eviction and damages against the appellant. The respondent filed an execution application on July 19, 1960. In answer to it the appellant flied objections by initiating proceedings under O. 21, r. 2(2) C.P.C. on September 3, 1960. In that

application, the appellant alleged that there was a compromise between the parties on July 25, 1957 that in pursuance of the compromise he made various payments and that the last of the payments was made on June 16, 1960, and prayed for recording an adjustment of the decree. The trial court, however, held that as the compromise was entered into on July 25, 1957 the period of limitation for filing the application would start from that date, and since the application was filed beyond 90 days from that date, it was barred by limitation. The trial court dismissed the application on that sole ground, without investigating into the truth of the compromise or the payments. On appeal, the appellate court accepted the contention of the appellant that if he was able to establish that be bad made the last payment on June 16, 1960 the period of limitation of three months for filing an application under O. 21, r. 2 would begin to run only from that date and that his application would be in time. The appellate court therefore set aside the order of the trial court and remanded the proceedings for investigation into facts, namely, whether the compromise and the payments alleged to have been made by the appellant on the basis of the compromise and particularly the payment said to have been made on June 16, 1960, were true. After remand, the trial court accepted the plea of the appellant regarding the truth of the compromise as well as the payments said to have been made by him, including the payment of June 16, 1960, held that the application filed was within time, and ordered 'full adjustment and satisfaction of the decree. On appeal, the findings of the trial court were confirmed and the anneal was dismissed, in second appeal, the High Court accepted the findings on the questions of compromise and payments but held that as the appellant had not claimed to have made the payments in compliance with O. 21, r. 1, C.P.C., as amended and in force in Allahabad, it was not open to the appellant to ask for recording adjustment of the decree, and dismissed the application of the appellant filed under O. 21, r. 2.

Allowing the appeal to this Court,

HELD: In view of the decision of the appellate court when remanding the matter, it was not open to the respondent to raise the objection ,either of limitation or that the payments had not been made as per O. 21, T. 1, C.P.C. The parties and the courts had proceeded an the basis that

837

the entire question related to a controversy in respect of execution, discharge or satisfaction of the decree. Under s. 47(2) C.P.C., the Court has power to treat the said proceeding as a suit. Under O. 41, r. 23, an appellant court has power to remand a proceeding when a suit has been disposed of on a preliminary point; and under O. 43, r. 1 (u) C.P.C. an appeal lies against an order remanding the case where an appeal would lie against the decree of the appellate court. The respondent should have filed an appeal

against the order of the remand, and the consequence of his omission to file such an appeal is that under s. 105(2), C.P.C., the decision of the appellate court, while remanding the matter, regarding the date from which the period of limitation is to commence, namely June 16, 1960, if payment on that date was established by the appellant, was final and binding on the parties. The High Court when dealing with the matter should have given due effect to the decision given in the order of remand and should have held that the respondent was precluded from raising either the plea of limitation or that it was not open to the appellant to rely upon the payments not made in accordance with O. 21, r. 1, C.P.C., as in force in Allahabad. The High Court had not differed on the concurrent findings recorded on facts in favour of the appellant and therefore, interference with the decision of the two subordinate courts was erroneous in law. [843 F-G. 844 C-H; 845 A-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1970 of 1969. Appeal by special leave from the judgment and order dated January 21,1969 of the Allahabad High Court in Ex. Second Appeal No. 270 of 1963.

The appellant appeared in person.

E.C. Agrawala, A. T. M. Sampath and S. R. Agarwal,, for the respondent.

The Judgment of the Court was delivered by Vaidialingam J. The appellant in this appeal, by special leave, has argued his case in person and attacks the judgment of the Allahabad High Court dated January 21, 1969 reversing the decrees of the two Subordinate Courts. The facts leading upto this appeal may be briefly stated :

The respondent, who is the- landlord, under whom the appellant is a tenant, obtained an exparte decree on March 9, 1957 in suit No. 74 of 1956 in the Court of the Additional Munsif, Kanpur. The decree was not only for eviction, but also for payment of rent or damages and mesne profits, as well as costs.

The appellant pleaded that there was a compromise entered into between him and the respondent in and by which the manner of extinguishment of the decree was arrived at. That compromise, according to the appellant, was entered into on July 25, 1957. The terms of the compromise have been incorporated in ,the judgment of the Additional District Judge dated March 27, 1961 in Misc. Civil Appeal No. 688 of 1960 and in other proceedings, and it is unnecessary for us to refer to them. It is enough to note that if the amounts agreed to be paid as per its terms were paid the decree for eviction would stand extinguished retrospectively.

The plea of the appellant was that he has made the payments in accordance with the compromise and the last of such payments was on June 16, 1960. As noted earlier, according to him, the date of the compromise was July 25, 1957. It was his claim that when the last payment was made, the decree for eviction obtained against him on March 9, 1957 stood extinguished and that the landlord-respondent has no further right to execute the decree.

The landlord had filed an application on July 19, 1960 for executing the decree in Suit No. 74 of 1956. Prior to that, the appellant appears to have taken certain proceedings and asked for stay of execution till the disposal of some criminal case an also for adjustment of payments. We are more particularly concerned with the application filed by the appellant on September 3, 1960, before the trial court. That application was under Order XXI Rule 2(2) C.P.C. In that application, the appellant, after referring to the compromise and the various payments, claimed to have been made by him under the compromise, prayed for recording an adjustment of the decree. This application was opposed by the respondent on three grounds : (a) There has been no compromise, (b) There has been no payment, and (c) The application under Order XXI Rule 2 is barred by limitation, as it has been filed beyond 90 days from July 25, 1957. The contentions of the landlord-respondent were accepted by the trial court, which by its order dated October 8, 1960, dismissed the application filed by the appellant under Order XXI Rule 2, on the ground that the application having been filed beyond 90 days from' July 25, 1957 was barred by limitation. It is the view of the learned Munsif that as the case of the appellant was that the compromise was entered into on July 25, 1957, the period of limitation for filing an application for recording adjustment of the decree will start from that date. The application filed by the appellant was dismissed on this sole ground without inves- tigation into the truth of the compromise and the payments. The appellant carried the matter before the learned Additional District Judge, Kanpur in Misc. Civil Appeal No. 688 of 1960. Before the learned District Judge, the appellant raised the contention that the view of the trial court that the period of limitation starts from July 25, 1957 is erroneous. He pleaded that as the decree obtained by the landlord will get extinguished only when the last payment was made, namely, on June 16, 1960, the period of limitation of 90 days for filing the application for recording adjustment of the decree will have to be computed from that date. As the application has been filed within 90 days from June 16, 1960, the executing court has acted erroneously and illegally in rejecting his application as being barred. The appellant had also raised contentions on facts regarding the truth of the compromise, as well as the payments claimed to have been made by him.

These contentions of the appellant, as seen from the judgment, were very strenuously contested by the respondent who pleaded that the application filed under Order XXI Rule 2 was barred, as correctly held by the executing court on the basis that the limitation starts from July 25, 1957. The respondent pleaded that the appellant had sufficient opportunity to lead evidence both regarding the truth about the factum of compromise as well as regarding the payments claimed to have been

made by him. As this opportunity was not availed of by the appellant, the landlord pleaded that the appeal should be dismissed.

The learned District Judge by his judgment and order dated March 27, 1961, after referring to the contentions of the parties, as well as the terms of the compromise pleaded by the appellant, considered the main question as to from what date the period of limitation is 'to be computed. The learned Judge before whom case law was cited on both sides with regard to the starting point for limitation, ultimately accepted the contention- of the appellant that if he is able to establish that he has made the last payment, on June 16, 1960, the period of limitation of three months for filing an application under Order XXI Rule 2 would begin to run only from that date,, and that in that case, the application filed on September 3, 1960 will be in time. The learned Judge categorically rejected the contention of the respondent-decree-holder supporting the view of the trial court that limitation has begun to run from July 25, 1957. In fact the trial court could not have held otherwise, in view of the decision of the District Court in Misc. Civil Appeal No. 688 of 1960.

After holding that the limitation will start only from June 16, 1960, the learned Judge, however, adverted to questions regarding the truth about the compromise as well as the payments claimed to have been made by the appellant. But the court was faced with this difficulty, namely, that parties had not adduced evidence before the trial court as the latter had dismissed the application of the appellant on the ground that it was barred by limitation. Therefore, the learned District Judge set aside the order of the trial court and remanded the proceedings for investigation into facts, namely, whether the compromise and the payments alleged to have been made by the appellant on the basis of the com- promise, particularly the payment stated to have been made on June 16, 1960 were true. He gave a specific direction that if the payment on June 16, 1960 is found in favour of the judgment debtor the application filed by him is not barred by limitation It is significant that the respondent-landlord never raised any objection to the maintainability of the appeal No. 688 of 1960. Nor did he raise the contention that no investigation into the truth of the compromise or payments pleaded by the judgment debtor was needed as the payments claimed to have been made have not been certified and made in accordance with Order XXI Rule 1 C.P.C. as in force in Allahabad, nor on the ground that the application filed by the judgment debtor is barred by time. No appeal was filed by the decree-holder against the order of remand passed by the District Court.

After remand, both the parties adduced evidence with regard to these questions of fact before the trial court. Even before the trial court the decree,-holder did not contest its jurisdiction to investigate into facts. In fact, he could not have raised any such contention, as the Munsif was bound by the remand order. By judgment and order dated September 28, 1961, the learned Munsif accepted the plea of the appellant both regarding the truth of the compromise as well as the payments stated to have been made by him. In particular, though there was a serious controversy between the parties regarding the payment stated to have been made by the appellant on June 16, 1960, the learned Munsif, on the evidence, accepted the appellant's case and held in his favour on this point. In view of this finding regarding payment on June 16, 1960, in favour of the judgment-debtor, the period of limitation was computed by the Munsif from that date, as directed by the remand order of the District Judge, and held that the application filed by the judgment debtor was within time. In this view, the learned Munsif ordered full adjustment and satisfaction of the

decree as well as cost and further held that the decree got extin- guished as pleaded by the judgment debtor. The respondent filed an appeal before the 1st Additional Civil Judge challenging the judgment and order of the trial court dated September 28, 1961. The learned Civil Judge by his judgment dated October 20, 1962, confirmed the findings of the trial court and dismissed the respondent's appeal. The respondent-decree-bolder filed Second Appeal No. 270 of 1963 before the High Court. The learned Judge has not adverted to the proceedings referred to above leading up to the order of remand and the directions given in Misc. Civil Appeal No. 688 of 1960. On the other hand, the learned Judge has proceeded on the basis as if the decision in this case was rendered for the first time by the Munsif on September 28, 1961, and by the Civil Judge on October 20, 1962. In view of this, the. learned Judge merely noted that the two subordinate courts have concurrently accepted the case of the appellant, both on the question of compromise, as well as the payments claimed to have been made by him. The learned Judge has also noted that the claim of the judgment debtor that he paid Rs. 235/- on June 16, 1960 has been concurrently accepted by both the courts. After noting the above findings recorded concurrently by both the courts, the High Court does not express any disagreement with those findings. But on the basis of those findings, the High Court considered the question whether, in the nature of the compromise pleaded by the appellant and found in his favour by the two courts, an application under Order 21 Rule 2 C.P.C. was maintainable. In this connection the High Court referred to the provisions of Order 21 Rule 1 C.P.C. as amended and in force in Allahabad. After quoting that rule, the High Court' is of the view that as the appellant has not claimed to have made payments in compliance with those provisions, it was not open to him to ask for recording adjustment of the decree. According to the High Court, his remedy, if any, is only by way of a separate suit for damages against the decree-holder. It is the further view of the High Court that this aspect has not been considered at all by the two courts and as such they committed an error in investigating the question regarding the truth or otherwise of the compromise or payments claimed to have been made in pursuance of the said compromise, particularly the payments made on June 16, 1960. The High Court then refers to the stand taken by the decree-holder that even on the basis of the compromise, the period of limitation for filing an application for recording adjust- ment of the decree commences fro in July 25, 1957 as also the plea of the appellant that limitation commences from June 16, 1960, when the last payment was made, The High Court expressed the view that the agreement pleaded could amount to an adjustment of the decree only if the said agreement was in writing and had been tiled within the period allowed by the law of Limitation. The High Court has not pursued the matter further and expressed an opinion as to what is the date from which the period of limitation is to be computed. In the end the High Court expressed the view that the whole approach made by the two subordinate courts is erroneous, Obviously, this criticism must refer to the circumstances noted by the High Court that the payments under the, compromise. have not been claimed to have been made in the manner provided in Order 21 Rule 1 C.P.C. as in force in Allahabad. On this reasoning the High Court reversed appellant filed under Order 21 Rule 2 C.P.C. It will be noted that even before the High Court the respondent had not taken any objection that the appeal filed by the judgment debtor namely, Misc. Civil Appeal No. 688 of 1960 was not maintainable and that the findings recorded therein against are not binding on him:

> The appellant urged before us that the High Court was not justified in interfering with the concurrent findings on facts and that it committed an error in going behind

the findings recorded in the Misc. Civil Appeal No. 688 of 1960. He further urged that the question as to from what date the period of limitation is to be computed has already been adjudicated upon in the said appeal, and that the decree-holder should not have been permitted to raise over again the point concluded by the remand order. The appellant also urged that the view of the High Court that the payments have not been made by him in accordance with Order 21 Rule 1 C.P.C. is not correct.

Mr. E. C. Agarwala, learned Counsel for the respondent decree-holder has drawn our attention to Order 21 Rule 1 C.P.C. as in force in Allahabad. He contended that even according to the appellant the payments have not been made in accordance with the said rule. Therefore, he urged that the High Court was perfectly justified in holding that the payments which have not been made in accordance with the said rule, cannot be taken into account for recording adjustment of the decree.

In the view that we take that because of the decision in Misc. Civil Appeal No. 688 of 1960 it is not open to the respondent to raise the objection either of limitation on or that the payments have not been made as per the said rule, we express no opinion whether the payments made directly to the decree-holder under the specific terms of an agreement or a compromise cannot be pleaded in an application filed for recording satisfaction or adjustment and whether under those circumstances such payment should also be made in the manner provided in the said rule.

One aspect which strikes us and which will conclude the case against the respondent is the finding recorded by the learned District Judge on March 27, 1961 in Misc. Civil Appeal No. 688 of 1960. We have already referred to the nature of the findings recorded therein. The executing court had dismissed the application filed by the appellant on the ground that it is barred by limitation as it has been filed beyond 90 days. from July 25, 1957. Before the District Judge parties were at issue on this aspect. While according to the appellant, limitation starts only from June 16, 1960, the respondent's plea was that limitation commences from July 25, 1957 Various decisions were cited by both the parties before the District Court. After a consideration of those decisions, the District Court specifically held that if the appellant is able to establish the compromise as well as the further fact that he paid the last instalment on June 16, 1960, his application is not barred by limitation as it has been filed within 90 days, namely on September 3, 1960. Though the respondent pleaded that the appellant had an opportunity to let in evidence regarding the truth of the compromise as well as the payments claimed to have been made by him, the District Court took the view that the learned Munsif had no occasion to consider these aspects as he dismissed the application filed 'by the appellant on the sole ground of limitation. After specifically recording the date from which period of limitation is to be computed, the learned District Judge remanded the proceedings to the trial court for investigation into the truth of the compromise as well as the. payments claimed to have been made by the appellant. The District Munsif, after remand has elaborately gone into the matter and specifically found on fact in favour

of the appellant, both regarding the truth of the compromise and the payments. He also held that the last payment has been made on June 16, 1960, and, therefore, in view of the directions contained in the remand order, the application filed by the appellant was within time.

It is against this order of the District Munsif that the respondent filed an appeal before the District Court and a further Second Appeal before the High Court. We have already stated that the respondent had filed on July 19, 1960 an application for executing the exparte decree. It is in answer to that execution petition that the appellant filed objections by initiating proceedings under Order 21 Rule 2(2) C.P.C. on September 3, 1960. Therefore, the. parties and the Courts had proceeded on the basis that the entire question related to a controversy in respect of execution, discharge or satisfaction of the decree.Under s. 47(2) C.P.C. the Court has power to treat the said proceeding as a suit. That explains why the respondent did not raise any objection before the District Court that Misc. Civil Appeal No. 688 of 1960 filed by the appellant was not maintainable. We have already pointed out that before the District Court 'the respondent did not also raise any objection that no investigation regarding the truth of the compromise and the payment is necessary as the amount, even according to the appellant, has been paid contrary to Order 21 Rule 1 C.P.C. as in force in Allahabad.

In View of the circumstances pointed out above, in our opinion, the decision of the Additional District Judge in Misc.

Civil Appeal No. 688 of 1960 precludes the respondent from reagitating the point covered by that decision. Mr. Agarwala pointed out that Misc. Civil Appeal No. 688 of 1960 was not maintainable. We are not impressed with this contention because apart from the fact that no such objection was raised before the District Court, which was dealing with the said appeal, the respondent himself has filed the appeal and the Second Appeal against the order passed by the District Munsif after remand. It was against the original order of the District Munsif that the appeal was filed by the appellant before the District Court. Even otherwise, as We have already pointed out, the proceed- ings have been treated 'as one under s. 47 C.P.C. in which the Misc. Civil Appeal No. 688 of 1960 was perfectly competent. Under Order 41 Rule 23, an appellant court has got power to remand the proceedings when a suit has been disposed of on a preliminary point. We have already pointed out that the District Munsif dismissed the application filed by the appellant on the preliminary ground that it is barred by limitation. We have already further pointed out that it must be considered to be a proceeding under s. 47 as it was really in opposition to the execution proceedings filed by the respondent. The appellate court, under those circumstances, when it disagreed with the trial court on the question of limitation was perfectly competent to remand the proceedings. Under Order 43 Rule 1 Cl.(u) C.P.C. an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court. From the fact that the respondent has filed Second Appeal, which is the subject of attack before us against the decision in an appeal of the District Court in the same proceedings, it is clear that the respondent should have filed an appeal against the order of remand.

The consequence of an omission to file an appeal against the order of remand, under such circumstances, is indicated in s. 105. sub-s. (2) C.P.C. which is as follows :

"Sec. 105(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which-an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

We have already pointed out that the respondent had a right of appeal against the judgment and order passed in Misc. Civil Appeal No. 688 of 1960. The respondent admittedly did not file an appeal against the said order of remand. If so, it follows that the decision in Misc. Civil Appeal No. 688 of 1960 regarding the date from which the period of limitation is to commence, namely, June 16, 1960, if payment on that date is established by the appellant binds both the parties, as that decision has become final. It is on the basis of that decision that the trial court went into the facts and held in favour of the appellant. Those findings have been confirmed by the District Court on October 20, 1962. It was against the fresh decision given by the District Munsif on September 28, 1961 and confirmed by the District Court on December 20, 1962 that the present Second Appeal was filed before the High Court by the respondent. The High Court when dealing with the matter should have given due effect to the decision given in the order of remand in Misc. Civil Appeal No. 688 of 1960 and should have held that the respondent is precluded from raising either the plea of limitation or that it was not open to the appellant to rely upon the payments hot made in accordance with Order 21 Rule 1 C.P.C. as in. force in Allahabad. The High Court has committed a very serious error in law in not adverting to the remand order as well as to the various other circumstances We have already pointed out that the High Court has not differed from the concurrent findings recorded on facts in favour of the appellant. The interference by the High Court with the decision of the two subordinate courts is erroneous in law.

In the result, the decree and judgment of the High Court dated January 21, 1969 in Second Appeal No. 270 of 1963 are set aside and this appeal is allowed. There will be no order as to costs.

V.P.S. Appeal allowed.