

Prem Lata Agarwal vs Lakshman Prasad Gupta & Ors on 23 April, 1970

Equivalent citations: 1970 AIR 1525, 1971 SCR (1) 364, AIR 1970 SUPREME COURT 1525, 1970 SCD 612 1970 KER LJ 649, 1970 KER LJ 649

Author: A.N. Ray

Bench: A.N. Ray, I.D. Dua

PETITIONER:
PREM LATA AGARWAL

Vs.

RESPONDENT:
LAKSHMAN PRASAD GUPTA & ORS.

DATE OF JUDGMENT:
23/04/1970

BENCH:
RAY, A.N.
BENCH:
RAY, A.N.
DUA, I.D.

CITATION:
1970 AIR 1525 1971 SCR (1) 364
1970 SCC (3) 440

ACT:
Limitation Act (9 of 1908), s' 15 and Art. 182 and Code of
Civil Procedure (Act 5 of 1908), s. 48-Scope of.

HEADNOTE:

The first respondent, in 1938, obtained a decree against the appellants branch of a joint family, and in 1941, commenced proceedings for the execution of the decree in Allahabad. Meanwhile, in 1939, a final decree had been passed in a suit for partitioning the family properties among the members of the joint family, and the matter was taken up in appeal to the High Court of Allahabad. Certain orders were passed by the High Court which were construed by the executing court in the years 1941 and 1942 as stay orders of the execution proceedings commenced by the respondent. The High Court

passed a final decree in the partition suit in December 1949, but did not immediately discharge the Receivers who were appointed during the pendency of the suit. The respondent revived the execution proceedings in May 1, 1950 and a mill belonging to the joint family was attached and sold 'but the sale was set-'aside in 1955 as the appellant's branch applied for relief under the U.P. Encumbered Estates Act, 1934. Thereafter, in 1956, the decree in favour of the respondent was transferred to Madras High Court for execution and on 13th August, 1956, the respondent filed an execution application, for attainment of certain properties which fell to the appellant's share.

High Court of Madras in Letters Patent Appeal held that the execution application was in time. On the question whether the execution application dated 13th August, 1956, was in time, or barred by limitation,

HELD : (i) The respondent bonafide pursued execution against the mill and since his good faith was not questioned before the Appellate Court it was not open to the appellant to do so in this Court. [370 A, C]

(ii) It was not possible to spell out any order of partial stay on the facts and circumstances of the present case. The facts that the Receivers were not finally discharged in 1949 when the final decree by the High Court was passed in the partition suit, and the understanding of the parties and the executing court that execution was stayed by the High Court, indicate that the stay was in unqualified terms. Therefore, the respondent could not have applied earlier 'for execution with respect to other property of the joint family either at Allahabad or at Madras. [369 A-C, D-G]

(iii) Further, when the execution proceedings were revived in May 1950 the executing court held that execution proceedings had been stayed till December 1949 and the appellant did not challenge the order of attachment and sale of mill on the ground that the proceedings were barred by limitation. Therefore, the appellant was barred by the principle of res judicata from questioning the order of May 1950 on the ground of limitation. [371 D-E]

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(iv) Section 15 of the Limitation Act states that in computing the period of limitation prescribed the time of the continuance of the injunction staying execution shall be excluded. The word "prescribed" would apply not only to Limitation Act but also to the limitation prescribed in general statutes like the Civil Procedure Code. Section 48 of the Code, as it then stood, laid down 12 years as the maximum limit of the period of execution but it did not prescribe the period within which each application for execution was to be made. Such an application was to be made within three years from the dates mentioned in third column of Article 182 of the Limitation Act, 1908. Therefore, an application for execution of a decree must first satisfy Article 182 and it would then have to be found

out as to whether s. 48 of the Civil Procedure Code operated as a further bar. [370 C-H; 371 A-B]

(v) Since the execution proceedings were stayed in the present case, the respondent was entitled to claim its benefit of s. 15 of the Limitation Act in respect of the period of stay of the execution of his decree, from June 1941 till end of 1949; and since the execution application of 1950 was finally disposed of in 1955, the present application filed in 1956 was within time. [372 E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 350 of 1970. Appeal by special leave from the judgment and order dated March 21, 1966 of the Madras High Court in O.S. Appeal No. 11 of 1962.

B. R. L. Iyengar, M. V. Goswami, S. R. Agarwala, A. T. M. Sampat and E. C. Agrawala, for the appellant. U. P. Singh, Santok Singh, Ugra Shankar Prasad and Shiva Pujan Singh, for respondent No. 1.

S. P. Sinha and M. I. Khowaja, for respondents Nos. 2 and 3. The Judgment of the Court was delivered by Ray, J. This appeal is by special leave from the judgment dated 21 March, 1966 of the Madras High Court dismissing the appeal preferred by the appellant against the decree holders' application for execution of the decree. The appellant is one of the judgment-debtors brought on record as legal representative of a deceased judgment debtor Lala Baijnath Prasad. Respondent No. 1 Lakshman Prasad Gupta was one of the plaintiffs. Pratap Chand and Basudeb Prasad respondents Nos. 2 and 3 respectively are the sons of a judgment-debtor Girdharilal Agarwala.

The plaintiff respondent Lakshman Prasad Gupta was married to the sister of Lala Bansilal. Bansilal belonged to the joint family which consisted inter alia of the appellant's father. There were five branches of the said joint family of the judgment-debtors, three whereof were at Banaras, Calcutta and Naini and the other two were the branches of the descendants of Mohanlal and of Lala Baijnath Prasad, father of the appellant, respectively. The said joint family had valuable properties in and around the town of Arrah in Bihar. There are alleged to be valuable properties of the joint family also at Allahabad, Banaras, Bombay, Calcutta and Madras. Some time in the year 1926 Lala Pratap Chand, one of the descendants of Mohanlal who was a grand-uncle of Lala Bansilal filed a partition suit in the court of the Subordinate Judge at Allahabad. A preliminary decree was passed in the said partition suit on 14 February, 1927. An appeal was preferred and it was dismissed. An amicable settlement was arrived at in the partition suit on 13 January, 1931 for partition of the properties into five equal lots and allotment of the shares. Thereafter a Commissioner was appointed in the partition suit to go into accounts and prepare five lots. The branches inter se raised disputes as to liability for loans alleged against the joint family. The Commissioner prepared his report on 18 May, 1936. Final decree was passed on 13 January, 1939. An appeal was preferred against the said final decree in the partition suit to the High Court at Allahabad. The appeal was disposed on 6 December, 1949.

The plaintiff Lakshman Prasad Gupta and six others filled suit No. 76 of 1937 in the Court, of the First Subordinate Judge at Arrah in Bihar and obtained a decree on 20 July, 1938 for Rs. 18,540 and for costs Rs. 1,840/4/- aggregating Rs. 20,380/4/-. This decree was against Banwarilal and other members of the joint family to which the appellant's father belonged. The decree was transferred from Arrah to the Court of the Civil Judge at Allahabad where. on 2 June, 1941 the decree-holder commenced execution proceedings marked as Execution Petition No. 38 of 1941. In that execution petition the decree-holder prayed for attachment and sale of Shri Krishna Desi Sugar Works at Jhusi known as the Jhusi Sugar Mills in the District of Allahabad which belonged to the joint family.

The execution proceedings were according to the decree- holders stayed under orders of the Allahabad High Court and after the stay order was vacated the execution proceedings were revived on 13 May, 1950. The jhusi Sugar Mill was attached on 11 July, 1952 and it was sold on 19 February, 1955. The sale was set aside on 31 May, 1955 pursuant to objections of the judgment-debtors that the Jhusi Sugar Mill could not be sold because of the provisions of the U.P. Encumbered Estates Act, 1934. It may be stated here that some time in the month of September, 1935 Baijnath Prasad filed an application before the Collector of Allahabad for protection and relief under the U.P. Encumbered Estates Act of 1934 and it was registered as Encumbered Estates, Suit No. 25 of 1935.

Thereafter the decree-holders on 17 March, 1956 made an application in the Arrah Court for transfer of the decree. On 6, June, 1956, the Subordinate, Judge, at Arrah transferred the decree to the Madras High Court. On 13 August, 1956 the decree-holders, filed in the Madras High Court an application for attaching the properties of the joint family. This application in the Madras High Court is the subject matter of the present appeal.

The matter-was heard first by the Master of the High Court of Madras who held that the application for execution was barred by limitation. An appeal from the decision of the Master was heard by the learned Single Judge of the Madras High Court who held that the application was not within the mischief of bar of limitation Thereafter Letters Patent Appeal was heard by a Division Bench of the Madras High Court. The appeal is from the Bench decision upholding the judgment of the learned Single Judge.

Before the Master of the Madras High Court the contention on behalf of the judgment debtors was that the decree was passed on 20 July, 1938 and therefore the execution petition filed on 13 August, 1956 was barred by limitation. The decree holders on the other hand contended that the execution of the decree which commenced on 2 June, 1941 before the Civil Judge at Allahabad was stayed till the end of 1949 and was revived on 13 May, 1950 and finally disposed on 31 May, 1955, and, therefore, the execution petition filed on 13 August, 1956 was within time. The Master held that the decree holders had failed to prove as to from what point of time the execution of the decree was stayed pursuant to the order of the Allahabad High Court and also the time when the stay was vacated. The application for execution was therefore found by the Master of the Madras High Court to be barred by limitation.

The learned Single Judge of the Madras High Court referred to the revival of execution proceedings before the Civil Judge at Allahabad on 13 May, 1950 and also the finding of the Civil Judge at

Allahabad who in passing the final order on 31 May, 1955 setting aside the sale of the Jhusi Sugar Mill stated that the execution proceedings were stayed by orders of the High Court at Allahabad., The Civil Judge at Allahabad set aside the Sale because of the mandatory provisions of sections 7(2) and 9(5) of the U.P. Encumbered Estates Act. The Madras High Court placed reliance on Exhibits P-2, P-3 and P-3A on the question of stay of execution proceedings. It may also be stated here that the judgment 3 68 debtor did not dispute the translation of those Exhibits P-3 and P-3A. The Exhibits set out the orders of the Civil Judge at Allahabad. Exhibit P.-2 is the judgment dated 31 May, 1955 passed by the Civil Judge setting aside the sale of the Jhusi Sugar Mill. Exhibits P-3 and P-3A comprise the orders passed by the Civil Judge. The three relevant orders in Exhibits P-3 and P-3A are dated 18 August, 1941, 23 August, 1941 and 30 August, 1941 in the said execution proceedings.

The order dated 18 August, 1941 was to the effect that the receivers were to be informed about the execution proceedings and their objections, if any. The receivers were the receivers in the partition suit No. 4 of 1926. The said order further recited that the orders of the High Court at Allahabad in the, partition suit were also received in the executing court. The order dated 23 August, 1941 recited that the execution application of the decree holder was presented in the presence of the lawyers of the decree holder and the receivers. Further, the order was that the request for permission should be submitted in suit No. 4 of 1926 namely, the partition suit of the defendants judgment debtors. The order dated 30 August, 1941 recorded by the Civil Judge at Allahabad was inter alia as follows :-

"The proceedings remain stopped on account of the injunction of the High Court. Hence it was ordered that receivers should be informed accordingly. Further steps will be taken after getting permission .

These orders are relied on by the decree holder to substantiate the case of stay of execution proceedings. The contention which was advanced before the Madras High Court and repeated in this Court was that there was no absolute stay of the execution of the decree. It was amplified to mean that the execution proceedings before the Civil Judge at Allahabad related only to one property and therefore the decree holders would not be entitled to claim benefit of exclusion of time by reason of partial stay of execution proceedings at Allahabad. The Madras High Court rightly found that there was no evidence that the judgment debtors were possessed of other properties in Allahabad where the decree was being executed. The Madras High Court rightly held that the decree holders were restrained by injunction issued by the Allahabad High Court from executing the decree and were therefore entitled to claim the benefit of section 15 of the Limitation Act in respect of the period of stay of execution of the decree.

It was contended-by counsel for-the appellant that the decree holder could start execution proceedings in Madras or in other States where the judgment debtors had properties. Simultaneous 3 6 9 execution proceeding in more places than one is possible but the power is used sparingly in exceptional cases by imposing proper terms so that hardship does not occur to judgment debtors by allowing several

attachments to be proceeded with at the same time. In the present case, however, the important features are that a partition suit was instituted in the year 1926 among the defendants. and receivers were appointed of the properties. The judgment of the Allahabad High Court dated 6 December, 1949 disposing the appeals filed by the parties in the partition suit directed inter alia "that the parties will be put in possession of the immoveable properties at once, but the two receivers will be legally discharged only after they have accounted for the period they were in charge of the properties". Counsel for the decree holder rightly relied on this portion of the judgment of the Allahabad High Court that this would fortify the construction that there was stay of execution of the decree.

In the present case, the effect of the order passed by the Allahabad High Court was recorded by the Civil Judge, Allahabad in his judgment dated 31 May, 1955 to amount to stay of execution proceedings.. The order of the Civil Judge, Allahabad dated 30 August, 1941 was that "proceedings remain stopped on account of the injunction order issued by the High Court. in the Madras High Court the parties proceeded on the basis of the order as recorded by the Civil Judge at Allahabad. The order indicates that the stay of execution proceedings was in unqualified terms, namely, that the execution proceedings were stopped. It is not possible to spell out any order of partial stay in the facts and circumstances of the present case as was contended by counsel for the appellant. The order is on the contrary to the effect that there was an absolute, stay of execution proceedings. It is, therefore, manifest that the execution proceedings before the Civil Judge at Allahabad were stayed and the decree holder was rightly found by the Madras High Court to the benefit of exclusion of time during which the execution, was stayed, Though the judgment debtors did not question before the Master of the Madras High Court the bona fides of the decree holder in prosecuting the execution proceedings, that contention was advanced before the learned Single Judge of the Madras High Court. The learned Single Judge of the Madras High Court held that the decree holders commenced execution proceedings for sale of the Jhusi Sugar Mill for realisation of the decretal amount but the attempt of the decree holder failed because of the objections of R the judgment-debtors under the provisions of the U.P. Encumbered Estate Act. The sale was set aside by reason of the mandatory provisions of the statute. The learned Single Judge of the Madras High Court rightly held that the-decree holders prosecuted the exe--

cution case in good faith and with due diligence and were entitled to protection under section 14 of the Limitation Act.

Before the Division Bench of the Madras High Court no argument was advanced touching the bona fides or good faith with which the execution proceedings were carried on. Counsel for the appellant repeated the contention that the decree holders were guilty of lack of good faith and diligence. It is not open to the judgment debtors to advance that contention having abandoned the same before the Division Bench of the Madras High Court. We are furthermore of opinion that the conclusion of the

learned Single Judge of the Madras High Court on that point is correct. The other question which arise before the Madras High Court was whether section 15 of the Limitation Act, 1908 would apply to limitation prescribed in statutes other than the Limitation Act. Section 48 of the Code of Civil Procedure until its amendment on the passing of the Limitation Act, 1963 enacted that the decrees of the Civil Courts were to be executed within 12 years and not after that. The present case is governed by section 48 of the Code of Civil Procedure as it stood prior to the deletion of that section along with the passing of the Limitation Act, 1963. In section 15 of the Limitation Act, 1908 it is enacted that in computing the period of limitation prescribed for any suit or application for a decree execution of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded. In the Madras High Court it was argued that the word 'prescribed' occurring in section 15 of the Limitation Act could apply only to cases of limitation prescribed by the First Schedule to the Limitation Act, 1908 with the result that the benefit of exclusion of time by reason of operation of stay could not be availed of in cases of limitation prescribed by section 48 of the Code of Civil Procedure. The Madras High Court relied on the decision in *Kandaswami Pillai v. Kannappa Chetty*(1) which held that the expression 'prescribed' in section 15(1) of the Limitation Act would apply not only to limitation prescribed in the First Schedule to the Limitation Act but also to limitation prescribed in general statutes like the Code of Civil Procedure. That is the correct statement of law and counsel for the appellant did not advance any contention to the contrary. It may, however, be stated that the effect of section 48 of the Code of Civil Procedure is not to supersede the law of limitation with regard to execution of decrees. The Limitation Act prescribes a period of limitation for execution of decrees. Section 48 of the Code of Civil Procedure dealt with the maximum limit of time provided for execution, but it did not prescribe the period within (1) (1951) 2 M.L.J. 668 3 7 1 which each application for execution was to be made. An application for execution was to be made within three, years from any of the dates mentioned in the third column of Article 182 of the Limitation Act 1908. An application for execution of a decree would first have to satisfy Article 182 and it would also have to be found out as to whether section 48 of the Code of Civil Procedure operated as a further bar.

In the present case, there was stay of execution proceedings. On 13 May, 1950 the execution proceedings were revived. The judgment debtors did not challenge the order dated 13 May, 1950. The judgment debtors impeached the sale only on a ground covered by the U.P. Encumbered Estates Act, 1934. The judgment debtor further in impeaching the sale of Jhusi Sugar Mill did not advance before the Civil Judge at Allahabad any contention that any of the orders, of the Civil Judge at Allahabad reviving the execution proceedings, attaching the Jhusi Sugar Mill and directing the sale of the Sugar Mill was barred by limitation. The principle of *res judicata* applies to execution proceedings. The judgment debtors in the present case did not raise any objection as to limitation in regard to execution of the decree before the Civil Judge at Allahabad. On the contrary the judgment debtors asked for setting aside the sale on the basis of revival of execution proceedings. The revival of execution was not challenged and the judgment debtors are thereby barred by the principle of

rem judicate from questioning directly or indirectly the order dated 13 May, 1950 reviving the execution proceedings.

When the appellant made the application for special leave, the appellant referred to an affidavit affirmed by the appellant's father on 12 February, 1957 in the execution proceedings in the Madras High Court. The copy of the said affidavit annexed to the petition for special leave in this Court is in seven paragraphs. In paragraph 6 of the said affidavit it is alleged that the decree is against 5 branches and the plaintiff Lakshman Prasad in collusion with the other branches excluded the other four branches and chose to proceed only against the appellant's branch though the other four branches were possessed of vast properties. The further allegations in paragraph 6 of the said affidavit are that the object of the plaintiff is to harass only one branch and the application is not bonafide. The plaintiff respondent in answer to the petition for special leave affirmed an affidavit in this Court that paragraph 6 in the said affidavit was an interpolation and was not at all in existence in the affidavit filed in the Madras High Court. The plaintiff respondent obtained a photostat copy of the said affidavit filed in the Madras High Court. The photostat copy established that paragraph 6 was not there and further that the affidavit was affirmed at Allahabad on 12 February, 1957 and not at Madras. Furthermore, the affidavit was explained to the deponent Baijnath Prasad as will appear from the photostat copy as annexed to the petition whereas in the copy annexed to the petition for special leave there was no such statement. It is a serious matter that the appellant asked for relief on the basis of false copies of affidavits. An explanation was suggested in the affidavit of the appellant that the copy was annexed in accordance with the draft that had been sent by the Madras lawyer. It is beyond comprehension as to how an incorrect copy would be sent by the Madras lawyer. Counsel for the appellant realised the gravity of the situation and conceded that the matter should be proceeded, with on the basis as it paragraphs did not exist. The appellant is guilty of lack of uberrimae fidei. We have therefore proceeded on the basis that paragraph 6 did not exist in the copy of the said affidavit.

The Madras High Court upheld the order of the learned Single Judge entitling the decree holder to the exclusion of the period spent in prosecuting prior infructuous execution proceedings before the Civil Judge at Allahabad. The decree holder was allowed to proceed with the execution proceedings and the Madras High Court remitted the matter to the Master to consider the questions indicated in the judgment and the judgment debtors were allowed to raise objections to the executability of the decree apart from that of limitation as indicated in the judgment of the learned Single Judge. We are of opinion that the Madras High Court is right in holding that the decree holder is entitled to the benefit of exclusion of time during which the execution proceedings were stayed by the order of the Allahabad High Court and the decree holder proceeded with the said execution proceedings in good faith and with the diligence.

For these reasons we are of opinion that the appeal fails. The appellant will pay the costs to the respondents.

Y.P.

Appeal dismissed.

