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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: January 19, 2010

Date of Order: March 22, 2010

+ CM(M) 144/2008

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22.03.2010

Kannu Through Lrs

...Petitioners

Through: Mr. S.S. Panwar with Mr. Sunil Dutt, Advocates

Versus

Daulat Ram Through Lrs

...Respondents

Through: Mr. S.K. Bagga, Sr. Advocate with Mr. Seeraj Bagga, Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

1. By way of present petition, the petitioner has assailed an order dated 10th January 2008 passed by the learned ADJ allowing an appeal against an order dated 29th August 2006 of learned Civil Judge.

2. Brief facts relevant for the purpose of deciding this petition are that the respondent's predecessor Daulat Ram, who was allottee of Plot No. 138, had filed a suit for possession against the predecessor of the respondent. A decree of possession was passed in favour of Shri Daulat Ram on 16th December 1982 in respect of one Khokha measuring 8'x6' existing upon a piece of land measuring 103 sq yards in Village Abadi, Old Roshanpura, Nazafgarh, New Delhi. Against this judgment, an appeal was filed by Shri

Kanu, predecessor of present petitioners being RCA No.87 of 1983. The first appellate court stayed the operation of decree of trial court during pendency of appeal. In the meantime, Mr. Kanu filed an LPA No.69 of 1980 against an order passed in favour of Mr. Daulat Ram in a Writ Petition No.878 of 1975. Looking at the pendency of LPA before this Court, the first appellate court adjourned RCA No.87 of 1983 sine die. The LPA No.69 of 1980 was dismissed on merits on 28th September 2004. The appeal filed by Shri Kanu, predecessor of the petitioner, was dismissed as withdrawn on 27th October 2006. After dismissal of LPA, the respondent/ decree holder filed an execution before the Civil Judge for execution of the decree passed on 16th December 1982, being execution no.67 of 2004. In this execution petition, some of the Lrs of Mr. Kanu filed objections which were dismissed vide order dated 15th January 2005. Against dismissal of these objections, the Lrs of Mr. Kanu filed a CM(Main) petition which was also dismissed by High Court on merits on 24th November 2005 and against the order of this Court dismissing the CM(Main) petition, an SLP was filed by Lrs of Mr. Kanu which was dismissed by the Supreme Court on 23rd January 2006. The present petitioners who are daughters of Mr. Kanu filed fresh objections against the execution of decree under Section 47. This was the second round of objections filed by Lrs and while deciding these objections, the learned Civil Judge held execution to be time-barred. Against this order, the respondent/ decree holder preferred an appeal against the order before learned ADJ which was allowed vide the impugned order.

3. One of the main objections taken before the learned ADJ and before this Court as well, is about the maintainability of the appeal in view of the amendments in the Civil Procedure Code in 1976 whereby Section 47 was

omitted from the Definition of Decree under Section 2 sub Section 2 vide Amendment Act No.104 of 1976. The learned ADJ considered these objections and observed that since the suit was instituted before 1976 and the appeal against the judgment /decree being already pending when the Amendment Act came into force, the right to appeal being a substantive right, the amendment would not affect the right of the party to file an appeal against an order passed under Section 47 CPC. It is submitted by counsel for the petitioner that there was an apparent error. The suit in this case was not instituted before 1976 and an appeal against the judgment/ decree was not pending when the Amendment Act came into force was clear from the facts stated by the appellate court in paragraph 3, where it is recorded that the Civil Court decree was passed on 16th December 1982 and the appeal was preferred thereafter. It is thus argued by the counsel for the petitioner that the order passed by first appellate court was liable to be set aside because the appeal was entertained on erroneous basis.

4. The appellate court while entertaining appeal observed that since the dismissal of execution in this case by the learned Civil Judge amounted to final determination of the rights of the parties, it would have the force by a decree in the same manner as a suit is rejected by the Court under Order 7 Rule 11 CPC. Such rejection of suit by the Court amounts to final adjudication of rights of the parties and an appeal lies. Therefore, where the executing court dismisses the execution on the ground of limitation, an appeal would lie. The learned trial court relied upon *Maples v Dolores AIR 2001 Kerala 353* and *P.V. R. Polyurethane Food(P) Ltd. v Gita Bhargava & Ors. 133 (2006) DLT 58*.

5. The petitioner has not assailed the merits of the order and the main plank of attack of the petitioner was that the appeal before the learned ADJ was not maintainable. There seems to be dissenting opinion amongst the different High Courts regarding maintainability of an appeal where adjudication under Section 47 is done by the Executing Court dismissing the execution itself. The Patna High Court and Andhra Pradesh High Courts have been having contradictory views. Allahabad High Court in *Pratap Narain Aggarwal v Ram Narain Aggarwal & Ors* AIR ALL 1980 42(Full Bench) held that despite reference of Section 47 having been omitted from the Definition of Decree to Sub-section 2 of Section 2 of CPC, an appeal would lie against adjudication of executing court like any other adjudication even after the amendment, if the order passed by the executing court satisfies the definition of decree as given in Section 2(2).

6. In *Nand Kishor Mohana v Mahabir Pd. Lath* AIR 1978 Orissa 129, Orissa High Court observed that where a party has a right to appeal against the order passed in an appeal determining the question under Section 47 before the Amendment of Civil Procedure Code that right would not be lost even after commencement of the amendment.

7. In my view, where an order satisfies the definition of decree as given in Section 2(2) CPC, whether it is passed by executing court or by a trial court, an appeal would lie as held by Allahabad High Court. The learned appellate court rightly entertained appeal in this case and reversed the order of the executing court, keeping in view the fact that the executing court had finally taken away the right of the respondent herein to obtain possession of his property by his order. When a Civil Court adjudicates upon the rights of the

parties and passes a decree which is upheld in appeal, the executing court, without there being any justification, cannot refuse to execute the decree. If it does so, the executing court finally takes away the right from a party and, therefore, such an order of the executing court finally determines the rights of the party. Such an order satisfies the test under Section 2(2) and the order of the executing court would be an appealable order. Hence, the present petition deserves dismissal on this count.

8. This Court under Article 227 of the Constitution of India has powers to see that the court below does not exceed jurisdiction or does not refuse to exercise its jurisdiction vested in it. It is settled law that an appeal is an continuation of the suit and the order of the first court merges into the order of appellate court and where second appeal lies against order of the first appellate court would merge into the order of second appellate court and once the lis between the parties is finally decided and the rights of the parties are finally crystallized, the decision of the last Court becomes the final decision.

9. In the present case, the petitioner's appeal against the decree was dismissed as withdrawn on 27th October 2006 after dismissal of the LPA of the petitioner on 11th October 2004. Thus, the execution could be filed by the respondent after 27th October 2006. The present execution was filed by the respondents in 2005. The execution, therefore, could not have been held time-barred under any circumstances. The learned Civil Judge ignored the basic law of limitation and observed that the respondents should have taken steps for getting the stay granted by the appellate court vacated and since the respondents did not take steps for getting the stay vacated, the period of

limitation had already expired.

10. In *Krishan Gopal Chawla v. State of UP AIR 2001 SC 3832*, the appellants filed execution to execute a decree obtained in 1979 against the respondents. The execution was stayed by Supreme Court on entertaining an appeal. After dismissal of appeal, on an application of Decree Holder, the execution was revived. The High Court quashed the order of revival. The Supreme Court observed that the execution petition filed in 1980 was stayed during the pendency of the appeal and after dismissal of the appeal, there was no impediment or bar to continue the execution proceedings and the High Court committed a manifest error in taking a view that a fresh execution petition should have been filed after dismissal of the appeal. The Supreme Court further went on to hold that there was no issue that a fresh execution could have also been filed on the principal of merger of the judgment but a pending execution also could be got revived after dismissal of the appeal.

11. In view of the foregoing facts and settled legal position, I am of the view that this Court in exercise of its power under Article 227 of the Constitution of India can direct the subordinate courts/ tribunals to follow due procedure of law. The order passed by the trial executing court was contrary to the settled legal position that a judgment of the lower court merges into the judgment of the appellate court and the period of limitation for execution would start from the date of dismissal of the appeal and not from the date of the original decree passed by learned Civil Judge. The present petition deserves dismissal being a frivolous petition, where second round of litigation has been started by the other Lr by filing a second round of objections when first round of objections filed by the Lrs of the Judgment Debtor were

dismissed right up to the Supreme Court. The petition is hereby dismissed with costs. The costs are quantified at Rs.50,000/-.

March 22, 2010
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SHIV NARAYAN DHINGRA J.