

*

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 13.02.2012

+

EFA(OS) No. 4/2012

SATBIR & ANR.

..... APPELLANTS

Vs

MS. ADARSH KAUL GILL & ORS.

..... RESPONDENTS

Advocates who appeared in this case:

For the Appellants:

Mr Pramod Ahuja & Dr. N. Pradeep Sharma, Advocates.

For the Respondents:

Mr C.S. Sundaram, Sr. Adv. with Mr Anish Kapur, Ms Durga Bhalla & Mr Zafar Inayat, Advocates.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

Caveat No. 152/2012

The respondent has put in an appearance and the caveat stands discharged.

CM No. 2685/2012 (Exemption)

Allowed subject to just exceptions.

EFA(OS) No. 4/2012 & CM No. 2686/2012 (Stay)

1. The captioned appeal impugns the order of the learned Single Judge dated 02.02.2012 passed in Execution Petition No. 286/2011. The only submission

made before us, by the learned counsel for the appellant, in support of the appeal is that, the warrants of possession issued qua the immovable property i.e., land comprising in Mustatil No. 90, Killa No. 11/2, Mustatil No. 91, Killa Nos. 7/1, 7/2, 14, 17, 15/2 and 16, total admeasuring 17 Bighas and 4½ Biswas, situated within the revenue estate of Village Dera Mandi, Delhi (hereinafter referred to in short as the property) ought not to have been issued, as the execution petition was not maintainable, in view of it being barred, by limitation. In support of this submission learned counsel for the appellant Mr Pramod Ahuja, relied upon Article 136 of the Limitation Act, 1963 (in short the Limitation Act).

2. We are in these circumstances called upon to decide as to whether in the factual matrix, which obtains in the instant case, the execution petition filed, was instituted, beyond the prescribed period of limitation. In order to appreciate the issue raised by the appellant, the following facts are required to be noticed:

2.1 Respondent no. 1, who is the decree holder in the present case, had instituted a suit, on 10.10.1988 being CS(OS) : 2524/1988, to seek specific performance of the agreement to sell dated 02.05.1988 (in short agreement). To be noted this agreement was executed between respondent no. 1 and respondent nos. 2 to 4 alongwith appellant nos. 1 and 2 (collectively referred to as the vendors); being the other party in the said agreement. The total sale consideration, as set out in the agreement, is a sum of Rs 7,20,000/-. It is not in dispute, that over a period of time respondent no. 1 paid a sum of Rs 2,50,000/-.

2.2. It appears that the vendors did not proceed to execute a sale deed, which propelled respondent no. 1 to institute the aforementioned suit for specific performance. Since, despite service of summons, (which were admittedly received by respondent no. 4, i.e., Satpal) no appearance was put in by the

vendors, by an order dated 06.11.1989, the vendors, who were impleaded in the suit, were proceeded ex-parte.

2.3. It appears that the vendors took no immediate steps to retrieve the situation, which resulted in the court proceeding to decree the suit against the vendors based on the evidence placed before it by respondent no. 1. The judgment and decree thus came to be passed on 15.11.1990. Interestingly, respondent no. 1 in its suit had only sought a decree of specific performance of the agreement referred to above, which was granted by the court with a direction that the balance sale consideration be deposited by her, in court, within two weeks. The vendors, who were the defendants in the suit, were directed to take steps for execution and registration of the “sale deed” within two weeks of the deposit of the sale consideration, failing which the Registrar of this Court was directed to take necessary steps for execution and registration of the sale deed.

2.4. It is not in dispute that the vendors took no steps towards execution of the sale deed and consequently the Registrar of this court executed a sale deed dated 22.10.1991, in favour of respondent no. 1.

2.5. A perusal of the list of dates filed by the appellant, would show that admittedly, respondent no. 1 had taken out proceedings before the Revenue Assistant for mutation of the property in issue, in her favour. These proceedings were taken out in 1992. According to the appellant, on 23.11.1994, the Revenue Assistant declined the request for mutation as it was made in contravention of Section 33 of the Delhi Land Revenue Act, 1954 (in short DLR Act).

2.6 Undeniably, against the order dated 23.11.1994 a revision petition was filed by one of the vendors. This revision petition was filed on 04.07.1995.

The appellants in the present proceedings were made parties to the revision petition.

2.7 A revision petition was, as it appears, preferred even by respondent no. 1 before the Financial Commissioner against order dated 23.11.1994, passed by the Revenue Assistant. This revision petition was dismissed on 21.12.1995, on the ground, that the *gaon sabha* being a necessary party, had not been arrayed as party in the said proceedings. Against the said proceedings a writ petition being: WPC(C) 1489/96 was filed. The appellant claimed to have received notice of the said writ petition, on 05.10.1998.

2.8 We may observe here, that there is a brief mention of aforesaid events pertaining to revenue proceedings only in the list of dates. There are no averments, in this regard, the writ petition. One of the reasons perhaps the appellants have been constrained to refer to these events in the list of dates is because in an earlier round this very bench had heard an appeal being FAO(OS) No. 228/1999, wherein reference to these proceedings was made though the order ultimately came to be passed on other grounds to which we would shortly make a reference.

2.9 The point to be noted is that, the appellants were aware of the ex-parte judgment and the resultant execution of the sale deed during the course of the revenue proceedings. Despite, such a position obtaining, the appellants for the first time, preferred an interlocutory application being: IA No. 9784/1998, under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code), for setting aside the ex-parte judgment and decree dated 15.11.1990, only on 30.10.1998. The said application, however, was also accompanied with IA No. 1398/1998, preferred under Section 5 of the Limitation Act, to seek condonation of delay.

3. A single Judge of this court, by an order dated 07.07.1999, dismissed the application for condonation of delay, and consequently, the application filed under Order 9 Rule 13 of the Code.

3.1 It is against the aforementioned order that an appeal being: FAO(OS) No. 228/1999 was preferred before the Division Bench of this court. In the said appeal, i.e., FAO(OS) 228/1999 came to be admitted on 30.04.2001. At that stage, in the interlocutory application being: CM 2789/1999, the Division Bench passed the following order.

“C.M. 2789/99

Heard.

No other or further order is required to be passed on this application except by directing respondent not to transfer, alienate, part with or create any third party interest in the property in question during pendency of the appeal. Ordered accordingly.

The application stands disposed of.”

3.2. The said appeal was finally disposed of by this very Bench, by an order dated 16.08.2011. Briefly, the appeal was disposed of in rather peculiar circumstances. The reason being that the appellants before us, denied their signatures both on the application and the affidavit supporting the application filed under Order 9 Rule 13 as also the Vakalatnama placed on the suit record. In these circumstances, we were faced with the situation that there was, as a matter of fact, no application on record under Order 9 Rule 13 read with Section 151 of the Code or, an application under Section 5 of the Limitation Act. The situation was no different qua the appeal, as they denied their signatures even on the appeal and the affidavits filed in support of the appeal as also on the Vakalatnama accompanying the appeal. The proceedings having come to this pass, the appeal was dismissed by us, on the ground that it was incompetent. We refrained from proceeding further, for the reason that the appellants claimed

that they had, not had, much education. This apart, any further enquiry by us would have embarrassed the advocate on record who had admittedly identified the signatures of the appellants.

3.3. The appellants, as a matter of fact also preferred a review petition qua our order dated 16.08.2011, to seek withdrawal of the statements recorded on 16.08.2011. The said review petition was dismissed on 09.12.2011 with costs of Rs 50,000/-. The costs, in term of the order had to be paid within a period of one week. We may note that this had not been paid and a cheque in the sum of Rs 50,000- was handed over to the counsel for Respondent no. 1 today in court.

4. The second round of litigation thus commenced, when respondent no. 1 filed the aforementioned execution petition being EP No. 286/2011; in which the impugned judgment has been passed by the learned Single Judge. It appears that in the aforementioned execution petition the prayer made was to direct the vendors, i.e., the judgment debtors to hand over possession of the property in issue, or in the alternative, permit the amendment of the plaint to include the relief of possession. The learned Single Judge, by way of a detailed judgment, has discussed at length this aspect of the matter as well as the other issue of limitation, which is raised in the present appeal before us, both from a factual and legal angle. The learned Single Judge in respect of the first issue after noticing the legal position, in particular, the observations of the Supreme Court in *Babu Lal vs Hazari Lal Kishori Lal (1982) 1 SCC 525*, came to the following conclusion as noted in paragraph 28 of the impugned judgment:

“28. Grant of relief for delivery of possession is just a formality and even though, no specific prayer is made in the plaint and even the decree is silent about the delivery of possession, the Executing Court is empowered and bound to grant such relief. If I go through the judgments referred above, it is not even necessary to amend the plaint, as it is the admitted position in the present case that the sale deed in terms of the decree has already been executed in favour of the decree-holder

and there is no involvement of the third party regarding the possession. This fact has not been controverted by the judgment-debtors in the pleadings also as status-quo orders passed by this Court till the disposal of the appeal. Thus, it is clear that the possession was with the judgment-debtors. Therefore, the facts of the cases directly apply to the facts and circumstances of the present case. However, since the objection is raised by the judgment-debtors and the decree-holder has also sought amendment of the plaint for including the relief for possession of the property in question, coupled with the fact that a conflicting view has been taken by the Courts in some of the cases and the proviso to sub-section (2) of Section 22 of the Specific Relief Act, 1963 allows the plaintiff who has not claimed any such relief provided in clauses (a) or (b) of sub-section (1) of Section 22 to amend the plaint for including a claim for recovery of possession. The amendment, under these circumstances, can be allowed at any stage of proceedings including the execution proceedings.....”

5. On the aspect of limitation, the learned Single Judge was of the view that, since the Division Bench had by an order dated 30.04.2001 restrained the vendors/judgment debtors from transferring, alienating, parting with or creating any third party interest in the property during the pendency of the appeal; which was followed by an order dated 07.10.2010 restraining them from carrying on construction; vendors/ judgment debtors could not have parted with possession, as acting contrary to it would have resulted in breach of the order of the Division Bench. Therefore, impliedly, respondent no. 1, i.e., the decree holder was restrained from taking possession of the property. The relevant observations in this regard made in the impugned judgment are extracted hereinafter for the sake of convenience.

“..... It is also not in dispute that the Division Bench on 30.04.2001, while admitting the appeal, passed the interim order directing the judgment debtors not to transfer, alienate, part with or create any third party interest in the property in question during the pendency of the appeal. Not only that, on 07.10.2010 further interim order was passed in the appeal to the effect that no further construction would take place.

Therefore, in case both the interim orders are read together, it is clear that the judgment-debtors were precluded to part with possession of the suit property otherwise it would have been breached of the order passed by the Division Bench. Similarly, by the said orders, the decree-holder was impliedly asked not to receive the possession.

18. In the case referred by Mr Ahuja, the facts are different, i.e., the suit was filed for declaration of title and recovery of possession. There was no stay at any stage, granted by the court and the execution was filed after the expiry of twelve years. But in the present case, the Appeal Court has passed the specific order not to part with the possession of the suit property. Further, in the present case, in terms of decree, the sale deed was already registered in the name of decree holder in the year 1991 and next steps was merely to hand over the possession of the suit property which could not be parted with because of interim orders. Thus, the period, in which the interim orders were operated against the parties, is to be excluded for the purpose of limitation. It is also the admitted position that after the dismissal of appeal filed by the judgment-debtors, who failed to handover the possession of the suit property in terms of agreement, the decree-holder was within her right to file the present execution for the purpose of remaining in compliance. The objection now raised about limitation is misconceived and is not tenable to the facts of the present case, as it was an obligation on the part of the judgment-debtors to deliver the possession in terms of agreement, in consonance with the provisions of Section 55(1) of the Transfer of Property Act, 1882 which mandates that the seller to give, on being so required, to the buyer, the possession of the suit property as its nature admits. The entire scheme is that it has to be done in order to avoid multiplicity of proceedings and such duty is to be performed by the party who is also a party to the agreement meaning thereby it would be implied.

19. Since, after the dismissal of the appeal, the judgment-debtors did not come forward to handover the possession, the decree-holder is entitled to recover the same by filing of execution proceedings. Thus, the decision referred by the judgment-debtors does not help the case of objector, as the facts of the present case are materially different.....”

6. Mr Pramod Ahuja, learned counsel for the appellant, submitted that the observations of the learned Single Judge were not in consonance with the judgement of the Supreme Court in the case of ***Dr. Charanji Lal (D) by L.Rs. vs Hari Das (D) by L.Rs. AIR 2005 SC 2564*** and ***Ram Bachan Rai & Ors. vs Ram Udar Rai & Ors. AIR 2006 SC 2248***. Mr Ahuja further submitted that the provisions of Article 136 of the Limitation Act required execution of the decree within a period of twelve years. The judgment and decree having been passed in this case on 15.11.1990, the execution petition was woefully beyond the prescribed period of limitation. It was Mr Ahuja's contention that, there being no order of any competent court staying the operation of the judgment and decree, the limitation continued to run against respondent no. 1, i.e., the decree holder. In other words, despite the respondent no.1 having a sale deed in her favour, she could not seek possession of the property from the appellant through the mode of execution.

7. Mr C.A. Sundaram, learned senior counsel for the respondents, instructed by Mr Anish Kapur, opposed the admission of the appeal.

8. Having perused the record and heard the learned counsel for the parties, we are of the view that the appeal is without merit for the following reasons. Article 136 of Limitation Act prescribes that the execution of a decree (other than a decree granting mandatory injunction) or order of any civil court should take place within a period of twelve years. What is, however, crucial is that the period of twelve years commences when the decree or order, whose execution is sought, becomes "enforceable" or is capable of being enforced. The Supreme Court's observations in that regard in the case of ***Akkayanaicker vs A.A.A. Kotchadainaidu & Anr. (2004) 12 SCC 469*** being apposite are extracted hereinbelow:

"14. In pursuance of the recommendations made by the Law Commission of India, Section 48 CPC was repealed by Section 28

of the Act and Article 182 was replaced by the present Article 136. As noticed earlier in this judgment, Article 136 of the Act being the governing statutory provision, prescribes a period of 12 years when the decree or order becomes enforceable. This court in *Hameed Joharan vs Abdul Salam* after referring to the meaning ascribed to the word “enforce” from various dictionaries held that the words “when the decree or order becomes enforceable” should be read in their literal sense and as per intention of the legislature 12 years’ period is to be reckoned from the date and decree became enforceable. It was observed that the language used by the legislature in Article 136 if read in its proper perspective must have been to clear up any confusion that might have arisen by reason of the user of the expression “the date of the decree or order” which was used in the earlier Act. ***The requirement of the Limitation Act in the matter of enforcement of a decree is the date on which the decree becomes enforceable or capable of being enforced. The intention of the legislature being clear and unambiguous a meaning other than the literal meaning of the words used in the statute did not arise.***

15. Section 48 CPC which provided for a limitation of 12 years for the execution of a decree has been replaced by Article 136 of the Act. The words “when the decree becomes enforceable” which find place in Article 136 were not there in Section 48 CPC. Because of the change brought about by the legislature in the starting point of limitation would be the date on which the decree becomes capable of execution. The amendment carried out in the decree in the present case was substantial and not inconsequential like correction or clerical or arithmetical mistake under Section 152 CPC. The decretal amount was substantially reduced because of the scaling down of the decree in terms of Act 40 of 1978. ***A learned Single Judge in Fatimunnisa Begum vs Mohd. Zainulabuddin Saheb relying upon the expression in Article 136 of the Act “when the decree becomes enforceable” which is not there in Section 48 CPC concluded that the decree which was subjected to an amendment can be enforced only as amended and the period of limitation would start only from the date of the amendment of the decree.....”***

8.1. Before, we proceed further to examine as to what would be the result if the aforesaid principle is applied, it would be useful to extract the provisions of Article 136 of the limitation Act:

“Art. For the Twelve [when] the decree or order
136 execution of Years becomes enforceable or
any decree where the decree or any
(other than a subsequent order directs any
decree granting payment of money or the
a mandatory delivery of any property to be
injunction) or made at a certain date or at
order of any recurring periods, when
civil court. default in making the
payment or delivery in
respect of which execution is
sought, take place:

Provided that an application
for the enforcement or
execution of a decree
granting in perpetual
injunction shall not be subject
to any period of limitation.”

8.2. As noted hereinabove by us while detailing out the facts in the instant case, the decree dated 15.11.1990 granted specific performance of the property in issue, as the plaint at the relevant point in time did not seek the consequential relief of possession. This decree was satisfied, on the Registrar General of this court executing a sale deed dated 22.10.1991 in favour of respondent no. 1/decree holder. Therefore, the decree as it stood on 15.11.1990 was satisfied. This decree by virtue of the impugned judgment includes the relief of possession by permitting the amendment of the plaint. The impugned judgment is dated 02.02.2012. The learned Single Judge in coming to this conclusion, i.e., in allowing the amendment of the plaint at the state of execution of the decree has relied upon the dicta of the judgment of the Supreme Court in ***Babul Lal*** (*supra*). The relevant observations are extracted hereinafter:

“19. The same High Court, however, in *M/s. Ex-Servicemen Enterprises (P) Ltd. v. Sumey Singh*¹⁴ considered the effect of section 22 (2) with its proviso. In that case the decree did not give the plaintiff the relief of possession. The question arose: Was the Court powerless to put him in possession of the property though he had a decree for specific performance in his favour ? The Delhi High Court observed:

"Section 22 enacts a rule of pleading. The legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though, strictly speaking the right to possession accrues only when specific performance is decreed.. The legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession.

In my opinion the proviso gives ample power to a court to allow the amendment of the plaint even at this stage. The proviso says that the amendment of the plaint can be allowed "at any stage of the proceedings" on such terms as may be just for including a claim for possession where the plaintiff has not claimed such relief in his original plaint.

* * *

The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which Judicial business is conducted.

The word "proceeding" in Section 22 in my opinion includes execution proceedings also....."

The High Court had relied upon *Rameshwar Nath v. U.P. Union Bank Ltd.* for its decision in this case. We are in

¹⁴ AIR 1976 Del 56: ILR (1975) 2 Del 539

complete agreement with the view taken by the Delhi High Court on this case.

20. It is thus clear that the Legislature has given ample power to the court to allow amendment of the plaint at any stage, including the execution proceedings. In the instant case the High Court granted the relief of possession and the objection raised on behalf of the petitioner is that this was not possible at the execution stage and in any case the Court should have allowed first an amendment in the plaint and then an opportunity should have been afforded to the petitioner to file an objection.

21. If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law courts always abhor.

22. The only amendment to be made in the plaint was to add a relief for possession necessitated because of the provisions of section 22, which is only an enabling provision.

23. There has been a protracted litigation and it has dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree-holders to file a separate suit for possession. The objection of the petitioner is hyper-technical. The executing court has every jurisdiction to allow the amendment. The only difficulty is that instead of granting a relief of possession the High Court should have allowed an amendment in the Plaint. The mere omission of the High Court to allow an amendment in the plaint is not so fatal as to deprive the decree-holders of the benefits of the decree when section 55 of the Transfer of Property Act authorises the transferee to get possession in pursuance of a sale deed.”

8.3. Crucially the aforesaid aspect of the matter was not assailed before us in the appeal. Nevertheless, we are of the view that the learned Single Judge has come to a correct conclusion in law, which is borne out from the observations made in paragraph 28 of the impugned judgment; which we have culled out in the earlier part of our judgment. The sum and substance of the discussion of the learned Single Judge, on this aspect is, that the relief of possession is embedded in the decree for specific performance, and that, in any event even at the stage of execution, the executing court is permitted to allow the amendment of the plaint for inclusion of such a relief.

8.4 Given this position in law, the argument of Mr Ahuja that the period of limitation has to be counted from 15.11.1990 is, according to us, without merit. The decree vis-à-vis the relief of possession, in a sense, became enforceable only on its formal inclusion in the judgment and decree dated 15.11.1990.

8.5 This apart, during the course of the argument we had put to Mr Ahuja, that in view of the interim order dated 30.04.2001 have been passed by the Division Bench in FAO(OS) 228/1999, whereby the vendors which included the appellants, had been directed not to transfer, alienate or create third party rights in the property, whether an execution petition, in all practicality, would have been entertained by the single judge? Mr.Ahuja's laconic answer to the query was that, it ought to have been instituted nevertheless. In our view, if such a submission is accepted, it would in a sense lead to a situation where substantive law which is required to accord with justice and equity will have to pay obeisance to a futile procedural exercise. The mirror image of the order of the Division Bench whereby the vendors, which included the appellants, were restrained from creating third party rights; was that respondent no.1/decreed holder could not seek execution of the judgment and decree dated 15.11.1990 as, if granted, would have amounted to a variation of the Division Bench Order by a single judge of this court. Therefore, no fruitful purpose would have been

served by respondent no.1/deGREE holder instituting an execution petition which, could not be brought up for hearing before the executing court.

9. In so far as the two judgments cited by Mr Ahuja are concerned, in our view, the same are clearly distinguishable. The first judgment, i.e., ***Dr. Chiranjil Lal*** (*supra*) deals with the issue as to when the period of limitation for execution of a decree, passed in a partition suit, commences. In the instant case we are dealing with a decree passed in a suit for specific performance where the plaint was amended to include the relief for possession by the executing court. The judgment is clearly distinguishable on facts.

9.1 In so far as the judgment of the Supreme Court in the case of ***Ram Bachan Rai*** (*supra*) is concerned; it is again distinguishable on facts. The plaintiff, in the said case, had filed a suit for declaration of title and recovery of possession. The defendants had appeared and filed a written statement. Since, the defendant did not appear on the date fixed, the suit was decreed ex-parte. Against the ex-parte decree, an application under Order 9 Rule 13 of the Code was preferred, which was dismissed for default. A restoration application filed, was also dismissed, by the trial Court. Against the said order passed in the restoration application, a civil revision was preferred, which was also dismissed. All this while there was no “*stay*” granted by any court. The decree holder after a gap of nearly four years, after the dismissal of the civil revision petition, filed an application for execution of the decree. The issue thus arose, as to whether limitation would commence from the date of dismissal of the civil revision petition. The Supreme Court came to the conclusion that the limitation under Article 136 of the Limitation Act commences from the date the decree becomes “*enforceable*” and, therefore, date of dismissal of the civil revision petition was not relevant (See paragraph 11 at page 2250). In the instant case there was not only an interim order in operation but also the presence of an additional factor, which was the amendment of the decree.

9.2 As a matter of fact, the judgment reinforces the principle that the period of limitation under Article 136 of the Limitation Act commences from the date the decree becomes enforceable.

10. For the aforesaid reasons we agree with the rationale provided in the impugned judgment by the learned Single Judge on this aspect of the matter. The continued proceedings / defences of the appellant are clearly abuse of process of court to deprive respondent no.1 of the fruits of success in prior litigation. Accordingly, the appeal is dismissed with cost of Rs 50,000/- to be paid to respondent no.1.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

FEBRUARY 13, 2011
kk