

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.2740 of 2014

ORDER :

The important question which arises for consideration in this Civil Revision Petition is “*whether an execution petition filed on 19.11.1999 by the respondent, which was later numbered as E.P.No.473 of 2000 by the Court below, to execute a decree of specific performance passed in O.S.No.103 of 1974 is within time or not ?*”

2. The admitted facts are that O.S.No.103 of 1974 was filed for specific performance of an agreement of sale by respondent against the father of petitioner one K. Kuppaiah Chetti. The respondent also filed O.S.No.192 of 1974 for recovery of sum of Rs.874.79 from the father of petitioner. Both the suits, viz, O.S.No.103 of 1974 and O.S.No.192 of 1974 were disposed of by a common judgment dt.18.09.1979 and both suits were dismissed by the said common judgment.
3. Aggrieved thereby, the respondent filed A.S.No.416 of 1981 against the decree in O.S.No.103 of 1974 and A.S.No.419 of 1981 against the decree in O.S.No.192 of 1974 before the Additional Subordinate Judge, Chittoor. Both the appeals were allowed by a common judgment and decree dt.14.02.1983.
4. Aggrieved by the common judgment of the first appellate court, the father of petitioner preferred S.A.No.898 of 1984 and S.A.No.974 of 1984 before this Court. This Court by judgment dt.30.11.1987 dismissed both the appeals without costs. There

was no challenge to the judgment of the High Court and the said judgments became final. The respondent was already in possession and enjoyment of the E.P. Schedule property.

5. He filed E.P.No.136 of 1984 in O.S.No.103 of 1974 for execution of sale deed pursuant to decree of specific performance, but it was dismissed on 03.07.1986. The respondent again filed E.P.No.473 of 2000 on 19.11.1999 seeking execution of a registered sale deed in respect of the E.P. Schedule property in its favour.
6. The petitioner, who is the son of Judgment-Debtor, contended that the Execution Petition is barred by limitation, and the E.P. is liable to be dismissed.
7. By order dt.21.06.2014, the Court below rejected the said contention. It held that the judgment of the High Court in the Second Appeal rendered on 30.11.1987 is the first point for counting the period of limitation for execution of a decree under Article 136 of the Limitation Act, 1963 (hereinafter referred to as, 'the Act') and since the E.P. was presented on 19.11.1999, which was within a period of 12 years fixed under the said Article, the E.P. was not barred by limitation.
8. Challenging the same, this Revision is filed.
9. Heard Sri R.N. Hemendranath Reddy, counsel for petitioner; and Sri G. Manohar, counsel for respondent.
10. The counsel for petitioner contended that no stay of the execution of the decree was granted in favour of respondent/decreed holder pending Second Appeals, and therefore, the period of limitation for execution of the decree for

specific performance should be counted from the date of judgment of the first appellate court on 14.02.1983 and not from the date when the Second Appeals were dismissed i.e., 30.11.1987. He placed reliance on **Bimal Kumar and another v. Shakuntala Debi and others, Manohar, S/o.Shankar Nale and others v. Jaipal Singh, S/o.Shivlal Sing Rajput and others, and Siraj-ul-Haq Khan and others v. The Sunni Central Board of Waqf, U.P. and others.**

11. The counsel for respondent Sri G. Manohar, on the other hand, refuted the above contentions and stated that the order passed by the Court below is correct and did not warrant any interference by this Court. He contended that the judgment of first appellate court merged in the judgment of the High Court in the Second Appeals and since the judgment in the Second Appeals constitutes a decree, the Court below had rightly calculated the point for commencement of the limitation as the date of the judgment in the Second appeals by the High Court.

12. I have noted the submissions of both sides.

13. The point for consideration is :

“what is the starting point for counting the commencement of period of limitation - whether it is the date of the judgment of the first appellate court or the date when the Second appeal was decided ?”

14. Article 136 of the Limitation Act, 1963 states :

	<i>“Description of suit”</i>	<i>Period ofLimitation</i>	<i>Time from which periodBegins to run</i>

136.	For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place :Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation”.
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15. If the commencement of period of limitation for execution of the decree under Article 136 is taken to be 14.02.1983, when the first Appeals were allowed, then the E.P.No.473 of 2000 filed on 19.11.1999 would be clearly barred by time. But, if the commencement of period of limitation is from 30.11.1987, when the Second Appeals were dismissed by the High Court, then the E.P. filed on 19.11.1999 would be clearly within time.

16. In **Posani Ramachandraiah v. Daggupati Seshamma**, a Division Bench of this Court held that under Article 136 of the Act, the period of limitation can be reckoned from the date of the appellate decree, even though there was no stay in the appeal and that if there is an appeal, the decree that can be enforced is that of the appellate court only and the period of limitation has to be reckoned from the date of decree of appellate court. In that case, a suit for partition was decreed on 29.07.1958 and certain alienations were set aside. The 2nd defendant, an alienee, preferred an appeal to the High Court which was dismissed on 26.09.1963. He also filed L.P.A.No.104 of 1964 which was also dismissed on 30.10.1969 with some directions. The decree-

holder then filed E.P.No.39 of 1973 on 23.04.1973 against the 2nd defendant for recovery of costs. He also filed E.P.No.151 of 1973 for recovery of *mesne* profits. In the E.P.No.39 of 1973, the 2nd defendant raised an objection that it was barred by limitation under Article 136 of the Act. The learned Subordinate Judge negatived that contention and the same was confirmed by a learned single Judge. In an L.P.A.No.3 of 1977 filed against a judgment of a learned Single Judge, it was contended that E.P.No.39 of 1973 was barred by limitation on the ground that there was no stay during the pendency of the appeal. This argument was rejected by the Division Bench. It held following the decisions in **Nacharammal v. Veerappa** and **Vyравan v. Rayalu Ayyar & Co.** that where an appellate court passes a decree, it takes the place of the decree of a trial Court, and it is the decree of the appellate court only which becomes capable of execution. Consequently, it held that the period of (12) years for filing E.P. commences from the date of such appellate decree and not from the date of decree of the trial court. It observed that this is on the well-established principle that the decree of the first court merges in the appellate decree.

17. Similar view has been expressed in **Chandi Prasad and others v. Jagdish Prasad and others**. The Supreme Court declared that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. It held that the doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system; that the said doctrine does not make

a distinction between an order of reversal, modification or an order of confirmation passed by the appellate court; and that it postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time. It declared that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. It explained that a merger of a decree takes place irrespective of the fact as to whether the appellate court confirms, modifies or reverses the decree passed by the Trial Court. It also referred to the judgment of the Supreme Court in **Kunhayammed v. State of Kerala**. It however explained that where an appeal is dismissed on the ground that it is time-barred, there is no decree passed, and in such an event, the counting of time for the purpose of Article 136 of the Act would be from the date when the lower court pronounced judgment.

18. In **Ratansingh v. Vijaysingh and others** also, the Court had considered the question when a decree becomes enforceable. It observed that filing an appeal would not affect the enforceability of decree unless the appellate court stays its operation. The Court held that if the appeal results in a decree that would supersede the decree passed by the lower court, then it is the appellate court decree which becomes enforceable. It held that only if the appellate order does not amount to a decree, there would be no supersession and in such an event it is the lower court decree which continues to be enforceable. It explained that the rejection of application for condonation of delay will not

amount to a decree, and consequent dismissal of an appeal as time-barred would not be a decree. It held that the rejection of a memorandum of appeal after the application for condonation of delay in filing the appeal is dismissed is merely an incidental order and the dismissal of the appeal by such an incidental order has no effect on the decree passed by the first appellate court.

19. In the present case the Second Appeal against the judgment of lower appellate court in A.S.No.416 of 1981 was dismissed on 30.11.1987. The E.P. was filed on 19.11.1999 to execute the decree of specific performance. It was in my opinion a situation where the decree of the first appellate court merged with the decree of the High Court since the Second Appeal was decided on merits. So period of limitation commences from date of judgment in the Second Appeal and not from date of judgment of first appellate court. So the E.P. filed on 19.11.1999 is within time.
20. In **Manohar** (2 supra), referred to by the counsel for petitioner, suit for recovery of possession was dismissed by both the trial court and the first appellate court. But the Second Appeal was allowed on 02.09.1983. Thereafter, an application to review the judgment of the Second Appellate Court was filed which was dismissed on 01.07.1985. This was questioned by way of Special Leave Petition. Leave was granted and the appeal came to be numbered as a Civil Appeal. On 21.03.1988, stay of judgment of the Second Appeal was granted. Ultimately, the Civil Appeal came to be dismissed on the ground that no appeal lies in terms of Order 47 Rule 7 C.P.C. rejecting a review application. The application for executing the said decree was filed by the decree-holder on 10.12.2001. This was contested before the

executing court by the judgment-debtor raising a plea that the E.P. was barred by limitation. The executing court rejected the said contention. This was questioned in a Writ Petition before the High Court which dismissed it. Then the parties approached the Supreme Court. The Supreme Court held that the Special Leave Petition was filed only against the order dt.01.07.1985 refusing to review the judgment and decree dt.02.09.1983 passed by the High Court in the Second Appeal and the interim order granted by the Supreme Court staying operation of order dt.01.07.1985 was meaningless since the review petition had been dismissed. It held that the execution petition should have been filed within a period of (12) days from the date of the judgment in the Second Appeal on 02.09.1983 and that the execution petition filed on 10.12.2001 is barred by limitation. It rejected the contention that the decree in the Second Appeal in favour of respondent merged with the order dismissing the review application and held that there was no merger. I am of the considered opinion that this judgment has no application to the present case, because the issue in that case was whether a judgment rendered by a court would merge in an order rejecting review of the said judgment by the same court.

21. The counsel for petitioner also relied on the judgment in **Bimal Kumar** (1 supra) in support of his plea that the execution petition is barred by limitation. In that case, there was a compromise decree passed in a partition suit No.131 of 1962 containing certain terms accepted by both parties. Later, another partition suit No.49 of 1973 was filed by a legal representative of a party who was not a party to the compromise in the earlier suit on the ground that the earlier decree was obtained by fraud. This suit

was dismissed on 27.08.1994. An appeal was filed against it which came to be dismissed for non-prosecution on 06.01.2004. The respondents filed Execution Case No.8 of 2004 seeking execution of the decree passed in P.S.No.131 of 1962. An objection was raised to the execution of the decree on the ground that it was barred by limitation. The executing court upheld the said objection. This was questioned in Revision before the High Court which allowed the Revision and held that the execution petition is not barred by limitation. The said order was questioned in the appeal before the Supreme Court. The Supreme Court set aside the order of the High Court and restored the order of the executing Court. It held that at no point of time there was any order passed by any court directing stay of operation of the judgment and decree passed in PS.No.131 of 1962, and therefore the decree holder was entitled to execute the decree. But since he did not initiate proceedings for execution of the decree within a period of limitation, the execution proceedings were barred by limitation. Even in this case, the principle of merger did not arise for consideration because there was no appeal against the judgment in PS.No.131 of 1962, but the compromise decree passed therein was questioned by way of a separate suit. Therefore, the said decision also will not apply.

22. The counsel for petitioner also relied on **Siraj-ul-Haq Khan** (3 supra) which dealt with the scope of Section 15 of the Limitation Act, 1963 which provides for “exclusion of time during which proceedings are suspended”. In that case, the suit was instituted against the appellants who were members of the Managing

Committee of a Darga with the sanction of the Advocate-General, for their removal and for settlement of a fresh scheme. It was decreed by the Trial Court on 16.10.1941 and the appellants were ordered to be removed, but on appeal the decree of the trial court was set aside on 07.03.1946. The period between 16.10.1941 and 07.03.1946 was sought to be excluded by the appellants under Section 15 of the Limitation Act (9 of 1908) to save their suit from bar of limitation under Section 5(2) of the U.P. Muslims Waqf Act, 1936. The suit was filed on 18.10.1946 against the Sunni Central Board of Waqf as a result of a notification issued by it on 26.02.1944 declaring the properties in the suit to be a Sunni Waqf under the said Act and for a declaration that the suit properties were not covered by the provisions of the Act and for consequential injunction. The court held that Section 15 did not apply to the suit since the order dt.16.10.1941 of the trial court cannot be construed as an order or an injunction staying the institution of the appellants' suit. It held that the later suit was the result of a notification issued by the Sunni Central Board of Waqf on 26.02.1944 and the subsequent steps taken by it in the purported exercise of its authority under the above Act. It declared that cause of action for the suit had thus arisen subsequent to the making of the order, and on a plain construction of the order it was impossible to hold that it was an order which would attract the application of S.15 of the Limitation Act, 1908. I am of the view that this decision also does not assist the petitioners because the issue raised therein is with regard to bar of limitation to file a fresh suit, but the situation in the present case is totally different.

23. Also Section 15, in my opinion, would no doubt, apply to

applications made for execution of a decree where such execution had been stayed by an injunction or order.

24. In the present case, Section 15 of the Act would not apply since the decree being executed is the decree in the Second Appeal passed by this Court (upon merger of the decree of the first appellate court with the judgment passed by this Court) and it is not a case of execution of the decree passed by the lower appellate court.
25. In this view of the matter, I am of the opinion that the Court below had rightly held that the E.P. filed by respondent is not barred by time. Therefore, the Revision fails and it is accordingly dismissed. No order as to costs.
26. Miscellaneous applications, pending if any in this Revision, shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date : 02-07-2015

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