

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 38 OF 2015

SHRI.ERLIC R.T. ALVARES AND 3
ORS.,

... Applicants

Versus

SMT. MARIA EUGENIA MARQUES COLACO
AND 3 ORS.,

... Respondents

Mr. S.D. Lotlikar, Senior Advocate with Mr. Johnson
Simoes, Advocate for the Applicants.

Mr. Sudesh Usgaonkar with Ms. Rosette Pereira,
Advocates for Respondent Nos. 1 to 4.

CORAM:- C.V. BHADANG, J.

DATE:- 5th JULY, 2016.

ORAL ORDER:

By this civil revision application, the applicants, who are judgment debtors take exception to the order dated 29.05.2013, passed by the learned Civil Judge Junior Division, Margao in Regular Execution No. 47/2012/D, by which the objection raised on behalf of the applicants about the execution being barred by limitation, has been rejected.

2. The brief facts are that, the respondents/decreed holders have obtained a decree dated 28.05.2008, for preemption against the applicants in Special Civil Suit No. 83/2005/A. Under the said decree, the applicants are to execute the sale deed in favour of the respondents. Undisputedly, the decree was challenged by the petitioners in first appeal, before the learned District Judge, Margao in Regular Civil Appeal No. 255/2010, which was disposed on 02.07.2012. It is an admitted position that there was no stay granted by the Appellate Court during the pendency of the appeal. After the appeal was decided the respondents initiated the execution proceedings on 06.12.2012. The contention raised on behalf of the petitioners was that under Article 135 of the Limitation Act, an application for execution of the decree granting mandatory injunction has to be made within a period of three years from the passing of the decree or where a date is fixed for

performance, such date. It was contended that the execution was filed beyond three years of passing of the decree, by the Trial Court.

3. The learned Executing Court placed reliance on the decision of the Hon'ble Supreme Court in the case of **Chandi Prasad Vs. Jagdish Prasad, 2004(7) Supreme 121** and the decision of this Court in the case of **Joaquim Borges Vs. Pedro Dias, 2010(5) Bom C.R.1**, to hold that the Trial Court's decree merges with the decree of the Appellate Court and the period of three years has to be computed from the date of disposal of the appeal. It was found that thus, the execution was filed within limitation.

4. I have heard Mr. Lotlikar, the learned Senior Counsel for the petitioners and Mr. Usgaonkar, the learned Senior Counsel for the respondents.

5. On behalf of the petitioners, reliance is

placed on the decision of the Supreme Court in the case of **Sulleh Singh Vs. Sohan Lal, AIR 1975 S.C. 1957, P.K. Kutty Anuja Raja Vs. State of Kerala, AIR 1996 S.C. 2212** and **Naguba Appa Vs. Namdev, AIR 1954 S.C. 50**, in order to submit that the pendency of the appeal does not amount to suspension of the operation of the decree of the Trial Court and would not stop the running of time, for filing of the execution. It is submitted that there was no stay operating of the impugned decree passed by the Trial Court and thus, the execution application could not be saved by placing reliance on the principle of doctrine of merger.

6. On the contrary, it is submitted by the learned Counsel for the respondents that the decree passed by the Trial Court would merge in the Appellate Court's decree, irrespective whether there was any stay operating during the pendency of the appeal. It is submitted that in the case of **Chandi Prasad** (supra), the Supreme Court has held that irrespective of whether the decree of

the trial Court is confirmed, set aside or modified, the doctrine of merger applies and the limitation for execution would start from the date of passing of the Appellate decree. The learned Counsel submits that there cannot be two decrees in a suit and thus, the Trial Court has rightly placed reliance on the decision in the case of **Chandi Prasad** (supra), which has been relied upon by this Court in the case of **Joaquim Borges** (supra), in which similar controversy was involved.

The learned Counsel placed reliance on the decision of the Supreme Court in the case of **Union of India and Others Vs. West Coast Paper Mills Ltd. and Another**, (2004) 2 SCC 747, wherein it was held that doctrine of merger would apply irrespective of whether the stay of the judgment was granted. The learned Counsel pointed out that in the case of **West Coast Paper Mills Ltd.** (supra), the decision in the case of **P.K. Kutty Anuja Raja** (supra) has been overruled.

7. I have considered the circumstances and the submissions made. The relevant dates are not in dispute. Thus, admittedly, the execution is filed beyond the period of three years from the date of passing of the decree of the Trial Court. Undisputedly, the first appeal was decided on 02.07.2012 and the petitioners had not carried the matter any further. It is also not in dispute that there was no stay of the Trial Court's decree, during the pendency of the appeal. The execution application was filed on 06.12.2012. The only reason on which the objection has been overruled is based on the principle of doctrine of merger. It has been held that the limitation would start from 02.07.2012 i.e. when the first appeal was decided.

8. Before proceeding to consider the issue, it may be mentioned that the decree, which is sought to be executed is one of preemption and there was some debate during the course of arguments at bar, as to whether the said decree

can be said to be a decree for mandatory injunction, in as much as a suit for mandatory injunction is covered by Section 39 of the Specific Relief Act, 1963, while the decree of preemption, in the present case is granted under Article 1556 of the Portuguese Civil Code, 1857, which deals with the right of preemption of co-owners. Be that as it may, this aspect was not agitated before the Executing Court, which proceeded on the premise that it was a decree for mandatory injunction. The learned Counsel for the parties primarily confined their arguments, on the principle of merger. Therefore, I do not propose to deal with the question, whether the impugned decree can be indeed said to be one granting mandatory injunction, governed by Article 135 of the Limitation Act. Thus, assuming that the decree is governed by Article 135 of the Limitation Act, it has to be seen whether the execution is filed within limitation.

9. The law on the doctrine of merger is no longer

res integra. The Supreme Court has held that, when an appellate Court passes a decree, the decree of the Trial Court merges with the decree of the Appellate Court, irrespective of the fact whether the Appellate Court affirms, modifies or reverses the decree passed by the Trial Court. In the case of **Chandi Prasad** (supra), the question was relating to the execution of a money decree governed by Article 136 of the Limitation Act.

However, this may not be a distinguishing feature, as we are only concerned with the principle namely, whether the Trial Court's decree merges with the one passed by the Appellate Court and the time from which the period of limitation for execution can be reckoned.

10. This Court in the case of **Joaquim Borges** (supra) has held that the decree passed by the Trial Court had merged with the appellate decree and the execution application filed, was well within three years.

11. The decision in the case of **P.K. Kutty Anuja Raja** (supra), would not come to the aid of the petitioners as the said decision is over ruled by the Supreme Court in the case of **West Coast Paper Mills Ltd.** (supra) (see para 44 of the judgment).

12. In the case of **Sulleh Singh** (supra), the question was whether the preemptor's suit stood dismissed on the failure to deposit the price, within the time fixed by the Trial Court. It was held that the direction given by the Trial Court in view of the provisions contained under Order 20 Rule 14 of the Code of Civil Procedure would be mandatory and it imposes obligations on both sides and that they are so conditioned that performance by one is conditional on performance of the other.

It can thus be seen that the issue involved in the said case was different with the one with which we are concerned in the present case.

I find that, having regard to the law laid

down in the case of **Chandi Prasad** (supra), the Trial Court's decree would merge in the appellate decree and the limitations for filing execution would start from the date of disposal of appeal. I have carefully gone through the impugned order and I do not find that it exhibits any jurisdictional error or infirmity, requiring interference.

The civil revision application is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

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