

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (C) No.1991 of 2007Order reserved on: 11-7-2018Order delivered on: 6-8-2018

1. Amhad Hussain (Dead) Through Legal Representatives

- (i) Halima Begam, aged about 58 years, widow of Ahmed Hussain,
- (ii) Imtiyaz Hussain, aged 30 years, S/o Ahmed Hussain,
- (iii) Imran Hussain, aged 23 years, S/o Ahmed Hussain,
- (iv) Nikhat Begam, aged about 32 years, D/o Ahmed Hussain,
- (v) Nishat Begam, aged 27 years, D/o Ahmed Hussain, and W/o Shahzad Khan,
- (vi) Ku. Nigar Begam, aged about 25 years, S/o Ahmed Hussain,
- (vii) Ku. Nasim Begam, aged 21 years, D/o Ahmed Hussain

All R/o Main Road, Juna Bilaspur, Near Nago Rao Shesh School,
Bilaspur, Tahsil & Distt. Bilaspur (C.G.)

2. Israr Hussain (Dead) Through Sole Legal Representative

Intekhab Hussain Kasim, S/o Late Israr Hussain, aged about 35
years, R/o Ward No. 30/2013, C/o Boy Zone, Main Road, Juna
Bilaspur, District Bilaspur (C.G.)

3. Iftekhhar Hussain, aged about 60 years, S/o Late Amjad Hussain,
R/o Main Road, Juna Bilaspur, Near Nago Rao Shesh School,
Bilaspur, Tahsil & Distt. Bilaspur (C.G.)

----- Petitioners

Versus

- 1. Amna Begam, widow of Shabbir Hussain, aged about 63 years,
- 2. Shahid Kasmi, S/o Shabbir Hussain, aged about 36 years,
- 3. Naushad Kasmi, S/o Shabbir Hussain, aged about 34 years,
- 4. Shoaib Kasmi, S/o Shabbir Hussain, aged about 30 years,
- 5. Sohial Kasmi, S/o Shabbir Hussain, aged about 30 years,
- 6. Zahid Kasmi, S/o Shabbir Hussain, aged about 26 years,

7. Nasera Begam, aged about 70 years, widow of Anwar Hussain,
8. Javed Hussain, aged about 45 years, S/o late Anwar Hussain,
9. Aasif, aged about 40 years, S/o late Anwar Hussain,
10. Tanvir, aged about 30 years, S/o late Anwar Hussain,

All R/o Main Road, Juna Bilaspur, Near Nago Rao Shesh School,
Bilaspur, Tahsil & Distt. Bilaspur (C.G.)

11. Mst. Hazara Begam, aged about 68 years, W/o Abdul Rajjak, D/o late Amjad Hussain, R/o Village Uslapur, Tahsil & Distt. Bilaspur (C.G.)

12. Mst. Sabra Begam (Dead) Through Legal Representative

12 (A) Imran Qureshi, aged about 40 years, S/o Mobeen Ahmed Qureshi, R/o Chourasiya Colony, Raipur, Distt. Raipur (C.G.)

13. Mst. Saira Begam (Dead) Through Legal Representatives

13-A. Abdul Sattar Khan, aged 72 years, S/o late Jumman Khan

13-B. Shadab Khan, aged 40 years, S/o Abdul Sattar Khan,

13-C. Shanul Khan, aged about 35 years, S/o Abdul Sattar Khan,

All R/o Tikrapara, Old High Court Road, Behind Old High Court Building, Bilaspur (C.G.)

14. Nadira Begam, aged about 39 years, W/o Rijwan, D/o Late Amjad Hussain, R/o Near Maszid Chantidih, Bilaspur, Tahsil and District Bilaspur (C.G.)

---- Respondents

For Petitioners: Dr. N.K. Shukla, Senior Advocate with Mr. Sushil Dubey, Advocate.

For Respondents No.1 to 10: -
Mr. Bhaskar Payashi, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The trial Court granted preliminary decree of partition at the instance of suit for partition filed by Ameena Khatun and others. Thereafter, in the partition proceeding, Commissioner was appointed and the trial Court, with some modification passed final decree of partition, feeling dissatisfied against that judgment and

decree, defendants Sajjad Hussain and Amjad Hussain preferred first appeal before the first appellate Court and that appellate Court in its judgment and decree dated 9-10-1972 passed in Civil Appeal No.3-A/1962, set aside the judgment of the trial Court and remanded back the case to the trial Court for fresh consideration, which was questioned before the High Court of Madhya Pradesh in Second Appeal No.999/1972. The High Court of Madhya Pradesh allowed the appeal and restored the judgment and decree of the trial Court on 9-7-1981. Thereafter, the execution was laid before the trial Court being Execution Case No.135-A/1981 by Ameena Khatun which was dismissed in default on 10-3-1995 and thereafter, the petitioners preferred application for execution for delivery of possession on 11-5-2000 in which the respondents preferred their objection holding the same to be hit by Article 136 of the Indian Limitation Act which was dismissed by the executing court and thereafter, it was questioned in Civil Revision No.75/2006 before this Court and this Court allowed the civil revision and remanded back the matter to decide the objection raised by the respondents herein afresh. This time, the executing Court held that the date of finalisation of decree for partition is 9-7-1981, but till 11-5-2000, no execution was laid by the petitioners, therefore it is hit by Article 136 of the Limitation Act. Questioning legality, validity and correctness of the order passed by the executing court, the instant writ petition has been preferred.

2. Dr. N.K. Shukla, learned Senior Advocate appearing for the petitioners, would submit that the impugned order is unsustainable and bad in law, as it is a suit for partition in which the petitioners /

defendants have also share with the plaintiffs and as soon as the petitioners / decree holders withdraw the execution on 10-3-1995, they filed an application on 11-8-1997 for calling the record of Execution Case No.135-A/1981 and for execution of final decree, but ultimately that application was rejected at the instance of Ameena Khatun / decree holder on 25-3-2000 and thereafter, the execution application was filed by the petitioners herein on 11-5-2000 which was only a continuation to the earlier execution filed by Ameena Khatun and thereby, Article 136 of the Limitation Act would not apply and the impugned order deserves to be quashed.

3. Mr. Bhaskar Payashi, learned counsel appearing for the respondents, would submit that first execution case filed by Ameena Khatun was dismissed on 10-3-1995, thereafter, only on 11-5-2000, second execution case was filed which is apparently and clearly hit by Article 136 of the Limitation Act, as the decree has become final by virtue of the judgment and decree of the second appellate court (High Court) dated 9-7-1981 and Amjad Hussain neither filed execution application during his lifetime nor chose to file application for execution of the part of decree in his faovur. Therefore, the executing Court is justified in dismissing the execution case as barred by limitation and as such, the writ petition deserves to be dismissed.
4. I have heard learned counsel for the parties, considered the rival submissions made herein-above and went through the record with utmost circumspection.
5. Application for execution has been dismissed in light of the provisions contained in Article 136 of the Limitation Act, 1963 which

provides as under: -

Description of suit	Period of limitation	Time from which period begins to run
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.

6. A careful perusal of the aforesaid provision would show that the period of limitation prescribed by Article 136 of the Limitation Act, 1963 starts to run from the date when the decree becomes enforceable provided the case does not fall within the scope of the latter part of the provision in the third column.
7. The Supreme Court in the matter of **Deep Chand and others v. Mohan Lal**¹ dealing with Article 136 of the Limitation Act, 1963 held that it is a specific article prescribing and dealing with the applications for the execution of decrees and orders and further held that the policy of law is to give a fair and liberal and not a technical construction enabling the decree-holder to reap the fruits of his decree. Their Lordships observed as under: -

“A perusal of the article shows that the period of limitation prescribed by it starts to run from the date when the

¹ (2000) 6 SCC 259

decree becomes enforceable provided the case does not fall within the scope of the latter part of the provision in the third column. Generally a decree or order becomes enforceable from its date, but in appropriate cases the court passing the decree may prescribe time wherefrom the decree becomes enforceable on a future date. It must, however, be remembered that the purpose of an execution proceeding is to enable the decree-holder to obtain the fruits of his decree. In case where the language of the decree is capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree and the other prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted. The execution of the decree should not be made futile on mere technicalities which does not, however, mean that where a decree is incapable of being executed under any provision of law it should, in all cases, be executed notwithstanding such bar or prohibition. A rational approach is necessitated keeping in view the prolonged factum of litigation resulting in the passing of a decree in favour of a litigant. The policy of law is to give a fair and liberal and not a technical construction enabling the decree-holder to reap the fruits of his decree."

8. Their Lordships further relying upon three decisions of the Calcutta High Court, the Madras High Court and the Punjab & Haryana High Court held in **Deep Chand** (supra) as under: -

"6. It has been held in *Akshoy Kumari Debi v. Nalini Ranjan Mukherjee*², *Kotta Annapurnamma v. Makku Venkamma*³ and *Parmeshri v. Atti*⁴ that:

"It is the policy of law that **Article 182** (now **Article 136**) should receive a fair and liberal and not a technical construction so as to enable the decree-holder to reap the fruits of his decree. It will not be in consonance with the principles of just interpretation, to strain the language of **Article 182** in favour of a judgment-debtor who has not paid his just debt".

9. In the instant case, suit for partition and possession was filed by Smt. Ameena Khatun. Amjad Hussain was defendant No.2 in that civil suit and the petitioners herein are his legal representatives. That suit was decreed on 14-2-1948 granting preliminary decree

² AIR 1950 Cal 493

³ AIR 1938 Mad 323

⁴ AIR 1958 Punj 79

and final decree was passed on 3-7-1961, which was accepted and upheld by the M.P. High Court. As per final decree, share of Amjad Hussain (defendant No.2) is as under: -

“Defendant No.2: 2/9 share

(a) Portions 1, 2, 3 & 4 of House No.3 as per map valued at ₹ 15,000/-.

plus

(b) Portion No.3 of House No.1 as per map No.1, valued at ₹ 7,000/-

plus

(c) Portion No.13 & 14 of House No.3 as per map No.3 valued at ₹ 8,000/-.”

10. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. (See Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others⁵.)

The Supreme Court further held qua partition in the aforesaid case – Shub Karan Bubna (supra) as under: -

“6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated

⁵ (2009) 9 SCC 689

and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

(i) whether the person seeking division has a share or interest in the suit property/properties;

(ii) whether he is entitled to the relief of division and separate possession; and

(iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/ combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

11. The Kerala High Court in the matter of Mary George and others v. Zacharia Kuriakose and another⁶ relying upon other decisions has held that the trend of judicial decisions is that a dismissal of execution application, for no fault on the part of the decree holder, is not to be treated as strictly judicial order, despite the apparent tenor of its judicial nature.

12. Thus, reverting to the facts of the present case, in this case, admittedly, the preliminary decree became final after acceptance of report of the Commissioner by the trial Court and the decree became final by the judgment and decree of the M.P. High Court on 9-7-1981 and execution filed by Ameena Khatun within the period

⁶ (1988) 1 KerLJ 282

of limitation was pending consideration since 28-2-1979 in which the present petitioners had filed an application for substitution under Order 22 Rule 4 of the CPC as their father Amjad Hussain had died and that application was heard on 9-3-1995 and the case was reserved for orders on the application for substitution, but that Execution Case No.135-A/ 1981 was dismissed for want of prosecution on 10-3-1995, whereas the executing court ought to have passed orders on that substitution application filed by the applicants (therein) on its merit. Thereafter, the LRs of deceased defendant No.2 Amjad Hussain / petitioners herein filed an application under Section 151 of the CPC for calling the record and to finally decide the case as per the judgment of the High Court of Madhya Pradesh in the second appeal, on 11-8-1997. That application remained pending since 11-8-1997 and Smt. Ameena Khatun – original decree-holder filed an application under Order 23 Rule 3 of the CPC for withdrawal of her suit which was permitted by the executing court and by order dated 25-3-2000, in an execution application pending for execution of decree filed by the petitioners, the application filed by the petitioners was closed holding that the plaintiff / decree holder does not want to have any relief, whereas the application filed by the petitioners was for execution of the decree for partition and possession duly upheld by the M.P. High Court. Thereafter, fresh execution application seeking possession as per partition decree was filed by the present petitioners on 11-5-2000 in which objection was raised by other side about the execution application being hit by Article 136 of the Limitation Act, 1963 which was dismissed by order dated 6-3-2006 and which was set aside by the High Court in revision with a direction for fresh

consideration and this time, the execution application has been held to be barred by limitation. The fact remains that the decree is for partition in which admittedly, share has been allotted in the said decree to the petitioners also, but since the execution application was already laid to execute the final decree at the instance of Ameena Khatun and others, the petitioners remained bona fide believed that once the decree will be executed in the execution application already filed and pending, they will also be getting their share in the execution so filed, but that was got dismissed for want of prosecution on 10-3-1995 by the executing court contrary to law, even substitution application was not decided after hearing the arguments and the application filed by the LRs of defendant No.2 Amjad Hussain / petitioners was also got dismissed by Ameena Khatun on 25-3-2000, which is also absolutely illegal, as Smt. Ameena Khatun had no right and authority to withdraw the application filed by the petitioners for execution of final decree, therefore, the petitioners have no option except to file fresh application for execution which cannot be said to be barred by Article 136 of the Limitation Act, 1963.

13. In the considered opinion of this Court, though the petitioners stood as defendants in the suit, but since the suit is for partition and they were allotted share, they will be deemed to be decree-holders for the purpose of execution of final decree for partition and they bona fide believed to get their share in the execution application which was filed and pending consideration, but upon dismissal of their execution application by Ameena Khatun contrary to law and even the application by the petitioners for complying the judgment and

decree of the High Court restoring partition decree of the trial Court was got dismissed by Ameena Khatun unauthorisedly, and following the principle of law laid down by the Supreme Court in Deep Chand (supra), Article 136 of the Limitation Act, 1963 has to be construed liberally and not technically to enable the decree-holder to reap the fruits of the decree, as the parties are litigating for partition of their respective shares in the suit property since 1946, it cannot be held that the execution application filed by the petitioners on 11-5-2000 was barred by limitation. It is a clear case where the judgment-debtor along with the plaintiff / original decree-holders for the reasons best known to them acted in collusion to deprive the petitioners from reaping the fruits of the decree for partition.

14. As a fallout and consequence of the aforesaid discussion, the impugned order dated 29-1-2007 passed by the 1st Civil Judge, Class-I, Bilaspur in Execution Case No.135-A/81/240-A/46 is set aside. The execution application filed by the petitioners is held to be within limitation and restored accordingly. The executing court is directed to execute the decree in accordance with law, expeditiously, keeping in view that the civil suit was filed and decreed on 14-2-1948 in Civil Suit No.240-A/46 duly upheld by the Madhya Pradesh High Court.

15. The writ petition is allowed to the extent indicated herein-above and the judgments debtors are saddled with a cost of ₹ 10,000/- for adopting delaying tactics in execution of decree.

Sd/-
(Sanjay K. Agrawal)
Judge