IN THE HIGH COURT OF BOMBAY AT GOA

STAMP NUMBER (APPLN) NO.3581 of 2016

ERLIC R. T. ALVARES AND
3 ORS .. Applicant

Vs.

MARIA EUGENIA MARQUES
COLACO AND 3 ORS. .. Respondent.

Shri S. D. Lotlikar, Senior Advocate with Ms. A. Naik, Advocate for the applicants.

Shri Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the respondent nos.1, 2, 3 and 4.

CORAM :- C. V. BHADANG, J.

Date : 2nd August, 2018

ORAL ORDER :

This application for review is taken up for hearing forthwith by consent of parties.

2. I have heard Shri Lotlikar, the learned Senior Counsel for the applicants and Shri Usgaonkar, the learned Counsel for the respondents. Perused record.

3. The brief facts are that the respondents, who are the decree holders have obtained a decree for pre-emption against the applicants (original owners) on 28/05/2008. Indisputably, the

respondents have deposited the amount of consideration as directed by the impugned decree and the decree is fully executed in as much as the sale deed has been executed in favour of the respondents on 04/12/2013. It is further a matter of record that prior to its execution, the decree of the Trial Court was challenged in appeal, which was dismissed on 02/07/2012. The applicants did not carry the matter any further and the decree had attained finality. It is further undisputed that there was no stay operating to the decree passed by the Trial Court during the pendency of the First Appeal.

4. The respondents /decree holders sought to execute the decree by filing an application for execution on 06/12/2012, in which an objection was raised on behalf of the applicants that the execution application is barred by limitation. The specific contention raised was that the decree is one for mandatory injunction, for which the limitation period is governed by Article 135 of the limitation Act, where the period of limitation was three years for filing the execution application. The learned Trial Court dismissed the objection raised on behalf of the applicant on 29/05/2013, which order was challenged by the applicants before this Court in Civil Revision Application No.38/2015. This Court, by an order dated 05/07/2016, has dismissed the Civil Revision

Application. It is this order, which is the subject matter of this review application.

5. The only contention raised by Shri Lotlikar, the learned Senior Counsel for the applicants is that the period of limitation for filing an application having expired during the pendency of the appeal, even though the doctrine of merger would apply, it would at the highest merge with a decree (of the Trial Court), the execution of which was already barred by limitation and would be thus inconsequential. It is submitted that this aspect has not been considered by this Court, while deciding the Civil Revision Application. Except this, there is no other contention raised.

6. Shri Usgaonkar, the learned Counsel for the respondents points out that this Court, after considering the decision of the Hon'ble Supreme Court in the case of ***Chandi Prasad Vs. Jagdish Prasad***; 2004(7) Supreme 121, has rightly come to the conclusion that the decree of the Trial Court would merge with that of the Appellate decree and the limitation for filing an execution application would commence from the date of disposal of the appeal. It is submitted that this Court has also noticed that the decision of the Supreme Court in the case of ***P. K. Kutty Anuja Raja Vs. State of Kerala,*** AIR 1996 S.C. 2212, on

which reliance was placed on behalf of the applicants, was overruled by the Supreme Court in the case of ***Union of India and others Vs. West Coast Paper Mills Ltd. and Another***; (2004)2 SCC 747 and the other judgment, on which reliance was placed on behalf of the applicants, namely in the case of ***Sulleh Singh Vs. Sohan Lal***, AIR 1975 SC 1957, was distinguishable on facts.

7. I have carefully considered the circumstances and submissions made and I do not find that the order dated 05/07/2016 exhibits any error apparent on the face of the record. This Court, after considering the decision of the Supreme Court in the case of ***Chandi Prasad*** (supra) 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. This was irrespective of whether there was stay of the decree of the Trial Court operating during the pendency of the appeal or not. If the contention raised on behalf of the applicants is accepted, there would be two classes of cases, namely first where the limitation for filing the Execution Application expires during the pendency of the appeal and second, where such limitation expires after the disposal of the appeal. This would in

effect render the entire doctrine of merger otiose. The doctrine of merger has certain objective to be achieved, which itself would stand frustrated, if such a contention is accepted. There was no decision brought to my notice holding that if the limitation for execution of the decree of the Trial Court expires during the pendency of the appeal, then, notwithstanding the fact that the doctrine of merger applies, the limitation for execution will have to be reckoned from the date of the decree of the Trial Court. In that view of the matter, I find that the application is without any merit and it is, accordingly, dismissed, with no order as to costs.

C. V. BHADANG, J.

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