

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9281 OF 2014

Maheboob Sahab s/o Amin Sahab
Died – through L.Rs.

- 1A. Shaikh Hamida @ Kanees Fatima
w/o Mehboob Sahab, Age 60 years,
Occupation Household.
- 1B. Shaikh Ismail s/o Mehboob Sahab,
Age 47 years, Occupation Business,
- 1C. Shaikh Ibrahim s/o Mehboob Sahab
Age 38 years, Occupation Business,
- 1D. Shaikh Ilyas s/o Mehboob Sahab
Age 35 years, Occupation Business,
- 1E. Shaikh Yahya s/o Mehboob Sahab
Age 27 years, Occupation Business,
- 1F. Shaikh Yakub s/o Mehboob Sahab
Age 25 years, Occupation Business,
- 1G. Shaikh Yaseen s/o Mehboob Sahab,
Age 24 years, Occupation Business,

All r/o Shah Sailani, Gandhi Nagar,
Tq. Udgir, Dist. Latur.
- 1H. Sayyed Safiya w/o Ibrahim Jagirdar
Age 43 years, Occupation Household,
r/o Nideban Ves, Syed Chand Dargah,
Tq. Udgir, Dist. Latur.
- 1I. Shaikh Zakiya w/o Shaikh Shafi
Age 30 years, Occupation Household,
r/o Near Musa Nagar, Udgir,
Tq. Udgir, Dist. Latur.

1J. Momin Ayesha w/o Momin Moinuddin
Age 29 years, Occupation Household,
r/o Baba Nagar, Shellal Road, Udgir,
Tq. Udgir, Dist. Latur

... PETITIONERS
Orig.J.D.No.2's L.Rs.

Versus

Shivrajappa s/o Maharudrappa Wadje
Age 73 years, Occupation Business,
r/o Uma Chowk, Nanded Road, Udgir,
Tq. Udgir, Dist. Latur

... RESPONDENT
Orig. D. H.

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Dr. S. D. Tawshikar, Advocate for petitioners.
Mr. S. S. Chillarge, Advocate for respondent.
....

CORAM : R. G. AVACHAT, J.

Date of reserving the Judgment : 16th OCTOBER, 2019

Date of pronouncing the Judgment : 06th JANUARY, 2020

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally by consent of learned counsel appearing for the parties.

2. The challenge in this writ petition is to the order dated 14.08.2014 passed by the Joint Civil Judge, Junior Division, Udgir, on applications Exh. 14, 37 and 48 in Regular Darkhast (execution proceeding) No.10/2011.

3. A short question, that falls for consideration in this writ petition is as to whether proceedings initiated for execution of a decree of mandatory injunction is barred by Article 135 of the Limitation Act, 1963.

4. Facts :

The original petitioner was one of the defendants in a suit, being R.C.S. No.247/1987 instituted by the respondent-plaintiff for perpetual and mandatory injunction. The trial Court (C.J.J.D. Udgir) was pleased to dismiss the suit on 06.03.1996. The respondent-plaintiff preferred appeal thereagainst. The appeal (R.C.A. No.93/1996) came to be allowed on 02.09.1999. The original petitioners preferred second appeal, being Second Appeal No.323/2000 before this Court. The appeal came to be dismissed on 10.06.2003. The respondent-plaintiff initiated proceedings on 03.08.2011 for execution of the decree passed in R.C.S. No.247/1987. The executing Court issued notice under Order 21 Rule 22 of the Code of Civil Procedure. The original petitioner appeared in the execution proceedings and filed his say (Exh.37) and moved applications Exh.14 and 48 for dismissal of the execution proceedings on the ground of limitation.

5. The executing Court was pleased to dismiss those applications. In view of the executing Court, respondent-plaintiff had moved an application for correction of the decree. His application was allowed. Writ Petition preferred against the order correcting the decree, came to be dismissed. The decree could not have been executed unless it was corrected. In view of the executing Court, if two views are possible, which is in favour of the decree holder has to be preferred. The execution of decree of mandatory injunction is in respect of restoration of suit nala/drain. There is a decree of perpetual injunction as well it is a composite decree. Unless decree of mandatory injunction is executed, a decree for injunction would be of a little consequence.

6. Dr. Tawshikar, learned counsel for the petitioner would submit that there was no stay to the decree passed in the suit. The application moved for correction of the decree was preferred only with a view to bring the execution proceedings within period of limitation. Learned counsel took me through Articles 135 and 136 of the Limitation Act, to ultimately submit that executing Court erred in passing the impugned orders.

7. Mr. Chillarge, learned counsel for the respondent would on the other hand submit that period of limitation for execution of the decree

would start to run from the date of correction of the decree. He would further submit that Article 136 of the Limitation Act would apply. Two reliefs have been granted. In case of failure of the petitioner to perform his obligation, the respondent was directed to do the needful. As such, the second part of the decree is not in the nature of mandatory injunction. Article 136 of the Limitation Act would therefore come into play. Learned counsel supported the impugned order.

For better appreciation, Articles 135 and 136 of the Limitation Act, are reproduced below.

Art.	Description of suit	Period of limitation	Time from which period begins to run
135.	For the enforcement of a decree granting a mandatory injunction.	Three years	The date of the decree or where a date is fixed for performance, such date.
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.

8. Regular Civil Suit No.247/1987 was filed for the relief of mandatory and perpetual injunction. The trial Court dismissed the suit

on 06.03.1996. The appeal preferred thereagainst, came to be allowed on 02.09.1999 in terms of the following order :

“The appeal is allowed with costs. The impugned judgment and decree is set aside. The suit is decreed with costs. It is declared that the suit Nala (drainage/culvert) is in existence and the plaintiff is entitled to drift away foul water of his house property into the said Nala. Mandatory injunction be issued directing the defendants to restore original position of the suit Nala at their own costs within period of two months. Otherwise the plaintiff will be entitled to get the restoration work done through the process of law and recover costs of the same from the defendants.

After restoration of the flow of suit Nala, the defendants shall not cause any attempt to narrow it down, close the flow of the same and to divert the same in future.”

9. The petitioner-defendant preferred second appeal (Second Appeal No.323/2000). There is nothing to indicate that the decree dated 02.09.1999 was stayed pending the Second Appeal. Admittedly, the Second Appeal came to be dismissed on 10.06.2003. The decree granting relief of mandatory injunction ought to have been put to execution within three years from 03.11.1999, since two months period was granted/fixed for performance of decree.

Admittedly, the proceedings for execution of the decree were initiated in the month of January-2011 i.e. little over 11 years after 02.11.1999. Thus, the proceedings for execution of the decree were obviously barred by limitation prescribed under Article 135 of the Limitation Act.

10. True, respondent-plaintiff had moved application in early 2009 for amendment/correction of the decree. The said application was allowed on 24.02.2011. The Court was pleased to correct the suit number and the date of decision/decre. Once the period of limitation for execution of a decree starts to run, no subsequent event would probably stall the running of the limitation period. The correction in the number of the suit and date of decision was a matter, that could have been decided by the executing Court if the evidence in that regard was led before it. Nothing has been shown to indicate that the decree sans correct number of the suit and the date of decision was unexecutable.

11. It is also true that second part of the decree empowered the respondent-plaintiff to get the restoration work done through the process of law and recovery of cost of the same from the defendants, if decree was not obeyed. This part of the decree is also in the nature of

mandatory injunction holding the respondent-plaintiff entitled to get restoration work done. The relief of getting the restoration work done, is no less in the nature of mandatory injunction. In fact, had this part of the decree would not have been there, still the respondent-plaintiff would have been entitled thereto by putting the decree of mandatory injunction to execution.

12. In the case of *Ishteyaque Ahamad and another v. Kitawan Bibi and others – AIR 1985 ORISSA 102*, the learned Judge of Orissa High Court has observed thus :

“.....

.....

3. *The operative part of the decree quoted above gave the following reliefs to the opposite parties :-*

i) Declaration of their right, title and interest over the suit premises and shed.

ii) Direction to the petitioners to demolish the alleged constructions made by them within a month failing which the opposite parties were entitled to get them demolished through Court.

So far as the first two reliefs were concerned, they became effective immediately after the decree was passed, which means, the opposite parties have right, title and interest over the suit premises and the shed and further the petitioners stood permanently restrained from making

further construction thereon. That is why in column 10 of the execution petition, the opposite parties did not seek for the assistance of the executing Court. But so far as the third relief is concerned, it was contended that it is in the nature of a mandatory injunction. By granting a mandatory injunction, a Court compels performance of any requisite act, for example, the demolition of an unauthorised structure according to S.39 of the Specific Relief Act, 1963 which reads as follows :-

“39. Mandatory injunction – When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

In the instant case by granting the third relief the trial Court compelled the petitioners for the performance of certain act, that is, demolition of unauthorised construction. The third relief granted in the decree is, therefore, in the nature of a mandatory injunction as envisaged in S.39 of the Specific Relief Act, 1963.”

13. It is reiterated, the direction contained in the decree that in the event of failure of the defendant to obey the decree of mandatory injunction, the respondent-plaintiff was directed to get the decree executed through the process of law. Since, the petitioner-defendant failed to comply with the decree of mandatory injunction within a

period of limitation, the respondent-plaintiff ought to have initiated proceedings for execution of the decree at least soon before the period of limitation for performance by the petitioner-defendant was to over. Since, the same has not been done, the proceedings initiated for execution of mandatory injunction became barred by limitation.

Findings given by the executing Court in support of the impugned order, are not proper. Interference with the impugned order, is therefore, called for. The writ petition, thus, succeeds.

14. The writ petition, is therefore, allowed in terms of prayer clauses “C” and “D” so far as execution of decree for mandatory injunction is concerned. Rule is made absolute in above terms.

[R. G. AVACHAT, J.]

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