



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1399 OF 2017

Lukeman Shaikh Bashir Musalman

...Petitioner

VERSUS

Hasarat Appa Patil

(Since deceased) through his L.Rs. & Others ...Respondents

.....

Mr. V.R. Dhorde, Advocate for Petitioner.

Mr. B.P. Thakare, Advocate for respondent No. 1(A)(1) to 1(A)(5).

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON: 10th OCTOBER 2023

PRONOUNCED ON: 22nd DECEMBER, 2023

ORDER :

1. Petitioner is aggrieved by the order passed by learned 2nd Joint Civil Judge, Junior Division, Chalisgaon in Regular Darkhast No. 26/2008.

2. Factual matrix which can be taken note of is as under:

Property bearing Block No. 35/1 corresponding Survey No. 10, admeasuring 1 Hectare 94 Are, situated at Pilkhod, Taluka- Chalisgaon, Dist. Jalgaon (for short 'suit property') was subject matter of Regular Civil Suit No. 84/1980

filed by respondent/plaintiff Hasrat Appa Patil for specific performance of contract against heirs of Ashabi Amirkhan Pathan namely Gulshadbi and Budhankha. The suit was partly decreed by the Trial Court by judgment and decree dated 30.09.1982. It was held that plaintiff is entitled for specific performance of agreement to the extent of 87 Are land out of the suit property. Plaintiff being aggrieved by partly allowing the suit, preferred Regular Civil Appeal No. 34/1983 before the District Court and sought specific performance of contract in respect of entire suit property. Regular Civil Appeal No. 34/1983 was allowed by the District Court by judgment and decree dated 04.02.1994 and suit was decreed for entire suit property.

Petitioner's mother who was original defendant No. 1 in the suit, challenged the judgment and decree dated 04.02.1994 passed in Regular Civil Appeal No. 34/1983 by filing Second Appeal No. 331/1994 before this Court. On 12/12/1994 original plaintiff Hasrat Appa Patil expired, when the second appeal was pending. Heirs of Hasrat Appa Patil were not brought on record within stipulated time. Civil Application No.5631/1996 for bringing legal representatives on record was belatedly filed. This Court by order dated 09.12.2004 rejected the said application and disposed of second appeal as abated. During

pendency of second appeal, there was no stay granted to the judgment and decree passed by the appellate Court.

3. Regular Darkhast No. 26/2008 was filed by heirs of plaintiff Hasrat Appa Patil on 11.08.2008. Since in the meanwhile, defendant No. 1 Gulshadbi transferred the suit property in favour of petitioner on 17.11.1990, petitioner was arrayed as respondent No. 3 in Regular Darkhast No. 26/2008. Thereafter, defendant No. 1 Gulshadbi died and her heirs were brought on record. Initially, decree holder sought execution of the decree to the extent of 87 Are, however, by moving application below Exhibit-33 an amendment was sought and the execution was sought in respect of entire suit property. Amendment was permitted by the Executing Court by order dated 1.10.2015.

4. Petitioner moved application Exhibit-43 seeking dismissal of the execution proceeding mainly on the ground that during the pendency of second appeal there was no stay or prohibitory order. Therefore, plaintiff or his legal heirs were not prevented from filing proceeding for execution of judgment and decree dated 04.02.1994. The execution petition is filed after approximately 15 years from the date of passing of the decree,

and therefore, same is beyond limitation and hence execution proceeding be dismissed as barred by limitation. Said application was opposed by the decree holder by filing say contending that Section 15 of the Limitation Act is not applicable and time spent in prosecuting the second appeal needs to be excluded in terms of Section 14 of the Limitation Act. The Executing Court has rejected the application. This order is impugned in the present petition.

5. Learned advocate for petitioner/judgment debtor by relying on *Bimal Kumar And Another vs. Shakuntala Debi and Others*, (2012) 3 SCC 548 and *Ratansingh vs. Vijaysingh and others*, (2001) 1 SCC 469 submitted that on 04.02.1994 decree was passed by the First Appellate Court and it became enforceable from the said date and limitation started running from that date. Merely because second appeal was filed, wherein no stay was granted, the period spent by decree holder in prosecuting the second appeal cannot be excluded and in view of Section 15 of the Limitation Act, execution filed by decree holder is beyond limitation and hence same is not maintainable. It is submitted that the Executing Court has committed an error in holding that Section 15 of the Limitation Act is not applicable to

the facts of the present case and Section 14 is applicable. The Executing Court has erred in excluding the period spent in prosecuting the second appeal and coming to a conclusion that the execution petition filed by decree holder is within limitation.

6. Per contra, learned advocate for respondents/decreed holders supported the impugned order by relying on *Sri Kant v. Bansraj Singh*, AIR 1986 Allahabad 5, *Amba Bai and others vs. Gopal and others*, Appeal (Civil) 4156/1998, *Union of India vs. West Coast Paper Mills Ltd. and Another*, Appeal (Civil) No. 1061-62/1998, *Sayed Abdul Rauf v. Nurul Hussain and others*, AIR 1992 Rajasthan 3.

7. Heard the learned advocate for petitioner and learned advocate for respondents at length. Perused the writ petition memo, annexures thereto, the impugned order and the citations relied on by the parties.

8. It is a matter of record that on 04.02.1994 decree for specific performance of contract in respect of entire suit property was passed by the District Court, Jalna, in Regular Civil Appeal No.34/1983. The said judgment and decree was challenged by filing Second Appeal No.331/1994. Admittedly, there was no stay

to the judgment and decree passed by the first appellate Court. Indisputably, plaintiff/decreed holder Hasrat Appa Patil expired on 12.12.1994 and his heirs were not brought on record within stipulated time. Civil Application No.5631/1996 filed for bringing legal heirs of decreed holder on record, is rejected by this Court by order dated 09.12.2004. In the backdrop of these facts, execution petition filed on 11.08.2008 cannot be said to be in limitation as the same was filed beyond the period of 12 years from the date of said decree.

9. In Bimal Kumar (supra), compromise decree was passed by the Trial Court on 03.04.1964. There was no order of stay operating against said judgment and decree. Hence, it was held that decree become enforceable immediately. But the parties therein instead of filing application for execution of decree within 12 years from the date of decree filed second suit for partition seeking a declaration that earlier decree was obtained by fraud. Second suit came to be dismissed and appeal was filed. After dismissal of appeal, application for execution of earlier decree was filed after 40 years after passing of the decree. In these facts it was held that time taken in pursuing the second suit and appeal cannot be excluded for computation of

period of limitation prescribed under Article 136.

10. In Ratansingh (supra), appellant therein was successful in obtaining a decree for possession of the suit property. First Appeal filed by respondent challenging the decree was dismissed on 01.08.1973 and the execution petition was filed on 24.03.1988, was obviously beyond limitation. Appellant relied on the order passed by the High Court on 31.03.1976 when High Court rejected the delay condonation application in filing Second Appeal. In these facts Apex Court held that, decree become enforceable on 01.08.1973 when the Appellate Court passed the decree which superseded the decree of the Trial Court. Appellant's execution application filed beyond limitation of 12 years is rightly held to be time barred. It is also held that; *'Filing of appeal would not affect enforceability of decree, unless Appellate Court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court and it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable.'*

11. The decree under execution became enforceable on

04.02.1994, since there was no stay operating in the second appeal. Regular Darkhast No.26/2008 filed on 11.08.2008, is filed beyond limitation period of 12 years.

12. Executing Court has misdirected itself in holding that Section 14(2) of the Limitation Act is applicable to the facts of the present case. Considering facts of the present case, it cannot be said that parties were prosecuting proceedings in Appellate Court and said period needs to be excluded under Section 14(2) of the Limitation Act.

13. In West Coast Paper Mills Ltd. and Another (supra), the Apex Court has held that, even in relation to a civil dispute an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of appeal. There cannot be any dispute about the said proposition. However, in the facts of present case, Second Appeal cannot be said to be continuation of the suit when there was no stay to the judgment and decree impugned in Second Appeal.

14. In Roshanlal Kuthalia and Ors. v. R.B. Mohan Singh Oberai, AIR (1975) SC 824, it is held that 'Section 14 of the

Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstances, legal or factual, which inhibits entertainment or consideration by the Court of the the dispute on the merits conies within the scope of the Section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has right.'

15. In **The State of Punjab Vs. Nathu Ram, 1962 AIR 89,**
the Apex Court has held:

"The abatement of an appeal means not only that the decree between the appellant, and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondents, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

16. In **Rahmani Khatton Vs. Harkoo Gope, AIR 1981 SC 1450,** Apex Court held:

"The concept of abatement is known to civil

law. If a party to a proceeding either in the trial Court or any appeal or revision dies and the right to sue survives or a claim has to be unserved, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so would result in abatement of proceedings. Now, if the party to the suit dies and the abatement takes place, the suit would abate. If a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is preferred. In fact, such judgment, decree or order under appeal or revision would become final."

17. In the present case, due to the death of plaintiff/decreed holder Second Appeal was abated. Thus, the decree between plaintiff and defendant became final and as there was no stay operating in Second Appeal, decree became executable on 04.02.1994.

18. Executing Court has erred in holding that objection as to the maintainability of execution proceedings is belatedly filed after 08 years of filing execution proceedings. Executing Court has failed to appreciate that since execution proceedings is filed beyond limitation, the same was not maintainable. Reasons assigned by the Executing Court while rejecting application Exhibit-43 are erroneous and they are unsustainable in law and

facts of the present case. In the result, following order:-

ORDER

- (I) Writ petition is allowed in terms of prayer clause 'B'.
- (II) Impugned judgment and order dated 20.12.2016 passed by learned 2nd Joint Civil Judge, Junior Division, Chalisgaon, in Regular Darkhast No.26/2008, below Exhibit 43 is hereby quashed and set aside.
- (III) Application Exhibit 43 is allowed.

[NITIN B. SURYAWANSHI, J.]