

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.157 of 2020**

=====

Sudarshan Prasad, son of Sri Yadunandan Prasad, resident of Village-
Nagarnausa, P.O. and P.S.- Nagarnausa (Chandi), District- Nalanda.

... .. Petitioner

Versus

Smt. Rajpati Devi, wife of Sri Ramyatan Prasad, resident of Village-
Nagarnausa, P.O. and P.S.- Nagarnausa, District- Nalanda.

... .. Respondent

=====

Appearance :

For the Petitioner	:	Mr. Bal Bhushan Choudhary, Advocate
For the Respondent	:	Mr. Rajendra Prasad, Senior Advocate
		Mr. Pramod Kumar, Advocate
		Mr. Ritesh Kumar, Advocate

=====

**CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 10-12-2024**

Heard learned counsel for the petitioner and learned
counsel for the respondent.

2. In this case, the petitioner has challenged the
order dated 16.12.2019 passed by the learned Munsif, Hilsa in
Execution Case No.01 of 2018, by which the objection petition
dated 06.04.2019 filed by the petitioner opposing the
maintainability of the said execution case, has been dismissed.

3. It is the case of the petitioner that the
respondent herein filed a suit for specific performance of
contract in the Court of learned Munsif, Hilsa on 18.02.1994
against one Sheo Nandan Matho (defendant no.1 therein) which
was registered as Title Suit No.14 of 1994. In the said suit, the
present petitioner was also made as defendant No.2 as he was the



subsequent purchaser. In the aforesaid suit, it was alleged that the defendant no.1 had executed a sale deed on 20.01.1993 in favour of the respondent but later failed to appear before the registering authority for admission of execution of the said sale deed. Therefore, the respondent-plaintiff had made a prayer in the suit to direct the defendant no.1 to appear before the registering authority and to admit the execution of sale deed or in alternative pass a decree for specific performance of contract. According to the petitioner, the respondent-plaintiff got the summons served upon the defendants fraudulently by suppressing the service of summons. As a result of which, the said suit was decreed *ex parte* on 09.01.1998 against the defendants. The defendant no.1 had challenged the *ex parte* decree by filing a petition under Order IX Rule 13 of the Civil Procedure Code, which was registered as Miscellaneous Case No.13 of 1998 but the same was dismissed vide order dated 27.08.1999. The defendants thereafter challenged the said order in Miscellaneous Appeal No.23 of 1999 before the learned District Judge, which also came to be dismissed. Against the aforesaid order, the defendants then preferred Civil Revision Nos.2189 of 2000 and 2196 of 2000 before this Court, which were also dismissed vide a common order dated 31.08.2006. Thereafter, Sheo Nandan



Mahto, original defendant no.1, passed away in the year 2007 leaving behind his widow Shyampati Devi, who also died in the year 2015.

4. The respondent-plaintiff filed a petition on 22.03.2016 in the said disposed of suit praying that the legal heirs of original judgment debtor be directed to admit the execution of the sale deed dated 20.01.1993. The defendant no.2 (petitioner) filed an objection in the said disposed of suit on 22.06.2016 objecting the maintainability of the petition dated 22.03.2016 filed by the respondent-plaintiff on various grounds. After hearing both the parties, the learned Munsif vide order dated 21.04.2017 disposed of the petition dated 22.03.2016 with an observation that the respondent-plaintiff should have filed execution case for the execution of the *ex parte* decree. Against the said order dated 21.04.2017, the respondent-plaintiff filed Civil Miscellaneous No.1034 of 2017 before this Court which was dismissed by a coordinate Bench of this Court vide order dated 05.10.2018 holding that the only way out to get the judgment and decree executed is to file an execution case. Thereafter, the respondent-plaintiff filed Execution Case No.01 of 2018 for execution of the *ex parte* judgment and decree dated 09.01.1998. In the said execution case, the respondent-plaintiff



also filed a petition under Order XXI Rule 54 of the Code of Civil Procedure for attachment of the schedule-1 property. The defendant no.2 (petitioner) filed an objection petition dated 06.04.2019 opposing the maintainability of the execution case preferred by the respondent-plaintiff on several counts. However, the learned Munsif vide impugned order dated 16.12.2019 rejected the said objection petition dated 06.04.2019 filed by the petitioner-defendant no.2.

5. Learned counsel for the petitioner has submitted that the learned Munsif after relying on the judgment of the Full Bench of this Court in the case of **Jokhan Rai vs. Baikunth Singh** reported as **AIR 1987 Patna 133** has dismissed the objection petition though the said decision is not applicable to the facts of the present case. He has further submitted that the learned Munsif has also failed to consider the fact that the execution case was grossly barred by limitation.

6. Learned counsel for the petitioner has also submitted that the *ex parte* decree was passed on 09.01.1998 and the period prescribed for execution of a decree is 12 years, which has already expired on 09.01.2010 itself, but the learned Munsif has not considered this aspect and mechanically passed the impugned order rejecting the objection petition filed by the



petitioner-defendant no.02.

7. Learned counsel for the petitioner has further submitted that the respondent-plaintiff intended to enforce the decree against unknown persons, who were neither party to the suit nor did their names appear in the decree and hence, respondent-plaintiff failed in her short-cut attempt to get the decree amended and circumvent the bar of limitation.

8. It has been submitted by learned counsel for the petitioner that defendants challenged the *ex parte* decree by filing Miscellaneous Case No.13 of 1998 but the same was dismissed vide order dated 27.08.1999, thereafter, the order dated 27.08.1999 was challenged in Miscellaneous Appeal No.23 of 1999 which too was dismissed vide order dated 25.08.2000. Thus, the *ex parte* decree dated 09.11.1998 remained intact but during the pendency of miscellaneous case as well as miscellaneous appeal, the operation of *ex parte* decree was not stayed either by the Munsif or by the District Judge and even then the respondent-plaintiff i.e. the decree holder had not chosen to file any execution case in order to execute the said *ex parte* decree.

9. It has been argued by learned counsel for the petitioner that once the said *ex parte* decree was passed, the



Court of learned Munsif, Hilsa became *functus officio* and thus, the learned Munsif was not supposed to take any step further in the disposed of suit. Further, the respondent-plaintiff could have filed the execution case within the stipulated 12 years as per the provisions of Article 136 of the Limitation Act, 1963 which has already been expired on 09.01.2010 since the *ex parte* decree was passed on 09.11.1998, but the respondent-plaintiff (decree holder) failed to file any such execution petition during the prescribed period of limitation and instead preferred to file a petition on 22.03.2016 in the said disposed suit on the basis of false and concocted statements with a prayer to issue notice to the persons who were not party to the suit and to further direct them to admit the execution of disputed sale deed dated 20.01.1993 including the petitioner, who is not executant of the said sale deed.

10. It has further been argued that though the petitioner-defendant no.2 filed a detailed objection to the said petition dated 22.03.2016 preferred by the respondent-plaintiff opposing the maintainability of the said petition but the learned Munsif vide dated 21.04.2017 disposed the petition dated 22.03.2016 preferred by the respondent-plaintiff with an observation that the respondent-plaintiff should have filed an



execution case for the execution of the *ex parte* decree. The respondent-plaintiff assailed the said order dated 21.4.2017 before this Court in Civil Miscellaneous Case No. 1034 of 2017 unsuccessfully. Thereafter, the respondent-plaintiff filed the execution case which was objected by the defendant no.2 but the learned Munsif without considering the facts and circumstances of the case vide impugned order on 16.12.2019, contrary to his previous order, had held that execution case is not time barred and rejected the objection petition dated 06.04.2019 filed by the present petitioner.

11. It has also been argued that the petitioner was arrayed as defendant No.2 in the suit without seeking specific relief against him, further the respondent-plaintiff could not have prayed for any relief against the petitioner who was not the executant of the impugned sale deed. It has been submitted that the respondent-plaintiff is having full knowledge of the subsequent transfer made by the original defendant no.1 in favour of the defendant no.2 (petitioner) with respect to the entire suit property and subsequently the petitioner-defendant no.2 came in possession of the same and his name has been duly mutated in the official records. Furthermore, the petitioner-defendant no.2 has been paying rent to the State of Bihar since



1993 yet the respondent-plaintiff has filed the suit against the defendants including the present petitioner.

12. It has also been argued that the records of the title suit were never missing, as has been alleged by the respondent-plaintiff, which is mere concoction and a false story being propounded with the sole intention of circumventing the limitation and for getting the delay condoned in filing the execution case. It has been further argued that the original defendant no.1-Sheo Nandan Mahto was a very simple man and died issue-less and therefore, the husband of the respondent-plaintiff had greedy eyes upon the property of Sheo Nandan Mahto and the husband of the respondent-plaintiff in a fraudulent manner succeeded in getting four sale deeds executed from Sheo Nandan Mahto. Out of the four sale deeds, three deeds were written in the name of minor sons of respondent-plaintiff and one sale deed was written in the name of the respondent-plaintiff herself. The husband of the respondent-plaintiff had managed in getting the three sale deeds registered successfully however, one deed was left, which might be due to the fact that the original defendant no.1 Sheo Nandan Mahto may have smelt fraud and thereafter refused to admit the execution of the said deed. Thereafter, Sheo Nandan Mahto had



also filed a suit for setting aside all the aforesaid deeds in the Court of Sub Judge-I, Hilsa which was registered as Title Suit No.18 of 1993. Sheo Nandan Mahto had contested the suit but owing to his bad financial condition he defaulted in doing *pairvi* which resulted in dismissal of the suit in default. Thereafter, he filed a Miscellaneous case for restoration, which was registered as Misc. Case No. 03 of 1997. The learned counsel vehemently argues that these clearly illustrates that the alleged impugned sale deed dated 20.01.1993 was not executed by Sheo Nandan Mahto voluntarily.

13. It has further been argued that when original defendant no.1-Sheo Nandan Mahto discovered fraud he not only refused to execute the sale deed in favour of respondent-plaintiff but, also sold the entire land mentioned in the fraudulent sale deed in favour of the petitioner on payment of full consideration amount by four registered sale deeds dated 23.03.1993 and since then the petitioner has been enjoying the peaceful possession of the said parcels of land.

14. Learned counsel for the petitioner has also submitted that the learned Munsif has committed gross error by relying upon the Full Bench judgment of this Court rendered in the case of *Jokhan Rai vs. Baikunth Singh (supra)* as the



aforesaid judgment is not applicable to the facts and circumstances of the present case, inasmuch as, the aforesaid Title Suit No.161 of 1961 was heard and finally dismissed on 25.01.1964. Against which, appeal was filed and the same was allowed by setting aside the dismissal order dated 25.01.1964 and thereby, the Title Suit No.161 of 1961 was decreed on 23.12.1969 by the appellate court. Thereafter, the defendant of the suit filed S.A. No.121 of 1970 in this Court, which was dismissed on 21.03.1980 and thereby the decree of the appellate court was affirmed and merged in the decree of second appellate court. Thereafter, the respondent-plaintiff (decree holder) filed Execution Case No.07 of 1983. The judgment debtor challenged the maintainability of the execution case being barred by Limitation Act but, the executing court rejected the objection of the judgment debtor, against which civil revision was filed before this Court and the same was referred to the Full Bench. However, in the present case, the trial court decreed the suit on 09.01.1998, from which no appeal was filed rather, a Miscellaneous Case for setting aside the *ex parte* decree was filed, which was dismissed on 27.08.1999. Against the aforesaid order, an appeal was filed which was also dismissed. Hence, the question of merger of *ex parte* decree dated 09.01.1998 in the



subsequent orders dated 27.08.1999 and 25.08.2000 does not arise.

15. In support of the contention regarding the execution case being barred by limitation, the learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of ***Ratan Singh vs. Vijay Singh*** reported as ***AIR 2001 SC 469***. Paragraph nos. 8, 9, 11 to 16 of the aforesaid judgment read as under:-

- “8. When is a decree becoming enforceable?
Normally a decree or order becomes enforceable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on the happening of certain specified events. The expression enforceable has been used to cover such decrees or orders also which become enforceable subsequently.*
- 9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court then 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. In order that decision of a court should become a decree there must be an adjudication in a suit and such adjudication must have determined*



*the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court [S.P. Mitra, CJ, Sabyasachi Mukherjee, J (as he then was) and S.K. Datta, JJ] has held in **Mamuda Khateen and Ors. vs. Beniyan Bibi and ors. (AIR 1976 Calcutta 415)** that if the application under Section 5 of the Limitation Act was rejected the resultant order cannot be decree and the order rejecting the memorandum of appeal is merely an incidental order. The reasoning of the Full Bench was that when an appeal is barred by limitation the appeal cannot be admitted at all until the application under section 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal*



in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law.

12. *In such a situation the mere fact that the second appeal was dismissed as a corollary to the dismissal of application for condonation of delay has no effect on the decree passed by the first appellate court.*
13. *Learned counsel cited the decision of a two Judge Bench of Calcutta High Court in **Shyama Pada Choudhury vs. Saha Choudhury & Co. & ors. (AIR 1976 Calcutta 122)** as the Bench repelled the contention that the time would start running from the date of the decree of the lower court when the appellate court did not interfere with the lower court decree. That position was adopted in the background where the appellate court affirmed the decree of the lower court though with a slight modification regarding the costs portion. In such a situation it was rightly held that the appellate court decree became enforceable and hence the time would start running from the date of that decree.*
14. *Learned counsel reminded us of the observation made by this Court in **Anandilal & anr. vs. Ram Narain and ors. (AIR 1984 SC 1383)** that there is no justification for placing a rigid construction on the provisions of the Limitation Act. But we must remind ourselves of the other profile that in construing*



statutes of limitation, considerations of hardships are out of place. What is needed is a liberal and broad based construction and not a rigid or narrow interpretation of the provisions of the Limitation Act.

15. *The observations of the Privy Council contained in **Nagendra Nath Dey and anr. vs. Suresh Chandra Dey and ors. (AIR 1932 PC 165)** cited by the learned counsel do not help in the present context as it related to the scope and interpretation of Article 182 of the old Limitation Act. The serious departure made by the Parliament from the said article to the present one cannot be lost sight of while considering the decisions rendered under the former article.*
16. *So the end result is this: The decree became enforceable on 1.8.1973 when the appellate court passed the decree which superseded the decree of the trial court. As no decree was passed by the High Court in the second appeal the decree of the first appellate court remained unaffected and the enforceability once commenced remained undisturbed for a period of 12 years therefrom. The execution process initiated by the appellant long after the expiry of 12 years from 1.8.1973 is thus irretrievably barred. Hence no interference is called for. The appeal is accordingly dismissed.”*

16. Learned counsel for the petitioner has also



relied upon the decision of the Hon'ble Supreme Court in the case of ***Ram Bachan Rai & Ors. vs. Ram Udar Rai*** reported as ***AIR 2006 SC 2248 : 2006 (9) SCC 446*** wherein the Hon'ble Supreme Court was considering the appeal against the summary rejection of the civil revision application by the High Court, which was filed against the order of the executing court allowing the application for execution of a decree after lapse of more than 14 years. After quoting the Article 136 of the Limitation Act the Hon'ble Supreme Court observed as follows :-

*“8. Noticing some conflicts in views expressed by two Judge Bench judgment of this Court, reference was made to a three Judge Bench in **Chiranjilal (dead) by Lrs. V. Hari Das (dead) by Lrs. (2005(2) SCC 261)**. A three Judge Bench by its judgment dated May 13, 2005 in **Dr. Chiranji Lal (D) by Lrs. V. Hari Das (d) by Lrs. (2005 (10) SCC 746)** has decided the matter observing inter-alia as follows (SCC p. 755, para 24)*

"24. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded



and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon."

In paragraph 25 of the same decision, this Court also observed as follows: (SCC pp.755-56)

*"25. The engrossment of the final decree in a suit for partition would relate back to the date of the decree. The beginning of the period of limitation for executing such a decree cannot be made to depend upon date of the engrossment of such a decree on the stamp paper. The date of furnishing of stamp paper is an uncertain act, within the domain, purview and control of a party. No date or period is fixed for furnishing stamp papers. No rule has been shown to us requiring the Court to call upon or give any time for furnishing of stamp paper. A party by his own act of not furnishing stamp paper cannot stop the running of period of limitation. None can take advantage of his own wrong. The proposition that period of limitation would remain suspended till stamp paper is furnished and decree engrossed thereupon and only thereafter the period of twelve years will begin to run would lead to absurdity. In **Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, 1950 SCR 852 : AIR 1951 SC16** it was said that the payment of court fee on the amount found due was entirely in the power of the decree- holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed." (Emphasis*



supplied)

9. *In view of the said decision, the inevitable conclusion is that the Executing Court was not correct in its view. It is to be noted that learned counsel for the respondents conceded to the position that the period of limitation is not to be reckoned from the date of dismissal of the Civil Revision which was filed relating to rejection of the application under Order IX Rule 13 CPC. The entire focus was on the date from which the period of limitation is to be reckoned. Reliance was placed on a decision of the Calcutta High Court in **Ram Nath Das and Ors. v. Saha Chowdhury and Co. Ltd. and Ors. (AIR 1974 Cal 246)** where it was held that the decree was enforceable and when cost is assessed. The ratio in the said judgment clearly runs counter to what has been stated in Dr. Chiranji Lal's case (supra).*
10. *For the reasons aforesaid, the application for execution filed on 5.4.1991 was clearly time barred having been filed beyond the period of twelve years prescribed under Article 136 of the Limitation Act. Accordingly the High Court as well as the Executing Court committed illegality in coming to a conclusion that it was not barred by limitation. Therefore, the inevitable result is that the order passed by the High Court and the Executing Court cannot be maintained and are set aside. The appeal is allowed. The application for execution stands rejected. No costs."*

17. Learned counsel for the petitioner has also relied upon the decision rendered in the case of **Branch Manager, Central Bank of India vs. M/s. A.M. Brothers**



reported as 2013 (3) PLJR 807. Paragraph nos. 11 and 13 of the aforesaid decision read as under :-

“11. In view of this, now the submission on behalf of the appellants that the period of limitation would start from the date when the Misc. case was dismissed is to be tested in the light of various judgments of the Apex Court which have been referred to hereinabove.

13. The judgment of Apex Court in the case of Ram Bachan Rai (supra) applies in the present case and answers the plea taken on behalf of appellants as regards the date from which the period of limitation would run. In the case of Ram Bachan Rai (supra) the suit was decreed ex parte. The ex parte decree was passed on 3.5.1976. The judgment-debtors filed an application under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree which was dismissed for default on 14.7.1978. The said application was not restored by the trial court and Misc. Appeal filed also stood dismissed on. 10.1.1987. The Civil Revision application filed against the order of dismissal was also dismissed on 6.4.1987. At no stage, any stay was granted by any court. The decree holders filed an application for execution on 5.4.1991. The Apex Court has held that the period of limitation is not to be reckoned from the date of dismissal of the Civil Revision rather from the date when the decree becomes enforceable. Paragraph 9 of the judgment is



being quoted hereinbelow for quick reference:—

“In view of the said decision, the inevitable conclusion is that the executing court was not correct in its view. It is to be noted that learned counsel for the respondents conceded to the position that the period of limitation is not to be reckoned from the date of dismissal of the civil revision which was filed relating to rejection of the application under Order 9, Rule 13 CPC. The entire focus was on the date from which the period of limitation is to be reckoned. Reliance was placed on a decision of the Calcutta High Court in Ramnath Das v. Saha Chowdhury and Co. Ltd. where it was held that the decree was enforceable and (sic) when cost is assessed. The ratio in the said judgment clearly runs counter to what has been stated in Dr. Chiranji Lal case.”

18. The counsel for the petitioner has argued that a decree becomes enforceable immediately upon its pronouncement unless it is stayed by the appellate Court and therefore an application for execution of a decree which is filed beyond 12 years from the date when the judgment/decrece becomes enforceable cannot be maintainable since time period prescribed under the Limitation Act cannot be extended under section-5 of the Limitation Act. He has further argued that that



mere filing of an appeal would not affect the enforceability of the decree unless the appellate Court has stayed the operation of such a decree. If the appeal results in a decree from the appellate Court that would surely supersede the decree passed by the lower Court and in such a case, the appellate decree would become enforceable from the date of its pronouncement. In the present case, at no stage stay was ever granted on the operation of the *ex parte* decree yet the decree holder chose to file the execution case after lapse of 12 years and is therefore barred by limitation.

19. Learned counsel for the respondent has supported the impugned order by submitting that that the respondent-decree holder obtained certified copy of relevant papers and filed a petition in the year 2016 in Title Suit No. 14 of 1994 before the Court of learned Munsif, Hilsa praying therein that legal heirs of original judgment debtor be directed to admit the execution of sale deed dated 20.01.1993 but the said petition was disposed of by observing that the decree holder should file separate execution case. After that, the respondent-decree holder filed a Civil Misc. Case no.1034 of 2017 before this Court and this Court vide order dated 05.10.2018 dismissed the said petition by holding that the only way out to get the judgment and decree executed is to file execution case. Thereafter, the



respondent-decree holder filed the execution case in terms of the observations of this Court.

20. Learned counsel for the respondent has further submitted that the period of limitation should be counted from the date when the decree becomes enforceable, meaning thereby, if any appeal or revision is pending against the judgment of trial Court or the original Court, such judgment and decree cannot be said to be enforceable because the matter between the parties is *sub judice* and the same should not be presumed to be finally settled unless the said appeal or revision is decided.

21. I have considered the submissions of the parties and perused the material on record.

22. The Title Suit No.14 of 1994 was instituted at the instance of the respondent against the original defendant no.1-Sheo Nandan Manto (since deceased) who had entered into an agreement to sell the suit property in favour of the respondent-plaintiff, however the said original defendant no.1 failed to appear before the registering authority to execute the said sale deed, which compelled the respondent-plaintiff to institute a civil suit for specific performance before the learned Munsif, Hilsa. The said suit was decided *ex parte* and a decree was passed in favour of the respondent-plaintiff vide order dated



09.01.1998. The original defendant no.1 contended that the suit was decreed *ex parte* due to the fraudulent suppression of service of summons. Aggrieved by the *ex parte* decree dated 09.01.1998 passed in Title Suit No.14 of 1994, the original defendant no.1 preferred a petition under Order IX Rule 13 of the C.P.C 1908, which was registered as Miscellaneous Case No.13 of 1998 but the same was dismissed vide order dated 28.07.1999, which was affirmed in Miscellaneous Appeal No.23 of 1999 before the learned District Judge and thereafter, the defendants preferred Civil Revision Nos.2189 of 2000 and 2196 of 2000 before this Court, which were also dismissed vide a common order dated 31.08.2006.

23. The relevant paragraphs of the common order dated 31.08.2006 passed by this Court in ***Civil Revision No. 2196 of 2000 (Shiv Nandan Mahto v. Shrimati Raj Pati Devi)*** and ***Civil Revision No. 2189 of 2000 (Sudarshan Prasad v. Shrimati Rajpati Devi)*** is reproduced herein below:-

*“Learned counsel for the petitioners has also relied upon a decision of the Supreme Court in the Case of **G.P. Srivastava vs. R.K. Raizda and others: 2000 (3) Supreme Court Cases 54.** However, on a consideration of the said case, I find that the same was not a case where the ground taken for setting aside an *ex parte* decree was non-service of summons, rather the*



defendant therein was prevented by sufficient cause from appearing when the suit was called on for hearing. It is settled proposition of law that an ex parte decree can be set aside under Order 9 Rule 13 of the C.P.C. only if either of the two conditions are satisfied, namely, (i) that the summons was not duly served upon the defendant, or (ii) the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. In the said case in the facts and circumstances the Supreme Court had held that once the defendant approached the court immediately and within the statutory time prescribed the discretion is normally to be exercised in his favour, provided the action was not mala fide or intentional, if he is able to show sufficient cause for such non-appearance. Thus, the said case was not one where no summons was duly served upon the defendant and the said observations of the court cannot help the petitioners.

In a case of the present nature, once the court reaches the conclusion on facts that the summons had duly been served and the matter is covered by the first part of Order 9 Rule 13, then there is no discretion left in the court to set aside the ex parte decree nor any question of adopting a liberal approach. In the present matter both the courts below have decided on concurrent findings that the summons had duly been served not only by the process server but also through registered post and in addition, notice of the suit



had also been published in the daily Newspaper "Aaj" dated 18.9.1997. The said findings are based upon good reasons as stated in the orders of the court below and, therefore, cannot be disturbed in a proceeding under section 115 of the C.P.C. The mere contradiction regarding the opposite party having accompanied the process server does not affect the basic findings of the courts below. They have considered this fact in the light of the other evidence that has clearly come that the village Chowkidar, Mukhdeo Yadav, had accompanied the process server and was also a witness to serving the summons and pasting of the notice on the door of the house of the petitioners.

In the aforesaid facts and circumstances, both the revision applications have no merit and they are, accordingly, dismissed.” (Emphasis supplied)

24. Thus, the challenge to the *ex parte* decree dated 09.01.1998 on grounds of defective summons was thoroughly considered by this Court and the said issue was decided against the present petitioner vide order dated 31.08.2006 and the said order has attained finality.

25. In support of contention regarding the execution case being barred by limitation, learned counsel for the petitioner has relied upon the decisions of the Hon’ble Supreme Court rendered in the case of **Ratan Singh vs. Vijay Singh &**



Ors. (supra); Ram Bachan Rai & Ors. vs. Ram Udar Rai & Ors. (supra) and Branch Manager, Central Bank of India vs. M/s. A.M. Brothers (supra).

26. So far as the decision rendered in the case of ***Ratan Singh vs. Vijay Singh & Ors. (supra)*** is concerned, the same has been overruled by the Hon'ble Supreme Court in the case of ***Shyam Sundar Singh vs. Pannalal Jaiswal*** reported as ***2005 (1) SCC 436***. Paragraph no.12 of the aforesaid decision reads as under:-

“12. Learned counsel placed reliance on the decision in Ratansingh vs. Vijaysingh & Ors. 2001 (1) SCC 469 rendered by two learned Judges of this Court and pointed out that it was held that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time-barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in Mela Ram and Sons and Sheodan Singh were not brought to the notice of Their Lordships. The principle laid down by a three-Judge Bench of this Court in Mela Ram and Sons and that stated in Sheodan Singh was, thus, not noticed and the view



expressed by the two-Judge Bench, cannot be accepted as laying down the correct law on the question. Of course, Their Lordships have stated that they were aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the definition of a decree obtaining in the Code. Thereafter, noticing the decision of the Calcutta High Court above-referred to, their Lordships in conclusion apparently agree with the decision of the Calcutta High Court. Though the decision of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey' was referred to it was not applied on the ground that it was based on Article 182 of the Limitation Act, 1908, and there was a departure in the legal position in view of Article 136 of the Limitation Act, 1963. But with respect, we must point out that the decision really conflicts with the ratio of the decisions in Mela Ram and Sons and Sheodan Singh and another decision of this Court rendered by two learned Judges in Rani Choudhury v. L.-Col Suraj Jit Choudhury (1982) 2 SCC 596. In Essar Constructions v. N.P. Rama Krishna Reddy (2000) 6 SCC 94 brought to our notice, two other learned Judges of this Court left open the question. Hence, reliance placed on that decision is of no avail to the appellant”

27. A coordinate Bench of this Court in the case of **Ram Murti Choudhary @ Ram Murat Prasad Chaurasiya**



vs. Ram Nihora Choudhary reported as **2016 SCC OnLine Pat 9800** has considered a similar question and after considering the issue had referred the matter for an authoritative decision before the Division Bench. Thereafter, the Division Bench of this Court decided the reference, which has been reported as **2016 SCC OnLine Pat 10395 : (2017) 2 PLJR 136**. While deciding the aforesaid reference, the Division Bench has relied upon the decision of the Hon'ble Supreme Court in the case of **Kunhayammed vs. State of Kerela** reported as **(2000) 6 SCC 359**. Paragraph nos. 32, 41 and 44 of the aforesaid decision read as under :-

“32. It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal on such grounds as may have provided foundation for refusing the grant at the earlier stage. But that will be a dismissal of appeal. The decision of this Court would result in superseding the decision under appeal attracting doctrine of merger. But if the same reasons had prevailed with this Court for refusing leave to appeal, the order would not have been an appellate order but only an order refusing to grant leave to appeal.

41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court



becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of the doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speak or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court. (Emphasis supplied)

44. To sum up our conclusions are:—

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains



operative and is capable of enforcement in
the eye of law. (emphasis supplied)

xxx xxx xxx

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.”

28. In the present case, it is not in dispute that the *ex parte* decree passed by the learned Munsif was challenged by the petitioner in Miscellaneous Case No.13 of 1998, which was dismissed. The said order was thereafter challenged by the petitioner in appeal before the learned District Judge unsuccessfully. Against the order of dismissal of appeal, the petitioner moved before this Court in Civil Revision Nos.2189 of 2000 and 2196 of 2000, which were also dismissed. In these circumstances, it has to be considered by this Court as to whether the *ex parte* decree of the Munsif passed in the Title Suit which was challenged before the learned District Judge and then this Court will amount to an appeal against the judgment and decree passed by the Munsif or not and whether when any order passed by the Subordinate Court is challenged before the higher Court and if the nomenclature of the appeal is not titled as appeal or



First Appeal but Miscellaneous Appeal then whether that can be treated as an appeal arising from the original order or not.

29. It is well settled that it is the substance of the petition/application and not the mere nomenclature of the case chosen by the parties that has determinative value. In my view, if any order is challenged before a superior Court then it is an appeal against the order of the lower Court and the mere nomenclature will not change the nature of the appeal. In the present case also, the *ex parte* decree of the Munsif was challenged before the learned District Judge by filing a Miscellaneous Appeal, which was dismissed and the same was thereafter challenged/appealed before the High Court under Civil Revisional Jurisdiction though the nomenclature is civil revision but, in fact, it is an appeal against the order passed by the District Judge. In the present case, against the order of appeal, a revision petition has been filed before this Court and in the revision, the order of the appeal has been affirmed and therefore, the decision of the subordinate Court i.e. Munsif has merged in the decision of the superior forum i.e. in the order of this Court and therefore, the same is capable of enforcement in the eye of law.

30. In view of the aforesaid discussions as well as in view of the decisions rendered in the case of *Kunhayammed*



vs. State of Kerela (supra) and Ram Murti Choudhary @ Ram Murat Prasad (D.B) (supra) dismissal of the civil revision will amount to merger of a degree and the same cannot be said to be barred by limitation. Therefore, once it is held that the appellate decree has merged with the revisional order, the period of limitation for the execution of decree will start from the date of dismissal of the civil revision and therefore, the execution case filed by the decree holder i.e. respondent-plaintiff is well within the period of limitation.

31. In view of the aforesaid discussions, I do not find any error in the impugned order dated 16.12.2019 passed by the learned Munsif, Hilsa in Execution Case No.01 of 2018. Accordingly, this application is dismissed. The stay granted by this Court vide order dated 13.03.2024 is hereby vacated.

32. Pending interlocutory applications, if any, stand disposed of.

(Sandeep Kumar, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
Uploading Date	12.12.2024
Transmission Date	

