

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.340 of 2023

1. Kanhaiya Singh, S/o Late Badri Nath Singh, Resident of Village- Pasiwad, Pipra, P.O.-Chand Parsa, Police Station- Hasanpura, District- Siwan.
2. Leelawati Devi, w/o Late Brijraj Singh, resident of Chitaur, P.S.- Andar, Distt.-Siwan.
3. Amit Kumar Singh, S/o Late Brijraj Singh, resident of Chitaur, P.S.- Andar, Distt.- Siwan.
4. Seema Devi, W/o Rajesh Singh, village- Karamen, P.S.- Gauri Bazar, Distt.- Dewariya, Uttar Pradesh.
5. Meera Devi, W/o- Ajay Singh, resident of Village- Rakauli, P.S. Aswan, Distt.- Siwan.
6. Anil Kumar Singh, S/o- Late Brijraj Singh, resident of Chitaur, P.S.- Andar, Distt.- Siwan
7. Ajay Kumar Singh, S/o late Brijraj Singh, resident of Chitaur, P.S.- Andar, Distt.- Siwan
8. Indrawati Devi, W/o- Sardul Singh, resident of village- Labakani, P.S. Gauri Bazar, Distt. Dewariya, Uttar Pradesh.

... .. Petitioner/s

Versus

1. Paras Nath Singh, S/o Late Rajeshwar Singh resident of village- Pipra, P.S.- M.H. Nagar, district- Siwan.
2. Fateh Bahadur Singh, S/o Late Rajeshwar Singh, resident of village- Pipra, P.S.- M.H. Nagar, District- Siwan.
3. Ram Kishore Singh, S/o Late Rajeshwar Singh, resident of village- Pipra, P.S. M.H. Nagar, District- Siwan.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Janardan Prasad Singh, Sr. Advocate Mr.Dipak Kumar, Advocate
For the Respondent/s	:	Mr. Nagendra Rai, Advocate Mr.Satyapal Singh, Advocate Mr. Rajnish Kumar Choubey, Advocate Mr. Navin Nikunj, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 25-01-2024

Heard learned senior counsel appearing on behalf of



the petitioners and learned counsel for the respondents on the point of admission and I intend to dispose of the instant petition at the stage of admission itself.

2. The instant petition has been filed by the judgment debtors-petitioners challenging the order dated 07.02.2023 passed by learned Subordinate Judge-1, Siwan in Execution Case No.3/2017, Reg.No.24/2017 whereby and whereunder the petition filed by the judgment debtor-petitioners for rejection of the execution case, as barred by limitation, has been rejected.

3. The case of the judgment-debtors/petitioners as it appears from the records is that one Raj Ballabh Singh filed Title Suit No.147/1985 for specific performance of contract against Madan Gopal Singh and Smt. Parwati Devi. After death of said Raj Ballabh Singh, the present respondent no.1, who is power of attorney holder of the daughter and wife of Raj Ballabh Singh, became plaintiff. The petitioners are the descendants of Madan Gopal Singh, who was the original defendant No. 1 in the suit. On 08.05.1995, the learned Subordinate Judge Ist, Siwan heard the suit *ex-parte* under Order 8 Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') and allowed the suit in favour of the plaintiff, directing the plaintiff to pay the balance amount of Rs.



12,000/- to the defendant No. 2 within 3 months from the date of order and the defendant No. 2 was directed to execute a sale deed of the suit property in favour of the plaintiff, failing which the same was to be done by the process of the court and at the cost of defendant. However, the decree in Title Suit No. 147/1985 was passed on 27.05.1995. Thereafter, the judgment-debtors/petitioners filed Misc. Case No. 15/1995 for recalling the aforesaid *ex-parte* judgment, which was dismissed for non-prosecution on 22.08.1998. However, during pendency of aforesaid Misc. Case No. 15/1995, the respondents filed a petition seeking liberty from depositing the balance money till pendency of the miscellaneous case, which was allowed vide order dated 11.10.1996. Thereafter, the judgment-debtors/petitioners filed Misc. Case No. 29/1995 for restoration of Misc. Case No.29/1995, which was allowed vide order dated 26.06.2014 and the Misc. Case No. 15/1995 was restored. On 09.03.2017, the judgment-debtors/petitioners filed a petition for withdrawal of Misc. Case No. 15/1995, which was allowed vide order dated 15.04.2017, as a result of which, the Misc. Case No.15/1995 was dismissed as withdrawn. Thereafter, after 22 years of passing of the decree, on 12.06.2017, the Execution Case No. 03/2017 was filed by the respondents, in which, the



judgment-debtors/petitioners filed their rejoinder dated 03.05.2019 and in paragraph Nos. 3 to 6, the judgment-debtors/petitioners have taken a plea that the execution case was barred by law of limitation and hence, the same was fit to be dismissed. The respondents-decree holder also filed their reply on 02.08.2019 in which they have taken a plea that they were given liberty to deposit the balance consideration amount after disposal of Misc. Case No. 15/1995 and, as such, due to pendency of miscellaneous case, they did not file the execution case and hence, their execution was not barred by law of limitation and the objection filed by the judgment-debtors/petitioners was fit to be dismissed. The learned Subordinate Judge-1, Siwan, after hearing the parties, dismissed the objection petition filed on behalf of judgment-debtors/petitioners in Execution Case No.3/2017 vide order dated 07.02.2023. Aggrieved by the said order of the learned trial court, the judgment-debtors/petitioners have filed the instant petition. The petitioners are the judgment-debtors, whereas the respondents are the decree-holders and for convenience, I will use the terms Judgment-debtors (JDs) and Decree-holders (DHs) for the petitioners and the respondents, respectively



4. The learned senior counsel appearing on behalf of the JDs submits that the JDs are the descendants of the original defendant no.1 in the suit. The JDs appeared and filed their written statement, but unfortunately, their counsel did not appear in subsequent date and the suit was decreed *ex-parte*. The learned senior counsel further submits that Misc. Case No. 29/1998 remained pending for 16 years, but no order staying the execution of the decree was passed in Title Suit No. 147/1985 nor any execution case was filed till then. The learned senior counsel further submits that Title Suit No. 147/1985 was decided *ex-parte* and judgment and decree were passed on 08.05.1995 and 27.05.1995, respectively and no execution case for executing the said decree has been filed within the period of limitation, i.e., within 12 years. Furthermore, there was no stay of the execution proceedings by any court. The learned senior counsel further submits that the DHs filed the execution case after 22 years from the date of passing of the decree without any legal excuse, which is hopelessly barred under Section 136 of Indian Limitation Act. The learned senior counsel further submits that there is no provision of law to condone such delay. The learned senior counsel further submits that the DHs filed a petition seeking liberty from depositing the balance amount till



pendency of the Misc. Case No.15/1995 after expiry of three months period and no extension was sought earlier by the DHs from the court and liberty granted by the learned Subordinate Court was without authority and it was an illegal order. The learned senior counsel further submits that this issue of time barred execution and equity has been decided by the Hon'ble Apex Court in the case of ***Raghunath Rai Bareja v. Punjab National Bank***, reported in ***(2007) 2 SCC 230***, wherein it has been held that when there is a conflict between law and equity, it is the law which will prevail. Paragraph 29 is relevant which reads as under :

“29. Learned counsel for the respondent Bank submitted that it will be very unfair if the appellant who is a guarantor of the loan, and Director of the Company which took the loan, avoids paying the debt. While we fully agree with the learned counsel that equity is wholly in favour of the respondent Bank, since obviously a bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim “dura lex sed lex”, which means “the law is hard, but it is the law”. Equity can only supplement the law, but it cannot supplant or



override it”.

5. On similar proposition, the decision of this Court in the case of ***Laxmi Rai Vs. Sanjai Bhattacharya***, reported in ***2012 (2) PLJR 547***, has been relied upon. The learned senior counsel further places his reliance on the judgment in the case of ***Hameed Joharan (d) Ors. vs. Abdul Salam (d) & Ors.***, reported in ***2002 (1) PLJR (SC) 6: (2001) 7 SCC 573*** on the point of limitation. In this case, stamp duty was paid beyond the limitation period and the Hon'ble Apex Court held that it was the date on which that stamp was paid was relevant and not the date when it was applied for as it was within the power of the decree holder to purchase the stamp earlier and submit the same. Relevant paragraphs 13 to 15 and 34 read as under :

“13. Article 136 of the Act of 1963 prescribes as noticed above, a twelve-year period certain and what is relevant for Article 136 is, as to when the decree became enforceable and not when the decree became executable. The decision of the Calcutta High Court in Biswapati case [AIR 1972 Cal 172] has dealt with the issue very succinctly and laid down that the word “enforceable” should be read in its literal sense. In the contextual facts, the final decree upon acceptance of the Report of the Commissioner was passed on 20-11-1970, while it is true that notice to furnish stamp paper was issued on 28-2-1972 and the



time granted was up to 17-3-1972 but that by itself will not take it out of the purview of Article 136 as regards the enforceability of the decree. Furnishing of stamp paper was an act entirely within the domain and control of the appellant and any delay in the matter of furnishing of the same cannot possibly be said to be putting a stop to the period of limitation being run —no one can take advantage of his own wrong: as a matter of fact, in the contextual facts, no stamp paper was filed until 26-3-1984 — does that mean and imply that the period of limitation as prescribed under Article 136 stands extended for a period of twelve years from 26-3-1984? The answer if it be stated to be in the affirmative, would lead to an utter absurdity and a mockery of the provisions of the statute. Suspension of the period of limitation by reason of one's own failure cannot but be said to be a fallacious argument, though, however, suspension can be had when the decree is a conditional one in the sense that some extraneous events have to happen on the fulfilment of which alone it could be enforced — furnishing of stamped paper was entirely in the domain and power of the decree-holder and there was nothing to prevent him from acting in terms therewith and thus it cannot but be said that the decree was capable of being enforced on and from 20-11-1970 and the twelve-year period ought to be counted therefrom. It is more or less in an identical situation, this Court even five decades ago in the case of Yeshwant Deorao Deshmukh v.



Walchand Ramchand Kothari [1950 SCC 766 : AIR 1951 SC 16 : 1950 SCR 852] has stated: (AIR p. 18, para 5)

“The decree was not a conditional one in the sense that some extraneous event was to happen on the fulfilment of which alone it could be executed. The payment of court fees 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.”

*14. Needless to record that engrossment of stamped paper would undoubtedly render the decree executable but that does not mean and imply, however, that the enforceability of the decree would remain suspended until furnishing of the stamped paper — this is opposed to the fundamental principle on which the statutes of limitation are founded. It cannot but be the general policy of our law to use the legal diligence and this has been the consistent legal theory from the ancient times: even the doctrine of prescription in Roman law prescribes such a concept of legal diligence and since its incorporation therein, the doctrine has always been favoured rather than claiming disfavour. Law courts never tolerate an indolent litigant since delay defeats equity — the Latin maxim *vigilantibus et non dormientibus jura subveniunt* (the law assists those who are vigilant and not*



those who are indolent). As a matter of fact, lapse of time is a species for forfeiture of right. Wood, V.C. in Manby v. Bewicke [(1857) 3 K&J 342 : 69 ER 1140] (K&J at p. 352) stated: (ER p. 1144)

“The legislature has in this, as in every civilized country that has ever existed, thought fit to prescribe certain limitations of time after which persons may suppose themselves to be in peaceful possession of their property, and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be most difficult to obtain.”

15. Recently this Court in W.B. Essential Commodities Supply Corpn. v. Swadesh Agro Farming & Storage (P) Ltd. [(1999) 8 SCC 315] had the occasion to consider the question of limitation under Article 136 of the Limitation Act of 1963 and upon consideration of the decision in the case of Yeshwant Deorao [1950 SCC 766 : AIR 1951 SC 16 : 1950 SCR 852] held that under the scheme of the Limitation Act, execution applications like plaints have to be presented in court within the time prescribed by the Limitation Act. A decree-holder, this Court went on to record, does not have the benefit of exclusion of the time taken for obtaining even the certified copy of the decree like the appellant who prefers an appeal,



much less can he claim to deduct time taken by the court in drawing up and signing the decree. In fine, this Court observed that if the time is reckoned not from the date of the decree but from the date when it is prepared, it would amount to doing violence to the provisions of the Limitation Act as well as of Order 20 and Order 21 Rule 11 CPC, which is clearly impermissible.

34. Be it noted that the legislature cannot be subservient to any personal whim or caprice. In any event, furnishing of engrossed stamp paper for the drawing up of the decree cannot but be ascribed to be a ministerial act, which cannot possibly put under suspension a legislative mandate. Since no conditions are attached to the decree and the same has been passed declaring the shares of the parties finally, the Court is not required to deal with the matter any further — what has to be done — has been done. The test thus should be — has the Court left out something for being adjudicated at a later point of time or is the decree contingent upon the happening of an event — i.e. to say the Court by its own order postpones the enforceability of the order — in the event of there being no postponement by a specific order of the Court, there being a suspension of the decree being unenforceable would not arise. As a matter of fact, the very definition of decree in Section 2(2) of the Civil Procedure Code lends credence to the observations as above since the term is meant to be “conclusive determination of



the rights of the parties”.

6. Thus, the learned senior counsel for the JDs submits that it was well within the power of the plaintiff-decree holder to make payment of the balance money and file the execution, but he slept over the matter for more than 20 years. The learned senior counsel further submits that during the pendency of those two miscellaneous cases, at no point of time, there was any stay of the execution. The decree was passed on 27.05.1995 and the rest money was to be deposited on 27.08.1995. The learned senior counsel, thus, submits that the impugned order is illegal and without jurisdiction and the same be set aside.

7. *Per contra*, the learned counsel for the DHs vehemently contends that this civil miscellaneous application under Article 227 of the Constitution of India is not maintainable on the ground of amended Section 115 of the Code and remedy for the JDs was only to file a civil revision under Section 115 of the Code. The learned counsel submits that if the applications of the JDs were allowed by the learned executing court, that would have been the end of the matter and it would have disposed of the case before the learned executing court. So, against such order, only a revision under Section 115 of the



Code would lie and this Court could not exercise its supervisory jurisdiction under Article 227 of the Constitution of India when the impugned order was revise-able under Section 115 of the Code. On this aspect, the learned counsel relies on two decisions of the Hon'ble Supreme Court; ***Surya Dev Rai vs. Ram Chander Rai and Ors. [(2003) 6 SCC 675]*** and ***Durga Devi v/s Vijay Kumar Poddar & Ors. (2010 (2) PLJR 954)***.

8. The learned counsel further submits that the decree has not become time barred. Judgment in the case was delivered on 08.05.1995. The suit was decreed *ex-parte* on 27.08.1995. The JDs filed Misc. Case No.15/1995 for setting aside the *ex-parte* decree, which was dismissed for default on 22.08.1998. While this miscellaneous case was pending, the DHs filed a petition to keep the direction for depositing the balance consideration money in abeyance during the pendency of the miscellaneous case and that was allowed by the learned court below vide order dated 11.10.1996 in presence of the JDs, but this order was never challenged. Thereafter, Misc. Case No.15/1995 which was dismissed for default on 22.08.1998, was restored on 26.06.2014. But ultimately it was withdrawn by the JDs on 15.04.2017 and soon thereafter, the DHs have filed Execution Case No.03/2017 on 12.06.2017. With regard to the



effect of the order dated 11.10.1996, the learned counsel submits that this order is very crucial for deciding this matter as the same was never challenged and by this order the DHs were exempted from depositing the balance amount. On this point, the learned counsel has attracted the attention of this Court to the provisions of Section 28 of the Specific Relief Act, which reads as under:

“28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) shall direct the purchaser or lessee, if he has obtained possession of the property under



the contract, to restore such possession to the vendor or lessor; and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor; and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely—

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court”.



9. The learned counsel thus submits that period, allowed by the decree or such further period as the court may allow, means it can be allowed even after expiry of the period which has been granted. The court does not become *functus officio* and it has power to grant extension even after expiry of the period. The learned counsel further submits that order was quite appropriate and it was never assailed. The period can be extended by the original court, it can be extended by the appellate court as well and it can be extended even after disposal of the appeal. On this aspect, he has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Ramankutty Guptan v. Avara*** reported in ***AIR 1994 SC 1699 : (1994) 2 SCC 642***.

10. Learned counsel for the DHs also submits that Misc. Case No. 29 of 1995 was filed immediately after dismissal for default of Misc. Case No.15/1995 and it was restored in the year 2014. Once the miscellaneous case is restored, entire case is revived and all orders stand revived.

11. The learned counsel further submits that so far as the question of limitation is concerned, it will commence when the decree becomes enforceable. In this context, he has placed reliance on the judgment in the case of ***Hameed Joharan (d)*** (*supra*) especially para 4 & 34. Paragraph 34 has already been



quoted hereinabove and paragraph 4 reads as under :

“4. Presently, Article 136 of the Limitation Act, 1963 prescribes a period of twelve years for the execution of a decree other than a decree granting a mandatory injunction or order of any civil court. As regards the time from which the period of twelve years ought to commence, the statute has been rather specific in recording that the period would commence from the date of the decree or order when the same becomes enforceable. We need not go into the other situations as envisaged in the statute for the present purpose, save what is noticed above. To put it shortly, it, therefore, appears that a twelve-year period certain has been the legislative choice in the matter of execution of a decree. Be it noted that corresponding provisions in the Act of 1908 were in Articles 182 and 183 and as regards the statutes of 1871 and 1877, the corresponding provisions were contained in Articles 167, 168, 169 and 179, 180 respectively. Significantly, Article 182 of the Limitation Act of 1908 provided a period of three years for the execution of a decree. Be it clarified that since the reference to the 1908 Act would be merely academic, we refrain ourselves from recording the details pertaining to Article 182 save what is noted hereinbefore. It is in this context, however, the Report of the Law Commission on the Act of 1963 assumes some importance, as regards the question of limitation and true purport of Article 136. Before elaborating any further, it would be convenient to note the Report of the Law



Commission which reads as below:

“170. Article 182 has been a very fruitful source of litigation and is a weapon in the hands of both the dishonest decree-holder and the dishonest judgment-debtor. It has given rise to innumerable decisions. The commentary in Rustomji's Limitation Act (5th Edn.) on this article itself covers nearly 200 pages. In our opinion the maximum period of limitation for the execution of a decree or order of any civil court should be 12 years from the date when the decree or order became enforceable (which is usually the date of the decree) or where the decree or subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. There is, therefore, no need for a provision compelling the decree-holder to keep the decree alive by making an application every three years. There exists a provision already in Section 48 of the Civil Procedure Code that a decree ceases to be enforceable after a period of 12 years. In England also, the time fixed for enforcing a judgment is 12 years. Either the decree-holder succeeds in realising his decree within this period or he fails and there should be no provision enabling the execution of a decree after that period. To this provision an exception will have to be made to the effect that the court may order the execution of a decree upon an application presented after the expiration of the period of 12 years, where the



judgment-debtor has, by fraud or force, prevented the execution of the decree at sometime within the twelve years immediately preceding the date of the application. Section 48 of the Civil Procedure Code may be deleted and its provisions may be incorporated in this Act. Article 183 should be deleted....

In pursuance of the aforesaid recommendation, the present article has been enacted in place of Articles 182 and 183 of the 1908 Act. Section 48 of the Code of Civil Procedure, 1908 has been repealed.”

12. The learned counsel for the DHs further submits that in a decree for specific performance, there are three stages. First the decree holder has to deposit the money, thereafter, he has to get the sale deed executed and then delivery of possession is to be made. Vide order dated 11.10.1996, in the very first stage, the learned court below kept that deposit of money in abeyance. Therefore, the very first stage did not commence till 15.04.2017. As this order was passed in presence of the parties and it was never contested, so, the order is binding on the parties. Due to liberty granted, the decree became enforceable in the present case only on 15.04.2017. He has further placed reliance on Section 15 of the Limitation Act for exclusion of time in certain cases in computing the period of limitation for any suit or application for the execution of the



decree, the institution or execution of which has been stayed by an injunction or order. The learned counsel further submits that though three decisions have been cited on behalf of the JDs, but all the decisions referred to Article 136 and in all it has been held that the date of commencement is from the date of enforceability. The judgments relied upon by the JDs, i.e., ***Raghunath Rai Bareja & Anr. (supra)*** as well as ***Laxmi Rai (supra)*** are distinguishable on facts as neither in these two cases, there was a suit for specific performance nor there was any interim order like the present one. Lastly, he has placed reliance on one judgment of this Court in the case of ***Uma Shankar Sharma vs. State of Bihar and Anr.*** reported in ***2005 1 PLJR 541*** wherein the Court held that the decree of the courts below became enforceable when the second appeal was dismissed. The learned counsel further submits that in the present case, the decree became enforceable only after dismissal of the Misc. Case No.15/1995 on 15.04.2017.

13. In reply, the learned senior counsel appearing on behalf of the JDs submits that the petition under Article 227 of the Constitution of India is maintainable since the provisions of Section 115 of the Code cannot curtail the power of the court. The learned senior counsel further submits that merely change



in nomenclature would not take away the jurisdiction of this Court. The civil revision under Section 115 of the Code would also lie before this Court in its revisional jurisdiction as well as the present civil miscellaneous petition under Article 227 of the Constitution of India. Moreover, the civil miscellaneous petition is maintainable even when the remedy is also available under Section 115 of the Code. On this aspect, reliance has been placed on the decision of this Court in *Arun Kumar Vs. Smt. Shyampati Kuer and Ors. (2017(2) PLJR 958)* wherein the Division Bench decision of this Court in the case of *Durga Devi (supra)* was also referred to. Furthermore, in the present facts and circumstances of the case, the learned counsel stresses that a petition under Article 227 is maintainable.

14. The learned senior counsel appearing on behalf of the JDs further submits that much emphasis has been placed on the order passed in miscellaneous case permitting DHs to deposit the rest amount after disposal of Misc. Case No.15/1995. If the said proposition is held to be legal, this miscellaneous case was dismissed on 22.08.1998 and when it was dismissed, DHs were required to deposit the amount. Regarding extension of time for payment of purchase money, the learned senior counsel submits that the liberty may be



legally or illegally granted and even though it was not opposed, still that liberty was only up-to 28.08.1998. When the Misc. Case No. 15/1995 was dismissed, then the DHs should have deposited the money. If the limitation started running after dismissal of the miscellaneous case in 1998, it expired in the year 2010 and as no money was deposited, as such, execution became barred by limitation. One thing is also very important that this is a suit for specific performance of contract in which readiness and willingness is very important. This very petition for extension of time to deposit the rest amount makes it clear that the DHs were not ready to make payment in terms of the decree. Another decision which has been cited by the learned counsel for the JDs is the case of ***Sri Chandra Mouli Deva vs. Kumar Binoya Nand Singh & Ors.*** reported in ***1976 PLJR***

331. Paragraph nos. 4 & 5 read as under:-

“4. Admittedly the Article applicable for recovery of the decretal amount is Article 136 of the Act. This Article corresponds to Article 182 of the Old Limitation Act. It will be useful to quote these Articles. Article 136 of the Act and Article 182 of the old limitation Act, run as follow:—

*ACT OF
1963,
ART. 136*

“136. For the Twelve When the decree or order becomes



<i>execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.</i>	<i>years.</i>	<i>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-</i>
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Provided that an application for the enforcement or execution of the decree granting a perpetual injunction shall not be subject to any period of limitation.

ACT OF
1908.
ART. 182

<i>'182. For the execution of a decree or order of any civil court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure 1908.</i>	<i>Three years; or where a certified copy of the decree or order has been registered , six years.</i>	<i>1. The date of the decree or order, or</i> <i>2. (Where there has been an appeal); the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or</i> <i>3. (Where there has been a review of judgment) the date of the decision passed on the review, or</i> <i>4. (Where the decree has been amended) the date of amendment, or</i> <i>5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper court for execution or to take some step in aid of execution of the decree or order, or</i> <i>6. in respect of any amount, recovered by execution of the decree or order, which the</i>
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decree-holder has been directed to refund by a decree passed in a suit for such refund the date of such last mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the appellate court or of the withdrawal of the appeal, or

7. (Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

5. Learned counsel for the appellant first contended that under the new Article limitation begins to run from the day the decree becomes enforceable whereas under Article 182 of the Old Limitation Act, 1908, time ran from the date of the decree. He further contended that the decree became enforceable after the decree was sealed and signed. If this argument is accepted, then the execution has been levied within 12 years and, therefore, is not barred by limitation. Learned counsel for the respondents, on the other hand, submitted that the change “from the date of the decree” to when the decree becomes enforceable, does not alter the position in so far as the present decree is concerned. He contended that by virtue of Rule 7 of Order XX of the Code of Civil Procedure, the date of the decree is the date of the judgment and the decree became enforceable immediately after the judgment was pronounced. He, therefore, contended that the execution case has been rightly held to be barred by limitation. Learned counsels



in support of their arguments have cited cases decided by this Court as also by the Calcutta High Court. Before I deal with those cases, it will be fruitful to see as to why Article 182 of the Limitation Act, 1908 was replaced by the new Article 136 of the Act.”

15. The Division Bench of this Court held that Section 5 of the Limitation Act does not apply to the proceeding under Order 21 of the Code. The learned senior counsel, thus, submits that 12 years period cannot be extended even for a day and it started running on 08.05.1995 and it expired on 08.05.2007 and in worst case on 21.08.2010. The learned senior counsel submits that by the effect of withdrawal or the effect of dismissal as withdrawn, the entire interlocutory orders passed in that miscellaneous case became non-est. It has no meaning and moreover, this order was passed in the miscellaneous case for recalling the *ex parte* decree and not in a separate proceeding instituted by the DHs for extension of time period.

16. Having regard to the rival submissions of the parties, the issues which arise for consideration may be summarized as under :

(i) When the limitation started running in the present case and when the decree became enforceable?

(ii) Whether the opportunity granted vide



order dated 11.10.1996 could be said to be an order under Section 28 of the Specific Relief Act and what is scope of Section 28 in cases of such nature?

(iii) Whether the present petition is maintainable?

17. Before embarking upon the matter, it would be useful to recollect the facts of the case. The judgment in the case was delivered on 08.05.1995 and decree was prepared on 27.05.1995. Misc. Case No.15/1995 for setting aside the *ex-parte* decree was filed in 1995 and in the said miscellaneous case, the aforesaid liberty was granted vide order dated 11.10.1996. Misc. Case No.15/1995 was dismissed for default on 22.08.1998 and it was subsequently restored on 26.06.2014. The JDs withdrew their miscellaneous case on 15.04.2017 and execution case was filed on 12.06.2017.

18. Now, Article 136 of the Limitation Act provides that limitation period of 12 years for execution of any decree (other than decree granting the mandatory injunction) and the period will start running when the decree becomes enforceable. The Division Bench of this Court in the case of ***Sri Chandra Mouli Deva (supra)*** has held that Section 5 of the Limitation Act is not applicable in execution proceeding. Section 15 of the



Limitation Act provides for exclusion of time in certain situation and it grants exclusion of time when the execution of a decree has been stayed by injunction or order.

19. The learned counsel for the DHs have contended that when the learned trial court granted liberty to the DHs from payment of the due amount during the pendency of the miscellaneous case, it impliedly stayed the execution of the decree. So, the time would not start running and it remained stayed during the pendency of Misc. Case No.15/1995 till its withdrawal on 15.04.2017.

Furthermore, Section 28 of the Specific Relief Act has been relied upon by the counsel for the DHs to fortify his argument that it was within the power of the learned trial court to extend the time for making the payment.

I find the argument of learned counsel for the DHs to be fallacious. Section 15 of the Limitation Act is in the form of exception whereas, general rule is Section 5 which excludes admittance of any application under any of the provisions of the Order 21 of the Code after the period prescribed by the Act which makes it clear that time prescribed by the Act cannot be extended under any circumstances under Section 5 of the Limitation Act. Only in certain condition, time period can be



excluded.

20. Much stress has been put on liberty given by the court in Misc. Case No.15/1995. According to the DHs, the said liberty means the time period for making payment towards specific performance of the contract got extended. On the other hand, it has been contended on behalf of the JDs that the time lapsed prior to its extension. However, in the decision relied on ***Ramankutty Guptan (supra)***, the Hon'ble Supreme Court in paragraph 4 has held that in a suit a decree for specific performance of a contract for the sale of immovable property has been made and time has been prescribed for performance, it should be complied within time. On its default, power has been given to the court that passed the decree to further extend the time as the court may allow and the purchase money or any other sum be paid within the extended time. It means the time period could be extended even after lapse of the time period prescribed in the decree by the same court. However, the remedy under Section 28 (1) of the Specific Relief Act for extension of time would require the affected party to approach the same court by moving application which ought to be treated an interlocutory application on the original side and ought to have been disposed of in accordance with law. It is not that any



application filed in miscellaneous case by the JDs for setting aside the *ex-parte* decree would serve the same purpose. So, the order passed by the learned court below was highly irregular. In any case such extension could not stop the limitation from running.

21. Even if for argument sake, it is presumed that the order dated 11.10.1996 was a valid extension, the same came to an end on 22.08.1998 when the miscellaneous case was dismissed for default. So, there was no order staying the payment by the DHs till 26.06.2014. If the decree became enforceable on 22.08.1998, the period of 12 years will eventually come to an end on 21.08.2010. There is no explanation by the DHs for not preferring their execution case during this period. The DHs cannot take shelter of the fact that the miscellaneous case was restored on 26.06.2014 and the limitation would revive from the beginning. So, the contention of the learned counsel for the DHs that the decree became enforceable only in the year 2017 is not correct. Hence, the contention of the learned counsel for the DHs is rejected. Even the decision in the case of *Hameed Joharam (supra)* makes it very much clear that the term 'when decree becomes enforceable' should be read in its literal sense. Taking analogy from the same



case that the payment of balance amount was within the domain and control of the DHs and any delay in the matter of furnishing of the same cannot possibly be said to be putting stop to the period of limitation being run and no one can take advantage of his own wrong. So, no right accrued to the DHs and the decree was never kept in abeyance. Moreover, in a contract for specific performance, time is essence and when the decree holders did not move diligently and did not show his willingness to perform his part of commitment, it goes on to show the incapacity on part of the DHs to perform their obligation and reflects a lack of readiness and willingness and such conduct would come under the purview of Section 16 of the Specific Relief Act. He cannot even claim equity. In any case, the law would always trump equity and reliance could be placed on the Hon'ble Supreme Court in the case of ***Raghunath Rai Bareja (supra)***.

22. So far as issue of maintainability is concerned, I think it is non-issue. Where there is availability of remedy under Section 115 of the Code, the civil miscellaneous petition under Article 227 of the Constitution of India would normally not lie. But it could not be said that a civil miscellaneous petition under Article 227 of the Constitution of India shall not be maintainable at all. The difference and distinction between the



entertainability and maintainability was considered by the Hon'ble Supreme Court in the case of ***Raj Shri Agarwal @ Ram Shri Agarwal and another vs. Sudheer Mohan and Ors.***, reported in ***2022 SCC OnLine Sc 1775***, wherein it was held that the remedy under Article 227 of the Constitution of India is a constitutional remedy and in a given case the Court may not exercise the power under Article 227 of the Constitution of India, if in its opinion, the aggrieved party has another efficacious remedy available under the CPC. But to say that the writ petition under Article 227 of the Constitution of India shall not be maintainable at all is not tenable. Once the matter came up before this Court and the same was heard, relegating the petitioners/JDs for filing another petition under Section 115 of the Code is simply unwarranted and would result in wastage of time if this Court could entertain the petition under Article 227 of the Constitution of India.

23. In the light of the discussions made here-in-above, I think the learned trial court committed an error when it rejected the application of the JDs against time barred execution proceeding of the DHs and hence, the impugned order dated 07.02.2023 passed by the learned Subordinate Judge-1, Siwan in Execution Case No.3/2017 is not sustainable and, as such, the



same is set aside. Consequently, the application dated 21.06.2019, filed by the JDs for rejection of the execution case as barred by limitation, is allowed.

24. With the aforesaid observations/directions, the instant petition stands allowed.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	29.01.2024
Transmission Date	N.A.

