



C.R.P.(MD)No.1982 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.03.2024

Pronounced on : 04.06.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.1982 of 2017

and

C.M.P.(MD)No.10007 of 2017

1. V.Packirisami Padayachi

Nagarajan (Died)

2. Sakunthala Ammal

3. Anjammal

... Petitioners

Vs.

1. Sundarambal Ammal

2. Kalavathi

3. Mala

4. Neela

... Respondents

Prayer : This Civil Revision Petition filed under Section 115 C.P.C., to set aside the order passed in E.P.No.199 of 2007 in O.S.No.62 of 1973 on



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19.08.2017 by the Principal Sub Court, Kumbakonam and allow the Civil Revision Petition.

For Petitioners : Mr.S.Madhavan

For R1 to R3 : Mr.M.Siddharthan

For R4 : No appearance

ORDER

The Civil Revision Petition is directed against the order passed in E.P.No.199 of 2007 in O.S.No.62 of 1973 dated 19.08.2017 on the file of the Principal Subordinate Court, Kumbakonam, directing delivery of the property.

2. The revision petitioners are the judgment debtors/defendants 1, 3 and 4 and the respondents 1 to 4 are the decree holders/plaintiffs.

3. The respondents as plaintiffs have filed a suit for partition in O.S.No.62 of 1973 on the file of the Subordinate Court, Kumbakonam against the revision petitioners/defendants. After full-trial, preliminary decree came to be passed on 17.03.1979. The respondents have filed a final decree petition in I.A.No.512 of 1979 and an Advocate



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Commissioner was appointed. Subsequently, final decree came to be passed on 23.07.1980. The revision petitioners have preferred an appeal challenging the preliminary decree dated 17.03.1979 before this Court in A.S.No.839 of 1984 and the appeal was dismissed by this Court on 04.11.1997. The respondents have then laid an execution petition in E.P.No.199 of 2007. Pending execution petition, the revision petitioners have filed an application under Section 47 C.P.C. alleging that the final decree is not executable and as such, the execution petition is liable to be dismissed, in E.A.No.14 of 2011 on the file of the Principal Subordinate Court, Kumbakonam. The respondents have filed their counter statement raising serious objections. The learned Subordinate Judge, after enquiry, has passed an order dated 19.08.2017 dismissing the application filed under Section 47 C.P.C. in E.A.No.14 of 2011 and consequently the Executing Court has passed an order of delivery on 19.08.2017 itself. Challenging the order of delivery passed on 19.08.2017, the present revision came to be filed.

4. The main contention of the revision petitioners is that though the trial Court had passed the final decree on 23.07.1980, the revision



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petitioners have not preferred any appeal therefrom and the same had become final, that the said decree became executable on and from 23.07.1980 itself, that the respondents ought to have filed the above execution petition on or before 23.07.1992, but they have filed the execution petition in the year 2007 long after the prescribed time of 12 years and that the final decree is inexecutable on the date of its presentation and as such, the above execution petition is hopelessly barred by limitation.

5. The revision petitioners have also taken a stand that subsequent to the final decree dated 23.07.1980 the appeal filed by the revision petitioners came to be dismissed on 04.11.1997, that the respondents, without filing any application for passing of final decree in pursuance of the judgment and decree passed in A.S.No.839 of 1984 dated 04.11.1997, have filed the present execution petition only to execute the final decree passed earlier and that therefore, the present execution petition cannot legally be entertained.

6. It is pertinent to note that the above objections/pleas were raised in the petition filed under Section 47 C.P.C. and after enquiry, the said

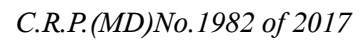


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petition came to be dismissed. It is not known as to whether the revision petitioners have challenged the order passed in E.A.No.14 of 2011 filed under Section 47 C.P.C. dated 19.08.2017 but only challenged the consequent order of delivery, after the dismissal of the petition filed under Section 47 C.P.C.

7. As rightly contended by the learned counsel appearing for the respondents, since the objections raised by the revision petitioners that the execution petition itself is barred by time has already been decided and in the absence of any challenge to the said order passed in E.A.No.14 of 2011, the revision petitioners are not entitled to canvass the very same plea of limitation. Even assuming for arguments sake that the revision petitioners are entitled to canvass the same plea, as the order impugned was passed consequent to the dismissal of the petition under Section 47 C.P.C., let us consider as to whether the execution petition is barred by time.

8. The learned counsel appearing for the revision petitioners has relied on the decision of the Hon'ble Supreme Court in the case of



the said decision case, the trial Court passed the decree on 14.12.1970, that the first appeal was dismissed on 01.08.1973, that the second appeal before the High Court was dismissed on 31.03.1976 and that the execution petition came to be filed on 24.03.1988. When the maintainability of the execution petition was questioned on the ground of limitation, the decree holders have attempted to give an explanation that since the execution petition was filed within 12 years as contemplated under Article 136 of the Limitation Act from the date of dismissal of the second appeal by the High Court on 31.03.1976, but the second appeal was filed along with an application to condone the delay in filing the second appeal and the High Court, by holding that the appellant has not shown sufficient cause for condonation of delay in filing the appeal, rejected the delay condonation application and consequently dismissed the appeal as barred by time. The Hon'ble Apex Court has specifically observed that when the appellate order does not amount to a decree there would be no supersession and hence the trial Court decree continues to be enforceable and the relevant passages are extracted hereunder:-

“In order that decision of a court should become a decree there must be an adjudication in a suit and such



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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, J] 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



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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.

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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.”

9. In the above said decision case, since the second appeal was dismissed as time barred consequent to the order of rejecting the application to condone the delay in filing the second appeal, the said dismissal of the second appeal does not amount to a decree and as such, there was no supersession and the same has no application to the case on hand.



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10. Article 136 of the Schedule to the Limitation Act, 1963 provides 12 years for execution of any decree or order of any civil Court other than a decree granting a mandatory injunction and the third column of the said Article which indicates the time from which period begins to run, states that when the decree or order becomes enforceable.

11. Generally, a decree or order becomes enforceable from its date, but in some cases, it has become enforceable on some future date or on the happening of a certain specified events. Moreover, filing of an appeal would not affect the enforceability of the decree, unless the appellate Court stays its operation. But at the same time, if the appeal results in a decree that would supersede the decree passed by the trial court and it is the appellate Court decree which becomes enforceable.

12. At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in the case of ***Chandi Prasad and others Vs. Jagdish Prasad and others*** reported in ***2004 (5) CTC 67*** relied on by the learned counsel appearing for the respondents, wherein also, the decision of the Hon'ble Supreme Court in ***Ratansingh's*** case referred above came



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to be considered. The Hon'ble Apex Court has invoked the Doctrine of Merger and observed as follows;

“Merger:

The doctrine of merger is based on the principles of propriety in the hierarchy of justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

It is trite that when an Appellate Court passes a decree, the decree of the trial court merges with the decree of the Appellate Court and even if and subject to any modification that may be made in the appellate decree, the decree of the Appellate Court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the Appellate Court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. Pvt. Ltd. Vs. Commissioner of Income-tax, AIR 2000 SC 1623]



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In Kunhayammed (supra), it was observed:

"12.Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view."

The said decision has been followed by this Court in a large number of decisions including Union of India and Others Vs. West Coast Paper Mills Ltd. and Another [(2004) 2 SCC 747].

However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. [See Raja Mechanical Company



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*Pvt. Ltd. Vs. Commissioner of Central Excise, ILR 2002 (1)
Del. 33J”*

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13. While considering **Ratansingh's** case above referred, the Hon'ble Apex Court has observed that when a dismissal of an appeal takes place on the ground of its being time barred, no decree is passed and therefore **Ratansingh's** case has no application to the present case as admittedly the High Court upon dismissal of the second appeal had drawn up a formal decree on 30.10.1986. In the case on hand, though the final decree came to be passed on 23.07.1980, the first appeal preferred by the revision petitioners was taken on file in 1984 in A.S.No.839 of 1984 and the same was dismissed on 04.11.1997. Since the first appeal challenging the preliminary decree was pending before this Court, the question of executing the final decree which was passed in pursuance to the preliminary decree dated 17.03.1979 does not arise at all. Since this Court has passed the decree in the appeal on 04.11.1997, the preliminary decree passed by the trial Court got merged with the decree of the appellate Court. Even assuming for arguments sake that some modifications were made in the appellate Court decree, even then the appellate Court decree supersedes the trial Court decree.



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14. It is settled law that merger of a decree takes place irrespective of the fact as to whether the appellate Court affirms, modifies or reverses the decree passed by the trial Court. In the case on hand, this Court in the appeal in A.S.No.839 of 1984 has passed the judgment and decree confirming the judgment and decree of the trial Court in all respects except with regard to the accounting by the revision petitioners. So there is no dispute that the decree passed by this Court got merged with the preliminary decree passed by the trial Court. Hence, the limitation has begun to run only from 04.11.1987 the date on which the appeal was dismissed by this Court. Admittedly, the execution petition was filed in the year 2007 within 12 years from 04.11.1987 and as such, the execution petition is filed within time.

15. The next contention of the revision petitioners that the respondents ought to have filed another final decree application in pursuance of the decree passed by the appellate Court. As already pointed out, except accounting by the revision petitioners, the preliminary decree of the trial Court was confirmed in all respects by this Court and that since the trial Court has already passed a final decree in terms of the preliminary



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decree dated 17.03.1979, which came to be confirmed by the appellate Court, the question of applying and obtaining another final decree does not arise at all.

16. Except the above, the revision petitioners have not canvassed any other reason or ground to impugn the order of delivery. Consequently, this Court concludes that the revision is devoid of merit and the same is liable to be dismissed.

17. In the result, this Civil Revision Petition is dismissed. Delivery by 10.07.2024. Batta to be paid before the Executing Court after 01.07.2024. Consequently, connected Miscellaneous Petition is closed. No costs.

04.06.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
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Note : Issue order copy on 12.06.2024



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1. The Principal Subordinate Judge,
Kumbakonam.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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Pre-Delivery Order made in
C.R.P.(MD)No.1982 of 2017
and
C.M.P.(MD)No.10007 of 2017

Dated : 04.06.2024