



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

WRIT PETITION NO.565/2024

Pralhad s/o Suryabhan Sapkal,
Age: 66 yrs., Occ: Agriculturist,
R/o Takli, Tq. Motala,
Dist. Buldana

... PETITIONER

...VERSUS...

Gajanan s/o Hari Marodkar,
Age: 55 yrs. Occ: Cultivator,
R/o Takli, Tq. Motala,
District Buldana.

...RESPONDENT

Shir A.J. Thakkar, Advocate for petitioner
Shri R.R. Vyas, Advocate for respondent

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 31/01/2025

DATE OF PRONOUNCING THE JUDGMENT: 03/02/2025

JUDGMENT

. Heard learned Counsel for both the parties.

2. By consent and request of parties, the matter is taken up for final hearing at the stage of admission.

3. The present petition is filed challenging the order dated 31.10.2023 passed below exhibit-1 in Regular Dharkast No.05/2015 by the learned Civil Judge Junior Division, Motala. There was Regular Civil Suit No.68/1997 filed by the respondent before the learned Civil Judge, Junior Division, Malkapur, which was decreed vide judgment and decree dated 02.12.1999. The Civil Judge Junior Division by judgment and decree allowed the suit for possession in respect of 51 R of land out of Gat No. 77 belonging to the present petitioner. Petitioner challenged the said judgment and decree by filing a Regular Civil Appeal No.131/1999, there was no stay during the pendency of appeal. The said appeal came to be dismissed in default for want of prosecution on 25.11.2004. On 04.12.2015, the respondent filed the executive proceeding before the learned Civil Judge Junior Division, Motala for possession of 51 R land from Gat No.77 vide regular Dharkar No.05/2015. The petitioner appeared in the matter on 26.02.2016 had filed his objections to the maintainability of the proceeding. It is submitted

that execution proceeding is hopelessly barred by the law of limitation. The suit was filed after 12 years of the said judgment and decree dated 03.12.1999. It is also contended that the decree is not executable as the revenue authority has wrongly shown Gat No.78 in 7/12 extract. He also raised certain objections in respect of wrong measurement, however at present, the main ground is the executive proceeding is filed beyond limitation.

4. As against this, learned Counsel for respondent in reply submitted that from the dismissal of appeal, the limitation will begin. Moreover, it is the contention of respondent that it is a preliminary decree and enquiry in respect of *mesne profit* is directed to be conducted under Order 20 Rule 12 of CPC. The parties relied on judgments which will be discussed at appropriate stage.

5. Heard both the parties at length, considered the citation relied on in the impugned order. The suit filed by the respondent herein was decided on 02.12.1999, the following order came to be passed, which reads as under:

“ **Order**

- 1) *Suit is decreed.*
- 2) *Defendant shall hand over possession of 51 R. land out of land Gat No. 77 to the plaintiff as shown in blue colour in map Exh.42 which shall form the part of decree hereinafter, within 3 months.*
- 3) *Defendant shall also pay Rs. 500/- to the plaintiff towards mesne profit prior to filing of suit.*
- 4) *The future inquiry be held in respect of mesne profit under Order 20 rule 12 of CPC from the date of Judgment till delivery of possession by defendant to plaintiff.*
- 5) *Defendant shall pay costs to plaintiff and shall bear his own.*
- 6) *Decree be drawn up accordingly.”*

6. There was appeal carried out by the present petitioner vide Civil Appeal No.131/1999. The same came to be dismissed on 25.11.2004. The following order came to be passed:

“ **ORDER**

The Appellant and his Advocate are absent when called.
It appears that the Appellant is not interested in prosecuting the Appeal.
Hence, Appeal is dismissed in default for want of prosecution.
No order t cost.”

7. Thereafter, the respondent herein filed Regular Darkhast No.05/1015 on 04.12.2015. The petitioner raised his

objection vide Exhibit-8. The main objection was that execution is filed beyond limitation.

8. The learned Civil Judge Junior Division, Motala held that in the affidavit against the suit of limitation, it is held that appeal came to be dismissed on 25.11.2004, and Darkhast came to be filed on 04.12.2015, which means it is filed within 12 years of dismissal of appeal.

9. The petitioner relied on *Bimal Kumar and another Vs. Shakuntala Debi and others 2012 (3) Civil LJ 266*, wherein the Hon'ble Apex Court held as under:

“40. We have already held that the decree was a final decree. Therefore, it was immediately executable. The question, thus, would be "was the time arrested?" On a query being made, it was fairly conceded at the Bar that at no point of time, there was any order by any Court directing stay of operation of the judgment and decree passed in PS No. 131 of 1962. The question that emanates for consideration is whether the period during which the suit and appeal preferred by the appellants remained pending is to be excluded for the purpose of limitation.”

41. In this context, we may usefully refer to the dictum in Ratansingh v. Vijaysingh, (2001) 1 SCC 469 wherein, while dwelling upon the concept of enforceability of a decree and the effect of an order of stay passed by the Appellate Court, the Bench stated thus:

"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."

10. In present matter, on perusal of the judgment and decree passed in Regular Civil Suit No.68/1997, it is final decree which is enforceable. Though respondent claimed that it is preliminary decree, on the basis of direction of inquiry in the mesne profit under Order 20 Rule 12 of the C.P.C., however, the inquiry

under Order 20 Rule 12 of the C.P.C. is an independent inquiry and, therefore, it cannot be said that the judgment and decree passed on 02.12.1999 as preliminary decree.

11. Learned Counsel for respondent relied on *Vaijinath S/o Yeswanta Jadhav deceased by legal representatives and others Vs. Afsar Begum, w/o Nadimuddin, deceased by legal representatives and others (2020) 15 SCC 128*, in support of his contention that on dismissal of appeal, confirmed decision of Trial Court on merit amounts to appeal being heard and finally decided on merits. Even if, the appeal is dismissal on some preliminary grounds. However, facts involved in the said matter, is in respect of applicability of principles of res judicata. Wherein, the decision on earlier occasion, in proceeding filed by a person had been rendered by proper competent forum, after hearing parties and on perusal on record held operated as res judicata in proceeding filed by another person as neither were the earlier findings erroneous nor was there any fraud. It is held that even assuming that the decision in the earlier proceeding was erroneous further held, still the same have been attained finality could operate as *res judicata* unless vitiated by

fraud. In the present matter, admittedly, though present petitioner filed appeal, there was no stay and the appeal dismissed for want of prosecution. As such, there is no decree passed in first appeal nor there is any consideration on merit or on any preliminary issue.

12. The learned Counsel for respondent Shri Vyas also relied in *Kishor s/o Bhikansingh Rajput Vs. Preeti w/o Kishor Rajput in Writ Petition No.2502/2006* passed by this Court on 07.02.2007, however, it is not relevant at all. It is in respect of the Family Court and in view of the facts involved in the matter, observations are made by the Court. That "*normally when this Court is ceased of the matter, it is expected of the subordinate Courts to stay their hands away.*"

13. In view of the ratio laid down in *Bimal Kumar and another(supra)*, filing of an appeal would not affect the enforceability of the decree unless the Appellate Court stay is in operation, but, the appeal results in a decree that supersede the decree passed by the learned Lower Court then it is Appellate Court decree which becomes enforceable. When the Appellate Court order

is not amount to decree, there would be no supersession then the Lower Court decree continued to be enforceable.

14. From the facts in the present matter admittedly, judgment and decree is dated 02.12.1999. As such, the execution ought to have filed before 02.12.2011, however, it appears that the same was filed on 04.12.2015. though appeal was filed challenging the decree and judgment by the petitioner herein, there was no stay during the pendency of appeal and same was dismissed in default on 25.11.2004. As such, there is no decree passed in Regular Civil Appeal No.131/1999. As such, there is no supersession and hence the Lower Court decree continues to be enforceable and executable within 12 years from the date of passing of judgment and decree in Regular Civil Suit No.68/1997. The limitation for filing of execution any decree in view of Article 136 of the Limitation Act provides 12 years of limitation. The time from which period begins to run is when the decree or order becomes enforceable As such on perusal of the said Article, it is quite clear that the period of limitation begins to run from the date when the decree become

enforceable. As such, execution is filed beyond limitation. As such, I proceed to pass the following order:

ORDER

- (i) The Writ Petition is allowed.
- (ii) The order dated 31.10.2023 passed below Exhibit 1 in Regular Darkhast No.05/2015 by the learned Civil Judge Junior Division, Motala is hereby quashed and set aside.
- (iii) It is held that the execution filed on 04.12.2015 while Regular Darkhast No.05/2015 is not maintainable as beyond limitation as prescribed under Article 136 of the Limitation Act and dismissed the same.

The Writ Petition stands disposed of in above terms. No orders as to costs.

R.S. Sahare

(SMT. M.S. JAWALKAR, J.)