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ALLAHABAD HIGH COURT

SINGLE BENCH

RAM KUMAR MAURYA — Appellant

Vs.

ADDL. DISTRICT JUDGE, LUCKNOW AND OTHERS — Respondent

(Before : Narayan Shukla, J)

Writ Petition No. 5923 of 2009 (M/S)

Decided on : 16-02-2010

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 105(2), Order 21 Rule 106, Order 21 Rule 35(1), Order 9 Rule 13, Section 11, Section 47
- Constitution of India, 1950 - Article 226

A. Limitation Act, 1963 — Article 135 & 136 — Execution of Decree — Mandatory Injunction vs. Possession — A decree for mandatory injunction for removal of construction and delivery of possession, even if it has two parts, the part concerning possession is covered under Article 136 of the Limitation Act, which provides a period of 12 years for execution, whereas mandatory injunction falls under Article 135 (3 years) — Where a decree mandates delivery of vacant possession of land, Article 136 applies for the execution regarding possession, making a subsequent execution application filed within 12 years from the date of the decree maintainable. (Paras 4, 13, 14, 18)

B. Civil Procedure Code, 1908 — Section 11 (Res Judicata) & Order 21 Rules 105, 106 — Execution Proceedings — Dismissal for want of prosecution — Successive Applications — Dismissal of a previous execution application for "want of prosecution" (default) is not a decision on merits and therefore does not attract the principle of res judicata — A subsequent execution application

is maintainable if it is within the limitation period — The policy of law aims to provide a fair and liberal interpretation to enable the decree-holder to reap the fruits of their decree, a rational approach is necessitated for prolonged litigation. (Paras 7, 13, 14, 15, 18)

C. Civil Procedure Code, 1908 — Order 21 Rule 35(1) & Order 43 Rule 1(ja) — Appealability of Orders — Execution for delivery of immovable property — An order passed on an execution application for delivery of immovable property under Order 21 Rule 35 is not appealable under Order 43 Rule 1(ja), which only permits appeals against orders rejecting applications under Order 21 Rule 106 (for setting aside dismissal in default). (Paras 11, 12)

D. Writ Jurisdiction — Article 226 of the Constitution of India — Scope of Review — Certiorari/Supervisory Jurisdiction — A High Court cannot assume the role of an appellate court to re-appreciate or evaluate evidence in writ jurisdiction — Errors of fact or law are rectifiable only if they are manifest and apparent on the face of proceedings, based on clear ignorance or disregard of law, and have caused grave injustice or gross failure of justice. (Paras 16, 17)

Counsel for Appearing Parties

Akhilesh Kalra, for the Appellant; Ashok Sinha, for the Respondent

Cases Referred

- [Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury](#), AIR 1982 SC 1397 : (1982) 1 SCALE 657 : (1982) 2 SCC 596 : (1983) 1 SCR 372 : (1982) 14 UJ 594
- [Deep Chand and Others Vs. Mohan Lal](#), AIR 2000 SC 1760 : (2000) 4 JT 337 : (2000) 3 SCALE 35 : (2000) 6 SCC 259 : (2000) 2 SCR 890 : (2000) AIRSCW 1402 : (2000) 3 Supreme 253
- [Shiv Kumar Sharma Vs. Santosh Kumari](#), AIR 2008 SC 171 : (2007) 5 CTC 453 : (2008) 1 CTLJ 108 : (2007) 11 JT 260 : (2008) 149 PLR 186 : (2007) 11 SCALE 303 : (2007) 8 SCC 600 : (2007) 10 SCR 17 : (2007) AIRSCW 6384 : (2007) 6 Supreme 347

Final Result : Dismissed

JUDGMENT

Shri Narayan Shukla, J.—Heard Mr.Akhilesh Kalra, learned counsel for the petitioner and Mr.Ashok Sinha, learned counsel for opposite party No.3.

2. The petitioner is aggrieved with order dated 23.07.2008 passed by opposite party No.2, i.e. Civil Judge (Junior Division) South, Lucknow, whereby the petitioner's application

moved u/s 47 of CPC has been rejected as also the order dated 15.10.2009 passed by opposite party No. 1, i.e., Additional District Judge, Room No. 14, Lucknow in Civil Revision No. 172/2008, whereby the order passed by the court below has been upheld.

3. Briefly the facts of the case are that opposite party No.3 moved an application for execution of decree on 6th September, 2002 in Regular Suit No.227/2000, which was dismissed for want of prosecution on 4th April, 2005. He moved an application for recall of order dated 4th April, 2005 which was also dismissed for want of prosecution on 7th April, 2007. Thereafter, he moved second application for execution of decree on 8th January, 2008, against which petitioner filed an objection u/s 47 of CPC on 16th April, 2008. By means of order dated 23.07.2008, the petitioner's objection has been rejected and second application for execution of decree moved by opposite party No.3 has been allowed.

4. The learned counsel for the petitioner by inviting the attention of this court towards the relief sought in the Regular Suit submitted that it has been taken into consideration by the trial court that it was a suit for mandatory injunction to remove illegal construction after vacating the plot in dispute to handover the possession to the plaintiff. The trial court passed the judgment and decree in the suit in the following manner:-

For execution of decree granting mandatory injunction, the period of limitation is provided as three years under Article 135 of Schedule to the Limitation Act, 1963. In the light of the aforesaid provisions, he submits that the second application for execution of decree moved by the opposite party No.3 dated 08.01.2008 was highly time-barred, therefore, after the limitation provided under the said Act, the decree cannot be executed. He further submitted that Rule 105(2) of Order XXI provides that "where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

5. Rule 106 of Order XXI provides that "the applicant against whom an order is made under sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application." He further invited the attention of this Court toward the provisions of Order XLIII Rule I(ja) of Code, which provides that "an appeal shall lie from the orders rejecting the application made under sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable."

6. In the light of the aforesaid provisions, he submits that once first application was dismissed for want of prosecution and opposite party No.3 moved an application for recall of the order, that was also dismissed in default, he had a remedy to file an appeal under

Order XLIII Rule 1 (ja), but he did not avail the said remedy, now, it was not open to him to move a second application for restoration. He further invites the attention of this Court towards Explanation VII of Section 11 of Code of Civil Procedure, which provides that "the provisions of section 11 shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree."

7. On the strength of the aforesaid provisions he submits that once after dismissal of application filed by opposite party no.3, the matter becomes final, it was not open for him as well as for the court to reopen the proceedings as it is barred by Section 11 of Code. He further submitted that once the application for execution of decree was dismissed may be for want of prosecution, but dismissal of application shall be considered to be dismissal on merit also.

8. In support of his contentions, he cited cases i.e. *Shyam Sunder Sharma v. Pannalal Jaiswal & Ors.*, 2005(1) ACJ 01 (S.C.) : 2005(1) CCC 202 (S. C.): 2005(23) LCD 1425, in which the Hon'ble Supreme Court has held that the effect of order passed on the application under Order 9 Rule 13 of the Code and principles of law laid down in the case of [Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury](#), He further cited the case [Shiv Kumar Sharma Vs. Santosh Kumari](#),.

9. It is stated that since there was no relief sought for passing the decree of possession even if the relief was granted, the same can not be executed unless the court formulated the questions on the point of possession-and dealt with it. Accordingly he submits that in any manner the decree of the court is not executable. Therefore, the orders passed by the courts below suffer from error and are liable to be quashed.

10. The opposite party No.3 contested the matter by filing a counter affidavit and submitted that there is no room of interpretation of order passed by the trial court as the decree for eviction of land in dispute as well as to handover the possession of the same in the vacant position have been passed. The petitioner filed an appeal against the judgment and decree which was registered as Regular Civil Appeal No.74 of 2003. The learned appellate court by means of judgment and order dated 7th May 2003 dismissed the same upholding the order passed by the trial court. Thereafter the petitioner filed Second Appeal bearing No.228 of 2003 before this Court. He further informed that the said appeal has been dismissed in default by this Court by means of order dated 18.09.2007 without admission. It has not been restored to its original number till date.

11. So far as the question of filing of appeal against the order passed on the application for restoration and for recall of order is concerned, he submits that when under Order 43 Rule 1 (ja), the order passed on the original application referred to under sub rule 1 of rule 105 is appealable. In the present case, since the execution application was filed before the executing court under Order 21 Rule 35 of Code, the order passed therein is not appealable

and the order passed on the application for recall of order is also not appealable.

12. Order 21 Rule 35(1) provides that "where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

13. So far as the principles of application of res judicata is concerned, he submits that section 11 speaks that issue must have been finally decided by this court, but the order passed on the application dismissing the same in default cannot be said the order deciding the issue, therefore the subsequent application moved by the opposite party No.3 for execution of decree is also not barred by principles of res judicata. So far as the limitation for filing an application for execution is concerned, he submitted that upon perusal of the relief claimed by opposite party No.3 as well as the terms of the judgment and order passed by the trial court it is very much evident that the relief sought for handing over the possession was also there and the trial court decreed the suit also for handing over the possession to the petitioner. Therefore in this case the period of limitation as has been provided under article 136 of the Schedule of Limitation Act shall apply, which is 12 years. He further submits that the trial court provided 60 days time for delivery of possession of land in dispute in vacant position, but since the petitioner failed to follow the decree, the opposite party No.3 moved an application for execution of decree.

14. In support of his contentions, he cited the following cases:-

Dakhilal Kushwaha v. 5th Additional District Judge & Ors., 1986 All. L.J. 582. In this case the suit was decreed for demolition and possession in respect of the land in suit. The defendant was directed to remove the construction from the land in dispute within 15 days and delivery of possession of land to the plaintiff failing which plaintiff shall be entitled to get the same done through court. An application for execution was dismissed in default and no steps were taken for the revival of the said application. Another application for execution of the decree was moved, against which an objection u/s 47 of the CPC was moved. The Executing Court upheld the objection and rejected the application as barred by time. The Revisional Court set aside the order passed by Executing Court and dealt with the application within time, which was challenged before this court. The petitioner's case was that the defendant made an application for enforcement of a decree granting a mandatory injunction which was patently barred by time as envisaged in article 135 of the Limitation Act 1963. The view taken by the Revisional Court was that the decree passed by the trial court was in 2 parts. The first was concerning the demolition of the construction may have become executable but the second part regarding the delivery of possession is still executable in view of Art.136 of the Act. In the said case the court has held that since the petitioner could not prove his title, the respondent succeeded in proving the title therefore a decree for the recovery of possession had been passed in his favour. Ultimately the court held that decree has not become either in fructuous or in executable merely

because the proceedings for the execution of the decree with respect to the mandatory injunction are barred by limitation (Article 135).

Kamla Prasad v. Ind Additional District Judge, Mainpuri & Ors., 1997 All. L.J. 858, of which is reproduced hereinbelow:-

.....In execution proceedings, after the execution is dismissed, a fresh execution can be levied provided the same is not barred by limitation. When the objection u/s 47 is not decided on merits, and the principle of res judicata is not attracted, the dismissal of the application for non-prosecution even by agreement does not preclude the judgment debtor from filing a fresh application under S.47.

Deep Chand and Others Vs. Mohan Lal, In the said case suit for specific performance of contract filed by respondents was decreed on 22.02.1973. The appeal filed by the appellant judgment-debtors was dismissed on merit, but the judgment debtors failed to abide by the terms of the said decree. The decree holder filed execution application on 17.12.1982, 12.06.1984 and 21.09.1992 which were dismissed. However the decree holder got the sale deed executed and registered in his favour through the process of execution of the decree from the executing court. As despite the mutation of ownership sanctioned in favour of the decree holder, the judgment debtors did not deliver the possession of the land in question, he filed an application for execution in April, 1994 which was dismissed by the Executing Court on 24.09.1998 holding that the same was barred by limitation. The decree holder filed a revision petition before the High Court which was allowed, but was challenged before the Hon'ble Supreme Court on the ground that as execution application was filed after 12 years from the date of the decree, the same was barred by time. The Hon'ble Supreme Court has held that Article 136 of the Limitation Act is a specific article prescribing and dealing with the applications for the execution of decrees and orders. In Govind Prasad v. Pawan Kumar the Privy Council held that successive applications for execution are permitted to be filed but only within the period of limitation provided by law, Article 136 provides:

Description of suit Period of limitation to run Time from which period begins For the execution of any Twelve years When the decree or order becomes decree (other than a decree granting mandatory injunction) or order of any Civil Court. enforceable or where the decree or any subsequent order directs any payment of money or for the delivery of any property to be made at a certain date or at recurring periods when default in making the payment of delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement of execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

15. The Hon'ble Supreme Court considered the provisions of Article 136 of Limitation Act and held that

it must, however, be remembered that the purpose of an execution proceeding is to enable

the decree-holder to obtain the fruits of his decree. In case where the language of the decree is capable of two interpretations, one of which assists the decree-holder to obtain the fruits of the decree and the other prevents him from taking the benefits of the decree, the interpretation which assists the decree-holder should be accepted. The execution of the decree should not be made futile on mere technicalities which does not, however, mean that where a decree is incapable of being executed under any provision of law it should, in all cases be executed notwithstanding such bar or prohibition. A rational approach is necessitated keeping in view the prolonged factum of litigation resulting in the passing of a decree in favour of a litigant. The policy of law is to give a fair and liberal and not a technical construction enabling the decree-holder to reap the fruits of his decree.

Ganga Prasad (Since deceased) (Through his substituted Lrs.) and others v. Deputy Director of Consolidation, U.P., Lucknow, Camp at Jaunpur & Ors., 2000(18) LCD 1109, Para 15 of which is reproduced herein under: -

A perusal of the aforesaid Section 11 of the Civil Procedure Code, referred to above, show that the first ingredient to said section is that there must be a suit of issue to be tried, which was directly or substantially in issue in a former suit. Secondly, the issue should have been directly or substantially in issue in the past suit and thirdly, it should be between the same parties under whom they or any of them, claiming or litigating under the same and fourthly, the court must be competent to try the subsequent suit, and lastly, such issue has been substantially raised and has been heard and decided by such court.

16. In the light of the aforesaid decisions learned counsel for the opposite party No.3 submits that there is no error in the order impugned and the writ petition deserves to be dismissed. He also raised the question on the maintainability of the writ petition under Article 226 of the constitution of India on the ground that there is no patent error in the orders passed by the courts below. Therefore this court may not entertain the present writ petition.

17. In support of his contentions he cited a case i.e Surya Dev Rai v. Rant Chander Rai & Ors., 2004 ACJ 221 (S.C.) : 2003 AIR SCW 3872, paras 12 and 38 of which are reproduced herein under:-

12. In the exercise of certiorari jurisdiction the High Court proceeds on an assumption that a Court which has jurisdiction over a subject-matter has the jurisdiction to decide wrongly as well as rightly. The High Court would not, therefore, for the purpose of certiorari assign to itself the role of an appellate Court and step into re-appreciating or evaluating the evidence and substitute its own findings in place of those arrived at by the inferior Court.

38.....Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave

injustice or gross failure of justice has occasioned thereby.

18. Upon perusal of the facts and circumstances of the case as well as decisions of this court as well as Hon'ble Supreme Court referred to herein above, I find that the petitioner prayed for decree of mandatory injunction to remove the encroachment and hand over the possession of the land in dispute in a vacant position. The trial court decreed the suit with direction to handover the possession of the land in dispute within 6 days from the date of judgment in a vacant position, failing which the plaintiff would be entitled to get possession of the land in dispute through the court. After comparing the relief sought as well as the decree granted I find that definitely it was a suit for mandatory injunction but for possession also, the part of the decree in possession is covered under Article 136 of the Limitation Act for the purposes of limitation for execution of decree and in the light of the decision rendered in the case of Deep Chand (supra) it is bound to be executed so. I am of the definite view that for the purpose of limitation the present case is covered under Article 136 of the Limitation Act and the successive application for the execution is within time, as the suit was decreed on 6th Sept. 2002 and the application in question was moved on 8th Jan. 2008. Under Article 136 of the Limitation Act the limitation is provided 12 years. Once I am of the view that successive applications for the execution was within time and being within time it was maintainable, the discussion on the point of application of principle of res judicata or availability of remedy of appeal against the order passed on the application for recall of the order becomes irrelevant, therefore I do not feel it necessary to make any observation on the said point. Nevertheless I am of the view that since the order passed on the application for recall of order is only an order of dismissal in default, the application moved further is not barred by res judicata. So far as the question of remedy of appeal against the order passed on the recall application is concerned, once I am of the view that subsequent application is maintainable, that becomes irrelevant. Therefore I need not to make any observation on this point. Thus I do not find error in the orders passed by the courts below.

19. In the result, the writ petition is dismissed.