

RADHEY SHYAM JAISWAL (DEAD) AND ORS.

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v.

SMT. RAM DULARI DEVI AND ORS.

MAY 1, 1996

[M.M. PUNCHHI, CJ. AND S.C. SEN J.]

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Civil Procedure Code. 1908—Section 48(1)(a)—Delay in filing application for execution of decree—Execution application filed without limitation period which was compromised—On failure to fulfill compromise conditions another execution application filed beyond limitation period—Not suggested by party that second execution application was not a fresh application—Held, the second execution application is barred by time—Plea that limitation should be computed from the date of failure—Plea not raised before the court below—Held, it cannot be permitted to raise the point in Supreme Court which was not urged in the Courts below—Practice & Procedure.

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The house in dispute, was attached, pursuant to a suit by 'H' against 'R' and his sons. The suit was decreed on October 29, 1949 'H' (the decree holder) applied for execution by sale of the house. The sons objected that their share could not be sold. The objection was upheld.

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Decree holder went in appeal in High Court contending that sons should be held liable to pay father's debt. The appeal was allowed.

Decree holder again started execution proceeding in which order for sale was made. But the sale did not take place because compromise was arrived at between parties that the sons would pay the whole decretal amount in monthly instalments and in default of payment of any of the instalments, decree holder was entitled to put the attached house for sale without issuing any further sale proclamation.

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The judgment debtors failed to pay the instalments and therefore, decree holder filed another application for execution on November 16, 1961.

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Pursuant to application, the house was put to sale and was purchased by the father of the appellants (auction purchasers) who paid the entire purchase price. The appellants came into possession of the house

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A since the day of the purchase and had also made improvement on the property.

B After the sale had taken place, the widow and the daughters of 'R' who were not impleaded as party, filed an objection that the sale was void ab-initio in their absence as they were also entitled to the property after Indian Succession Act, 1955 had come into force. The Civil Judge allowed the application and set aside the sale.

The decree holder preferred appeal before Additional Judge, which was allowed.

C The widow and the daughter preferred second appeal before the High Court who upheld their objections. While going through the record, the court observed that execution application filed on November 16, 1961 was for the execution of the decree dated October 29, 1949 and thus, there was delay in filing execution application. The court held on the point of delay that as per Section 48 of Civil Procedure Code, the application was barred by limitation and also recorded that the parties did not suggest that the application for execution was not a fresh application within the meaning of that provision.

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E The auction purchasers (appellants herein) filed appeal to this Court contending that the execution proceedings initially taken were compromised but the judgment debtor failed to fulfil the conditions of the compromise. Therefore, the limitation should be computed from the date of the failure. It was also contended that they should be compensated for the improvement brought about in the property. This Court had earlier directed the Civil and Session Judge, Mirzapur to evaluate the improvement, which he had evaluated at Rs. 86, 335.

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Dismissing the appeal, this Court

G HELD: 1.1. In view of the facts and circumstances of the case, the High Court was right in coming to the conclusion that the fresh application for execution was barred by time in view of the provisions of sub-section (1) (a) of Section 48 of the Civil Procedure Code as it stood at the material time. [194-G-H]

H 1.2. The appellant cannot be permitted to raise the point which was not even urged in the courts below. It does not appear from the High Court

Judgment that the point that since the judgment debtor failed to pay the instalments which he had agreed to pay, the limitation should be computed from the date of the failure was urged at all. On the contrary, the court after referring to the provisions of Section 48 of CPC has recorded that "it was not suggested that it was not a fresh application for execution within the meaning of that provision". That being the position, the appellant cannot be permitted to raise the point which was not even argued in the courts below.

The court directed that a sum of Rs. 86,335 must be paid by the respondents to the appellants as compensation for improvement to the property made by the appellant. [195-A-C; G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9983 of 1983.

From the Judgment and Order dated 8.2.82 of the Allahabad High Court in E.S.A. No. 4267 of 1964.

Ms. Kamini Jaiswal for the Appellants.

R.P. Singh and Shiv Sagar Tiwari for the Respondents.

The Judgment of the Court was delivered by

SEN, J. Late Hanuman Das filed a suit for recovery of money against Raghunandan Ram and his sons - Mewalal, Misri Lal and Sewa Lal - and his brother Babunandan Ram. In the suit, an order of attachment before judgment was passed in respect of the house now in dispute. The suit was decreed against Raghunandan Ram and his three sons but was dismissed against Babunandan Ram. The decree-holder applied for execution of the decree (execution case No. 3 of 1951) by sale of one half share in the disputed house. The sons of Raghunandan Ram filed an objection under Section 47 of Code of Civil Procedure that it is only the share of Raghunandan Ram in the joint family property which could be sold. The objection was upheld. Hanuman Das went up in appeal to the High Court and contended that the sons were liable for the payment of the father's debt. The entire one half share of the father and of the sons in the ancestral property was liable to be sold in the execution of the decree. The appeal was allowed and it was held that the decree-holder, i.e., Hanuamn Das was entitled to proceed against one half share of the house in dispute.

A After the decision of the appellate court, execution proceeding commenced once again but Raghunandan Ram died on 9.1.1960. The decree-holder moved an application for striking of the name of Raghunandan Ram of the record and continuing the execution proceedings. It was contended that the heirs of Raghunandan Ram - Mewa Lal, Misri Lal and Sewa Lal - were already parties in the proceedings and that it was not necessary to bring them on record as legal representatives. The prayer was allowed by the Civil Judge by passing an order as prayed for after giving a notice of hearing to the sons of Raghunandan Ram.

C In the execution case, an order for sale of the half share of the disputed house was made, a proclamation of sale was made and 20.4.1961 was fixed as the date of sale. However, the sale did not take place because a compromise was arrived at between the sons of Raghunandan Ram and the decree-holder. It was agreed that the sons would pay the whole of the decretal amount in monthly instalments of Rs. 500 each. A sum of Rs. 500 was paid to the decree-holder who was in the court. The sons of Raghunandan Ram were to pay the remainder of the decretal dues in three instalments on 31.5.1961, 30.6.1961 and 31.8.1961. In default of payment of any of these instalments, Hanuman Das was entitled to put the attached house to sale without issuing any further fresh sale proclamation. On this compromise being reached, the Civil Judge passed an order on 31.4.1961 striking off the execution case for the time being.

F The judgment-debtors, however, did not pay the instalments. Another application for execution was made on 16.11.1961 (execution case No. 22/1961). In that case, it was prayed that the record of the original case No. 3/1951 be sent for and execution proceeded with in accordance with law in view of the default committed by the judgment-debtors. Pursuant to the said prayer, one half share in the disputed house was put to sale once again and was ultimately sold to one Bhagga Ram on 8.9.1962. The entire purchase price was paid by Bhagga Ram on 17.9.1962.

G The case of the appellants who are the sons of the late Bhagga Ram is that they are living in the house since Bhagga Ram purchased the property in the auction sale. It is alleged that the property was in a very bad state and Bhagga Ram had spent large sums of money in the renovation of the house.

H The widow and daughters of Raghunandan Ram filed an objection on

11.10.1962 in the court alleging that after the passing of the Indian Succession Act, 1956, the widow and daughters became entitled to the property along with three sons but were not brought on record after the death of Raghunandan Ram and that the sale had taken place behind their back. The omission to implead them went to the root of the jurisdiction of the execution court to sell the property. The sale, therefore, was void *ab initio* and should be set aside. The objection was upheld by the Civil Judge and by an order dated 8.10.1963 the sale effected on 8.9.1962 pursuant to the order of the execution court was set aside. The auction-purchaser did not prefer any appeal against this order. A B

However, the decree-holder preferred an appeal to the court of Second Additional Judge, Allahabad who by order dated 3.10.1964 allowed the appeal and dismissed the objections filed by the objectors with costs. The court held that the widow and the daughters had never put in appearance in the execution case for thirteen years and filed the objections only after the sale had taken place with a view to further delay the execution proceedings. The objections have been filed belatedly to delay the execution proceedings and prevent the decree-holder from getting the benefit of the decree obtained by him. C D

The widow and the daughters of Raghunandan Ram being aggrieved by the decision of the Additional Judge, preferred an execution second appeal in the High Court of Allahabad. The High Court allowed the appeal and upheld the objections raised by the widow and the daughters of the judgment-debtor and cancelled the sale of property. E

The High Court pointed out that after reserving judgment, it went through the record and discovered that the execution application giving rise to the present proceedings was filed on 16.11.1961 while the order under execution was passed on 29.10.1949. This went to show that there was a delay of eighteen days beyond the limit of twelve years fixed by Section 48 of the Code of Civil Procedure as it stood at that time. He, therefore, directed the case to be fixed for further hearing in order to give the decree-holder and the auction-purchaser an opportunity to meet the point. The case was, thereafter, taken up for further hearing on the adjourned date. But the decree-holder did not appear. On behalf of the auction-purchaser, a prayer was made for examining the file of the execution case No. 3/1951 and No. 22/1961. It was contended that the sale had F G H

A been confirmed during the pendency of the appeal and even a certificate of sale had been issued.

B The court held that it was unnecessary to call for any of the files inasmuch as the entire file of the execution case in which the sale took place and also the application for execution was available in court. The subsequent papers relating to confirmation of the sale during the pendency of the appeal were not necessary for deciding the questions raised in the appeal.

C It was held that Section 48 of the Civil Procedure Code, as it stood at the material time, was a bar to filing any execution application beyond the period of 12 years from the date of passing of the decree. The execution application, which was filed on 16th November, 1961, was for execution of a decree passed on 29th October, 1949. Therefore, it was clearly beyond the period of 12 years and was barred by limitation. It was recorded in the order "it was not suggested that it was not a fresh application for execution
D within the meaning of that provision". The Court, therefore, passed the following order :

E "In the result, the appeal succeeds and is allowed. The appellant's objection under section 47 is allowed. The execution application filed on 16th November, 1961; Execution Case No. 22 of 1961 in the court of the Civil Judge, Mirzapur, is dismissed. The sale of the property and the confirmation thereof and the sale certificate issued in pursuance thereto and other action taken, stand annulled. The auction purchaser shall be entitled to refund of the amount paid by him. However, in the circumstances, the parties shall bear
F their own costs throughout."

G The decree-holder did not appear at the final hearing. The auction-purchaser also did not seriously dispute that the application for execution pursuant to which the judgment-debtor's property was sold was beyond the period of twelve years from the date of the decree. In that view of the matter the Court was right in coming to the conclusion that the fresh application for execution was barred by time in view of the provisions of sub-section (1)(a) of Section 48 of the Civil Procedure Code as it stood at the material time.

H It has been argued on behalf of the appellants that the execution

proceedings initially taken were compromised and the judgment-debtors had agreed to pay off the decretal dues by instalments. There was a failure on the part of the judgment-debtors to pay such instalments and limitation should be computed from the date of the failure. It does not appear from the judgment that this point was urged at all. On the contrary, the Court after referring to the provisions of Section 48 of Civil Procedure Code, has recorded that "it was not suggested that it was not a fresh application for execution within the meaning of that provision". That being the position, the appellant cannot now be permitted to raise the point which was not even argued in the court below. The court also did not go into the question of the effect of the failure on the part of the decree-holder to bring the widow and daughters of the judgment-debtor on record.

A point was taken by the appellant that considerable improvement to the property was brought about by him. Therefore, he must be suitably compensated for the improvements brought about by him before the property is allowed to be taken back by the judgment-debtors. As against this, it has to be borne in mind that the case of the appellant-auction purchaser is that immediately after the auction sale, he went into possession of the property and brought about improvements. He has been in possession of the property since then and has enjoyed the use and benefit of this property for a considerable period of time. It appears that on 30.11.1982 an order was passed by the then Chief Justice and V.D. Tulzapurkar, J. Directing the Civil and Sessions Judge, Mirzapur, to make a valuation of the improvements made by the auction-purchaser to the property after the date of the purchase on the basis of the current market price. A further direction was given for maintenance of status quo. The District Judge, Mirzapur, sent a report to this Court in which he has stated that improvements made by the auction-purchaser were valued at Rs. 86,335.

We, therefore, affirm the order dated 8.2.1982 passed by the Allahabad High Court in Execution Second Appeal No. 4267 of 1964 but direct that a further sum of Rs. 86,335 must be paid by the respondents to the appellants. Save as aforesaid, the appeal is dismissed. No order as to costs.

K.K.T.

Appeal dismissed.