

## Nand Kishore Pandey Vs Goshain Kirtarath Gir and Others

**Court:** Allahabad High Court

**Date of Decision:** April 28, 1944

**Acts Referred:** Limitation Act, 1963 " Article 181

**Citation:** AIR 1944 All 217 : (1944) 14 AWR 168

**Hon'ble Judges:** Malik, J

**Bench:** Division Bench

**Final Decision:** Dismissed

### Judgement

Malik, J.

This is a judgment-debtor's appeal.

2. The decree-holder filed a suit (No. 218 of 1931 of the Additional Civil Judge's Court, Jaunpur) and obtained a decree on 12th January 1932

for possession by removal of certain encroachments. The defendants filed an appeal but they were unsuccessful and the appeal was dismissed on

31st March 1933.

3. On 2nd March 1936 within three years of the decision of the first appellate Court the decree-holder applied for execution of the decree.

4. While the execution application was pending one Sheoram Pande filed a Suit No. 321 of 1936, against the decree-holder and the judgment-

debtor and obtained an interim injunction.

5. The interim injunction was received by the executing Court on 10th September 1936 and on the same date the executing Court disposed of the

execution case by the following order: ""Struck off for non-satisfaction with costs to decree-holder.

6. The Suit No. 321 of 1936 filed by Sheoram Pande was dismissed on 23rd October 1937 with the result that the order of injunction passed by

that Court came to an end.

7. The decree-holder, however, did not put in the present application for execution till 14th May 1941.

8. The judgment-debtor filed an objection that application was time-barred.

9. Both the Courts below have dismissed the objection and have held that the application was within time.

10. The lower appellate Court held that the order of dismissal was unwarranted and the Court should have only stayed the execution proceedings

and the order was, therefore, illegal as held, in Chhattar Singh and Another Vs. Kamal Singh and Others . The lower Court was of the opinion that

the order did not have the effect of terminating the execution proceedings but of merely suspending the same.

11. As regards the plea that the present application filed on 14th May 1941 should have been filed within three years of 23rd October 1937, the

date when Sheoram Pande's suit terminated and the injunction order passed by that Court lost its force, the lower Court relied on the Full Bench

ruling of this Court reported in Bhan Datta Upadhia and Another Vs. Mt. Tulsa Kuer, and held that Article 181, Limitation Act had no application

and it was not necessary that the decree-holder should have come within three years to ask the Court to continue proceedings that were still

pending before it.

12. Learned Counsel for the judgment-debtor has filed this appeal and his main contention is that the order passed by the execution Court was not

rightly interpreted and on a correct interpretation" of the said order it must be held that the execution proceedings terminated on 10th September

1936. He has placed great reliance on the fact that the executing Court had given costs to the decree-holder.

13. I have very carefully considered this matter as I do not like a belated application for demolition of constructions but I am of the opinion that this

appeal must fail.

14. In view of the fact, however, that there has been a great deal of discussion at the Bar and a large number of decisions have been cited before

me. I would like to give briefly my views on the point. As has been said so often the expression "striking off a case" is not to be found in the Code

of Civil Procedure, and it has, therefore, to be gathered from the surrounding circumstances as to what the Court meant by passing such an order.

If the Court only meant, by that order that the proceedings should remain adjourned sine die on account of some obstacle to the execution

proceedings being continued or as has been sometimes said the case is removed from the list of cases pending in the Court, the execution

proceedings cannot be deemed to have been terminated and it being the duty of the Court to dispose of all cases which have not been judicially

disposed of by it, the Court should suo motu re-start the proceedings after the obstacle to its prosecution has been removed. In case a party

reminds the Court that the case has not been disposed of and a date for its disposal may be fixed, it cannot be said that he is making an

application"" within the meaning of Article 181, Limitation Act. The word ""application"" in Article 181, Limitation Act, obviously means an

application on which the Court has to decide judicially. In Bhan Datta Upadhia and Another Vs. Mt. Tulsa Kuer, , a Full Bench of this Court

observed as follows:

All applications are not governed by the provisions of the Limitation Act.... An application to set in motion an execution application which has

already been made within time and is still pending is in our judgment an application of a similar nature.

15. The Court based this on the fact that it was not incumbent on the decree-holder to make an application to the Court to take up a pending case.

Where it is not necessary for a party to make an application under the CPC an application made by him is not governed by Article 181, Limitation

Act, is now well settled: see Prakash Singh v. Allahabad Bank Ltd. ("29) 16 AIR 1929 P.C. 19 and Joti Prasad and Another Vs. Srichand and

Another .

16. On the other hand, if the executing Court by using the word ""struck off"" wanted to finally dispose of the proceedings before it, it appears to me

to be wholly immaterial whether the Court acted rightly or wrongly, irregularly or even illegally, and the parties are bound by the order and they can

only have it set aside in accordance with the provisions of the Code and within the period of limitation fixed for that purpose. In case they do not

do that and file a fresh application for execution, that application will have to be filed within the period of limitation fixed by the Limitation Act.

17. To my mind, therefore, in each case the question is merely a question of the interpretation of the order.

18. If the matter was res integra, I might have been inclined to hold that in the absence of anything to the contrary the executing Court, when it

passed an order striking off a case, meant more or less to get rid of it, and so far as I know there are no separate lists kept in the lower Courts of

pending cases and cases which are in a sort of cold storage. There is, however, preponderance of authority that the word ""struck off"" has not the

effect of disposing of execution proceedings and in spite of that order it must be deemed to be still pending : see Chhattar Singh and Another Vs.

Kamal Singh and Others , Pragilal Kanhaiya Lal Vs. Ratan Lal Mathra Prasad, , Mohammad Taqi Khan Vs. Raja Ram and Others, , Bhan Datta

Upadhia and Another Vs. Mt. Tulsa Kuer, . In Chhattar Singh and Another Vs. Kamal Singh and Others , Lindsay J. observed as follows:

It has been repeatedly observed in judgments of this Court that an order "striking off" a pending application for execution is not recognised by the

law.... The only result it could have was that of leaving the proceedings still pending.

Banerjee J. agreed with Lindsay J. Sulaiman J. held:

The Subordinate Judge, without even issuing any notice to the decree-holder, struck the case off from the pending file and consigned the record to

the record room. That order cannot be deemed to be a final disposal of the application.

Mukerji J. held:

The order "striking off" the execution amounts simply to an order, sending the papers to the record room.

Walsh J. however, observed that the order in that particular case was a ministerial order as it was passed without notice to the decree-holder.

19. The case in Chhattar Singh and Another Vs. Kamal Singh and Others is the leading case on the point and since that case and the other cases, I

take it that the Judicial Officers in the Province now have come to understand that when by reason of a stay order passed by another Court, they

"strike off" an execution application, though the decree-holder is not in default, the application is only shelved and not disposed of.

20. Then remains the question whether the fact that costs were awarded to the decree-holder, it should be understood that the Court meant finally

to dispose of the application. In Mohammad Taqi Khan Vs. Raja Ram and Others, reliance was placed on the order as regards payment of costs

to deduce that the intention of the Subordinate Judge was to dispose of the matter so far as he himself was concerned: see Mohammad Taqi Khan

Vs. Raja Ram and Others, . But the facts in that case were entirely different. There the parties had entered into a compromise and the sale officer

informed the execution Court of this arrangement and the Court considered that it was no longer necessary to proceed with the execution.

21. In the case before me the decree-holder was anxious to proceed with the execution. A third party got an injunction order restraining the

decree-holder from proceeding with the execution. That injunction was merely temporary and could only be in force during the pendency of that

suit. There could be no ground for dismissing the decree-holder's application. The Court may, even when suspending proceedings, award costs to

the decree-holder and in Pragilal Kanhaiya Lal Vs. Ratan Lal Mathra Prasad, , the Court while striking off the proceedings "for the present" had

awarded costs to the decree-holder. After giving anxious consideration to the matter, I am of the opinion that the executing Court had merely

intended to suspend proceedings. In that view no question of limitation arises and the decisions of the lower Courts must be affirmed.

22. The appeal, therefore, fails and is dismissed with costs.