

(2008) 11 JH CK 0030

Jharkhand High Court

Case No: None

Tulsidas Patel and Others

APPELLANT

Vs

Md. Shafique and Another

RESPONDENT

Date of Decision: Nov. 20, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Constitution of India, 1950 - Article 227

Citation: (2009) 1 JCR 187

Hon'ble Judges: M.Y. Eqbal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

M.Y. Eqbal, J.

In the instant application filed under Article 227 of the Constitution of India the sole question that falls for consideration is as to whether the executing Court was justified in rejecting the objection filed by the petitioner-judgment debtor u/s 47 of the CPC holding that execution case is not barred by limitation.

2. The undisputed facts are that the plaintiff-respondent filed Title (Eviction) Suit No. 58/85 and obtained ex parte decree on 5.12.1987. The contesting defendant after having come to know about the ex parte decree filed application under Order IX, Rule 13 Code of Civil Procedure, 1908 for setting aside ex parte decree which was registered as Misc. Case No. 6/88. During the pendency of the miscellaneous case, since there was no stay of the execution of the decree, respondent-decree holder filed Execution Case No. 10/89 for obtaining delivery of possession. Since the decree holder did not take any step in the said execution proceeding, the same was dismissed on 26.9.1991 for default. The decree holder however, did not take any step for restoration of aforementioned Execution Case No. 10/89. After the expiry of 12 years from the date of decree and also from the date of dismissal of the earlier

execution case filed a fresh execution case in January, 2005 which was registered as Execution Case No. 2/2005. In the meantime the judgment debtor died and on service of notice to the heirs of the judgment debtors namely, petitioners, they appeared and filed objection u/s 47 Code of Civil Procedure, 1908 for dismissal of the execution case as it is barred by limitation. The respondent-decree holder filed rejoinder suiting, inter alia, that after the miscellaneous case for setting aside ex parte decree was rejected, a fresh execution case was filed, which is not barred by limitation, learned Munsif after hearing the parties, rejected the objection filed by the petitioner-judgment debtor u/s 47 of the Code and held that the execution case is not barred by limitation.

3. I have heard Mr. V. Shivnath, learned senior Counsel appearing for the petitioners and Mr. Rajesh Kumar, learned Counsel appearing for the respondents.

4. Mr. V. Shivnath, in course of argument, relied upon the decision of this Court in the case of Bharat Ram Malta to and Ors. v. Ramesh Chandra Shanna and Ors. (2007)1 JLJR 245, where the decisions of the Supreme Court have been followed. Mr. Rajesh Kumar, on the other hand, submitted that since the miscellaneous case filed under Order IX Rule 13 was pending, the decree holder did not proceed with the earlier execution case which resulted in dismissal for default. According to the learned Counsel alter the miscellaneous case for setting aside ex parte decree was finally rejected, the fresh execution case was filed, which is not barred by limitation. I am unable to accept the submission made by Mr. Rajesh Kumar. In the case of Bharat Ram Mahato (supra) a Bench of this Court, after following the principles laid down by Supreme Court in the case of D.M. Deshpande and Others Vs. Shri Janardhan Kashinath Kadam (Dead) by Lrs. and Others, and held:

As noticed above, in the instant case, judgment and decree passed by the trial Court on 113.1977 was finally confirmed by the High Court on 34.1989 in Second Appeal No. 245 of 1979. The original decree holder filed Execution Case being Execution Case No. 23 of 1993 within 12 years from the date of the decree. The said execution case was ultimately dismissed for non-prosecution on 22.9.2000. Thereafter, the legal representatives of the decree holder filed a fresh execution petition on 17.4.2003, which was registered as Execution Case No. 5 of 2003. Admittedly, the second Execution Case No. 5 of 2003 filed by the legal representatives of the decree holder was beyond the period of 12 years from 3.4.1989 when the judgment and decree attained its, finality. After the Execution Case was dismissed for non-prosecution, the remedy available to the decree holder or his representatives was to file an application for restoration of the Execution Case as provided under Order 21, Rule 10b of the Code of Civil Procedure. The period of limitation for filing an application for restoration of Execution Case is 30 days from the date when the Execution Case is dismissed for default. Admittedly the second Execution Case was filed beyond the period of 12 years from the date of the decree and no application for restoration of the earlier execution case was filed within 30 days from the date of

dismissal as contemplated under Rule 106 of Order 21 of the Code of Civil Procedure.

5. In the instant case, as noticed above, the respondent-decree holder obtained an ex parte decree of eviction in 1987 and Execution Case No. 10 of 1989 was levied, which was eventually dismissed on 26.9.1991 for non-prosecution. Neither the decree holder filed restoration application for restoration of earlier Execution Case No. 10 of 1989 nor even filed fresh execution, although not maintainable, within 12 years from the date of dismissal of the earlier execution case. In that view of the matter, fresh execution case filed by the Decree-Holder in 2005 was not at all maintainable as the same was barred by limitation. Learned Munsif, therefore, rightly passed the impugned order, which needs no interference at all by this Court.

6. For the reasons aforesaid, this writ application is dismissed.