

(2012) 07 CAL CK 0180

Calcutta High Court

Case No: A.P.O. No. 64 of 2012 and C.P. No. 265 of 2011

Tamil Nadu Co-operative Sugar
Federation Ltd.

APPELLANT

Vs

M/s. H.R. Traders and Investors
Pvt. Ltd.RESPONDENT

Date of Decision: July 31, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 48
- Companies Act, 1956 - Section 434(1)(a), 434(1)(b)

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** M.R. Narasinhham and Mr. R.K. Khanna, for the Appellant; Debangshu Basak, Advocate, Mr. Sanjoy Bose, Advocate, Mr. Sovik Majumdar, Advocate and Ms. Abha Alley, for the Respondent**Final Decision:** Allowed

Judgement

Ashim Kumar Banerjee, J.

This appeal would relate to a decretal claim that was passed by Madras High Court on January 3, 1992. The appellant obtained the not contest the same. In 1998 the appellant obtained certified copy of the decree and applied for transmission of the same to this Court for execution, as the respondents were based at Calcutta. Subsequently, the appellant filed a winding up petition being C.P. No. 289 of 2001 before this Court. During pendency of the winding up proceeding, the respondent filed an application for setting aside of the ex parte decree upon receipt of a notice for execution issued by this Court. The respondent made an application on September 25, 2003 for recall of the ex parte decree along with an application for condonation of delay of 4248 days. By an order dated September 30, 2003 appearing at page 143-144 of the Paper Book the Madras High Court stayed the operation of the decree for a period of four weeks that was subsequently extended

and directed to continue until further orders. On June 9, 2004 the winding up petition came up for hearing. Since the operation of the decree was stayed, the winding up petition based on the said decretal claim was not pressed and as such was dismissed for non-prosecution with liberty to apply afresh if occasion would arise in future. The order of stay so passed by the Madras High Court continued. On October 6, 2007 the Madras High Court passed a further order appearing at page 195-197 wherein the Court asked the respondent to deposit a sum of Rs.20 lacs to show their bona fide. The matter was adjourned. The matter again appeared before the Madras High Court on November 19, 2007 when the Court modified the earlier order by permitting the respondent to furnish bank guarantee to the extent of Rs.15 lakhs and payment of Rs.5 lacs to the decree-holder. No appeal was preferred. The respondent neither paid the said sum of Rs.5 lacs nor furnished the bank guarantee. The matter again came up on August 10, 2009 when the present application made in 2003 as also the modification application made in 2007 as also the application for condonation of delay were dismissed vide composite order dated August 10, 2009 appearing at pages 205-210. The order of stay so granted in 2003 stood vacated in 2009. The appellant issued a fresh statutory notice of remand on February 14, 2011 and filed winding up petition in March 2011 verified by an affidavit affirmed on March 31, 2011 inter alia praying for winding up of the respondent. The learned Single Judge vide judgment and order dated November 15, 2011 appearing at page 101- 102 permanently stayed the winding up proceeding. His Lordship held that the claim was barred by limitation in view of Article 136 of the Schedule to the Limitation Act, 1963. Hence, this appeal by the appellant.

2. Learned senior counsel appearing for the appellant drew our attention to Article 136 to say that the period when the operation of the decree remain stayed should be excluded for the purpose of computation of the period of limitation. According to him, the decree would only be enforceable once the fetter was withdrawn and that happened only when the application for setting aside was dismissed vide judgment and order dated August 10, 2009. The winding up petition was filed in 2011 hence, it was well within the time of limitation. To support his contention he relied upon four decisions of the Apex Court which are as follows :

i) [Pentapati Chinna Venkanna and Others Vs. Pentapati Bengararaju and Others,](#)

ii) Deep Chand & Ors. Vs. Mohan Lal reported in A I R 2000 SC 1760

iii) Ratansingh Vs. Vijaysingh & Ors. reported in AIR 2001 SC 279

iv) Akkayanaicker Vs. A.A.A. Kotchadainaidu & Anr. reported in 2004 Volume 12 Supreme Court Cases page-469;

3. He prayed for setting aside of the judgment and order coupled with an order of admission of the winding up proceeding.

4. Opposing the appeal Mr. Debangshu Basak, learned counsel relied upon the Division Bench Decision in the case of Bangur Foundation Limited Vs. Esje Corporation reported in 2004 Cal 621. Paragraph-27 of the said decision being relied upon is quoted below :

Consequently, we are also unable to agree with the views expressed by the learned Single Judge in the case of Rameswar Prosad Kejriwal & Sons. (supra), relied upon by Mr. Ghosh, since the learned Judge has proceeded on the basis that the recoverable debt had crystallised in a decree of 1997 and the winding up petition could not have been filed after a period of three years from the date of such decree, having regard to the period of limitation prescribed under Article 137 of the Limitation Act, 1963. We respectfully repeat that the recoverable debt in respect of a money decree is not barred by limitation after a period of three years from the date of decree and that the same is executable within a period of 12 years thereof, and as such can form the basis for a winding up petition u/s 434(1)(a) and/or 434(1)(b) of the Companies Act, 1956.

5. Mr. Basak also relied upon the decision in the case of Manohar S/o Shankar nale & Ors. Vs. Jaipalsing S/o Shivilalsing Rajput & Ors. reported in 2008 Volume - I Supreme Court Cases page 520 to support his contention in relation to Article 136 of the Limitation Act. He contended that the decree was of 1992. Article 136 would permit the decree-holder to complete the execution within 12 years from the date when it was enforceable. The money decree was enforceable on the date of passing of the decree. Hence, a period of 12 years expired in 2004. He further contended that order of stay was passed by the Madras High Court on September 30, 2003 after 11 years 8 months 27 days. Hence, the decree-holder would at best get the benefit of the period when the decree was stayed only to the extent of the residuary period being about three months three days. The order of stay stood vacated in 2009 whereas the winding up petition was presented in 2011. Hence, it was hopelessly barred by laws of limitation. He further contended that the Apex Court decisions cited by the appellant referred to above and Article 136 would rather support his contention.

6. Distinguishing the decision in the case of Akkayanaicker (supra) he contended that the said decision would not in any way support the appellant's case as the decree in the said case stood amended and the amended decree could be enforceable from the date of amendment. In the present case neither there was any amendment of the decree nor any modification was allowed by the Madras High Court. Hence, the period of limitation would be counted from the date of the decree less the period when the order of stay was in operation and on such basis the winding up petition of 2011 could not be held to be maintainable being barred by laws of limitation.

7. He distinguished the decision in the case of Pentapati China Venkanna (supra) by saying that Section 48 of the CPC was interpreted by the Apex Court vide judgment

and order dated January 20, 1964 whereas the said provision stood repealed with effect from January 1, 1964. Hence, the said decision would be of no assistance to us. He lastly contended that even if Article 136 would come into play on its correct interpretation giving benefit of the period of stay to the appellants, the winding up petition of 2011 could not be maintained being barred by laws of limitation.

8. He also distinguished the Apex Court decision in the case of Deep Chand (supra) by contending that the Apex Court therein considered the decree which was directed to be paid by instalments. Hence, the date of default was taken in consideration. Such is not the case here.

9. Mr. Basak prayed for dismissal of the appeal.

10. Replying to Mr. Basak, Mr. Narasinhham, learned senior counsel appearing for the appellant contended that date of decree was not relevant in the instant case as the enforceability should be considered from the date of default. He contended that in view of the order of modification made in 2007 the operation of the decree stopped, it got revived only in 2009 when the order of stay was vacated in view of default. He contended, continuous calculation from the date of decree was not permissible being not contemplated under Article 136. He put his emphasis on paragraph-8 of the decision of Ratansingh (supra) that being relevant herein is quoted below :

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.

11. Before we consider the subject controversy, let us first understand the true purport of Article 136 to resolve the controversy that is quoted below:

Description of application	Period of limitation	Time from which period begins to run
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136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.	Twelve years	[When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.
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12. If we slowly read the Article we would find that period of limitation would be counted on two eventualities (I) from the date of the decree or order that becomes enforceable (II) in a money decree when directions for payment of money was given, the date of default. Question would come, when the decree would become enforceable. Paragraph-8 of the decision in the case of Ratansingh (supra) as quoted above makes it clear that in normal circumstance the decree would become enforceable from its original date of passing. The Apex Court however considered the unforeseen circumstances where enforceability is shifted to a future date or on the happening of certain specified event. In this context we are of the view that the contention of Mr. Basak that there should be a continuous calculation taking the date of the decree as the start date, is not probably correct proposition of law. The decree was passed on January 3, 1992. Hence, the period of 12 years admittedly expired on January 3, 2004. Had it been so simple we would not have laboured on this, it could be said to be an "open and shut case". It is, however, not so although Mr. Basak with his great eloquence tried to impress upon us. Events subsequent to

passing of the decree, in our view, would rule the present case. If we take the relevant dates we would find, since the judgment-debtor was based at Calcutta, the decree-holder being the appellant, transmitted the decree to this Court. The execution application was filed in 1999. Subsequently, it was dismissed for default. We are told, application for restoration is still pending. In 2001 the appellant issued the statutory notice of demand followed by a winding up petition filed in this Court in C.P. No. 289 of 2001. The company for the first time applied for recall of the decree on September 25, 2003 coupled with an application for condonation of delay. On September 30, 2003 the Madras High Court passed an order of stay that continued up to 2009. Initially stay was for a brief period that continued in terms of subsequent order dated October 28, 2003. Since the operation of the decree was stayed, the winding up petition was not proceeded. Learned Single Judge dismissed the same for non-prosecution vide order dated June 9, 2004. The learned Judge observed that such order of dismissal would not preclude the decree-holder to approach this Court again if occasion would arise in future. The application for recall was kept pending along with the order of stay continuing.

13. In 2007 the Madras High Court asked the respondent to deposit Rs.20 lacs to show their bona fide. The respondent did not do so. They filed an application for modification. The Court allowed the same on November 19, 2007 to the extent that out of Rs.20 lacs they would pay Rs.5 lacs directly to the appellant/decreed-holder and secure the balance sum of Rs.15 lacs by way of Bank Guarantee. The respondent did not adhere to such direction. The matter again came up before the Madras High Court on August 10, 2009 when the Court dismissed the application by observing that the respondent did not deserve any indulgence. The appellant served a second statutory notice on February 14, 2011 and filed winding up petition on June 21, 2011. Learned Judge dismissed the same on November 15, 2011 finding it barred by laws of limitation.

14. From the sequence of events so discussed above, we find a dishonest debtor trying to stall the execution at different stage by obtaining order of stay on terms and, thereafter failing to comply with such condition. If we give a rigid interpretation of Article 136 and support the order of the learned Single Judge it would amount to premium to dishonesty. Keeping it in view, let us try to find out whether Article 136 could help the appellant to maintain the winding up proceeding.

15. As observed hereinbefore, in case of the first eventuality stated in the said Article, if taken into account, the appellant would forthwith be out of Court. Let us consider whether they could come within the scope of the second eventuality wherein the date of default was considered to be start date. The Article would provide where the decree directs any payment of money when default in making payment takes place such date should be the start date. It is true that decree did not provide any direction for payment. It was simply a money decree passed ex parte. If we examine the orders mentioned above, we would find as follows :-

(i) the order dated September 30, 2003 -

That the operation of the decree and judgment dated January 3, 1992 made in C.S. No. 593 of 1988 be and is hereby stayed for a period of four weeks from this date i.e. till 28.10.2003.

(ii) Order dated October 28, 2003 - "Interim stay is extended until further orders".

(iii) Order dated October 6, 2007 -

In these circumstances, the application is ordered to enable the applicant/defendant to contest the suit on merits, upon the applicant depositing a sum of Rs.20 lakhs to the credit of C.S. No.593 of 1988 on or before 02.11.2007. It is made clear that this deposit is insisted upon not as a condition precedent for condonation of delay but as proof of bona fide of party who has come to court with an application for condonation of delay after nearly ten years.

16. Hence, we find that the order of stay granted in 2003 continued until further orders and in 2007 the Court directed him to deposit Rs.20 lacs to the credit of the suit so that the judgment-debtor could be heard on merits. It is true that the decree was not recalled by the said order. However, the true purport would indicate that upon such deposit being made the decree would stand recalled. It would only depend upon formal order being passed on the next day on the eventuality of deposit.

17. The said order was modified on November 19, 2007 to the following effect :

5. I have carefully examined the rival contentions in the light of the plaint averments and the averments in this Application. The suit was decreed way back in 1992. The interest of the Members of the Cooperative Society is involved. In such view of the matter, in the interest of justice, I think that the earlier order is to be suitably modified. The earlier order dated 06.10.2007 is modified as under:-

I) The Applicant/Defendant is directed to pay a cash of Rs.5,00,000/- (Rupees five lakhs only) directly to the respondent/plaintiff within a period of four weeks from the date of this order.

II) The applicant/defendant is further directed to furnish Bank Guarantee for the balance amount of Rs.15,00,000/- (Rupees fifteen lakhs only) within a period of four weeks from the date of this order. The order dated 06.10.2007 is modified accordingly.

6. The above order of payment of cash to the respondent/plaintiff is made without prejudice to the contention of both parties in the suit. It is also made clear that in case if the Appellant/Defendant succeeds in the suit that amount of Rs.5,00,000/- is to be refunded to the Applicant/Plaintiff.

18. The judgment-debtor did not comply with the above direction, hence, the applications were dismissed on August 10, 2009.

19. If we closely examine the order of modification quoted above, we would find that there was a clear direction for payment to the extent of Rs.5 lacs within four weeks from the date of the said order. Hence, the default on the expiry of four weeks period should be, in our view, the relevant date from which the period of limitation would commence.

20. The matter may be viewed from another angle. It is true that initially there was some delay in putting the decree in execution. However, such delay was not fatal being well within the prescribed period of limitation. The execution application was made within the period of limitation that was dismissed for default and the restoration application is still pending. The judgment-debtor made application for recall of the decree that too, within the period of 12 years from the date of the decree that stopped the period of limitation running. The Court from time to time passed orders. The Court made it clear that those directions for deposit or payment or furnishing security was not conditional for condonation of delay. In our view, those directions must be taken into consideration while computing the period of limitation otherwise the true purport of the decree would be defeated. There was a clear mandate to pay Rs.5 lacs to the decree-holder within a prescribed period. Such sum of Rs.5 lacs is a part of the decree. Such direction for payment was also given considering the decree. Hence, the default in making payment of the said sum would be relevant in view of the second eventuality contemplated under Article 136.

21. Mr. Basak would emphasize on the decision of the case of Bangur Foundation Limited (*supra*). The Division Bench of our Court held that in the case of a decretal claim, 12 years was the period of limitation. Hence, winding up petition being an equitable mode of execution could be made within such period. The Division Bench did not consider the controversy involved in the present appeal. Hence, the said decision would be of no assistance to us, rather the decision in the case of Ratansingh (*supra*) would help us to interpret Article 136.

22. In our view, the learned Single Judge was not right in holding that the claim was barred by limitation. Mr. Basak also put emphasis on the recording of His Lordship that concession was made by the company. We examined the order closely and we find that such concession was on the proposition of law, the applicability of which would depend upon the factual matrix. The company did not make any concession on that score, at least we do not find any such concession recorded in the judgment and order. We accordingly hold that the claim made in the winding up petition on the basis of the decree coupled with the subsequent events as discussed above, was well within the period of limitation as on the date of filing of the winding up petition and as such the winding up petition was maintainable.

23. The appeal succeeds and is allowed. The judgment and order impugned in the appeal is set aside. The winding up petition stands admitted for the sum of Rs.23,25,793.78p. together with interest as per the decree. The appellant would be at liberty to apply for necessary direction for advertisement from the learned Single Judge. The appeal is disposed of without any order as to costs. Urgent Xerox certified copy of this order, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.