

9 SCOB [2017] HCD 163

**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 6142 OF 2004

Md. Mohitur Rohman Choudhury and others

Vs.

Mr. Md. Abdul Kuddus Miah, Subordinate Judge and others

Mr. Md. Delwar Hossain with

Ms. Salma Begum, Advocate

...For the petitioners

Ms. Khursheed Jahan, Advocate

... For the respondent No. 5

Heard on: 16.03.2017, 22.03.2017 and
23.03.2017

Judgment on: 04.04.2017

Present:

Mr. Justice Sheikh Hassan Arif

And

Mr. Justice Md. Badruzzaman

Limitation Act, 1908

Section 15

And

Code of Civil Procedure, 1908

Order IX rule 13

Pendency of a case for setting aside an ex-parte decree cannot extend the period of limitation for filing of execution case:

Application for execution of a final decree or order is to be made within 3 (three) years from the date mentioned in 2nd Column of Article 182 of the Limitation Act subject to some exceptions as detailed in the 3rd Column read with provisions of section 15 of the Act inasmuch as Article 182 makes no provision for fresh limitation from a final order passed on an application under Order IX rule 13 of the Code. In other words if no stay order or injunction is passed staying the operation of the decree or order under section 15 or no situation arises as per the 3rd Column of Article 182 the decree or order would keep open for execution and time would run from the date of final decree or order. A bare reading of Article 182 of the limitation Act also suggests that an application under order IX rule 13 of the code does not come within the meaning of applications mentioned in clause 5 of column 3 of Article 182 of the Limitation Act to save limitation. Accordingly, pendency of a case under Order IX rule 13 of the Code of Civil Procedure for setting aside an ex-parte decree cannot extend the period of limitation for filing execution case.

...(Para 15)

Judgment

Md. Badruzzaman, J

1. This rule *nisi* was issued calling upon the respondents to show cause as to why Title Execution Case No. 4 of 1995 then pending in the 2nd Artha Rin Adalat, Dhaka should not be

declared as time barred, void and not binding upon the petitioner as being filed beyond the period of limitation of 3 (three) years under Artha Rin Adalat Ain, 1990.

2. Relevant facts for the purpose of disposal of this rule in brief, are that the petitioner No. 1 and predecessor of other petitioners availed of House Building Loan from respondent No. 5 Janata Bank Limited. Being defaulted in payment by them respondent No. 5 filed Title Suit No. 228 of 1986 in 1st Commercial Court, Dhaka for recovery of outstanding dues amounting to Tk. 6,60,020/- as on 30.09.1985. Thereafter, the case was transferred to Artha Rin Adalat No. 2, Dhaka and renumbered as Title Suit No. 337 of 1990. Ultimately the suit was decreed ex-parte in preliminary form on 18.08.1990 and final decree was drawn on 04.02.1992. The present petitioners thereafter, filed Miscellaneous Case No. 180 of 1992 under Order IX Rule 13 of the Code of Civil Procedure on 18.03.1992 for setting aside the ex-parte decree which was dismissed for default on 26.09.1992.

3. Thereafter, respondent No. 5 filed Title Execution Case No. 4 of 1995 on 31.08.1995 before the Adalat. During pendency of said execution case the petitioners on 17.07.2000 filed an application for dismissing the execution case as being time barred. Said application was rejected by the Adalat on 24.08.2000. The petitioners then filed an application for recalling the order dated 24.08.2000 which was also rejected vide order dated 09.01.2003. Thereafter, the petitioners again filed application for dismissing the execution case as being time barred which was also rejected by order dated 14.10.2004.

4. In the above factual background the petitioners (judgment debtors) have come up with this application and obtained the instant rule on 10.11.2004.

5. At the time of issuance of rule further proceedings of the execution case was stayed for a period of 3 (three) months which was, thereafter, extended by order dated 08.02.2005 till disposal of the rule.

6. The rule is opposed by respondent No. 5 by filing affidavit-in-opposition stating that the miscellaneous case which was filed under Order IX rule 13 of the Code was a continuation of the suit inasmuch as the execution case was filed after 2 years 11 months and 5 days from the date of disposal of the miscellaneous case which was covered by the provisions of Article 182(2) of the Limitation Act. As such, the execution case was not barred by limitation.

7. One Md. Moklasur Rahman also been added as respondent No. 6 by order dated 31.08.2015 but at the time of hearing none appears to oppose the rule on his behalf.

8. Mr. Md. Delwar Hossain, learned Advocate appearing for the petitioners by drawing our attention to Article 182 of the Limitation Act submits that Article 182 of the Limitation Act prescribes provisions for filing execution case within a period of 3 (three) years from the date of final decree or order passed in a suit with some exceptions provided in the said Article but the respondent bank without complying with the aforesaid provisions of law filed the execution case after 3(three) years 6(six) months and 26(twenty six) days from the date of final decree and as such the execution case is barred by limitation and accordingly continuation of the said execution case is an abuse of the process of the Court and liable to be rejected. Learned Advocate further submits that Article 182 of the Limitation Act prescribes no provision for fresh limitation from an order rejecting an application by the trial Court under Order IX rule 13 of the Code of Civil Procedure. Further referring to section 15 of the

Limitation Act , learned Advocate submits that since no order or injunction was passed by the Adalat in the miscellaneous case staying the operation of the decree no time can be excluded in calculating the period of limitation.

9. As against the above submission Miss. Khursheed Jahan, learned Advocate appearing for respondent No. 5 reiterates the contentions as has been stated in the affidavit-in-opposition.

10. We have heard the learned Advocates and perused the records. It appears that an ex-parte final decree was passed on 04.02.1992 against the petitioners. Thereafter, they filed a miscellaneous case under Order IX rule 13 of the Code of Civil Procedure for setting aside said ex-parte decree which was ultimately dismissed for default by order dated 26.09.1992. Respondent bank then filed Execution Case No. 4 of 1995 on 31.08.1995 i.e after 3(three) years 6(six) months and 26 (twenty six) days from the date of final decree.

11. Now question arises as to whether in view of the pending miscellaneous case under Order IX rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree limitation would be saved within the meaning of Article 182 of the Limitation Act, which determines the starting point of limitation.

12. In the case of Md. Abdur Rahim and others vs. Sree Sree Gredhari reported in 27 DLR 72 it is held that the Limitation Act prescribes that an application for execution is to be made within 3(three) years from the date mentioned in 3rd Column of Article 182. And if such application is not filed within the prescribed period the execution case would hit by the above Article. By adopting aforesaid view our Appellate Division in the case of Bangladesh Jatiya Samabaya Bank Limited vs. The Sangbad Daily Paper and others reported in 1983 BCR (AD) 418 expressed the same view. In a later case of ADC (Revenue), Pabna vs. Md. Abdul Halim Miah reported in 48 DLR (AD) 143 our Apex Court held as follows:

“ This Court, has however, already pronounced itself on this point in the case of Bangladesh Jatiya Samabaya Bank Ltd. vs. Sangbad Daily Paper and others, BCR 1983 (AD) 418. The said decision was given on consideration of the cases of Md. Abdur Rahim and others vs. Sree Sree Gredhari Jeo. 27 DLR (Dhaka) 72; Pingle Venkata Rama Reddy vs. Kakaria Buchanna and others, AIR 1963 Andhra Pradesh (FB) 1 and Lalji Raja and sons vs. Firm Hansraj Nathuram, AIR 1971 (SC) 974. This Court approved of the approach of the then Dhaka High Court in the afore-cited cases in 27 DLR (Dhaka) 72 and affirmed that both section 48 CPC and Article 182 (2) of the First Schedule of the Limitation Act provide the period of limitation for the execution of a decree. The Civil Procedure Code fixes the longest period whereas the Limitation Act fixes the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid. This Court also affirmed the further view of the then Dhaka High Court that an application for execution has therefore to satisfy first Article 182 of the Limitation Act being the earliest period prescribed and then also section 48 CPC which prescribed the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail.”

13. In similar case of the Comilla Banking Corporation Limited vs. Nanda Kumar Bhattacharjee reported in 1 PLR (Dacca) 215 by a majority view of three learned Judges held as follows :

“The expression ‘where there has been an appeal’ cannot and does not include an appeal from an order rejecting an application under Order 9, Rule 13 of the Code of

Civil Procedure. Wide though literally the expression is, it cannot mean an appeal from any decree or any order passed between the parties in any suit or any proceeding. It is significant that Article 182 of Limitation Act makes no provision for fresh limitation from an order rejecting an application by the trial Court under Order 9, Rule 13 of the Code of Civil Procedure. If it had been intended that an appeal from an order rejecting an application would keep the decree open, it would have been provided also that an application to the trial Court to set aside an ex-parte decree would keep the decree open.” (underlined by me)

14. Section 15 of the Limitation Act also provides as follows:

“15. Exclusion of time during which proceedings are suspended.- (1) In computing the period of limitation prescribed for any suit for application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.”

15. The above ratio and the provisions of section 15 of the Act clearly suggest that application for execution of a final decree or order is to be made within 3 (three) years from the date mentioned in 2nd Column of Article 182 of the Limitation Act subject to some exceptions as detailed in the 3rd Column read with provisions of section 15 of the Act inasmuch as Article 182 makes no provision for fresh limitation from a final order passed on an application under Order IX rule 13 of the Code. In other words if no stay order or injunction is passed staying the operation of the decree or order under section 15 or no situation arises as per the 3rd Column of Article 182 the decree or order would keep open for execution and time would run from the date of final decree or order. A bare reading of Article 182 of the limitation Act also suggests that an application under order IX rule 13 of the code does not come within the meaning of applications mentioned in clause 5 of column 3 of Article 182 of the Limitation Act to save limitation. Accordingly, pendency of a case under Order IX rule 13 of the Code of Civil Procedure for setting aside an ex-parte decree cannot extend the period of limitation for filing execution case.

16. Admittedly, there was no order in the miscellaneous case staying operation of the final decree. The execution case was filed on 31.8.1995 which was beyond the period of 3 (three) years from 4.2.1992, the date of final decree. Accordingly, we are of the view that the execution case was barred by limitation.

17. In view of what we have stated above we find merit in this rule.

18. In the result, the rule is made absolute however, without any order as to costs.

19. The impugned execution proceeding as a whole is set aside as being time barred.

20. The order of stay granted earlier is hereby vacated.

21. Communicate a copy of this judgment at once.

Sheikh Hassan Arif, J

22. I agree