

B.K.NAYAK, J.

W.P.(C) NO.5029 OF 2011 (Dt.30.08.2011)

**CHAKRADHAR PAITAL (DEAD)
AFTER HIM, HIS L.Rs. & ORS.**

.....Petitioners.

.Vrs.

**GELHI BEWA (DEAD) AFTER
HIM, HIS L.Rs.& ORS.**

.....Opp.Parties.

A. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 21, RULE 32(5).

B. LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – S.136.

For Petitioner - M/s. Manas R. Panda, S.K.Swain,
S.Samal, S.K.Baral, M.R.Dash, R.Jena.
For Opp.Parties - M/s. Gadadhar Rayatsingh, L.N.Rayatsingh.

B.K.NAYAK, J. Judgment-debtors in Execution Case No.4 of 2009 of the court of the learned Civil Judge (Junior Division) Second Court, Cuttack have filed this writ application challenging the order dated 27.12.2010 passed by the Executing Court rejecting their objection to execution.

2. The decree holder-opposite parties filed T.S. No.6 of 1987 against the judgment-debtors and some of their predecessors-in-interest for permanent injunction. The suit was decreed on 24.06.1995 injunction permanently the defendants-Judgment-debtors from interfering with the peaceful possession of the decree holders over the suit land. The decree holders filed Execution Case No.4 of 2009 for executing the decree by way of recovery of possession on the assertion that on 06.03.2009, the judgment-debtors interfered with their peaceful possession and forcibly encroached the suit land by dispossessing them. The judgment-debtors filed their objection to the execution petition contending that the decree being one for permanent injunction, it could not be executed by way of recovery of possession of the suit land and that the execution proceeding was barred by limitation. The judgement-debtors also further prayed for stay of execution case on the ground that they had filed Title Appeal No.79 of 1995 challenging the decree in question and that the appeal having been dismissed for default they filed an application under Section 151, C.P.C. for restoration which was pending. The Executing Court rejected all the contentions raised by the Judgment-debtors and refused to stay the execution case by the impugned order.

3. In assailing the impugned order, Mr. M.R. Panda, learned counsel for the petitioners has raised the following contentions :

- (i) a decree for perpetual (prohibitory) injunction can be executed only in accordance with the provisions of Order 21, Rule 32 (1) of the

C.P.C. and not by way of recovery of possession. Other modes of execution provided in sub-rule (5) of Rule 32 of Order 21 is confined only to mandatory injunction and not to prohibitory injunction and that the Explanation appended to sub-rule (5) by virtue of amendment of C.P.C. in 2002, has no application to the present case as the decree is of the year 1995;

- (ii) the execution case was barred by limitation under Article 135 of the Limitation Act since the execution was in the form of executing a decree of mandatory injunction.

4. Learned counsel for the opposite parties, on the other hand, submits that a decree for perpetual (prohibitory) injunction can be enforced by way of recovery of possession, if it is found that after passing of the decree, the decree holders have been dispossessed by the judgment-debtors, in which event the decree holders can not be forced to file a separate suit. It is also his submission that by virtue of insertion of the Explanation to sub-rule (5) of Rule 32 of Order 21, C.P.C. in 2002, the execution of a decree of prohibitory injunction is no more confined to the modes envisaged in sub-rule (1) of Rule 32 above but can also be executed by other modes as per provision of sub-rule (5), as for instance, where a decree for perpetual injunction has not been obeyed by the judgment-debtors, the executing court can direct for recovery of possession if the same is required for enforcement of the decree. He also contends that execution of a decree of perpetual prohibitory injunction is not subject to any period of limitation as per the proviso to Article 136 of the Limitation Act and that Article 135 of the Limitation Act has no application to such a case.

5. Sub-rule (1) and Sub-rule (5) with its explanation of Rule 32 of Order 21, C.P.C., which are relevant for the purpose are extracted hereunder :

“32. Decree for specific performance for restitution of conjugal rights, or for an injunction.”-(1) where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

[Explanation.-For the removal of doubts, it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunctions.]”

6. It is evident from Sub-rule (1) of Rule 32, as quoted above, that a decree of injunction, be it a mandatory injunction or a prohibitory injunction, may be enforced by detention of the judgment-debtor in the civil prison or by attachment of his property, or by both. No other specific mode of execution of an injunction decree has been provided for in the procedure. However, Sub-rule(5) of Rule 32 of Order 21, C.P.C. provides for enforcement of an injunction decree, which has not been obeyed by the Judgment-debtor, directing the decree-holder or any other person to do the required act that will have effect of enforcement of such decree, at the cost of the Judgment-debtor. This mode of enforcement can be directed by the Court in lieu or in addition to the other modes of enforcement prescribed under sub-rule(1) of Rule 32.

7. Relying on the decision of this Court reported in **ILR 1979 (I), Cuttack 474; Fakira Pradhan v. Urdhaba Pradhan**, the learned counsel for the petitioners submits that the manner of enforcement of an injunction decree in accordance with Sub-rule(5) of Rule 32 is limited only to a decree for a mandatory injunction and not prohibitory injunction. No doubt, the aforesaid decision supports the contention of the learned counsel for the petitioners. Placing reliance on the decisions of several other High Courts, this Court in the aforesaid case held as under :

“.... Sub-rule (1) of Rule 32 of Order 21, Civil Procedure Code applies both to mandatory as well as prohibitory injunctions. Sub-rule (5) of Rule 32 on the language used applies to mandatory injunctions only. The word ‘injunction’ under Sub-rule (5) has been qualified by the words ‘has not obeyed’ and the rule says that in the event of disobedience of the injunction, the Court may, direct that the act required to be done may be done so far as practicable by the decree-holder. This could only be a mandatory direction. A prohibitory direction would be not to do an act. A prohibitory injunction is a negative one restraining the defendant from doing a particular act. The difference between the two is obvious and Rule 32(5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions.”

8. The aforesaid interpretation of Sub-rule (5) of Rule 32 would not, however, hold good after the incorporation of the Explanation thereto by the Amendment Act of 2002. The Explanation has explicitly made it clear that the expression, ‘the act required to be done’ in Sub-rule(5) covers both prohibitory as well as mandatory injunction. In case, it is held that sub-rule (5) with the Explanation will have application to the present case then the decision in **Fakira Pradhan** (supra) will have no application. Learned counsel for the petitioners has submitted that the C.P.C. Amendment Act of 2002 will not apply to the present execution case in which the decree passed in the year 1995 is being sought to be executed. In this context, he has relied upon the decisions of the apex Court, reported in **2007 (I) OLR (SC) 406; State Bank of Hyderabad v. Town Municipal Council** and **(2006) 13 SCC 295; Kamla Devi v. Kushal Kanwar and another**. The first decision cited by the learned counsel for the petitioners relates to amendment of pleadings in a suit filed in the year 1998 where the applicability of the proviso appended to Order 6, Rule 17, C.P.C., by the C.P.C. Amendment Act, 2002 which debars amendment of pleadings after commencement of trial of the suit unless the party is able to satisfy the Court that in spite of due diligence he could not have pleaded the new facts prior to the commencement of trial. It was held therein that the proviso will have no

application to pleadings filed prior to the proviso came into force as Section 16(2) (b) of the 2002 Amendment Act so provides by way of repeal and saving. In the case of **Kamla Devi** (supra) it was held that a letters patent appeal which was filed prior to coming into force of the C.P.C. Amendment Act of 2002 that inserted Section 100-A prohibiting such appeal would be maintainable as Section 100-A has no retrospective application.

9. This execution case had been filed in 2009 when the judgment-debtors disobeyed the decree of permanent injunction by encroaching upon the suit land and dispossessing the decree holders. Explanation to Sub-rule (5) of Rule 32 of Order 21, C.P.C. came into force with effect from 01.07.2002 and this execution case having been filed after the Explanation came into force, sub-rule (5) will have application and the decree of prohibitory injunction in question can be enforced by way of recovery of possession where the judgment-debtors have disobeyed the said decree. This Court also in the decision reported in **(2006) (II) CLR-368; Sabitri Khuntia and others v. Ram Avatar Modi** has held that a decree for prohibitory injunction can be executed taking recourse to sub-rule(5) of Rule 32 by removing a cowshed raised by the judgment-debtors in violation of the decree. It is also held in the decision reported in **AIR 2009 PUNJAB AND HARYANA 188; Kapoor Singh v. Om Prakash** that in the event of violation of a decree for prohibitory injunction by way of dispossession of the decree holder by the judgment-debtors, the executing court has jurisdiction to restore possession in favour of the decree holder, who cannot be compelled to file another suit. The contention of the learned counsel for the petitioners that sub-rule (5) with its Explanation has no application to a decree for prohibitory injunction therefore fails.

10. The other contention raised by the learned counsel for the petitioner is that the execution case must be held to be barred by limitation under Article 135 of the Limitation Act inasmuch as the decree is sought to be executed in a mandatory way by means of recovery of possession. This contention, to my mind, is wholly fallacious. The decree that is being sought to be executed is a decree for perpetual (prohibitory) injunction. It is being sought to be executed in a manner which sub-rule (5) of Rule 32 of Order 21, C.P.C. permits. Recovery of possession in the instant case would be an act which is required to be done so that the parties would be put in the position which they occupied at the time of passing of the decree that continued till the decree was disobeyed by way of encroachment. Such manner of execution does not convert the decree to be one of mandatory injunction. Irrespective of the manner or mode of execution, the decree of prohibitory injunction does not lose its character as such. As per proviso to Article 136 of the Limitation Act, there is no limitation for execution of a decree of perpetual (prohibitory) injunction. Therefore, the execution case in question cannot be said to be barred by limitation.

11. In the light of the aforesaid discussions, I find no infirmity in the impugned order. The writ petition is devoid of merit and is accordingly dismissed. No costs.

Writ petition disposed of.