IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYAISHTA, 1937

CRP.No. 1171 of 1998 (D)
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CMA 64/1988 of DISTRICT COURT, KOZHIKODE.
E.A. NO. 326/78 & 327/78 IN OS 118/1967 of
SUB COURT, KOZHIKODE.

REVISION PETITIONER(SAPPELLANT-1ST RESPONDENT:
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PUTHEN VEETTIL ASSAN KOYA,
S/O. P.V. MOHAMMED KOYA,
KASBA AMSOM AND DESOM,
KOZHIKODE, NOW RESIDING AT
P.V. HOUSE, EDAKKAD AMSOM AND DESOM.

BY ADVS.SRI.M.C.SEN (SR.)
SRI.JAYAPRAKASH SEN
SMT.SHAHNA KARTHIKEYAN
SRI.M.P.SREEKRISHNAN
SRI.A.PARVATHI MENON
SRI.S.PRAKASH

RESPONDENT(S)/PETITIONER- R11 TO R21 AND R22-
PETITIONER AND LRS OF RESPONDENT 9 AND 10 AND 11TH
RESPONDENT:
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1. M.A. KRISHNA MANOHAR,
   S/O. M.P. ANANTHARAJAYYA,
   KALPETTA AMSOM AND DESOM,
   SOUTH WYNAD.

2. C. KHADEEJABI, KHADEEJA MANZIL,
   THURUVANNOOR ROAD, POST KALLAI,
   CALICUT-3.

3. C. SULAIKHABI, D/O. KHADEEJABI OF DO.

4. C. RUKIYABI OF DO.

5. C. SAFIYABI OF DO.

6. C. JAMEELA OF DO.

7. C. BASHEER, S/O,. KHADEEJABI OF DO.

8. C. ASHRAF OF DO.

9. C. SUBAIR OF DO.

10. C. NADEER OF DO.

11. C. ANDUL NAZAR OF DO.

12. C. SAIDU OF DO.

RESPONDENTS 2 TO 12 ARE RESIDING AT PANNIYANKARA AMSOM AND DESOM.

13. M. PADMALATHA,D/O. M.P. ARANTHARAJAYYA, MANOHAR MANDIR, MADAKUNNU, 1/408, POST MAIYAMCODE, KALPETTA SOUTH WYNAD.

RESPONDENTS 2 TO 8 IN THE LOWER COURT ARE NOT IMPLEADED IN THIS REVISION PETITION AS THEY HAVE NO INTEREST IN THE PROPERTY AND THEY WERE EX PARTE IN THE LOWER COURT.

BY ADV. SRI.C.P.MOHAMMED NIAS
BY ADV. SRI.S.PRAKASH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 25-05-2015, ALONG WITH RP. 62/1998, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**P. BHAVADASAN, J.**

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C.R.P. No. 1171 of 1998 &
R.P. No. 62 of 1998 in
C.R.P. No. 1202 of 1988.

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Dated this the 25th day of May, 2015.

**ORDER**

The first respondent in E.A. No. 326 of 1978 and 327 of 1978 in O.S. No. 118 of 1967 is the revision petitioner as well as the review petitioner before this Court. These proceedings arose out of E.P. No. 220 of 1975.

2. It appears that a mortgage decree was obtained against the 9th respondent who was the first defendant in O.S. 118 of 1967. The mortgage property was brought to sale and sale was held and it was confirmed. The property was purchased by the petitioner herein.

3. The petitioner before the court below, who is the son of the 9th respondent, came forward with two petitions, namely, E.A. 326 of 1978 to set aside the sale on the ground of material

irregularity and fraud and E.A. 327 of 1978 to condone the delay in filing the said petition.

4. The averment in the petition was that the mortgage property was the family property and it could not be said that 9th respondent alone had right over the property and the petitioner before the court below too had interest in the property. It was contended that there was material irregularity in the conduct of sale and that vitiates the sale. The price for which the property was sold was totally inadequate and the proper procedure for conducting the sale had not been followed. It was also pointed out that there was laches on the part of the 9th respondent judgment debtor as he was mentally ill and he could not properly conduct the suit. Pointing out that the petitioner came to know about the irregularity only later, he filed E.A. 327 of 1978 for condoning the delay in filing the petition to set aside the sale.

5. The first respondent before the court below, who is the petitioner herein resisted the petition. He contended that the petitioner had no right to file the petition to set aside the sale. Even assuming that he could do so, a petition under Order XXI Rule 90 of the Code of Civil Procedure had to be filed within the time stipulated and there is no question of condoning the delay as Limitation Act is not applicable to execution proceedings. The suit was one on mortgage and item Nos. 6 to 31 of the decree schedule was brought to sale for a sum of Rs.20,000/- and items 1 to 5 were spared from court auction. The allegation of fraud and collusion was disputed. It was contended that proceedings are perfectly valid and legal and there is no irregularity in the conduct of sale. Even if the petitioner had any right over the property involved in the proceedings, his remedy lies elsewhere and not to have the sale set aside on the ground of material irregularity and fraud.

6. Respondents 2 to 8 also filed a separate counter supporting the first respondent.

7. For the purpose of the proceedings, P.Ws. 1 to 3 were examined and Exts. A1 to A8 were marked. Exts. B1 and B2 were marked and Exts. C1 and C2 are the commission report and plan. The execution court, finding that there was material irregularity in the publication and conduct of sale, set aside the sale and also held that Section 17 of the Limitation Act is applicable to condone the delay. That compelled the first respondent to approach this Court in C.R.P. No. 1202 of 1988 challenging the order which allowed E.A. 327 of 1978 condoning the delay in filing the petition to set aside the sale. The first respondent also filed C.M.A. 64 of 1988 against the order setting aside the sale.

8. C.M.A. No. 64 of 1988 happened to be dismissed for default and consequently C.R.P. before this Court was also dismissed. Later C.M.A. 64 of 1988 was restored to file and that

necessitated the petitioner to move R.P.62 of 1998 seeking to have C.R.P. 1202 of 1988 restored to file. Later on C.M.A. was dismissed and while dismissing the C.M.A. The lower appellate court was of the view that since C.R.P. was dismissed, the question of delay in filing the application need not be considered by that court. Against the dismissal of C.M.A., the petitioner has filed C.R.P.1171 of 1998.

9. Shri. M.C. Sen, learned Senior Counsel appearing for the petitioner contended that the courts below have misdirected themselves both on facts and in law. Both the courts below have gone on the premise that the whole property need not have been brought to sale and a portion would have been sufficient to meet the decree debt. Learned counsel went on to contend that the execution court was in gross error in condoning the delay invoking Section 17 of the Limitation Act. Section 17 of the Limitation Act has no application to the facts of the case since there is no averment in the

petition to condone the delay that the petitioner before the execution court was compelled or constrained not to take appropriate proceedings by fraud played on him by the petitioner herein. Even assuming that there is any irregularity or fraud in the publication and conduct of sale, that will not attract Section 17 of the Limitation Act. Even assuming Order XXI Rule 90 of C.P.C. is applicable, then the petition has to be filed within the stipulated period and it is trite that Limitation Act cannot be taken aid of to condone the delay in setting aside the sale in an execution petition.

10. Learned counsel also went on to point out that the lower appellate court was in error in holding that the question of limitation which was found favoured by the execution court need not be considered because the C.R.P. has been dismissed.

11. Learned counsel went on to point out that apart from all this, with the advent of Joint Hindu Family System (Abolition) Act, things have

taken a different turn altogether and that has also not been considered.

12. After having heard learned counsel elaborately on the matter, it is felt that there is considerable force in the submissions made by the learned Senior Counsel. In E.A. 326 of 1978 filed by the petitioner before the execution court, the main contention was that the property which was the subject matter of mortgage was joint family property and that he too had a share over the same. It was contended by the petitioner before the court below that 9th respondent was in management of the property and the petitioner is the only son of the 9th respondent. The 9th respondent has obtained the petition schedule property in partition and therefore, the petitioner had a right by birth in the property involved in these proceedings. It was alleged that the property was sold for totally inadequate price of Rs.20,000/- and even assuming that property was sold in execution against the 9th respondent, that cannot affect the right of the

petitioner over the property involved in these proceedings. Pointing out that there is gross irregularity in the publication and conduct of sale of the property, sale was sought to be set aside. E.A. 327 of 1998 was filed seeking to have the delay condoned in filing E.A. 326 of 1978. The reason given in E.A. 327 of 1978, the petition to condone the delay, is that the petitioner could come back in the native place only on 1.6.1978 and then only he came to know about the sale of the property. On coming to know the same, he made enquiries and came to know that a fraudulent sale has been conducted. In the petition, there is an averment that there is no laches on the part of the petitioner and he prayed for condonation of delay in filing E.A. 326 of 1978. The execution court, on appreciation of the materials before it, held in favour of the petitioner and set aside the sale holding that there is material irregularity and also held that Section 17 of the Limitation Act applies. The lower appellate court was also of the view that there was material irregularity in the conduct of sale and held that since the C.R.P. before the High Court had been dismissed, the lower appellate court need not consider the question as to whether the delay could have been condoned or not.

13. It is seen that the court below has forgotten one crucial aspect. The decree is a mortgage decree. The principle of selling in lots does not normally apply to a mortgage decree at all. If the petitioner before the court below has any independent right, that is not affected by the sale.

14. E.A. 326 of 1978 has been filed under Order XXI Rule 90 of C.P.C. Order XXI Rule 90 reads as follows:

> "**90. Application to set aside sale on ground of irregularity or fraud.**-(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or

whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under the rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation. - The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

As per Article 127, the petition to set aside the sale has to be filed within 60 days from the date of sale. One may at once notice here that the period begins to run from the date of sale and not from the date of knowledge of sale.

15. It is trite that Section 5 of the Limitation Act can have no application to an

application filed under Order XXI Rule 90 C.P.C. The proposition needs no authority for, the Section is clear on this aspect.

16. Coming to the question of application of Section 17 of the Limitation Act (earlier Sec. 18), the trial court has grossly erred in applying the same. Section 17 of the Limitation Act reads as follows:

> "**17. Effect of fraud or mistake.**- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,--(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
> (c) the suit or application is for relief from the consequences of a mistake; or
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;
> the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could,

with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or

> order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order:Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.”

Section 17 contemplates a situation where due to the conduct of a party, the other party is precluded from agitating his rights. In the case on hand, there is no such averment at all. In the decision reported in **Thommen Thomas v. John Simon** (1956 K.L.T. 783) considering Sec. 18, the parallel provision, then in force, it was held as follows:

> “It is incumbent on the applicant to distinctly allege any particular fraud by which he had been kept from knowledge of his right to make the application, specifically and with detailed particulars.”

17. The averment in E.A. 326 of 1978 is that there is material irregularity and fraud in the publication and conduct of sale and not that due to any act committed by the first respondent,

the petitioner who applied under Order XXI Rule 90 of C.P.C was precluded from agitating his rights. The sine qua non for applying Section 17 is that the person, who is aggrieved, must have been precluded by the other side by resorting to fraudulent method from agitating his rights. No such contingency has arisen in this case at all.

18. Further more, even assuming that the petitioner had any right over the property, his claim remains unaffected. One cannot omit to note that joint Hindu Family System (Abolition) Act had come into force on 1.12.1978. Thereafter, it is extremely difficult that the petitioner could have agitated the claim on behalf of the 9th respondent also.

19. If Section 5 of the Limitation Act is not available in an execution petition before the trial court, then it has to be concluded that application under Order XXI Rule 90 C.P.C is barred by limitation and the sale could not be set aside. It has already been noticed that Section 17 has no

application.

For the above reasons, the Civil Revision Petition and the Review Petition are allowed, the impugned orders are set aside and it is held that if at all the petitioner before the execution court has any remedy, he can pursue it in accordance with law.

P. BHAVADASAN,
JUDGE

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