

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 25TH DAY OF JUNE 2015/4TH ASHADHA, 1937

OP(C).NO. 3863 OF 2013 (O)

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E.P.NO.117/2012 IN O.S.NO.178/2009 OF SUB COURT, OTTAPALAM

PETITIONER:

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ABDUL SALEEM,  
AGED 36 YEARS, S/O. VERUPULAKKAL KUNJUMON  
KUTTIPPALA AMSOM DESOM, PONNANI TALUK  
MALAPPURAM DISTRICT.

BY ADVS.SRI.SANTHEEP ANKARATH  
SRI.ARUN MATHEW VADAKKAN

RESPONDENT/RESPONDENT:

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PALATHINKAL HAMSA, AGED 70 YEARS  
S/O. PALATHINKAL VEETIL KUNJHAMMU HAJI,  
EDATHANATTUKARA AMSOM DESOM, MANNARKAD TALUK,  
PALAKKAD DISTRICT-678 601.

R1 BY ADVS. SRI.T.SETHUMADHAVAN (SR.)  
SRI.PUSHPARAJAN KODOTH  
SRI.K.JAYESH MOHANKUMAR  
SMT.VANDANA MENON

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 25-06-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AS

OP(C).NO. 3863 OF 2013 (O)

**APPENDIX**

**PETITIONER'S EXHIBITS:**

- EXHIBIT-P1: TRUE COPY OF THE DECREE DATED 31/08/2011 IN O.S 178/2009 OF SUB COURT, OTTAPALAM.
- EXHIBIT-P2: TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN R.F.A 133/2012 DATED 22/05/2013.
- EXHIBIT-P3: TRUE COPY OF THE EXECUTION PETITION DATED 03/08/2012 AND NUMBERED AS E.P. NO. 117/2012 FILED BY THE PETITIONER IN O.S 178/2009 ON THE FILE OF THE SUB COURT, OTTAPALAM.
- EXHIBIT-P4: TRUE COPY OF THE COUNTER STATEMENT DATED 30/12/2012 IN EXHIBIT-P3 FILED BY THE RESPONDENT.
- EXHIBIT-P5: TRUE COPY OF THE ORDER DATED 17/07/2013 IN E.P 117/2012 IN O.S 178/2009 PASSED BY THE SUB COURT, OTTAPALAM.

**RESPONDENT'S EXHIBITS:** NIL

/TRUE COPY/

P.A TO JUDGE

AS

**'C.R.'**

**A.HARIPRASAD, J.**

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**O.P.(C).No.3863 of 2013**  
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Dated this the 25<sup>th</sup> day of June, 2015

**J U D G M E N T**

Short question arising for consideration is whether the executing court is legally justified in passing Ext.P5 order, which reads as follows, without complying with Order XX Rule 11 of the Code of Civil Procedure 1908 ("CPC" for short).

*"Rs.25,000/- paid. Instalment at the rate of 35,000/- p.m allowed. E.P closed. D.H can get the E.P revived in the same number upon two consecutive defaults."*

2. Now the relevant facts: The petitioner is the plaintiff in a suit for specific performance of a contract. Later, he limited his claim for recovery of money only. The suit was decreed for a sum of Rs.10,60,000/-. Ext.P1 is the decree. Tenor of the decree is that the amount is to be paid in lump. The respondent/defendant preferred an appeal before this Court. That appeal was rejected for

non-payment of court fee, as per Ext.P2 judgment. Ext.P3 is the execution petition filed before the lower court for sale of the properties belonging to the respondent for realisation of the decree amount. In that matter, the impugned order happened to be passed.

3. The legal question arising for the determination is whether the court below is justified in allowing the defendant/respondent to pay the decree amount in instalments without taking legal recourse?

4. Heard the learned counsel for the petitioner and the learned counsel for the contesting respondent.

5. Learned counsel for the petitioner submitted that the court below violated the law by making a money decree an instalment decree. Learned counsel contended that the respondent was prepared to pay money in instalments, as it is financially impossible for him to make a lump sum payment. But, execution petition being one for sale of property, this contention of the respondent may not be of any legal relevance. The subtle legal question is whether the executing court could have passed the

impugned order. Order XX Rule 11 CPC is the relevant provision. It reads as follows:

***“11. Decree may direct payment by***

***instalments:-***(1) *Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.*

***(2) Order, after decree, for payment by instalments.-*** *After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.”*

6. On a close scrutiny of Sub Rule (1) quoted above, it can be seen that it deals with orders postponing the payment under the decree and paying the decree amount in instalments. In this case, we are concerned only with making the decree an instalment decree. The court may for sufficient reasons, after hearing such of the parties before passing the judgment, incorporate in the decree an order that payment of the amount decreed shall be made by instalments. The provision makes explicitly clear that an adjudication is required, after hearing the parties, to determine whether the claim for an instalment decree, made at the instance of the defendant, is to be sustained or not. Sub Rule (2) to the said provision shows that the court does not have any power to pass an instalment decree without (i) an application of the judgment debtor and (ii) the consent of the decree-holder. It specifically indicates that a request should come from the side of the judgment debtor seeking the indulgence of the court for making alterations in the nature of the decree, including a permission to pay the decree amount

by instalments. And most importantly, for passing such an order at that stage, the decree holder should consent. Then only the court gets power to pass such an order. The expression “the Court may” employed in Order XX Rule 11 (2) CPC indicates that it is a discretionary order. True, the paying capacity of the judgment debtor is a relevant aspect in some cases. But, at the same time, the date when the liability was incurred, the amount of the loan, the difficulties that may be experienced by the decree holder by passing the instalment decree etc. are also relevant. None of the provisions in Order XXI CPC empowers the court to change the character of a money decree to an instalment decree without taking recourse to Order XX Rule 11 CPC [See **Jatti Krishnareddy v. Bhadri Ramagopalaiah** (AIR 1985 Andhra Pradesh 49)]. For the above reasons, the order passed by the court below is found to be clearly in violation of the above said provision.

I find that Ext.P5 order is unsustainable in law and hence, it is set aside. The court below shall proceed

with the execution petition in accordance with law.  
Considering the fact that it is an old matter, it shall be  
disposed of as expeditiously as possible.

Sd/-  
**A.HARIPRASAD, JUDGE.**

AS