

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

OP(C).No. 1843 of 2015 (O)

**(ORDERS DATED 25.01.2014 IN IA.NOS.1836/2010 & 1837/2010 IN O.S.NO.140/2004
ON THE FILE OF SUB COURT, MAVELIKKARA)**

ORIGINAL PETITIONERS/PETITIONERS/DEFENDANTS 3 & 4:

- 1. SELVARAJ AGED 65 YEARS
VAZHAKKALLIL HOUSE, PROPRIETOR, VAZHAKKALLIL JEWELLERS
KIZHAKKE NADA, HARIPPAD P O, HARIPPAD VILLAGE**
- 2. SREELAKSHMI
W/O.SELVARAJ, VAZHAKKALLIL HOUSE, PROPRIETOR
VAZHAKKALLIL JEWELLERS, KIZHAKKE NADA, HARIPPAD P O
HARIPPAD VILLAGE**

**BY ADVS.SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
SRI.A.R.DILEEP
SRI.MANU SEBASTIAN**

RESPONDENTS/RESPONDENTS/PLAINTIFF & DEFENDANTS 1 & 2:

- 1. THE FEDERAL BANK LTD.
MUTTOM BRANCH, MUTTOM P O, CHEPPAD VILLAGE
KARTHIKAPPALLY, REP BY ITS SENIOR MANAGER-685587.**
- 2. M RAJASEKHARAN, AGED 45 YEARS
S/O.P S MONY, MONY LAND HOUSE, THONDAKULANGARA MURI
AVALUKUNNUB P O , AMBALAPPUZHA TALUK, PROPRIETOR
MONEY JEWELLERS, EZHIKKAKATHU JUNCTION, HARIPPAD P O
HARIPPAD VILLAGE-690514.**
- 3. N P JAYA MEMON
W/O.M RAJASEKHARAN, MONY LAND HOUSE
THONDAKULANGARA MURI, AVALUKUNNUB P O
AMBALAPPUZHA TALUK-688561.**

**R1 BY ADV. SRI.A.ANTONY
R1 BY ADV. SMT.LEELAMMA ANTONY**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 29-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT.P1:-A TRUE COPY OF PLAINT IN OS NO 140/2004 ON THE FILE OF SUB COURT, MAVELIKKARA,.

EXHIBIT.P2:-A TRUE COPY OF WRITTEN STATEMENT IN OS NO 140/2004 ON THE FILE OF SUB COURT, MAVELIKKARA

EXHIBIT.P3:-A TRUE COPY OF JUDGMENT DATED 30/10/2004 IN OS NO 140/2004 ON THE FILE OF SUB COURT, MAVELIKKARA

EXHIBIT.P4:-A TRUE COPY OF JUDGMENT DATED 28/10/2010 IN RFA NO 632/2010 AND C.M.APPLICATION NO 1705/2010 OF THE HONOURABLE HIGH COURT OF KERALA, ERNAKULAM

EXHIBIT.P5:-A TRUE COPY OF IA NO 1836/10 FILED ON 30/11/2010 IN OS NO 140/2004

EXHIBIT.P6:-A TRUE COPY OF IA NO 1837/10 FILED ON 30/11/2010 IN OS NO 140/2004

EXHIBIT.P7:-A TRUE COPY OF OBJECTION

EXHIBIT.P8:-A TRUE COPY OF ORDER DATED 25/2/2014 IN IA NO 1837/10 IN OS NO 140/2004

EXHIBIT.P9:-A TRUE COPY OF THE ORDER DATEDDD 25/2/2014 IN IA NO 1836/10 IN OS NO 140/2004

RESPONDENT(S)' EXHIBITS

NIL

R.AV

//True Copy//

PA to Judge

K.ABRAHAM MATHEW, J

O.P.(C).NO.1843 OF 2015

Dated this the 29th day of October 2015

J U D G M E N T

Respondents 2 and 3 borrowed a certain amount from the first respondent bank and secured the loan by mortgaging the plaint schedule property. Those respondents transferred the property to the petitioners. When respondents 2 and 3 failed to repay the amount, the bank filed OS.140 of 2004 in Sub Court, Mavelikara against the petitioners and respondents 2 and 3. Respondents 2 and 3 failed to appear in response to summons and they were set ex parte. The petitioners filed a written statement admitting the plaint claims. The learned Sub Judge passed a decree on 30.10.2004 as seen from Ext.P3 judgment. It allowed the first respondent to realise from the petitioners and respondents 2 and 3, Rs.9,00, 994/- with interest at 14.79% per annum from the date of the suit till realisation and the decree debt was charged on the plaint schedule property. The petitioners filed RFA.632 of 2010 in this court, which rejected the

appeal on the ground that no appeal would lie against a consent decree. In Ext.P4 judgment it was observed that the appellants would be entitled to pursue any other relief as may be available in accordance with the law. Thereupon, the petitioners filed review application 1837 of 2010 before the Sub Court along with an application to condone the delay of 2220 in filing the review application. By Ext.P8 order the delay condonation application was dismissed and accordingly, by Ext.P9 order the review application also was dismissed. These orders are questioned in this O.P.

2. Heard the learned counsel on both sides.

3. There is no dispute that the petitioners had no personal liability to pay the amount. But unfortunately the learned Sub Judge passed a personal decree against them. The learned counsel for the first respondent bank submits that the bank will not proceed against the petitioners and but will proceed only against the property.

4. With regard to the rate of interest the agreed rate of interest was 14.79% per annum. The petitioners case is that since it was not a commercial transaction, the

court should not have granted interest exceeding 6% as provided in Section 34 CPC. The learned counsel for the first respondent bank submits that in view of the provision under Order 34 Rule 11 of CPC the bank is entitled to get interest at the agreed rate.

4. As mentioned above there is no doubt the decree is partly illegal, in as much it grants personal reliefs against the petitioners. It is not a question of the decree holder deciding not to proceed against them. If the decree is illegal the court cannot perpetuate it. It has the duty to see that the illegality is undone.

5. A perusal of the decree shows that the decree was not passed under Order 34 CPC. So there is no merit in the submission of the learned counsel that under Order 34 Rule 11 of CPC the first respondent bank is entitled to get interest at the agreed rate. The only provision applicable is Section 34 CPC. Under the said provision, in transactions other than commercial transactions the future interest can be only 6%. In this regard also the decree is illegal.

6. Now the question is whether the court was

justified in dismissing the delay condonation petition. Learned counsel for the first respondent bank has drawn my attention to the decision of the Supreme Court in ***Balwant Singh Vs. Jagdish Singh (AIR 2010 SC 3043)*** in support of his argument that the petitioners should have proved existence of sufficient cause for their non appearance. The learned counsel for the petitioners rely on the decision of this court in ***George Vs Federal Bank Ltd (2000(1)KLT 715)*** and ***State Bank of Travancore Vs. K.Vinayachandran and another (AIR 1989 KERALA 302)*** in support of his argument that once the court is satisfied that there is a mistake which is apparent on the face of the record the court has a duty to correct it even without an application invoking of the above three decisions relied on by the petitioners.

7. The first decision was rendered on identical facts. Recently in ***Raman Nadar & Velayudhan Nadar Janaki Karthi (2011(2) KLT 149)*** this court has observed that there cannot be any doubt that if the circumstances so warrant even the jurisdiction under Section 151 of the Code can be resorted to correct a

mistake which is evident on the face of the record, an act of court shall do no harm to litigant is the accepted principle; while passing the judgment the mistake was committed by the court resulting an injury and hardship to the litigant.

8. The judgment of the trial court shows that the learned Sub Judge did not apply his mind to the facts of the case and the law applicable to the facts. He did not take into account the well settled principles in passing the decree. This court cannot perpetuate the injustice. Once it is brought to its notice it is its bounden duty to set the matters right. This shall be done either under Section 151 or 152 C.P.C. If Section 151 or 152 of CPC is applicable, there is no limitation. The court shall undo the injustice once it is brought to its notice even without an application. If that is so the delay condonation petition filed by the petitioners was unnecessary and even without the delay condonation petition the learned sub Judge should have corrected that mistake. So I am inclined to grant the prayer of the petitioners.

9. The rate of interest now awarded is 14.79%

from the date of the suit. The decree was passed about more than 10 years ago, which may be a good ground for the trial court not to exercise its discretion to award less rate of interest till passing of the decree.

In the result, this O.P. is allowed, and Exts.P8 and P9 are set aside. The lower court is directed to pass appropriate modified decree in view of the findings made above.

sd/-

K. ABRAHAM MATHEW
JUDGE

R.AV

//True Copy//

PA to Judge