

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.449 of 2014
Arising out of
Civil Writ Jurisdiction Case No. 16665 of 2009

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1. Central Bank Of India, A Body Corporate Constituted Under The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and carries On Banking Business With its Head Office At Chander Murkhi, Nariman Point, Mumbai, Carrying On Its Business Amongst Its Order Branches, A Branch At Danapur, P.O. - Danapur, P.S. - Danapur, District - Patna Represented By The Chairman-Cum-Managing Director

2. The Branch Manager, Central Bank Of India, Branch - Danapur, P.O. & P.S. - Danapur, District - Patna

.....(Respondent no. 1 & 2 in the Writ Petition)

.... Appellants

Versus

1. M/S Kailash Art International , Factory And Regd. Office At Jamsut Ushri, P.S. - Danapur, District - Patna, A Proprietorship Concern Of Sri Saryug Prasad Singh

2. Sri Saryug Prasad Singh Son of Late Kishun Singh

3. Smt. Sabitri Devi Wife Of Sri Saryug Prasad Singh

Both 2 And 3 Residents Of Gandhi Nagar (Gabhtal), Danapur, P.O. - Digha, P.S. - Digha, District - Patna

..... (Petitioner no. 1 to 3 of the Writ Petition)

4. Presiding Officer, Debts Recovery Tribunal, Patna

5. Recovery Officer, Debts Recovery Tribunal, Patna

..... (Respondent no. 3 & 4 of the Writ Petition)

.... Respondents

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Appearance:

For the Appellant/s : Mr. Ajay Kumar Sinha and
Mrs. Manju Jha, Advocates.

For the Respondent/s : Mr. Raj Kishore Prasad Singh and
Mr. Bal Bhushan Chaudhary, Advocates.

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 21-11-2017

Some fine points of the civil laws, as contained in the Code of Civil Procedure, have come up for consideration in the present Letters Patent Appeal.



2. Central Bank of India, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (hereinafter referred to as 'the Bank') has preferred the present appeal questioning the judgment dated 11.12.2013 passed by a learned Single Judge of this Court in CWJC No. 1665/2009. The learned Single Judge has allowed the Writ Application and thereby accepted the prayer of the petitioners to quash the order dated 31.08.2009 passed by the Presiding Officer, Debts Recovery Tribunal, Patna in M.A.No. 07/2009 as also the order dated 19.04.2007 passed in OA (Ex.) Case No. 15/2006 and the resultant certificate issued by the Debts Recovery Tribunal, Patna in the said execution case for realization of a sum of Rs. 18,99,760.69 being the total of (i) decreed amount of Rs. 1,49,628.89 plus (ii) interest @ 14% per annum with quarterly rests from 01.02.1998 to 31.12.2005 amounting to Rs. 17,27,177.80 plus (iii) amount of cost awarded with subsequently incurred Rs. 22,954.00 with further interest @ 14% per annum with quarterly rests from 01.01.2006 till its realization against the respondents – judgment debtors from their person and properties.

BRIEF FACTS OF THE CASE

3. It is an admitted fact that on 07.06.1983 Danapur Branch of the Bank sanctioned a Cash Credit Loan Limit of Rs.



70,000/- in favour of M/s Kailash Art International (respondent no. 1), who happened to be a sole proprietorship firm owned by one Saryug Prasad Singh (respondent no. 2). Father of the respondent no. 2 (since deceased) and Smt. Savitri Devi (respondent no. 3) stood guarantors to the said financial assistance provided by the Bank. Default in repayment led to filing of a Title Mortgage Suit bearing no. 572/1987 in the court of learned Subordinate Judge-III, Danapur claiming Rs. 1,49,628.89 with interest and cost. The defendants in the suit appeared but did not contest the same leading to passing of an ex parte judgment and decree dated 21.04.1995 by the learned court.

4. The Bank filed an Execution Case bearing no. 05/1996 in the court of learned Subordinate Judge-III, Danapur on the basis of the said decree claiming an amount of Rs. 5,40,634/- after including interest and adding the same in the principal. The stand of the judgment debtors – respondents is that the said decree is in the nature of a preliminary mortgage decree and, in view of settled law that a preliminary mortgage decree cannot be executed, they filed an application under Sections 47 and 151 of the Code of Civil Procedure giving rise to Misc. Case No. 9/1996 challenging the maintainability of the execution case. The stand of the judgment debtors – respondents were contested by the Bank by filing an objection in which a stand was taken on behalf of the Bank that the execution case



was filed after preparation of the decree which is a composite decree for realization of the dues and also for sale of the mortgaged properties for realization of the dues. It was also the stand of the Bank that they were not required to await for anything more than the decree in hand and thus the execution case, according to the decree holder-Bank, was maintainable and operative.

5. In the latter part of this judgment, we will deal with the nature of the judgment and decree dated 21.04.1995 passed in Title Mortgage Suit No. 572/1986 because it is the said decree which need to be construed and has been construed by the learned single Judge holding that it is a preliminary mortgage decree but not properly worded by the learned Subordinate Judge III, Danapur.

6. The Execution Case No. 5/1996 pending before the learned Subordinate Judge III, Danapur got dismissed in default on 17.04.2004. During pendency of the execution case, one of the guarantors, namely, Lal Kishun Singh, who happened to be judgment debtor no. 4 and father of the respondent no. 2 in the present appeal died on 02.02.2003 but no step for substitution was taken by the Bank.

7. During pendency of the execution case, the Special Statute, namely, Recovery of Debts Due to Bank and Financial Institution Act, 1993 (hereinafter referred to as 'the DRT Act') came to be amended on 17.01.2000; Section 31-A was introduced in the



DRT Act which reads as under:-

“31-A. Power of Tribunal to issue certificate of recovery in case of decree or order.-

(1) Where a decree or order was passed by any Court before the commencement of the Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000 and has not yet been executed, then, the decree-holder may apply to the Tribunal to pass an order for recovery of the amount.

(2) On receipt of an application under sub-section (1), the Tribunal may issue a certificate for recovery to a Recovery Officer.

(3) On receipt of a certificate under sub-section (2), the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a debt recoverable under this Act.”

8. On 06.03.2006, the Bank filed an application under Section 31-A of the DRT Act giving rise to O.A. (Ex.) Case No. 15/2006 before the Debts Recovery Tribunal, Patna for grant of a certificate amount to Rs. 18,99,760.69 with further interest @ 14% per annum on quarterly rests from 01.01.2006 till its realization against the judgment debtors. In the application filed under Section 31-A, the Bank described the mortgaged properties in Schedule I of the said application. A notice was issued to the judgment debtors-respondents herein, who appeared before the DRT, and prayed for time to file a petition which was objected to on behalf of the Bank. Learned Presiding Officer, Debts Recovery Tribunal, Patna rejected



the prayer for adjournment and vide order dated 19.04.2007 in OA (Ex.) Case No. 15/2006 passed an order under Section 31-A(2) of the DRT Act. The operative part of the said order reads as under:-

“4- In the facts of the case, I accept and allow the application of the applicant-decree holder bank and order u/s 31A(2) that a certificate of recovery be prepared immediately as per decree of the Ld. Sub-Judge-III, Danapur, in T.M.S. No. 572/87 including interest on **Rs. 18,99,760.69P (Rupees eighteen lacs ninety nine thousand seven hundred sixty and paise sixty nine only)** applicant/ Decree Holder bank is entitled to receive future interest @ 14% p.a. with quarterly rests from 1.1.2006 till full and final realization from the defendants – judgment debtors, jointly and severally. All the other conditions mentioned in decree will apply and the decree will be a part of certificate and a copy of it will be attached with the certificate. Certificate be put up forthwith before me for seal and signature to be issued to Recovery Officer for recovery of the amount of debt. The Recovery Officer shall proceed to recover & realise the amount as per the certificate in the manner and mode prescribed under section 25 and 28 of the Act from the defendants and report compliance with remittance of R.P. file for final withdrawal of certificate u/s 26[2] of the Act and withdrawal of attachment by the Presiding Officer.”

9. By virtue of the certificate granted vide order dated 19.04.2007 the recovery proceeding being R.P. Case No. 16/2007 was registered and the Recovery Officer issued a notice dated 27.03.2008 under Section 29 of the DRT Act. The judgment debtors thereafter moved this Court in CWJC No. 14720/2008 challenging the order dated 19.04.2007 passed by the Debts Recovery Tribunal, Patna and an issue as to jurisdiction of the Debts Recovery Tribunal in



entertaining an application under Section 31-A of the DRT Act and the maintainability of the said application were raised on the following grounds:-

(i) that a preliminary decree in a mortgage suit is not an executable decree, it is executable only when a final decree is prepared for sale of the mortgaged assets for recovery of the amount under the mortgage and such decree in a mortgage suit cannot be treated to be a simple money decree, therefore, cause of action of a preliminary decree through the Debts Recovery Tribunal is not legally permissible;

(ii) that the proceedings initiated by the Bank under Section 31-A of the DRT Act would be governed by Article 137 and hence the application filed on 06.03.2006 would be barred by limitation; and

(iii) that the decree obtained by the Bank from the court of the learned Subordinate Judge III, Danapur was only for Rs. 1,49,628.89 plus interest @ 14% per annum with quarterly rests, therefore, the principal amount for which the property was mortgaged was less than Rs. 10 lakhs, hence, the jurisdiction of Debts Recovery Tribunal would not be attracted by merely leaving the decree unexecuted and then adding the interest thereon with an intention to confer jurisdiction upon the Debts Recovery Tribunal.



10. The Writ Court vide order dated 09.02.2009 disposed of the said Writ Application of the judgment debtors-respondents. As the court was of the opinion that the issues raised as to the jurisdiction of the Debts Recovery Tribunal may be very well raised before the Debts Recovery Tribunal itself at the first instance, therefore, a direction was issued to the Debts Recovery Tribunal to decide all objections raised by the petitioners within a period of two months from the date of filing of such objections before the Presiding Officer subject to the writ petitioners' cooperating in the matter. It is, however, worth mentioning that while remitting back to the Debts Recovery Tribunal to decide the issue of jurisdiction, the Writ Court rejected the third ground raised on behalf of the judgment debtors – respondents and held that by virtue of the decisions of the Hon'ble Supreme Court in the case of **Punjab National Bank, Dasuyi Vs. Charu Ram & Ors.**, reported in (2000) 6 SCC 655, which was followed by this Court in the case of **Durga Prasad Sah Vs. State of Bihar & Ors**, reported in 2003 (2) PLJR 409, it is no longer in dispute that on the date when the application was presented to the Debts Recovery Tribunal, the decretal amount along with accrued interest should have exceeded Rs. 10 lakhs and in such cases the Debts Recovery Tribunal had jurisdiction to entertain the case.

11. As directed by the Writ Court, the judgment debtors –



respondents herein filed an application before the Debts Recovery Tribunal which was registered as MA No. 7/2009 but the said application of the judgment debtors was rejected vide order dated 31.08.2009 passed by the Presiding Officer, Debts Recovery Tribunal. The judgment debtors, therefore, once again moved this Court giving rise to CWJC No. 16665/2009 in which the order passed by the Presiding Officer in MA No. 7/2009 as also the previous order dated 19.04.2007 passed in OA (Ex.) Case No. 15/2006 giving rise to the recovery proceeding were challenged. It is this final judgment passed in CWJC No. 16665/2009 dated 11.12.2013 which is impugned in the present Letters Patent Appeal.

SUBMISSIONS

NATURE OF DECREE – LIMITATION

12. Before the learned single Judge, learned counsel representing the judgment debtors-respondents mainly argued that the decree in the present case is a preliminary mortgage decree which is not executable and enforceable. It is his further plea that because there is no specific Article provided in the Schedule of the Limitation Act, 1963 prescribing limitation for filing of an application for preparation of a final decree in terms of Order XXXIV Rule 5 of the Code of Civil Procedure, the same would be covered by the residuary Article 137 which provides a period of three years as limitation from the date



when the right to apply accrued. According to the learned counsel for the judgment debtors-respondents, if the preliminary decree in the present case was passed on 21.04.1995 the application for final decree could have been made within a period of three years from the said date which was not done by the decree holder Bank, hence, there is no legally enforceable decree in existence.

MAINTAINABILITY OF APPLICATION U/S 31A OF THE DRT ACT

13. Based on the aforesaid submissions, learned counsel for the judgment debtors further submitted that if there is no legally enforceable decree in the name of the Bank, an application under Section 31A of the DRT Act could not have been filed. It was contended that a preliminary mortgage decree would not come within the meaning of 'debt' as envisaged under Section 2(g) of the DRT act and, therefore, cannot be enforced under Section 31-A for the purpose of recovery of the amount involved in the decree. Several judicial pronouncements of the Hon'ble Apex Court were cited before the learned single Judge which have been dealt with in the impugned order and we will consider the same here-in-after at an appropriate place.

14. Some more issues of technicalities of law were raised before the learned single Judge which have been discussed and rejected by his Lordship. The Petitioners-Respondents have not



preferred any cross-appeal.

SUBMISSIONS ON BEHALF OF THE DECREE HOLDER BANK

15. Learned counsel representing the Bank opposed the Writ Application on the grounds, inter alia, that there is a statutory remedy of appeal before the Debts Recovery Appellate Tribunal against the order passed by the Debts Recovery Tribunal, Patna and, hence, following the judgment of the Hon'ble Supreme Court in the case of **Punjab National Bank Vs. O.C. Krishnan & Ors.**, reported in **AIR 2001 SC 3208**, the Writ Court should not entertain the present application. It was further contended that the dismissal of the execution case in default does not operate as *res judicata* and, therefore, the second application for execution was rightly filed before the Debts Recovery Tribunal and the same was maintainable. In support of this contention, learned counsel for the Bank relied upon the decision of the Hon'ble Supreme Court in the case of **Shivshankar Prasad Sah & Anr. Vs. Baikunth Nath Singh & Ors.**, reported in **AIR 1969 SC 971**. It was further submitted on behalf of the respondent Bank that the decree in the present case is a composite decree, i.e., the money decree as well as mortgage decree, hence, the final decree was not necessary to be drawn and the execution case was filed in the court of the learned Subordinate Judge III, Danapur with correct amount. Further, learned counsel for the Bank submitted that



the decree in the present case is based on adjudication and payability of a 'debt' owned by the judgment debtors, hence, it is a 'debt' as envisaged under Section 2(g) of the DRT Act which would be legally enforceable. The Bank took a stand that a second execution case, even if filed within a period of 12 years from the date of decree, as envisaged under Article 136 of the Schedule of the Limitation Act, 1963, was not barred and, hence, the application under Section 31A of the Act was well within limitation. In his contention the composite decree in the present case was executable without the necessity of any final decree under Order XXXIV Rule 5 CPC, reliance was placed on several judicial pronouncements which we will refer while dealing with the submissions of the parties before us.

FINDINGS IN WRIT

16. On consideration of the rival submissions, learned single Judge decided the various issues raised by the parties. We need not go in detail with respect to all those issues which have been decided against the petitioners-respondents, against which they have not preferred any appeal or raised any issue in appeal, but in order to give a complete view of the entire matter we are briefly taking note of some of the issues which have been decided.

(i) Maintainability of an application under Section 31-A(1) of the DRT Act based on calculation of the amount under the decree including interest.



Upon consideration of the decision of the Hon'ble Supreme Court in the case of Punjab National Bank (Supra), the learned single Judge concluded that it would be open to the Bank or financial institution to file an application under Section 31-A(1) of the DRT Act for a certificate for recovery if the amount in the application along with interest, etc., on the date of such application exceeds Rs. 10 lakhs but any such application would be subject to the law of limitation which has been made applicable under Section 24 of the DRT Act to an application made before the Tribunal.

(ii) Applicability of Section 31-A(1) of the DRT Act vis-à-vis a preliminary decree.

Learned single Judge was of the view that even a preliminary decree, can be if capable of quantification and still subsisting on the date of the application can give rise to a right to file an application under Section 31-A(1) of the DRT Act. According to the learned single Judge, "The proposition that a preliminary decree must become final before it can be executed as laid down in the decisions cited above by learned counsel for the petitioners, would apply in its full rigour only if such a decree is sought to be executed in terms of the provisions of the Code of Civil Procedure before the Civil Court. Since the rights of the parties are basically decided by the preliminary decree subject to the details being worked out in the final



decree, therefore, the preliminary decree would also come within the ambit of the words “decree or order” as stated in Section 31A of the Act.”

(iii) PLEA OF RES JUDICATA

Learned counsel for the judgment debtors also raised an issue as to applicability of the principle of *res judicata* to the application filed by the Bank under Section 31A of the DRT Act. According to him, the order dated 17.04.2004 passed by the civil court dismissing the Execution Case No. 5/1996 in default would operate as *res judicata* to the application filed before the Debts Recovery Tribunal, Patna.

On this issue, the learned single Judge referred paragraph 6 of the judgment of the Hon’ble Supreme Court in the case of **Shivshankar Prasad Sah & Anr. Vs. Baikunth Nath Singh & Ors.**, reported in **AIR 1969 SC 971**, which was placed before the learned single Judge to submit that the plea of *res judicata* advanced by the petitioners was not tenable in law as dismissal of the execution case in default does not operate as *res judicata*, therefore, the second application for execution before the Debts Recovery Tribunal was maintainable. Learned single Judge agreed that dismissal of the execution case in default, when no hearing took place, shall not operate as ‘*Res Judicata*’.

(iv) Effect of non-substitution of deceased defendant no. 3-



(judgment debtor no. 4)

On this issue, on behalf of the Bank it was submitted that the question of nullity does not arise in an execution case as Order XXII Rules 4 and 5 does not apply. It was submitted that the Bank was not aware of the death of original defendant no. 3 which fact was concealed by the petitioners even in the execution case and by not disclosing it before the Debts Recovery Tribunal when they appeared before it they further concealed this fact. In support of the submission, learned counsel relied upon a Division Bench judgment of this Court in the case of **Ram Chandra Prasad Vs. Jagarnath Prasad & Ors.** (AIR 1983 BBCJ 154); paragraphs 4 and 5 which have been taken note of by the learned single Judge. Further reliance was placed on **Abdus Sattar Vs. Mohini Mohan Das & Ors.**, reported in AIR 1933 Cal 684. Learned single Judge concluded that the estate of deceased defendant no. 3 (judgment debtor no. 4) being represented through his son (judgment debtor no. 2) and wife (judgment debtor no. 3) who are on the record before the DRT it cannot be said that the certificate would be a nullity.

(v) Non-disclosure as to previous Execution Case.

The learned single Judge was of the view that even though a false statement has been made in the application filed before the Debts Recovery Tribunal under Section 31A of the Act saying that no



execution case has been filed earlier, the same cannot be held to be a fraud and misrepresentation of such dimension so as to vitiate the certificate. Learned single judge held “As already pointed out since successive execution applications are maintainable subject, of course, within the period of limitation, the fact that the earlier execution case had been dismissed for default not mentioned in the application under Section 31A, would not have materially affected the result of the case. However, the same does amount to false statement on affidavit before the Tribunal which has been deemed to be judicial proceeding within the meaning of Sections 193, 228 and for the purpose of Section 196 of the IPC as also it has been deemed to be a Civil Court for all the purposes of Section 195 and Chapter 26 of the Code of Civil Procedure, 1973; under Section 22(3) of the RDDBFI Act the person who has sworn false affidavit before the Tribunal would be liable for proceedings for filing false affidavit on oath before it under the relevant provisions of law.”

ISSUES DECIDED AGAINST THE BANK (RESPONDENTS-APPELLANTS)

(i) Nature of DECREE & Execution Case No. 05/1996.

Learned single Judge held that the decree dated 21.04.1995 is not a composite decree but a preliminary mortgage decree under Order XXXIV Rule 4 of the Code of Civil Procedure, though not



properly worded. Thus, the preliminary decree itself was not executable in the Civil Court unless a final decree having been applied for and is prepared in terms of Order XXXIV Rule 5 of the Code of Civil Procedure providing for selling out of the mortgaged properties. It was further held that “In terms of the reliefs sought by the plaintiff and granted by the decree dated 21.4.1995, the decree could not have been further executed as a money decree against the defendants without first getting an order under Order 34 Rule 6 in case the sale of the mortgaged properties could not satisfy the decretal amount with interest and cost etc. Thus, according to me, the Execution Case No. 05/1996 was non est and invalid in law and could not have been carried into effect as an execution because it was only for the execution of the preliminary mortgage decree...”

(ii) Application for final decree barred by limitation.

Learned single Judge having held that the decree dated 21.04.1995 was in the nature of a preliminary decree directing the defendants to pay the entire decretal amount within 30 days from the date of passing of the order, further held that an application for final decree ought to have been filed within a period of three years from the expiry of 30 days from the date of the order in terms of Article 137 under the Schedule of the Limitation Act, 1963 which applies to such an application for preparation of final decree. Learned single Judge



further stated-

“No such application having admittedly been filed within the period prescribed, it is evident that the right to apply for a final decree and get the same executed became barred after 21.5.1998. Thus on 17.1.2000 when Section 31A was introduced in the Act, there was no subsisting decree or order of the Court which could be executed under the law by the respondent-Bank. That being the position no right could accrue to the Bank merely because of enactment of Section 31A since the decree had become barred from execution by the passage of time and therefore could not form the basis for filing an application for an order of recovery under Section 31A (1). It was thus not open to the Debts Recovery Tribunal to have entertained the application filed by the respondent-Bank on 6.3.2006 and to have passed any valid legal order for recovery on the basis of such application.”

Learned Judge proceeded to consider this issue from a different angle also and found that on the date when the said Section 31A was enforced on 17.01.2000, there was no execution proceeding praying for more than Rs. 10 lakhs pending in the court below as the prayer made by the Bank in its execution case was only for an amount of Rs. 5,40,634/-. Thus, his Lordship was of the view that with the introduction of Section 31A a right accrued to the decree holder-Bank to apply for an application under the said provision of law but such an application could only be filed within three years from the date when the right to file an application under Section 31A accrued. According to learned Judge, the Bank could have filed an application for a certificate for recovery of debt in the present matter with respect to the



decree dated 21.04.1995, if the same was subsisting and recoverable on 17.01.2000, within a period of three years from the said date, i.e., on or before 17.01.2003. Thus, the filing of the application in the year 2006 was held to be barred by limitation and could not have been entertained by the Debts Recovery Tribunal.

(iii) ALTERNATIVE REMEDY

The respondent Bank in the Writ Application raised the issue of entertainability of the writ, because of availability of a statutory remedy of appeal under the provisions of the DRT Act. The learned single Judge, however, held that when a question of jurisdiction has been raised by the petitioners in the present writ application, the plea of alternative remedy of appeal cannot be accepted and, hence, the court can very well go into the jurisdictional issues.

SUBMISSIONS OF THE APPELLANT-BANK

17. Learned counsel representing the Bank has built up his argument on his submissions-

(i) that the decree dated 21.04.1995 is a composite decree inasmuch as not only it determines the actual amount due to the Bank and recoverable from the judgment debtors but also states that in case of failure of the judgment debtors to pay the said amount within the prescribed period of 30 days the same would be recoverable from the



judgment debtors through execution of the same;

(ii) that the decree dated 21.04.1995 nowhere states that the plaintiff had to apply for a final decree, rather the court passed a decree against the defendants as well and dispose of the suit itself, therefore, if no application for final decree which is under Order XX, Rule 6 and 7 of the Code of Civil Procedure was filed on behalf of the Bank, it was because of the contents of the decree, which is under Order XX, Rules 6 and 7 of the Code of Civil Procedure, hence, there is no question of applying a period of limitation and application for filing of a final decree, even if required, the period of limitation would not start running out on the expiry of 30 days from the date of the decree because the decree in the present case does not provide for filing of an application for final decree;

(iii) that the learned single Judge while considering the nature of the decree dated 21.04.1995 himself held that it was not a properly worded (emphasis supplied) decree and liberty to the plaintiff-bank to realise the decretal amount through the execution case against the defendants is clearly a wrong direction which should have no bearing on the rights of the parties, in terms of law as laid down in the Code of Civil Procedure, therefore, if the learned single Judge was of the view that the decree dated 21.04.1995 was not properly worded, in such circumstance the defect in decree dated



21.04.1995 would be a kind of irregularity and the only option left in the said view of the matter would be to give liberty to the plaintiff Bank to apply for amendment of the decree as there is no limitation prescribed for seeking amendment of decree; it is well settled in law that no one would suffer for the wrong committed by a court;

(iv) that in a title mortgage suit, a suit is not supposed to have been disposed of with the passing of the preliminary mortgage decree, it is also well settled that such suits cannot be dismissed in default, therefore, if what has been held by the learned Single Judge that an application for preparation of final decree became barred on expiry of three years from the date of expiry of 30 days from 21.04.1995 is taken to be correct then the plaintiff Bank on the one hand will suffer loss of public money despite there being a judgment and decree in its' favour and at the same time the mortgage suit will be deemed to be pending for ever;

(v) that the view taken by the learned single Judge that the decree dated 21.04.1995 is a preliminary mortgage decree but became unexecutable under Section 31A(1) of the DRT Act on expiry of three years from 17.01.2000 when Section 31A was introduced in the Act is contrary to the legal position;

(vi) that even a preliminary mortgage decree would come within the ambit of the words "decree or order" as stated in Section



31A of the Act and under the provisions of the DRT Act, 1993, which is a Special Statute, no period of limitation is prescribed for execution of decree which was already under execution in Execution Case No. 05/1996 and was subsisting till 17.01.2004, therefore, the cause of action for filing of an application under Section 31A of the Act arose to the plaintiff Bank only on or after 17.01.2004 when the Execution Case No. 05/1996 came to be dismissed in default. The application under Section 31A was filed within a period of twelve years from the date of decree which is in accordance with Article 136 of the Schedule of the Limitation Act, 1963 and, hence, no question of limitation in filing of an application under Section 31A of the Act would be raised against the plaintiff-Bank;

(vii) that the view taken by the learned single Judge that Execution Case No. 05/1996 was non est and invalid in law is not a correct view inasmuch as the language of the decree dated 21.04.1995 clearly states that the defendants would be liable for the dues determined by the court and if they fail to pay the same within a period of 30 days from the date of the decree, the same shall be recoverable through the process of execution, it is thus submitted that in the writ jurisdiction under Article 226 of the Constitution of India the learned single Judge was not correct in going behind the decree and interpreting it by adding or substituting something which is not



there;

(viii) that before the learned single Judge as well as before us in appeal, the Bank relied upon the judgment of the learned single Judge of Delhi High Court in the case of **Laxmi Commercial Bank Limited, New Delhi Vs. M/s American Rubber Mills Company, Delhi & Ors., AIR 1972 Delhi 118**, paragraphs 11, 15 and 17 of the judgment are quoted hereunder for a ready reference:-

“11. A Bench of the Patna High Court in **Lalji Bhagat V. Babu Raghubans Prasad: AIR 1964 Pat 135** observed as under:-

“The true test for determining whether an absolute decree is necessary in such cases or not is to find out if the compromise decree is by itself capable of execution without further proceeding in the suit so that the decree-holder may realize his dues by sale of the mortgaged properties or otherwise. It is obvious from the terms of the compromise in the instant case that the compromise decree was not by itself capable of execution. One of the terms incorporated in the preliminary decree was that, in default of payment of any of the instalments, the plaintiff would be competent to start proceedings for final decree and to recover the dues by sale of the mortgaged property as well as from the person and other properties of the defendants. It is clear therefore, that the decree dated the 27th June, 1945 could not have been executed without further proceedings in the suit itself. In view of the term just mentioned, and had the plaintiff made any attempt to sell the mortgaged property by executing the decree dated the 27th June, 1945, he would have been confronted with this term In view of the foregoing discussions, the correct legal position is this. If a mortgage suit is decreed in terms of a compromise, the consent decree amounts to a final decree only when nothing further is to be done in the suit in order to enable the decree-holder to execute the decree. But in case the consent decree cannot be executed without further proceedings in the suit, the decree-holder has to take



steps in the suit to have the decree made absolute in terms of the compromise, and whether any rule or Order 34, Code of Civil Procedure, applies or not, the order making the decree absolute amounts to a final decree.....”

“15. Order 34, Rule 5, Civil P.C. contemplates the passing of a final decree in certain contingencies but it is attracted only where a preliminary decree has been passed under Rule 4. Therefore where only a money decree has been passed initially a final decree under R.5 is not necessary although the decree may authorize the decree-holder to realize the decretal amount by sale of the judgment-debtor’s property. Where, however, the property is charged with the payment of the decretal amount the proper mode of realizing the decretal amount is to obtain a decree absolute for sale. We have thus to construe the decree in the present case to find out whether it is a decree to which Rule 5 would be attracted.”

“17. The compromise which resulted in the decree being passed sets out that a decree for recovery of money by instalments be passed. There is no bar to a decree under Order 34, Rule 4, Civil P.C. being passed in terms of a compromise extending the period allowed for payment in accordance with the wishes of the parties which is not limited to the period of six months prescribed by O.34, R. 2(b). It was in terms of this prayer that the court passed a compromise decree under Order 34, Rule 4 Civil P.C.. A reading of the decree in the present case brings it clearly within the ambit of the rule laid down by the Bench of the Allahabad High Court in AIR 1929 All. 881. The decree was passed on an application moved by the plaintiff-decree-holders under the provisions of Order 23, Rule 3, Civil P.C. The provisions in the decree for getting the pledged stocks released by payment of four instalments and the charge created on other immovable properties go to show that the decree was under Order 34, Rule 4, Civil P.C. and something more has to be done on report by the decree-holder that payment of money has not been made or part of the decretal amount had not been paid and so a decree for sale of the property mortgaged may be passed. On a construction of the decree, therefore, I hold that it is a preliminary decree



passed under Order 34, Rule 4, Civil P.C. and by itself could not be executed till a decree absolute was obtained by the decree-holder. The terms on which the decree has been passed clearly fall within the ambit of the rule laid down by the Patna High Court in the case of Lalji Bhagat, AIR 1964 Pat 135 and the rule laid down by the Bench of the Allahabad High Court in the case of Mohammad Unis, AIR 1929 All 881. The decree-holder having consented to a decree being passed under Order 34, Rule 4, Civil P.C. cannot take advantage of the rule enunciated by the Full Bench of the Allahabad High Court in Askari Hasan's case, AIR 1927 All 167 (FB). The auction sale, therefore, could not take place on the execution application as made by the decree-holder. I, therefore, decided Issue No.1 in favour of the objectors."

18. Learned counsel for the appellant – Bank has reiterated his reliance on the Division Bench judgment of the Bombay High Court in **Chhaganlal Sakarlal Vani Vs. Jayaram Deoraj Thakur & Ors., AIR 1927 Bombay 131**, at page 133 of which it has been held as under:-

"As regards the first point, it is perfectly true to say that there was a preliminary decree passed, and there was the order making the decree for sale absolute; but there was no formal final decree drawn up. Technically, therefore it is right to say that there is no final decree which could be executed. This contention has become possible because of the laxity which prevails in the lower Courts in drawing up decrees in mortgage suits. In the present case the preliminary decree was drawn up in the proper form provided by the Code of Civil Procedure. Under R. 5 of O.34, when such payment as is directed by the preliminary decree is not made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold. And when an order making the decree absolute is made, the final decree has to be drawn up. The question that now arises is whether, at this distance of time, nearly fifteen years after the decree, and twelve years after the order making the decree absolute was



made, the execution can go on or not.

Having regard to the terms of the preliminary decree which has been made absolute, we could only attribute the omission to have a final decree drawn up to a misapprehension on the part of the Court, as well as the parties concerned, as to the necessity of having a final decree formally drawn up. The parties seem to have gone on all the years on the footing that the preliminary decree which was made absolute, was the formal expression of the final decree under R. 4 of O. 34, as from the date when it was made absolute. I am of opinion that, though the final decree has not been formally drawn up on the terms of the preliminary decree, which has been made absolute, that decree coupled with the order may be taken under the circumstances to be the final decree. In its ultimate analysis, it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of execution; and it is necessary to seek that even such a formal defect does not creep in, and that a formal decree is drawn up when the decree is made final. But, under the circumstances of this case, we are not prepared to hold that there is no executable decree. The result of allowing the contention of this nature at this distance of time will be that a decree will have to be drawn formally now and a fresh beginning will have to be made in the way of execution after the lapse of so many years. That is a result which should be avoided so far as it is legally possible to do so. On this point there is no express decision which can help the Court one way or the other. But, having regard to the observations in *Jawahir Mal v. Kisturchand: (1891)13 All.343*, it seems to us that an omission of this kind may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable as they are in this case. Section 99 of the Code of Civil Procedure would cover such an error or irregularity, as, under circumstances such as we have in this case, it does not affect the merits of the case or the jurisdiction of the Court.”

19. Further learned counsel for the appellant – Bank relied upon the decision of the Hon’ble Apex Court in the case of **State**



Bank of India Vs. M/s Index Port Registered & Ors., (1992) 3

SCC 159, paragraph 10 of the judgment is quoted hereunder for a ready reference:-

“10. It will be noticed that the loan was taken by the firm, namely respondent No. 1, which consisted of Sh. Dhaneshwar Kumar Jain, respondent No. 2 (defendant No. 2) and Sh. Ajay Kishan Mehta (since deceased). The respondent No. 2 (defendant No. 2) had created an equitable mortgage of his shop and respondent No. 4, who is a father of late Sh. Ajay Kishan Mehta stood guarantor for the loan to respondent No. 1. The very wordings of the decree quoted above shows that it is a personal decree against all the defendants/ judgment-debtors. Respondent No. 4 was defendant No. 4, so it is a money decree against defendant No. 4 as well. It is also a mortgage decree against the mortgagor, namely - defendant No. 2 only. The decree specifically mentions that a money decree is being passed for recovery of Rupees 33,705/ 22 with costs and the defendants shall pay interest @ 7% per annum from the date of the institution of the suit till its realisation. There is also a decree passed in favour of the Bank entitling it to sell the shop in case decretal amount is not paid within three months from the date of the decree and the decree specifically mentions that it will be deemed to be a personal decree against all the defendants (respondents). Only qua defendant No. 3 it can be executed only to the extent the mother inherited the estate of her son Shri Ajay Kishan Mehta. It is thus clear from the decree that it is a money decree against all the defendants (respondents) and a mortgage decree only against defendant No. 2 (respondent No. 2) so far as the shop is concerned. The decree does not put any fetter on the right of the decree-holder to execute it against any party, whether as a money decree or as a mortgage decree. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount



covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months. The decree is not in the prescribed Form No. 5 of Appendix D to the Code of Civil Procedure.”

20. Learned counsel representing the Bank relied upon the judgment of the Hon’ble Apex Court in the case of **Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala, (2009) 9 SCC 478**, paragraphs 16 and 17 of which read as under:-

“16. *In SBI v. Indexport Registered* (1992) 3 SCC 159 : AIR 1992 SC 1740, this Court held that the decree holder bank can execute the decree against the guarantor without proceeding against the principal borrower. Guarantor’s liability is co-extensive with that of the principal debtor.”

“17. In that case, this court further observed that: (*Indexport* case (Supra), SCC p. 164, para 10)

"10. The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree- holder. The question arises, whether a decree which is framed as a composite decree as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of the decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the principal debtor.”

The court further observed that (*Indexport* case (Supra), SCC p. 165, para 13) "the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided by the contract."

21. On behalf of the Bank, further reliance has been placed



on a decision of the learned single Judge of the Madras High Court in the case of **(Machullathil) Chandukuttu Nayar Vs. Kuruvathancheri Keezana Narayana Nayar & Ors., AIR 1925 Madras 1083**, and another judgment of the Madras High Court in the case of **Sivan Pillai Vs. Anbayyan & Ors., reported in 1976 I The Madras Law Journal Reports 385**, paragraphs 4, 5, 6 and 9 of the judgment of the Hon'ble Madras High Court in the case of **Sivan Pillai** (Supra) are quoted hereunder:-

“4. Before I deal with this question, I may straightway mention certain admitted and well-settled principles. Not merely a suit on a mortgage, but also a partition suit as well as a suit for dissolution of partnership and accounts involve the passing of a preliminary decree in the first instance and thereafter a final decree. Another principle that has been settled is that an application for passing a final decree in the suits mentioned above is not an application in execution of the decree; but it is only an application in a pending suit. Thus, it is clear that the passing of a preliminary decree, does not terminate the suit and notwithstanding the preliminary decree, the suit is pending and the suit is terminated or comes to an end only by the passing of the final decree. A perusal of the various rules contained in Order 34 makes it clear that whatever the nature of the suit on a mortgage, in every suit that Order contemplates the passing of a preliminary decree in the first instance and thereafter the passing of a final decree. Therefore, it is clear that Order 34 itself expressly contemplates the passing of a final decree as the only method of terminating a suit in which a preliminary decree has already been passed. As far as the suit for partition is concerned, it has been held by several decisions that there is no period of limitation for passing a final decree. Similarly, an application for passing of a final decree in a suit for dissolution of partnership and accounts is also not governed by any period of limitation. However, as far as a suit on a mortgage is concerned, it has been held by Courts in this country that Article 181



of the First Schedule to the Limitation Act, 1908, corresponding to Article 137 of the Schedule to the Limitation Act, 1963, applies to an application for the passing of a final decree. In this case, the application was for passing a final decree directing the sale of the property, on default committed by the mortgagor in paying the amount mentioned in the preliminary decree. Article 137 of the Schedule to the Limitation Act, 1963, reads as follows:-

“137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.”
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Thus, it is clear that this is a residuary Article not specifically dealing with an application for the passing of a final decree in a mortgage suit and it is by interpretation of Courts that this Article has been held to apply to an application for the passing of a final decree. The period of limitation commences, under the terms of the entry in the third column, when the right to apply accrues, namely, in the case of an application for the passing of a final decree directing the sale of hypotheca, from the date fixed for payment of the mortgage amount in the preliminary decree, if within the time so fixed, the defendant does not pay the amount. Within the period of 3 years from that date, if the application, for passing a final decree is not filed, it has been held that such an application will be barred by limitation. It is too late in the day for questioning the correctness of the view that Article 181 of the old Limitation Act or Article 137 of the new Limitation Act will apply to such an application though it does not appear that a particular feature peculiar to suits of this nature has been considered in the past. As I pointed out already, whether it is a suit for partition or a suit for dissolution of partnership and accounts or a suit on a mortgage, the suit does not terminate on the passing of the preliminary decree, but terminates only on the passing of the final decree. In a suit on a mortgage, after the passing of the preliminary decree, if the decree-holder-plaintiff does not apply for the passing of final decree within the period prescribed by Article 181 of the



old Limitation Act or Article 137 of the new Limitation Act and on that ground the said application is dismissed as barred by limitation, what happens to the pending suit itself does not appear to have been considered so far. I gave an opportunity to counsel on both sides to draw my attention to any decision which has considered this aspect to the matter; but the learned counsel on both sides represented to me that they were not able to come across any decision which has considered this question. If the analogy of the partition suit is taken, once a preliminary decree declaring the shares of the parties has been passed, that suit is said to be pending till a final decree is passed. And there being no period of limitation prescribed for filing an application for final decree in such a suit, the suit will be pending till a final decree is actually passed and there is no compulsion on any of the parties to the preliminary decree to apply for a final decree within a particular time. This situation has been actually taken into account by this Court in framing the Civil Rules of Practice and Circulars Orders. In Rule 26, it is stated:-

“26. Proceedings not to be adjourned sine die or struck off the file.- No suit, appeal, matter, or proceeding, shall, under any circumstances whatever, be adjourned sine die or struck off the file; and if, by inadvertence, a day certain for the further hearing is not fixed by the Court, or a case is ordered to be struck off the file, the case shall be posted and come on for hearing one month from the day on which it was before the Court, or, if the Court is then closed, on the next day thereafter on which the Court is sitting:

Provided that in a suit for partition in which a preliminary decree has been passed the Court may adjourn the proceedings sine die, with liberty to any of the parties to whom shares have been allotted to apply for the passing of a final decree.”

Therefore, with regard to a suit for partition, once a preliminary decree has been passed, it has to be adjourned sine die with liberty to any of the parties to whom shares have been allotted to apply for the passing of a final decree. If the parties to whom shares have been allotted under the preliminary decree do not apply for the



passing of a final decree within a reasonable time, the Code does not confer a power on the Court to dismiss that suit on the ground that nobody has applied for the passing of the final decree, either suo motu or on the application of any one of the parties to the suit. So also even through Order 34 of the First Schedule to the Code of Civil Procedure elaborately deals with the manner of disposal of a suit on a mortgage, it does not contain any provision for dismissing a suit on a mortgage in which a preliminary decree has been passed already, on the ground that the decree-holder had not applied for the passing of a final decree within the time prescribed by law, either suo motu or on the application of the judgment-debtor. As a matter of fact, once the application made by a decree-holder for passing a final decree is dismissed on the ground that it is barred by limitation, we are left with a peculiar and nebulous position of the suit being still pending and the preliminary decree already passed not having been cancelled; but at the same time, the decree-holder in the suit not being able to realise the fruits of the decree which he obtained under the preliminary decree. I may also mention in this context that even though Order 34, rule 2 (1) read with rule 4 (1), Civil Procedure Code contemplates a Court fixing a date within 6 months before which the amount determined by the Court or declared by the Court should be paid by the mortgagor, at every stage, there is provision in that Order itself for extending the time so fixed. As a matter of fact, even in a case where a sale has already been ordered and has been held, there is a provision for payment of the amount due by the mortgagor before the confirmation of the sale. All these may indicate that the judgment-debtor has an opportunity of paying the amount not merely within the time prescribed under Order 34, rule 2 (1) read with rule 4 (1), Civil Procedure Code or within the extended time, but also even before the confirmation of the sale itself.”

“5. It is these features that are present in Order 34, which had been considered by Somayya, J., in *Angammal v. Muhammad Sulaiman Lebbai* [(1945) 2 M.L.J. 239 : 58 L.W. 492 : A.I.R. 1946 Mad. 38]. In that case, a preliminary decree for redemption of a usufructuary mortgage was passed on 15th October, 1935, and the time fixed for payment was 15th January, 1936. The



plaintiff who was the mortgagor did not deposit the amount by the date fixed, nor did she ask for extension of time under Order 34, rule 7 (2) of the Civil Procedure Code. She deposited the amount towards the end of 1942 and then applied under Order 34, rule 8 of the Code asking the Court to pass a final decree with a direction to the defendant to deliver the mortgaged property to her. Somayya, J., held that she was entitled to the remedy asked for by her in the petition and the outer limit beyond which payment under rule 8, sub-rule(1) cannot be made, is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under rule 8 (3) of Order 34 of the Code. The learned Judge also stated that the mortgagor was not bound to take out an application within three years of the time for payment fixed by the preliminary decree and that she was entitled to deposit the amount so long as the final decree was not passed. In the course of his judgment, the learned Judge stated:-

“Even if we take it that in the case of a decree for redemption of a usufructuary mortgage, the defendant has no right of asking the suit to be dismissed for nonpayment by the mortgagor of the amount decreed the suit will have to be considered to be pending and the mortgagor will have the right of paying the amount at any time. As I pointed out above, in the case of a mortgage by conditional sale, if after a preliminary decree for redemption, the mortgagor does not pay and the mortgagee does not ask for final decree for foreclosure within the time available to him, the result may be that the suit should be considered to be pending as it has been properly terminated. In that case the mortgagor would have the right of payment at any time under Rule 8(1). Similarly in cases where the defendant-mortgagee can ask for a final decree for sale. I do not see therefore any substance in the argument based on the possibility of payment at any time. This may be no doubt very inconvenient. But the Legislature has not provided that the suit may be terminated if neither the mortgagor nor the mortgagee obtained a final decree. The Privy Council has ruled that in a case of a preliminary decree for partition the suit cannot afterwards be dismissed for non-prosecution and must be kept pending. The same result may follow in cases of redemption suits where



after a preliminary decree, no action is taken by the parties. It may well be that as the rights of the parties are declared by the preliminary decree, the suits cannot be dismissed for non-prosecution.

“Whatever that may be, so long as the suit is pending, the mortgagor has the right expressly given to him under **rule 7(2) and under rule 8(1) of order 34, civil procedure code**. The whole scheme of **order 34, civil procedure code**, is to give the mortgagor an opportunity of getting the time fixed in the preliminary decree for payment of the amount extended. In case of suits by the mortgagee for foreclosure or sale, provision is made for such extension at the instance of the mortgagor on his showing good cause. Rule 2(2) provides for such extension in a suit for foreclosure. Rule 4(2) provides for similar power in a suit for sale. Without the necessity of showing good cause, the mortgagor is also given by Rule 3 opportunity of paying the amount decreed at any time before a final decree debarring the defendant from all right to redeem the mortgaged property is passed. Similarly in suits for sale the code goes further and Rule 5 provides that such payment may be made at any time before confirmation of a sale held in pursuance of a final decree for sale.

“Likewise in suits for redemption filed by the mortgagor we have Rule 7(2) corresponding to Rule 2(2) and Rule 4(2) enabling the plaintiff-mortgagor of getting an extension of time on showing good cause at any time before a decree for foreclosure or sale is passed. Again Rule 8(1) provides just as Rules 3 and 5 that before a final decree debarring the mortgagor of all right to redeem the property is passed or before the confirmation of a sale held in pursuance of a final decree for sale passed under Rule 8(3)(b), the mortgagor may make the payment and that without the necessity of showing good cause. There can be no doubt that these double opportunities given by the Legislature were available to mortgagors suing for redemption of a usufructuary mortgage also prior to 1st April, 1930. Under the rules of Order 34, as they then stood, in a suit for redemption of a usufructuary mortgage, the defendant-mortgagee could, in case of non-payment by the plaintiff-mortgagor, ask for a final decree for sale. Why this was omitted it is difficult to see. Anyway while omitting the right of a



usufructuary mortgagee to ask for a final decree for sale, the Legislature left **rules 7(2) and 8(1)** as they stood. There is no intelligible or apparent reason why only in the case of redemption of a usufructuary mortgage, the mortgagor should not have the right of getting an extension even by showing good cause under Rule 7(2) or without showing any cause under Rule 8(1). Under the Code as it stood prior to 1st April, 1930, both **rules 7(2) and 8(1)** applied to cases of usufructuary mortgages because a final decree for sale was expressly granted to a usufructuary mortgagee defendant in a suit for redemption of such a mortgage.

I have extracted in extenso from the judgment of Somayya, J., only for the purpose of showing the scope of the various rules contained in Order 34 as well as for pointing out that once a preliminary decree is passed, the application for passing a final decree is an application only in a pending suit and the Code itself has not provided for the dismissal of that suit after the passing of the preliminary decree on the ground that the decree-holder had not applied for a final decree. The general question, when a preliminary decree has been passed, the suit is still pending and there is no provision in the Code of Civil Procedure for dismissing the suit after the preliminary decree on the ground that the decree - holder has not applied for the passing of the final decree, whether there is any justification at all for applying any Article prescribing a particular period of limitation in the Limitation Act, to an application for passing a final decree, since the failure to apply for the passing of the final decree within the time prescribed by the Article does not terminate the suit, but only produces the anomalous situation of there being a fruitless preliminary decree and the suit itself pending permanently may have to be considered at the appropriate level. It is against the above background, I propose to consider the question that arises in the present case.”

“6. It is admitted that there is no direct authority of this Court on this point. The only direct authority which is available in this case is that of the Allahabad High Court in [Qazi Ghulam Amir v. Mt. Masuda Khatun and Ors.](#) A.I.R. 1943 All. 321. In that case, a preliminary decree fixed neither the amount due nor the date within which it



should be paid. Under those circumstances, the question that arose for consideration was whether the application for passing a final decree can be said to have been barred by limitation under **article 181 of the limitation act, 1908**. The Allahabad High Court pointed out that in the absence of a date fixed for payment of the amount, it could not be said that there had been a default in the payment which was a condition precedent for the accrual of a right to apply for final decree, vide **rules 4 and 5 of order 34** and paragraph 3 of Form No. 5-A, Appendix D to First Schedule of the Code. The Court proceeded to state:-

“It seems to us perfectly clear that a decree-holder can apply for a final decree only when there has been a default on the part of the judgment-debtor in the payment of the amount specified in the preliminary decree by the date specified therein. It follows that where no amount is specified and no date is fixed it is not possible for the decree-holder to say that there has been a default by the judgment-debtor in payment as directed by the decree. As we have pointed out above, the blank spaces in the printed form in the decree in question were not filled up. The result was that no amount was mentioned and no date was fixed. In these circumstances, we have no hesitation in accepting the contention of the respondent's Learned Counsel that time never began to run against Mt. Masuda under Article 181, Limitation Act, for the making of an application for the preparation of a final decree.”

“9. I may also point out certain general considerations which also favour the view I have taken in favour of the appellant. I have said enough already to show that under the rules of Order 34, the Court is bound to fix a date within the outer limit of 6 months for the mortgagor to pay the amount in question. If the Court fails to discharge its duty, the general principle is that no litigant should suffer as a consequence of the failure of the Court or the mistake committed by the Court. Secondly, it would have certainly been open to the appellant herein to apply for amendment of the decree to the trial Court, so that the decree could be made in conformity with the requirements of Order 34 as well as Form 5-A already referred to. It is conceded that for applying for



amendment of the decree, there is no period of limitation whatever. Therefore if the appellant had first applied for an amendment of the decree and had got the decree amended and thereafter, on default committed by the respondents herein to pay the amount within the date fixed by the amended decree, made the application for passing the final decree, it could not be said that the present application filed by the appellant herein was barred by limitation. These considerations also will support the view taken by the Allahabad High Court already referred to and therefore, looked at from any point of view, the application filed by the appellant herein for passing a final decree for the sale of the property cannot be said to be barred by limitation.”

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

21. On behalf of the respondents as well, the arguments made before the learned single Judge, have been reiterated before us. It has been submitted in the present case that the Execution Case No. 05/1996 was filed against the preliminary mortgage decree without realizing that a preliminary decree is not executable and enforceable. Learned counsel submits that the Bank could not have taken recourse to the provisions of Section 31A of the DRT Act, a preliminary mortgage decree was not enforceable and shall not come within the ambit of debt and, therefore, cannot be enforced under Section 31A for the purpose of recovery of the amount. Reliance in this regard has been placed upon the judgment of the Hon’ble Supreme Court in the case of **Venkat Reddy Vs. Pethi Reddy, AIR 1963 SC 992**, paragraph 6 of the said judgment reads as under:-

“6.....It is not clear from the judgment what the contingencies referred to by the High Court are in which



a preliminary decree can be modified or amended unless what the learned judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Ss. 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be "modified and amended". Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."



22. Learned counsel also relied upon another judgment of the Hon'ble Apex Court in the case of **Shankar Balwant Lokhande Vs. Chandrakant Shankar Lokhande, AIR 1995 SC 1211**, paragraph 12 of which is as under:-

“12. As to Maksudans case (AIR 1983 Patna 105) (supra), we state that it had not been correctly decided. Limitation does not begin to run from the date when direction is given to pass final decree. Mere giving of direction to supply stamped paper for passing final decree does not amount to passing a final decree. Until the final decree determining the rights of the parties by metes and bounds is drawn up and engrossed on stamped paper (s) supplied by the parties, there is no executable decree. In this behalf, it is necessary to note that S. 2(a) of the Bombay Stamp Act, 1958, as amended by the local Act, provides that a decree of civil Court is required to be stamped as per Article 46 in Schedule-I. Section 34 thereof lays down that "no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped". Therefore, executing Court cannot receive the preliminary decree unless final decree is passed as envisaged under Order 20 Rule 18(2). After final decree is passed and a direction is issued to pay stamped papers for engrossing final decree thereon and the same is duly engrossed on stamped paper(s), it becomes executable or becomes an instrument duly stamped. Thus, condition precedent is to draw up a final decree and then to engross it on stamped paper(s) of required value. These two acts together constitute final decree, crystallizing the rights of the parties in terms of the preliminary decree. Till then, there is no executable decree as envisaged on Order 20 Rule 18(2), attracting residuary Article 182 of the old Limitation Act. Contrary views of the High Courts are not good law. A division Bench of the Andhra Pradesh High Court in Smt. Kotipalli Mahalakshamma v. K. Ganeswara Rao, AIR 1960 Andh Pra 54, correctly decided the question of law which held that the limitation



begins to run only after a final decree is engrossed on stamped papers.”

23. Further reliance has been made on the decision of the Hon’ble Apex Court in the case of **Maharashtra State Financial Corporation Vs. Ashok Kumar Agarwal, (2006) 9 SCC 617**, paragraphs 5 and 6 of the said judgment read as under:-

“5. Sections 31 of the Act contains special provisions for enforcement of claims by State Financial Corporations. It is by way of a legal fiction that the procedure akin to execution of decrees under the Code of Civil Procedure has been permitted to be invoked. But one cannot lose sight of the fact that there is no decree or order of a civil court when we are dealing with applications under Section 31 of the Act. The legal fiction at best refers to a procedure to be followed. It does not mean that a decree or order of a civil court is being executed, which is a sine qua non for invoking Article 136. The proposition set out in the case of Gujarat State Financial Corporation (supra) found support in M/s. Everest Industrial Corporation and Others v. Gujarat State Financial Corporation 1987(3) SCC 597. Again in Maganlal etc. vs. Jaiswal Industries Neemach & Ors. 1989 (3) SCR 696 this court noticed that an order under Section 32 is not a decree stricto sensu as defined in Section 2(2) of the Code of Civil Procedure, the financial Corporation could not be said to be a decree holder. This makes it clear that while dealing with an application under Sections 31 and 32 of the Act there is no decree or order of a civil court being executed. It was only on the basis of a legal fiction that the proceedings under Section 31 are treated as akin to execution proceedings. In fact this Court has observed that there is no decree to be executed nor there is any decree holder or judgment debtor and therefore in a strict sense it cannot be said to be a case of execution of a decree. Article 136 of the Limitation Act has no application in the facts of the present case. Article 136 specifically uses the words “decree or order of any civil court”. The application under Sections 31 and 32 of the State Financial Corporation Act is not by way of execution of a decree or order of any civil court.



6. Article 137 of the Limitation Act applies in the facts of the present case. When Article 137 is applied, the application moved by the appellant-Corporation on 2nd January, 1992 for proceeding against the sureties i.e. the respondents herein, was clearly barred by time and the courts below were correct in holding so. To recall the facts of the present case, the notice demanding repayment of the amount of loan was issued against the borrower, that is, M/s. Crystal Marketing Private Limited on 8th March, 1983 and the application under Sections 31 and 32 of the State Financial Corporation was filed against the said borrower on 25th October, 1983. The liability of sureties had crystallised then.”

24. Learned counsel representing the respondents, in support of his contentions, also relied upon the **W.B. Essential Commodities Supply Corporation Ltd. Vs. Swadesh Agro Farming & Storage Private Ltd. [AIR 1999 SC 3421 = (1999) 8 SCC 315], Hameed Joharan (Dead) & ors. Vs. Abdul Salam (Dead) by LRs. : AIR 2001 SC 3404 = (2001) 7 SCC 573 and Neelu Gupta Vs. State Bank of India & Ors., AIR 2008 Patna 73**. It is once again reiterated before us that there being no period of limitation prescribed for filing an application under Section 31A of the DRT Act, by virtue of Section 24 of the Limitation Act, 1963, an application must be filed within three years of passing of the decree or order under the residuary Article 137. It is, therefore, submitted that the learned single Judge has rightly come to a conclusion that the decree dated 21.04.1995 is a preliminary mortgage decree which was unexecutable and, hence, the execution case itself was non est. He



further submits that the plaintiff having failed to file an application for preparation of final decree within a period of three years in terms of Order XXXIV Rule 5 of the Code of Civil Procedure, cannot obtain a final decree at this stage as the remedy of the Bank has already become barred by limitation. Learned counsel, therefore, defended the judgment of the learned single Judge and submits that the Letters Patent appeal has no merit in the facts and circumstances of the case.

CONSIDERATION

25. We have gone through the materials available on the record and considered the rival submissions advanced at the Bar. At this stage, we are not called upon to examine those issues which were raised on behalf of the judgment debtors – respondents before the learned single Judge but were rejected such as the plea of *res judicata* and nullity of decree due to death of judgment debtor no. 3. Both the sides have centered and concentrated their arguments on the issue of real construction of the decree dated 21.04.1995, therefore, we would first take note of the terminology of the decree in question. It appears from Annexure-1 to the Writ Petition that it is clearly written at the top ‘DECREE IN ORIGINAL SUIT’ under Order XX Rules 6 and 7 of the Code of Civil Procedure in form Schedule XLII – High Court (J) 17[Old C.P.20] after reiterating the relevant statements made in the plaint as to the cause of action, value of the suit, jurisdiction and then



the reliefs prayed in the suit, the operative part of the judgment reads as under:-

“It is ordered and decreed that the Suit be decreed ex-parte with cost. The defendant is directed to pay the entire decretal amount within 30 days from the date of passing of Order failing which the Plaintiff may realize the decretal amount by filing of the execution case against the defendant at his cost. During pendente lite and future interest at agreed rate is also allowed. Reader fee and Pleader Clerk Rs. 100/- at the rate of usual ex-parte is also allowed.”

The decree as contained in Annexure-1 to the Writ Application has been prepared as per Form No. I & II provided under Appendix ‘D’ of the Code of Civil Procedure.

26. The learned single Judge has held that the title mortgage suit was decreed, therefore, the prayers made by the plaintiff have been allowed. With this interpretation of the judgment passed by the learned Subordinate Judge in the mortgage suit, the learned single Judge proceeded to hold and declare that the ‘decree’ in the present case is a preliminary mortgage decree. Since it was a suit for sale of mortgaged property brought by mortgagee Bank, we will have to see the relevant provisions of Order XXXIV Rules 1, 4, 5 and 6 of the Code of Civil Procedure together with the relevant form prescribed under the Code of Civil Procedure for preparation of a preliminary mortgage decree in terms of Order XXXIV Rule 4 of the Code of Civil Procedure. Order XXXIV Rules 1, 4, 5 and 6 of the Code of



Civil Procedure are being taken note of in its entirety for a ready reference:-

“ORDER XXXIV

SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY

“1. Parties to suits for foreclosure, sale and redemption.- Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation: A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.”

“4. Preliminary decree in suit for sale.- (1) In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c)(i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction there from of the expenses of the sale) be paid into court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Power to decree sale in foreclosure suit—In a suit for foreclosure in the case of an anomalous mortgage, if the



plaintiff succeeds, the court may at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a Suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.”

“5. Final decree in suit for sale.-(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into court of all amounts due from him under sub-rule (1) of rule 4, the court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary—

(b) ordering him to transfer the mortgaged property as directed in the said decree, and also if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the court shall not pass an Order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into court by the purchaser.

Where such deposit has been made, the purchaser shall



be entitled to an Order for repayment of the amount of the purchase money paid into court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt within the manner provided in sub-rule (1) of rule 4.”

“6. Recovery of balance due on mortgage in Suit for sale.- Where the net proceeds of any sale held under rule 5 are found insufficient to pay the amount due to the plaintiff, the court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.”

27. Form No. 5A under Appendix ‘D’ of the Code of Civil Procedure specifically provides the language in which a preliminary decree for sale under Order 34 Rule 4 - (When the Court Declares the amount due) is to be drawn. It would be just and proper to take note of the complete Form 5A under Appendix ‘D’ of the Code of Civil Procedure as under:-

“No. 5A

PRELIMINARY DECREE FOR SALE

(Order XXXIV, rule 4.-When the Court declares the amount due.)

(Title)

This suit coming on this _____ day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with



interest thereon, and the sum of Rs. ____ for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:-

(i) that the defendant do pay into Court on or before the ____ day of _____ or any later date up to which time for payment may be extended by the Court, the said sum of Rs. _____;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such cost, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction here from of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and, such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the



balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.”

28. Apparently the language of a simple money decree as provided under Order XX Rules 6 & 7 of the Code of Civil Procedure and that of a preliminary mortgage decree in terms of Order XXXIV Rule 4 of the Code of Civil Procedure are totally different and distinct. In the present case, apparently though it was a mortgage suit but the court while considering the suit decreed the same and, therefore, in terms of Order XXXIV Rule 4 of the Code of Civil Procedure a preliminary decree should have been drawn in Form ‘5A’ under Appendix ‘D’ C.P.C. but that was not done. The plaintiff Bank having found that the decree has been granted for the entire principle as well as the interest amount claimed by the Bank and that a direction was issued to the defendants to pay the decretal within a period of 30 days and in case of non-payment, the plaintiff Bank was given liberty to recover the same by filing an execution proceeding got contended with the said simple decree for money. The language of the decree, as



contained in Annexure-1, leaves no doubt in our mind that it was not at all a preliminary mortgage decree as provided in Form 5A under Appendix 'D'. The decree in the present case as drawn clearly stated about its executability if the defendants failed to pay the amount in question within the prescribed period, therefore, it cannot be said that the decree issued in favour of the plaintiff Bank, as contained in Annexure-1, was not executable. We must remind ourselves that we are not sitting in appeal against decree. Learned single Judge has construed the decree in question by reading certain things in terms of Form 5A which are not there in the decree contained in Annexure-1 to the Writ Application. A question will arise whether a document in the nature of a decree of a court of law may be construed by a Writ Court under Article 226 of the Constitution of India by adding or subtracting anything out of the same only with a view to make it in consonance with a particular provision of law and then on the strength of such adding to the contents of a decree, can a decree holder be allowed to suffer by depriving him from the fruit of decree. In other words, in a title mortgage suit, if the suit was decreed but the decree was not drawn in terms of the judgment due to fault on the part of the court and thereby not expressing the judgment in its correct form of decree as prescribed under Appendix 'D' of the Code of Civil Procedure, can a party in whose favour the judgment and decree in the name of



simple money decree has been rendered and still valid may be deprived of the fruits of the said judgment for no fault on his part.

29. In the present case, what has happened is crystal clear; the mortgage suit was decreed but the decree was not drawn correctly, at this stage, the learned single Judge despite having recorded a finding that the decree is not properly worded came to a conclusion that the plaintiff Bank having not filed an application for preparation of a final decree in terms of Order 34 Rule 5 C.P.C. within a period of three years from the date of expiry of 30 days which was prescribed to the defendants for payment, an application for final decree became barred by law of limitation in terms of Article 137 of the Limitation Act, 1963. To me, it appears that there is no question of applying the law of limitation for preparation of a final decree because the plaintiff Bank was not given a preliminary mortgage decree in terms of Order 34 Rule 4 read with Form 5A of Appendix 'D' of the Code of Civil Procedure and if the Bank was not given this opportunity to file an application for preparation of a final decree, there was no fault on the part of the Bank in not applying for preparation of a final decree. No doubt, law of limitation is based on a sound public policy but at the same time the court would not be willing to apply the rigours of the Limitation Act to defeat a just and valid claim of the Bank which has now crystalised on adjudication by a competent court of law.



Applying principle of limitation in the facts of this case would amount to deprive the plaintiff Bank of the fruits of the judgment for no fault on its part. It would amount to giving undue benefit to the borrowers and the guarantors by construing a decree in original suit, as contained in Annexure-1, as a preliminary mortgage decree which is required to be issued in a title mortgage suit under Order XXXIV Rule 4 of the Code of Civil Procedure. In the present case, it cannot be said that an application for preparation of a final decree came to be barred by limitation after three years from the date of expiry of 30 days from the date of decree i.e. 21.04.1995.

30. Since we come to a conclusion that the learned single Judge has construed Annexure-1, which is in conformity with a decree in original suit, as a preliminary mortgage decree, by adding and reading something which is not there in Annexure-1 and thereby misconstruing the decree, in favour of the plaintiff Bank to its detriment, we would hold and declare that the decree as contained in Annexure-1 is a simple money decree in terms of Order XX Rules 6 & 7 C.P.C. and it may at best be construed as if the Bank has given up its claim to satisfy the decree first from the sale proceeds of the mortgaged property.

31. In our view, the Execution Case No. 5/1996 was maintainable and the view taken by the learned single Judge that the



said execution case was non est, with all respect to the learned single Judge, cannot be upheld. We would take note of Section 99 of the Code of Civil Procedure which reads as under:-

“99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties of causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

Provided that nothing in this section shall apply to non-joinder of a necessary party.”

32. In the case of **Sivan Pillai** (Supra), we have noticed that the learned court rejected the plea of limitation taking note of the judgment of the Hon’ble Allahabad High Court in **Qazi Ghulam Amir Vs. Mt. Masuda Khatum & Ors. [AIR 1943 All. 321]**. The learned Court noted, “In that case, a preliminary decree fixed neither the amount due nor the date within which it should be paid. Under those circumstances, the question that arose for consideration was whether the application for passing a final decree can be said to have been barred by limitation under Article 181 of the Limitation Act, 1908. The Allahabad High Court pointed out that in the absence of a date fixed for payment of the amount, it could not be said that there had been a default in the payment which was a condition precedent for the accrual of a right to apply for final decree, vide rules 4 and 5 of



Order 34 and paragraph 3 of Form No. 5-A, Appendix D to First Schedule of the Code.” The Hon’ble Madras High Court took a view in paragraph 9, as quoted above, where it is held, “If the Court fails to discharge its duty, the general principle is that no litigant should suffer as a consequence of the failure of the Court or the mistake committed by the Court.” In the said case, it was ultimately observed that “it would have certainly been open to the appellant herein to apply for amendment of the decree to the trial Court, so that the decree could be made in conformity with the requirements of Order 34 as well as Form 5-A already referred to. It is conceded that for applying for amendment of the decree, there is no period of limitation whatsoever.”

33. The Hon’ble Bombay High Court in the case of **Chhaganlal Sakarlal Vani** (Supra) while dealing with a case of omission to have a final decree drawn up to a misapprehension on the part of the Court, as well as the parties concerned, as to the necessity of having a final decree formally drawn up found that the parties had gone on all these years on the footing that the preliminary decree which was made absolute, was the formal expression of the final decree under Rule 4 of Order 34, as from the date when it was made absolute. The Court was of the opinion that, though the final decree had not been formally drawn up on the terms of the preliminary



decree, which has been made absolute, that decree coupled with the order may be taken under the circumstances to be the final decree. In its ultimate analysis, it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of execution. Under the circumstances of the said case, the Hon'ble Court was not prepared to hold that there is no executable decree. There was one more reason for the Court not to hold so because the result of allowing the contention of this nature at such a long distance of time would have been that a decree would have been required to be drawn formally and a fresh beginning would have to be made in the way of execution after the lapse of so many years. That result was required to be avoided so far as it is legally possible to do so. The Court relied upon the observation in *Jawahir Mal v. Kisturchand: (1891)13 All.343*, which held that an omission of this kind may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable. Section 99 of the Code of Civil Procedure was taken note of and held that the same would cover such an error or irregularity as it does not affect the merits of the case or the jurisdiction of the Court.

34. Submission of the learned counsel representing the respondents saying that it is a preliminary mortgage decree, hence, is neither executable nor enforceable in law is not fit to be accepted for



the reasons discussed here-in-above. At first instance we do not agree that Annexure-‘1’ to the Writ Application is a preliminary mortgage decree. The learned single Judge has rightly come to a conclusion that this principle cannot be applied with its full vigour in the present case though it may not be executed under the provisions of the Code of Civil Procedure but a preliminary mortgage decree if subsisting on the date of coming into force of Section 31A of the DRT Act would be covered under the definition of ‘debt’ under Section 2(g) and within the meaning of ‘decree and order’ under Section 31A of the DRT Act, 1993. To that extent we approve the view taken by the learned single judge.

35. We have come to the conclusion that the decree, as contained in Annexure-1 which was issued to the plaintiff Bank, was not in prescribed Form 5A as per the First Schedule of Appendix ‘D’ to the Code of Civil Procedure and, therefore, the plaintiff Bank was not at fault in not applying for a final decree for sale of the mortgaged property. The plaintiff Bank was issued a simple money decree in terms of Order XX Rules 6 & 7 in the prescribed form and a bare reading of the said decree would show that the Court itself declared the decree executable. In our view, this is one of those cases where the result of allowing the contention of the respondents at this distance of time will be that a preliminary mortgage decree will have to be drawn



formally now and a fresh beginning will have to be made in the way of execution after the lapse of so many years. That result may be avoided legally because we find that the terms of the decree, as contained in Annexure-1 which is sought to be executed, are very much ascertainable and, in fact, have been ascertained and there is no difficulty in executing the said decree because Section 99 of the Code of Civil Procedure would cover such an error or irregularity of this nature and also because it does not affect the merits of the case or the jurisdiction of the Court.

36. In ultimate analysis, for the reasons mentioned here-in-above, we would also find that the period of limitation prescribed for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court as prescribed under Article 136 of the Schedule of the Limitation Act, 1963 would apply in the facts of the present case. This provides 12 years period of limitation and, therefore, a decree dated 21.04.1995 was executable for a period of 12 years from the date of expiry of 30 days with effect from 21.04.1995, therefore, an application under Section 31A of the DRT Act, 1993 filed on or before 21.05.2007 would not be barred by limitation.

37. In the present case, the O.A. (Ex.) No. 15/2006 was filed by invoking Section 31A of the DRT Act on 06.03.2006, therefore, an application under Section 31A of the DRT Act was filed



well within the period of limitation. Learned single Judge has already held that the plea of res judicata would not come in the way of the appellant only because the earlier Execution Case No. 5/1996 stood dismissed in default. As a corollary to this finding on our part that application under Section 31A of the DRT Act was maintainable on 06.03.2006, we would hold and declare that the decree dated 21.04.1995 is an executable decree and the plaintiff Bank had a decree subsisting and enforceable on 06.03.2006. Therefore, the finding of the learned single Judge that because Section 31A was introduced or amended with effect from 01.07.2000 and the provisions of the Limitation Act apply in respect of the application under Section 31A, therefore, a legally enforceable decree could have been enforced by filing an application under Section 31A only within a period of three years, that is, by presenting the same on or before 17.01.2003 loses its significance. The decree as contained in Annexure-‘1’ is in the form of a decree in original suit, hence, when an application under Section 31A of the DRT Act was presented, a formal certificate of recovery has been issued only in terms of the said decree and, therefore, the Debts Recovery Tribunal, Patna has rightly exercised its jurisdiction to entertain the application under Section 31A moved on behalf of the Bank.

38. The certificate has to be executed just like execution of



a money decree in accordance with the provisions and procedures of law. We are also conscious of the fact that the plaintiff Bank is the custodian of public money, loan in the present case was disbursed in the year 1983, the title mortgage suit was filed in the year 1987 and the decree was passed on 21.04.1995. The judgment and decree passed in favour of the Bank has not been interfered with in appeal and, therefore, the plaintiff Bank cannot be deprived of the fruits of the judgment and decree which are clearly executable and where there is no denial of the liability affecting the merits of the case or any question as to the jurisdiction of the court.

39. In above view of the matter, the impugned judgment dated 11.12.2013 passed in CWJC No. 16665/2009 cannot be sustained and, hence, is hereby set aside. The Writ Application in fact is required to be dismissed, therefore, the Letters Patent Appeal is allowed.

40. There will, however, be no order as to costs.

(Rajeev Ranjan Prasad, J)

I Agree.
Ajay Kumar Tripathi, J.-

(Ajay Kumar Tripathi, J)

Dilip, AR

AFR/NAFR	A F R
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