Judgment Reserved on: 05.04.2017

Judgment Pronounced on : 10.04.1017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Appeal Suit No.809 of 2010
and
M.P.No.1 of 2010

L.K.Raju ..Appellant/Defendant

Versus

S.N.Samiappan ..Respondent/Plaintiff

Appeal Suit filed under Section 96 of Civil Procedure Code, against the Fair and Final order dated 30.03.2010 made in I.A.No.268 of 2009 in O.S.No.48 of 2003 by the Additional District Judge (Fast Track Court-I), Coimbatore.

For Appellant .. Mr.Srinath Sridevan
For Respondent .. Mr.P.M.Duraiswamy

JUDGMENT

Aggrieved over the Fair and Final Order passed by the learned Additional District Judge, Coimbatore, in I.A.No.268 of 2009 in O.S.No.480 of 2003, granting the final decree, the present appeal came to be filed by the Respondent/Defendant. The parties are arrayed as per their own ranking before the trial Court.

2. Brief facts of the plaintiff's case is as follows:- The plaintiff has filed a suit for recovery of a sum of Rs.3,32,500/- together with future interest at 12% per annum which was due from the defendant on the mortgage debt. Preliminary decree was passed in the above suit on 23.10.2003, directing the Respondent/Defendant to pay a sum of Rs.4,81,927.30 together with subsequent interest within a period of two months time. Pursuant to the preliminary decree passed, the Plaintiff has taken out an Application in I.A.No.268 of 2009 on 1.6.2009 for a final decree, which was contested by the Respondent/ Defendant on the ground that he has already filed appeal against the preliminary decree and the same is pending

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before the High Court. After taking into consideration of the pleadings of both sides, the learned Additional District Judge, has passed a final decree on 30.3.2010 for sale of the mortgaged property. Against which, the present appeal came to be filed.

3. The only contention put forth by the learned counsel for the appellant before this Court is that the Application filed by the plaintiff for grant of final decree itself is barred by limitation. Though the preliminary decree was passed on 23.10.2003, the Application was filed only on 1.6.2009, which is barred by limitation. As specified under Article 137 of the Limitation Act, three years period is given for filing an application for final decree. Whereas final decree application has been filed only on 1.6.2009 beyond three years, which is barred by Limitation. Hence, it is the contention of the learned counsel for the appellant that the application for a final decree itself is barred by limitation, passing of final decree cannot be sustained. According to the learned counsel the right to apply for final decree proceedings arose immediately after the period of two months which was granted by the trial Court for the defendant to pay the amount, which has expired on 23.12.2003 itself and plaintiff ought to have applied for a final decree within a period of three years i.e. on or before 23.12.2006. Whereas, this application has been filed only on 1.6.2009 which is clearly barred by limitation. In support of his arguments, the learned counsel for the appellant has also relied upon the judgments reported in Pattabirama Naidu v. Subramania Chetty - [1918-VII L.W. 438], S.Veluchamy Nadar v. Diravia Nadar [1991 (1) L.W. 502] and Monotosh Kumar Mitra v. Amarenderanath Shaw [2000 (2) SCC 672].

4. Though the learned counsel for the Respondent has fairly conceded that the Application for final decree has been filed beyond the period of limitation of three years, since the Court has taken the final decree application on record, the same would clearly show that the delay has been condoned by the trial Court. The delay in filing the Application is only due to settlement talks between the plaintiff and the defendant, which is also fortified by the counter filed by the defendant in the final decree application. Hence, it is the contention of the learned counsel for the Respondent that the technicalities should yield for the cause of substantial justice. In the similar situation this Court has given an opportunity to the respondent to file an application under Section 5 of the Limitation Act to explain the cause of delay in filing the application. Therefore, remanded the matter to the trial Court. Hence, the learned counsel for the Respondent prays for remand of the suit to the trial Court. In support of his arguments, the learned counsel for the Respondent relied upon the judgment reported in Theatre Mathi v. Indian Bank - 2004 (52) SCL 362

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Mad., and also the judgment reported in N.Balakrishnan v. M.Krishnamurthy- CDJ 1998 SC 692.

5. In the light of the above submissions, now the point that arises for consideration is:

> Whether the final decree passed by the learned trial Court is not sustainable in view of the fact that the Application for final decree itself is barred by law of limitation?

6. It is the admitted fact that a preliminary decree was passed by the Additional District Judge, Fast Track Court-1, Coimbatore, on 23.10.2003 in O.S.No.48 of 2003, to the effect that the defendant shall pay a sum of Rs.4,81,927.30 together with future interest at the rate of 6% per annum on Rs.2,50,000/- till the date of realisation and if any default, the plaintiff may apply to the Court for a final decree for the sale. The above preliminary decree was passed on 23.10.2003. Thereafter, an Application has been taken out by the plaintiff in pursuant to the preliminary decree in I.A.No.268 of 2009 for final decree, only in the month of June 2009, which is beyond the period of limitation of three years as specified under Article 137 of the Limitation Act.

7. It is well settled that Application for final decree is governed by the residuary Article 137 of the Limitation Act, in which an Application for final decree is to be filed within three years from the date when the right to apply accrues. If the right to apply for final decree had accrued to the plaintiff on default being committed by the defendant for payment of the decreetal amount. An Application for final decree ought to have taken out within a period of three years as specified under Article 137 of the Limitation Act. In this case, Application for final decree itself has been filed on 01.06.2009, i.e. Beyond the period of limitation of three years. Right to apply for final decree accrued to the plaintiff in this case is on the expiry of the two months time granted to the defendant for payment of decretal amount, by the trial Court in the preliminary decree dated 23.10.2003. Therefore, right to file Application for final decree accrued in the month of December 2003 itself and the Application for final decree ought to have been taken out within three years i.e., on or before 23.12.2006. Whereas in this case, the Application for final decree as could be seen from the lower Court records, was filed on 01.06.2009, much beyond the period of limitation, without filing an application to condone the delay.

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8. Further, in the Application for final decree, there was no explanation whatsoever pleaded, for the delay in filing such application and no evidence whatsoever has been led to satisfy the Court that he had sufficient cause for not preferring the Application within the period of limitation. The learned trial Court has simply taken up the Application on file and passed final decree in pursuant to the preliminary decree. In this regard, it is relevant to extract Section 3 of the Limitation Act, 1963 which is as follows:-

> "3. Bar of Limitation. (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. (2) For the purposes of this Act,- (a) a suit is instituted,- (i) in an ordinary case, when the plaint is presented to the proper officer; (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator; (b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted- (i) in the case of a set off, on the same date as the suit in which the set off is pleaded; (ii) in the case of a counter claim, on the date on which the counter claim is made in court; (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

From reading of the above Section it is very clear that any application made after the prescribed period of limitation shall be dismissed although limitation has not been set up as a defence.

8. In the Judgment reported in Pattabirama Naidu v. Subramania Chetty - [1918-VII L.W. 438], the Division Bench of this Court has held as follows:-

> " The question is whether this application under O.34, R.5 (2) of the Code of Civil Procedure for a final decree in a mortgage suit, is subject to Art. 181 or Art. 182, Schedule I of the Limitation Act.
>
> We do not think it necessary to refer to any case before Hussain v. Karim. It no doubt goes some way, if it is applicable in support of appellant's contention, for Art. 182.

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But it is in our opinion inapplicable to the case before us, the preliminary decree now in question having been passed after whilst the decree then in question was passed before, the present Code of Civil Procedure came into operation. This distinction is drawn in the judgment in Nimmala Mahankali v. Kallakuri Seetharamiah with which we express our respectful concurrence. We are further fortified in that concurrence by the fact that the judgment is in accordance with the decisions of two other High Courts, those of Bombay and Allahabad and that it is not in conflict with those of the High Court of Cancutta. Datto Atmaram v. Shankar Dattatraya, Madho Ram v. Nihal Singh, Beni Singh v. Berhandeo Singh. We hold that Art. 181 is applicable and dismiss the appeal against appellate order with costs."

9. In the Judgment reported in S.Veluchamy Nadar v. Diravia Nadar (1991 (1) L.W. 502), in para 16, 22 and 27 it has been held as follows:-

"16. The matter came up for consideration again in Subbalakshmi Ammal v. Ramanujam Chetty And Four Others I.L.R. 42 Mad 52, Mummadi Venkatish v. Boganatham Venkata Subbiah MANU/TN/0123/1921 : AIR 1992 Mad 65 and Rajamayyer v. Venkatasubba Iyer AIR 1945 Mad 463. The first two cases were decided by a Division Bench. It was held that an application for a final decree in a mortgage suit more than three years after the date fixed for payment under the preliminary decree, is barred by limitation under Article 181 of the Limitation Act. The ruling in Pattabhirama Naidu's case 7 L.W. 438 was followed.

22. The corresponding Section for S. 28 of the Limitation Act of 1908 in the Limitation Act of 1963 is S. 27. Thus, there being only one exception to the rule that limitation bars the remedy and does not extinguish the right, it is not correct to say that an anomalous situation will arise by keeping the suit pending and yet depriving the decree-holder of the fruits of the decree. The principles underlying the provisions of the Limitation Act is that the litigants should be diligent in exercising their rights and seeking the enforcement thereof though Courts of law, it is well settled that equitable considerations are out of place in construing the provisions of a statute of limitation and strict grammatical

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meaning of the words is the only safe guide, as the rule of limitation is based on public policy, vide Bootamal v. Union of India MANU/SC/0301/1962 : AIR 1962 S.C. 1716.

27. Learned counsel for the petitioner contends that the application for passing a final decree having Men made pursuant to a specific direction contained in the preliminary decree, would not be governed by the provisions of the Limitation Act. Learned counsel invites my attention to Clause 3 of the Preliminary Decree. I have already adverted to this clause and pointed out that in the event of default in payment as prescribed by the decree, plaintiffs 2 and 3 and defendants 8 to 13 may apply to the Court for a final decree for the sale of the mortgaged property. The direction contained in the preliminary decree is only to make an application for sale of the mortgaged property as per the provisions of the Code. No Court can confer a right on any part which is not already recognised by any law. The Court cannot create new rights. The preliminary decree in this case or in any other suit on a mortgage, could only contain directions in accordance with law and direct the parties concerned to take steps pursuant to other existing provisions of law. In this case, clause 3 of the decree directs the decree-holder to apply to the Court for a final decree for the sale of the mortgaged property. That means, the decree-holder is directed to apply to the Court under the provisions of 6.34, R.5 of the Code of Civil Procedure for passing a final decree. Such an application would undoubtedly be governed by the provisions of the Limitation Act. Even if a Court directs a party to file an application without reference to any particular provision of law, or an application which is not governed by any specific provision of law, it will fall within the terms "any other application" found in the first column of Article 137 of the Limitation Act. The application mentioned in column 1 of Article 137 of the Limitation Act would include an application filed pursuant to specific direction given by a Court."

10. Though the learned counsel for the Respondent relied upon the judgment of this Court reported in Theatre Mathi v. Indian Bank and Suguna-2004(52) SCL 362 Mad., arising out of the order of the Debt Recovery Tribunal, Coimbatore, entertaining

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the application filed by the first respondent Indian Bank, this Court has remanded the matter back to the Tribunal by giving an opportunity to the Bank to file Application to show their sufficient cause in filing the application with delay. It is to be noted that this Court has taken note of the fact that the money due to the first respondent bank has been determined by the second Additional Sub-Court, Madurai in the preliminary decree of that suit, granting time till 30.6.1997 for payment, the application for final decree is to be filed on or before 30.6.2000 in the Court which has passed the preliminary decree. However, the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 came into force on 24.6.1993, there was a delay in filing an Application for grant of certificate for recovery of the amount which is more or less like application for final decree in the Civil Court, this Court has remanded the matter back to the Tribunal.

11. It is to be noted that the parties to the litigation should be diligent in exercising their rights and seeking the enforcement thereof through Courts of law. Having obtained preliminary decree in the year 2003, the Respondent ought have taken steps within the period of limitation, the same should be done within the framework of statute. Having lost the opportunity provided under the statute, his right himself is barred under law, merely on the sympathetic ground one cannot canvass the case.

12. Admittedly, the final decree application was filed only on 1.6.2009 with enormous delay. As already stated above, there was no explanation whatsoever for such delay even in the application filed for final decree. Now if such opportunity is given to the Respondent to explain the delay which had accrued in between 2003 and 2006, there is every likelihood of filling up the lacuna by introducing the new sets of facts. In the judgment reported in Smt. Umrao Bai and Ors. v. Sardarilal Khatri-AIR 1997 Madhya Pradesh, 62 it has been held as follows:-

> "Limitation -Extention of Time - Challenge thereto - Section 5 of Limitation Act 1963 - Appeal filed by Plaintiff/Appellants against judgment and decree passed by Additional Judge - Whether appeal before lower appellate Court was barred by limitation - Held, Provisions of Order XLI, Rule 3A of Code of Civil Procedure are mandatory and judgment and decree rendered without extending time for filing an appeal under Section 5 of Act 1963 are bad in law - Powers of remand cannot be exercised to fill up lacuna of one or other party - They can be exercised for curing a radical defect in trial or hearing in appeal resulting in miscarriage of justice - Plea

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of limitation cannot be said to be technical plea – Respondent who filed a defective appeal, and did not make up when defect was pointed out by opposite party, could not seek indulgence of this Court to fill up lacuna and put clock back – After some lapse of time it is difficult to verify truth of an allegation unless it was present from very beginning of an event – Appellants should not be punished with prolonged agony of litigation for major fault of Respondent – Judgment and decree of Court below were set aside, as passed without jurisdiction and that of trial Court were restored – Appeal allowed."

11. Therefore, this Court is of the view that the right of the Respondent to apply the final decree itself is barred by statute, the same cannot be reopened by introducing the new set of facts to get over such lapse on the part of the Respondent. When the statute prescribed certain things to be done in a particular manner and in a particular time, the same cannot be undone by this Court by remanding the matter to the lower Court to fill up the lacuna. Therefore, this Court considering the fact that the Application itself is filed beyond the period of limitation for passing final decree the learned trial Court without looking into the statutory bar under Section 3 of the Limitation Act, 1963, has simply passed the final decree without application of its mind. Hence, the Fair and Final Order passed by the learned trial Court is liable to be set aside. Accordingly, this point is answered in favour of the appellant.

12. In the result, the appeal is allowed, the Fair and Final order passed by the learned trial Court is set aside. No costs. Consequently, M.P.No.1 of 2010 is closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

The Additional District Judge,
(Fast Track Court-1), Coimbatore.

+ 1 cc to Mr.Srinath Srideven, Advocate SR.21737
+ 1 cc to Mr.P.M. Duraiswamy, Advocate SR.21450

A.S.No.809 of 2010

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