

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.08.2018

DELIVERED ON : 06.09.2018

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAI SWAMY

W.P. No.20022 of 2018

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13 Miss. K.Thasin
14 Miss. K. Noosin
15 Mr. K. Shabro
16 Mr. K.M. Habeb
- सत्यमेव जयते .. Petitioners
- v.

State Bank of India
Rep. by the Chief Manager
Krishnagiri Road
Tirupattur .. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari, calling for the records of the proceedings in R.A. No. 28/ 2015 order dated 14.05.2018 on the file of the DRAT at Chennai and quash the same.

For Petitioners : Mr.S.Kothandaraman
For Respondent : Mr.Om Prakash, Senior Counsel
for M/s.Ramalingam Asso.

O R D E R

THE HON'BLE CHIEF JUSTICE
AND
M. DURAISWAMY, J.,

The petitioners have filed the above Writ Petition to issue a Writ of Certiorari to call for the records of the proceedings in R.A. No. 28 of 2015, dated 14.05.2018 on the file of the Debts Recovery Appellate Tribunal, Chennai and to quash the same.

2.1 It is the case of the petitioners that the respondent bank filed a suit in O.S.No.167 of 1982 on the file of Sub Court, Tiruppathur, North Arcot District for recovery of a sum of Rs.17,21,905.38 [Rupees seventeen lakhs twenty one thousand nine hundred and five and thirty eight paise only] and the Trial Court passed a preliminary decree on 12.04.1993 giving four months time to the petitioners to pay the decreed amount. Further, in the preliminary decree, it has been stated that if the petitioners fail to pay the decreed amount within the stipulated time, the respondent bank would be at liberty to apply for a final decree for the sale of the mortgaged property and if there be deficiency in the realization of the amount, then, directed to recover the sum from the petitioners personally.

2.2 The respondent bank filed an application in O.A.No.253 of 2004 on 09.08.2004 before the Debts Recovery Tribunal-I, Chennai for the issuance of recovery certificate as per the preliminary decree passed in O.S.No.167 of 1982 together with interest at the rate of 19.5% per annum. The said Original Application was subsequently transferred to the file of Debts Recovery Tribunal-III, Chennai and renumbered as O.A.No.305 of 2007. The Debts Recovery Tribunal-III, Chennai, by order dated 23.11.2012, dismissed the Original Application finding that the claim made by the respondent bank is barred by limitation under Article 137 of the Limitation Act.

2.3 Aggrieved over the order passed by the Debts Recovery Tribunal-III, Chennai, the respondent bank filed an appeal in R.A.No.28 of 2013 on the file of Debts Recovery Appellate Tribunal, Chennai and the Appellate Tribunal after taking into consideration the case of both sides, set aside the order passed by the Debts Recovery Tribunal and allowed the appeal. While setting aside the order passed by the Debts Recovery Tribunal, the Debts Recovery Appellate Tribunal observed that the banks are the custodian of public money, which they receive from a common man on interest and in such a situation, the recovery made by the bank should not be rejected.

3. On a perusal of the preliminary decree passed in O.S.No.167 of 1982, it is clear that the Trial Court had quantified the amount payable by the petitioners and also granted four months time to them to pay the said amount. However, the petitioners have not paid the decreed amount till this date.

4. It is not in dispute that the Debts Recovery Tribunal, Chennai was constituted on 07.11.1996. The Trial Court had quantified the amount payable by the petitioners even in the preliminary decree itself and granted four months time for paying the said amount and in the event of the petitioners failing to comply with the said directions, gave liberty to the respondent-bank to file a final decree application,

5. Mr.S.Kothandaraman, learned counsel appearing for the petitioners submitted that the claim made by the respondent-bank in the year 2004 is hit by the provisions of Article 137 of the Limitation Act, therefore, the Debts Recovery Appellate Tribunal ought not to have set aside the order passed by the Debts Recovery Tribunal-III Chennai. In support of his contention, the learned counsel relied upon the judgments reported in CDJ 2000 SC 1649 [Monotosh Kumar Mitra v. Amarendranath Shaw (dead) and others] and CDJ 1993 SC 1015 [K.Paramaswaran Pillai (Dead) v. K.Sumathi Alias Jesis Jessie Jacqueline and Another] wherein, the Hon'ble Supreme Court held that the application for passing of the final decree is governed by residuary Article 137 of the Limitation Act, 1963, under which, an application for passing of final decree has to be filed within three years from the date when the right to apply accrues.

6. Countering the submissions made by the learned counsel appearing for the petitioners, Mr.Om Prakash, learned Senior Counsel appearing for the respondent-bank submitted that after the passing of the preliminary decree on 12.04.1993, the respondent-bank had filed the Original Application within twelve years, therefore, Article 137 of the Limitation Act shall have no application. Further, the learned Senior Counsel submitted that the Recovery of Debts Due To Banks & Financial Institutions Act, 1993 enables the Recovery Officer to take up the Certificate of Recovery without any formal application and proceed to recover the amount. In support of his contention, the learned Senior Counsel relied upon the following judgments:-

(i) 2017 SCC online SC 518 [Venu v. Ponnusamy Reddiar (Dead) through LRS and Another], wherein the Hon'ble Supreme Court held as follows:-

"2. Learned counsel appearing on the appellant has submitted that since the application had been filed for appointment of court

commissioner, it ought to be governed by provisions of Article 137 of the Limitation Act, 1963.

3. On the other hand, learned counsel appearing on behalf of the decree holder has urged that in substance an application has been filed for final decree proceedings and the cost of the final proceedings is paid then the preliminary decree is executed, thus application for execution of preliminary decree for partition could not be said to be barred by limitation.

4. In our opinion a preliminary decree for partition crystallizes the rights of parties for seeking partition to the extent declared, the equities remain to be worked out in final decree proceedings. Till partition is carried out and final decree is passed, there is no question of any limitation running against right to claim partition as per preliminary decree. Even when application is filed seeking appointment of Commissioner, no limitation is prescribed for this purpose, as such, it would not be barred by limitation, it continues till preliminary decree culminates in to final decree."

(ii) AIR 1930 Madras 528 [Ramanathan Chetty v. Alagappa Chetty and others], wherein the Hon'ble Supreme Court held as follows:-

"20. It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation."

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the only issue that arises for consideration in this writ petition is with regard to applicability of Article 137 of the Limitation Act.

8. According to the respondent-bank, the Original Application has been filed within twelve years from the date of the decree and therefore, the order passed by the Debts Recovery Appellate Tribunal is proper.

9. It is pertinent to note that under section 2(g) of Recovery of Debts due to Banks & Financial Institutions Act, 1993, the word "debt" means, any liability (inclusive of interest) which is claimed as due from any person by a bank or

a financial institution or by a consortium of banks or financial institutions, during the course of any business activity undertaken by the bank or the financial institutions or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage, which remains unpaid.

10. The Subordinate Court, Thiruppathur, North Arcot District, while passing the preliminary decree in O.S.No.167 of 1982, directed the petitioners (defendants therein) to pay the suit claim amount within four months from the date of the decree. Further, the Trial Court gave liberty to the respondent bank (plaintiff therein) to file final decree application, if the petitioners fail to pay the decreed amount within the stipulated time, for the sale of the mortgaged properties. Therefore, it is clear that the petitioners should have paid the amount quantified by the Trial Court within four months from the date of the decree.

11. The Original Application in O.A.No.253 of 2004 was filed on 09.08.2004 before the Debts Recovery Tribunal-I, Chennai. Admittedly, the petitioners have not paid any amount in compliance of the decree passed in O.S.No.167 of 1992 so far. Now, after filing of the Original Application by the respondent-bank in the year 2004, the petitioners contended that the claim made by the respondent-bank is barred by limitation. It is needless to say that the banks are the custodian of public money and they are dealing with the public money. Hence, the borrowers cannot be left without discharging the loan amount.

12. The Hon'ble Supreme Court in the judgment reported in 2017 SCC online SC 518 [cited supra] held that no limitation is prescribed for the purpose of filing a final decree application for partition and it would not be barred by limitation and the lis would continue till the preliminary decree culminates into a final decree. In the said case, the final decree application for partition was filed after a lapse of 30 years.

13. Under Order XXXIV, Rule 5 of the Code of Civil Procedure, the court shall pass a preliminary decree directing the defendants to pay the mortgaged debt amount, in default, the plaintiff shall be entitled to apply for a final decree directing sale of the mortgaged property or sufficient part thereof be sold and proceeds of the sale be appropriated towards the debt amount. However, no limitation has been prescribed for filing an application for passing of the final decree under Order XXXIV, Rule 5 of the Code of Civil Procedure. The Hon'ble Supreme Court in the judgment reported in 2017 SCC online SC 518 [cited supra] held that there is no limitation prescribed for filing an application

for passing of the final decree for partition, therefore, filing of the application even after 30 years is not barred by limitation.

14. Under Article 62, the limitation to enforce payment of money secured by a mortgage or otherwise, charged upon the movable property is 12 years when the money sued for becomes due.

15. Under Article 136 of the Limitation Act, the limitation for the execution of any decree (other than a decree granting a mandatory injunction) or the decree or any order of any Civil Court is twelve years when the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place.

16. Though the prayer sought for in the O.A.No.253 of 2004 (New No.305 of 2007) is similar to a final decree application filed under Order 34 Rule 5 of the Code of Civil Procedure, in the strict sense, it cannot be construed as a final decree application for the reason that the Debts Recovery Tribunal has no jurisdiction to pass a final decree. When the application in O.A.No.253 of 2004 (New No.305 of 2007) is not a final decree application the provisions of Article 137 of the Limitation Act cannot be applied. As already stated, the Trial Court had quantified the amount payable by the petitioners - Debtors in the preliminary decree, which was also confirmed by the Lower Appellate Court. Therefore, so far as the amount quantified by the Trial Court in the preliminary decree is concerned, as the same has become final, the petitioners should have paid that amount within four months from the date of the preliminary decree as directed by the Trial Court. But the petitioners have not paid the outstanding amount to the Bank till this date (i.e.) 36 years from the date of filing of suit.

17. If the matter is pending before a Civil Court, then necessarily the plaintiff has to file a final decree application under Order 34 Rule 5 for bringing the property for sale. In such a case, the limitation prescribed under Article 137 of the Limitation Act would apply to the final decree application filed before the Civil Court.

18. After the constitution of the Debts Recovery Tribunal, Chennai on 07.11.1996, under Section 31 of the Recovery of Debts Due To Banks & Financial Institutions Act, all pending cases initiated for the recovery of the dues from the Debtors were transferred to the file of the Debts Recovery Tribunal. Therefore, the respondent-Bank had no occasion to file a final decree application before the Civil Court for the reason that the petitioners have filed a First Appeal challenging the preliminary decree passed in O.S.No.167 of

1982 on the file of the Subordinate Court, Tirupathur, North Arcot District. Though the learned counsel on either side submitted that the petitioners had filed a First Appeal as against the preliminary decree passed in O.S.No.167 of 1982, the learned counsel did not give the details of the First Appeal to this court.

19. In a suit on mortgage, the preliminary decree conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit. That apart, in a suit on mortgage, after the passing of the preliminary decree, what remains is only to find out the amounts specified in the preliminary decree have been paid by the mortgagor to the mortgagee and in the event of default on the part of the mortgagor, the clauses contained in the preliminary decree should be given effect to by passing a final decree. Even the form of a preliminary decree in a mortgage suit will make this position clear.

20. A 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 of Civil Procedure. No Court can confer a right on any party which is not already recognized by any law. The Court cannot create new rights. The preliminary decree passed in a suit on mortgage, could only contain directions in accordance with law and direct the parties concerned to take steps pursuant to other existing provisions of law.

21. In the present case, in the preliminary decree, the petitioners (the defendants in the suit) were directed to pay the quantified amount within a period of four months and if there is a default in payment, the respondent - Bank (the plaintiff in the suit) may apply to the Court for a final decree for the sale of the mortgaged property and on such application, the mortgaged property shall be directed to be sold.

22. The preliminary decree clearly specifies the course to be adopted in the event of the payment not being made within the stipulated time by the mortgagors. There is no question of any of the rights of the parties having been left open or left in doubt. If the payment is made, the mortgagee is bound to return the documents to the mortgagor and if the payment is not made, it is open to the mortgagee to apply for a final decree for the sale of the mortgaged property. Therefore, after the passing of the preliminary decree in a suit on mortgage, no more proceedings remain for the purpose of conclusively determining the rights of the parties. No doubt, some more proceedings remain to be taken for completely disposing of the suit, but in those proceedings, there is no question of any or all the rights of the parties being determined by the Court.

23. 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, it is a residuary Article of the Limitation Act viz., Article 137 would govern an application for passing a final decree.

24. After the constitution of the Debts Recovery Tribunal, Chennai on 07.11.1996, the respondent - Bank could not have filed the final decree application before the Civil Court. The Debts Recovery Tribunal has no jurisdiction to pass a final decree. When the respondent - Bank could not file the final decree application under the provisions of the Code of Civil Procedure before a Civil Court, it cannot be stated that even for the issuance of the Recovery Certificate, the limitation prescribed under Article 137 would apply.

25. It is well settled that the Limitation Act only bars the remedy and it does not extinguish the right of the parties.

26. Under Article 137 of the Limitation Act, 1963, this is a residuary Article not specifically dealing with an application for 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.

27. Under Article 137, 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 mortgaged property from the date fixed for payment of the mortgaged 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.

28. It is pertinent to note that whether it is a suit for partition or a suit for dissolution of partnership and accounts or a suit on mortgage, the suit does not terminate on the passing of the preliminary decree, but terminates only on the passing of the final decree.

29. 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 was dismissed as barred by limitation, what happens to the pending suit itself does not appear to have been considered so far. 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. There being no period of limitation prescribed for filing an application for final decree in a suit, the suit will be pending till the 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. 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.

30. Order XXXIV of the Code of Civil Procedure elaborately deals with the manner of disposal of a suit on a mortgage, but, 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 plaintiff 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.

31. As a matter of fact, once the application made by a plaintiff 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 plaintiff in the suit not being able to realise the fruits of the decree which they obtained under the preliminary decree.

32. Order XXXIV, 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.

33. As a matter of fact, even in a case where a sale has already been ordered and sale 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 XXXIV, 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. The whole scheme of Order XXXIV 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.

34. In the present case, as clearly stated about the executability, if the defendants failed to pay the amount in question within the prescribed period, it cannot be said that the decree issued in favour of the respondent-bank, was not executable.

35. 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.

36. Applying the principle of limitation in the facts of this case would amount to, depriving the respondent-bank of the fruits of the judgment. It would amount to giving undue benefit to the borrowers and the guarantors. The preliminary mortgage decree which was subsisting on the date of coming into force of Section 31A of the Recovery of Debts Due To Banks & Financial Institutions Act, 1993 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 Recovery of Debts Due To Banks & Financial Institutions Act, 1993.

37. For the reasons stated 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 Limitation Act, would apply in the facts of the present case. This provides 12 years period of limitation and, therefore, the decree dated 12.04.1993 was executable for a period of 12 years from the date of expiry of four months time. Therefore, the application filed under Section 31 of the Recovery of Debts Due To Banks & Financial Institutions Act, 1993 filed on 09.08.2004 would not be barred by limitation. A formal certificate of recovery has to be issued in terms of the decree passed in O.S.No.167 of 1982. The certificate has to be executed just like execution of a money decree in accordance with the provisions and procedures of law.

38. We are also conscious of the fact that the respondent-bank is the custodian of public money. It is pertinent to note that the loan in the present case was disbursed in the year 1976 and the properties were mortgaged in the same year, further the title deeds were deposited in the year 1980, the suit on the mortgage was filed in the year

1982 and the decree was passed on 12.04.1993. The judgment and decree passed in favour of the Bank has not been interfered by the Lower Appellate Court in the First Appeal filed by the petitioners-defendants, therefore, the respondent Bank cannot be deprived of the fruits of the judgment and decree which are clearly executable, where there is no denial of the liability affecting the merits of the case or any question as to the jurisdiction of the court. Therefore, the claim made by the respondent-bank shall not come within the purview of the residuary clause of the Limitation Act, namely, Article 137. Instead, the claim made by the respondent-bank would come within the purview of Article 136 of the Limitation Act and in such case, the claim made by the respondent-bank on 09.08.2004 was within the period of limitation.

39. Though there is no dispute with regard to the ratio laid down in the Judgments relied upon by the learned counsel for the petitioners, since the facts and circumstances of case is different, the said ratio cannot be applied to the present case.

40. The Debts Recovery Appellate Tribunal considering the case of both sides rightly held that the provision of Article 136 of the Limitation Act should have been applied, however, restricted the rate of interest at the rate of 9% per annum (simple) from the date of filing of the Original Application.

41. In these circumstances, we do not find any ground to interfere with the order passed by the Debts Recovery Appellate Tribunal. Accordingly, the Writ Petition is dismissed. No costs.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

Rj

To

The Chief Manager, State Bank of India,
Krishnagiri Road, Tirupattur.

+ 2 ccs to M/s. S. Kothandaraman, Advocate Sr.61488

+ 2 ccs to M/s. R. Ramalingam & Associates, SR.61576

W.P. No.20022 of 2018

RGN(CO)

EU(24/09/2018)