

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.6301 of 2017

ORDER:

1) Assailing the order in I.A.No.1164 of 2012 dated 04.08.2017 wherein an application filed under Section 5 of the Limitation Act to condone the delay in filing a final decree petition, was allowed, the present C.R.P. is filed under Article 227 of the Constitution of India.

2) The respondent herein filed O.S.No.56 of 1992 which was decreed preliminarily by the I Additional Senior Civil Judge, Rajahmundry on 16.03.2000. It is stated that as she was advised to file final decree application within 12 years from the date of expiry of redemption period, but she could not take steps to file final decree petition immediately after expiry of redemption period. The final decree petition came to be filed on 20.10.2010 by the respondent/plaintiff with a delay of 2446 days. It is urged in the petition that her co-sister's husband by name Surya Lakshmana Prasad used to look after all her affairs, and as the said Surya Lakshmana Prasad became sick due to brain stroke and other serious ailments she has no idea about filing a final decree petition and hence the delay of 2446 days in filing the final decree petition may be condoned.

3) A counter came to be filed opposing the same. It is urged that the certified copy of the preliminary decree was obtained on

16.03.2000, but she negligently slept over the matter and got filed final decree petition vide I.A.No.1401 of 2010 in O.S.No.56 of 1992 on 20.10.2010. It is contended that the final decree proceedings are barred by time as the time for seeking relief of passing final decree is within 3 years. Various pleas are taken in the counter, but however, the trial court holding that final decree proceedings are nothing but continuation of preliminary decree as well as proceedings of the suit, condoned the delay of 2446 days in filing the application for passing final decree.

4) As seen from the record, a preliminary decree of mortgage was obtained by one Madala Sitarama Lakshmi, who is the respondent herein. The said preliminary decree was obtained on 16.03.2000. The redemption period was granted till 16.09.2000. The respondent filed copy application on 21.03.2000 and the said copies were delivered on 22.04.2000. Thereafter, final decree petition was filed on 04.10.2010.

5) The short question that arises for consideration is "Whether the court below was right in entertaining the application filed under Section 5 of the Limitation Act in condoning the delay in filing final decree petition?"

6) The fact that it is a suit for mortgage is not in dispute. It is to be noted that there is a fundamental difference between a suit for mortgage and suit for partition. In a mortgage suit (whether a

decree for foreclosure under Rule 2 or a decree for sale under Rule 4 of Order 34 of the Code), the amount due is determined and declared and the time within which the amount has to be paid is also fixed and the consequence of non payment within the time stipulated is also specified. A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non payment of the amount. When the amount is not paid, the plaintiff gets a right to seek a final decree for foreclosure or for sale. On the other hand, in a partition suit, the preliminary decree only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. Further, in partition suit, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and, therefore, it is sometimes said that there is really no judgment-debtor in a partition decree. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus, the application for final decree as and

when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds. Therefore, the concept of final decree in a partition suit is different from the concept of final decree in a mortgage suit (**Shub Karan Prasad Bubna vs. Sita Saran Bubna and others 2009(9) SCC 689**).

7) Further, every application which seeks to enforce a right or seeks a remedy or relief on the basis of any cause of action in a civil court, unless otherwise provided, will be subject to the law of limitation. But where an application does not invoke the jurisdiction of the court, to grant any fresh relief based on a new cause of action, but merely reminds or requests the court to do its duty by completing the remaining part of the pending suit, there is no question of any limitation. Such an application in a suit which is already pending, which contains no fresh or new prayer for relief is not one to which Limitation Act, 1963 would apply. Since the partition suit is said to be pending till orders to be passed in final decree petition, the provisions of Limitation Act would not apply and that the said application can be filed at any time. But, however, the situation is something different in mortgage suits. In mortgage suits, the preliminary decree decides all the issues and what is left out is the action to be taken in the event of non-payment of money. When the amount is not paid, the plaintiff gets a right to seek final decree for foreclosure or for sale. Having regard to the distinction

referred to above, it is to be noted that in the instant case preliminary decree came to be passed in the month of March, 2000 and the time granted for redemption was till 16.09.2000. Thereafter no steps were taken for filing final decree petition. In fact, proceedings before the court would show that the counsel applied for a copy of the preliminary decree vide C.A.No.2264 of 2000 on 21.03.2000 and the copies were delivered on 22.04.2000. Even after getting the certified copies, the respondent did not file any final decree petition till 2010.

8) The Apex Court in **Monotosh Kumar Mitra (dead) by L.Rs., v Amarendranath Shaw (dead) and sons¹**, while dealing with a case relating to passing of final decree in a mortgage suit along with the provisions of Bengal Money Lenders Act, 1960 held that an application for passing a final decree in a mortgage suit is governed by residuary Article 137 of the Limitation Act, under which an application has to be filed within a period of 3 years from the date when the right to apply accrues. In the said case the said right got accrued to the plaintiff on 31.03.1969. It was held that the plaintiff cannot extend the period of limitation by delay in service of notice on defendant under Section 34 of the Bengal Act, which is a pre-condition for making an application by plaintiff for passing of final decree. It was held that the period of limitation would start running from the time the right to apply for final decree accrues, and is not

¹ 2000(2) SCC 672

dependent on the date of sending of notice by the plaintiff to the defendant as required under the Bengal Act.

9) Having regard to the above, the irresistible conclusion that can be arrived at is that the period of limitation in filing a final decree petition in a mortgage suit will be three years from the time the right got accrued to the decree-holder. In the instant case, the time granted for redemption was till 16.09.2000 and within three years thereafter, petition seeking final decree should have been made.

10) In view of the above, the trial court erred in invoking Section 5 of the Limitation Act in condoning the delay of 2446 days in filing a final decree petition.

11) Accordingly, the C.R.P. is allowed by setting aside the order dated 04.08.2017 passed in I.A.No.1164 of 2012 in I.A.No.1401 of 2010 in O.S.No.56 of 1992 on the file of the I Additional Senior Civil Judge at Rajamahendravaram. No costs. Miscellaneous Petitions pending if any in this C.R.P. shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt:29.06.2018

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