HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.6195 of 2017

ORDER:

1) Assailing the order in I.A.No.1165 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, invoking Section 5 of Limitation Act, the present C.R.P. is filed under Article 227 of the Constitution of India.

2) The respondent herein is the power of attorney holder of the plaintiff, who filed O.S.No.55 of 1992, which was decreed preliminarily on 10.11.2000 by the Court of I Additional Senior Civil Judge, Rajamahendravaram. An appeal came to be preferred vide A.S.No.22 of 2001 against the said preliminary decree and the same was dismissed on 29.11.2003. Subsequently, the final decree petition was filed on 20.10.2010 with a delay of 1543 days. It is urged in the petition that the plaintiff who is aged about 70 years lent money under a mortgage to the respondent through her husband, who during his life time used to pursue the affairs of the plaintiff. It is stated that the plaintiff has no idea about filing a final decree petition and as such the delay of 1543 days 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 10.11.2000, but slept over the matter for 10 years and then got filed

final decree petition vide I.A.No.1061 of 2010 in O.S.No.55 of 1992 on 22.03.2011. It is contended that the final decree proceedings are barred by time, as the time for seeking relief of 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 1543 days in filing the application for passing final decree.

4) As seen from the record, a preliminary decree of mortgage was obtained by one Radha Krishnaveni, who is the respondent herein. The said preliminary decree was obtained on 10.11.2000. The redemption period was till 10.05.2001. Challenging the said decree, an appeal vide A.S.No.22 of 2001 came to be filed, which was dismissed on 29.11.2003, and it has become final. The certified copies were delivered on 26.02.2010. Final decree petition was filed on 25.10.2010. A copy application for appellate Court order was filed on 08.06.2011 and the same was delivered on 14.06.2011.

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 preliminary decree 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 would also be fixed and the consequence of non payment within the time stipulated will also be 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 decrees 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 a 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 are 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 only 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 November, 2000 and the time granted for redemption was till 10.05.2001. Appeal came to be filed, challenging the preliminary decree and the same was dismissed in the year 2003. Thereafter no steps were taken for filing final decree petition. In fact, proceedings before the court would show that the counsel obtained copy of the preliminary decree vide C.A.No.l1428 of 2010 on 26.02.2010 i.e., nearly 10 years after passing of the preliminary decree and the order of the appellate court was obtained on 14.06.2011 i.e., nearly 8 years after dismissal of the appeal. Even applications for the said copies came to be filed with delay. Therefore, it cannot be said that an application for final decree came to be filed within a period of three years as required under Article 137 of the Limitation Act.

8) The Apex Court in **Monotosh Kumar Mitra (dead) by L.Rs., v Amarendranath Shaw (dead) and sons**[1], 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 of final decree in a mortgage suit is governed by residuary Article 137 of the Limitation Act, under which an

[1] 2000(2) *SCC* 672

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 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, I am of the view that the trial court erred in invoking Section 5 of the Limitation Act in condoning the delay of 1543 days in filing a final decree application.

10) Accordingly, the C.R.P. is allowed. No costs. Miscellaneous Petitions pending if any in this C.R.P. shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt:29.06.2018

GM

Note:
LR copy to be marked
B/o. GM