IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(N.P.D).No.2949 of 2016

Punjab National Bank
Represented by its Manager
Villupuram. ...Petitioner

Vs.

G.Vijayakumar ...Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order in I.A.No.579 of 2012 in O.S.No.89 of 2004 dated 10.01.2013 on the file of the Principal District Judge, Villupuram.

For Petitioner : Mr.N.Suresh

For Respondent : Mr.T.S.Baskaran

ORDER

The Civil Revision Petition is directed as against the fair and decretal order in I.A.No.579 of 2012 in O.S.No.89 of 2004 dated 10.01.2013 on the file of the Principal District Judge, Villupuram, thereby dismissed the petition to condone the delay in filing the final decree application.

2.The petitioner is the plaintiff; respondent is the defendant and the suit has been filed for recovery of an amount borrowed by the respondent. The suit was decreed and preliminary decree was passed n 02.12.2004. At the time of passing the preliminary decree, three months time was granted to the respondent to pay the amount. Thereafter, the petitioner filed a petition for final decree on 10.03.2008. The same was returned for carrying out defects and finally it has been represented and numbered.

3.While pending the final decree application, the respondent also made some payments towards the preliminary decree passed in favour of the petitioner. Thereafter, the petitioner filed a petition in I.A.No.579 of 2012 to condone the delay of 8 days in filing the final decree application, for the reason that the final decree application is ought to have filed within a period of three years from the date of preliminary decree. Unfortunately, final decree application was filed with a delay of 8 days. By wrong calculation, the said petition was dismissed by the Court below, on the ground that any suit or appeal, after a period of limitation should be dismissed, although limitation has not been set up as a defence. In this regard, the learned counsel for the petitioner cited the Judgment in the case of A Partnership Firm Vs. State Bank of India reported in ***2018 (5) CTC 353.*** Relevant paragraphs are below:-

> *"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 a Mortgage, the Suit does not terminate on the passing of the Preliminary Decree, but terminates only on the passing of the Final Decree.*
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> *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 34 of the Code of Civil Procedure elaborately deals with the manner of disposal of the 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 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.

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 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. 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.*

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."

4.The Hon'ble Division Bench of this Court has held that the suit for 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 was dismissed as barred by limitation, what happens to the pending Suit itself does not appear to have been considered so far. Further held that applying the principle of limitation in the facts of this case would amount to, depriving the Respondent-Bank from enjoying the fruits of the Judgment. It would amount to giving undue benefit to the Borrowers and the Guarantors.

5.In the case on hand, the petitioner obtained preliminary decree as against the respondent by decree dated 02.12.2004. Though the respondent approached for part of the suit amount, pending final decree application, the respondent has to realise the entire amount as fixed by the Court below.

6.Therefore, the order passed by the Court below dated 10.01.2013 in I.A.No.579 of 2012 in O.S.No.89 of 2004 is set aside and accordingly, this Civil Revision Petition is allowed. Further, the Principal District Judge, Villupuram, is directed to pass final decree application within a period of three months from the date of receipt of a copy of this order on merits and in accordance with law. No costs.

11.02.2021

Index:Yes/No
Speaking Order: Yes/No
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To
The Principal District Judge, Villupuram.

G.K.ILANTHIRAIYAN.J,

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