

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 13TH JANUARY 2006 / 23RD POUSHA, 1927

CRP.No. 1710 of 2003(C)

**(AGAINST THE ORDER DATED 11/04/2003 IN IA. 4830 /1993 IN
OS.240/1985 of ADDL.SUB COURT, PALAKKAD)**

REVN. PETITIONER/RESPONDENT/DEFENDANT:

UNNIMADHAVAN NAIR, S/O.AMMINI AMMA,
LEELA MANDIRAM, MALAMANMUKKIL, KAVASSERI
DESOM, ALATHUR TALUK.

BY ADV. SRI.K.RAMAKUMAR
ADV. SRI.T.S.ARUNKUMAR

RESPONDENT/PETITIONER/PLAINTIFF:

SREENARAYANA INVESTMENT BY
MANAGING PARTNER CHAMUNNI,
S/O.V.G.SUKUMARAN, RESIDING AT
ERIMAYUR AMSOM DESOM, ALATHUR TALUK.

BY ADV. SRI.P.R.VENKETESH

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 13/01/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

ORDER ON I.A. No. 1416 of 2003 IN C.R.P.No. 1710 of 2003

DISMISSED.

13.01.2006

**Sd/- K.T. SANKARAN,
JUDGE.**

/true copy/

P.A. TO JUDGE.

K.T. SANKARAN, J.

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C.R.P. No. 1710 OF 2003
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Dated this the 13th January, 2006

ORDER

Defendant in O.S. 240 of 1985, Sub Court, Palakkad is the Revision Petitioner. The suit was filed by the respondent for realization of money. It was contended that there was an equitable mortgage in favour of the plaintiff and it was found so. However, the trial court held that a preliminary decree for accounting is to be passed. This finding was arrived at by the trial court in the judgment dated 31.10.1989, wherein it was held thus:

"While considering issue Nos.2,3 and 4, I came to the conclusion that the plaintiff is entitled to get a decree for the balance amount with interest at the rate of 20% per annum against the defendant and charging on the hypothecated and mortgaged properties to the extent of the share of the defendant in the mortgaged properties. As I could not accept the statements filed by the plaintiff and the defendant, I came to the conclusion that a preliminary decree for accounting is to be passed in the suit to settle the dispute between the parties."

2. Going by the judgment, a preliminary decree should be passed. But the decree drafted was not a preliminary decree but a composite decree in a

mortgage suit, whereby the decree holder could straightaway execute the decree. In fact, the decree holder did file an execution petition. At that juncture, the defendant filed I.A. 1470 of 1991 for amendment of the decree dated 31.10.1989. In the application, the defendant contended that it is necessary to pass a final decree and only thereafter execution could be taken. It was contended that the decree drafted was erroneous and based on the judgment, a preliminary decree should have been drafted. I.A.1470 of 1991 was filed in June, 1991, i.e. After 1 1/2 years of passing of the judgment and decree. The trial court allowed I.A.1470 of 1991 on 21.11.1992.

3. After the decree was amended, the plaintiff filed I.A.4830 of 1993 for passing the final decree. The defendant raised an objection that the application for passing the final decree is barred by limitation as three years elapsed from the date of the preliminary decree dated 31.10.1989. It was contended that the amendment of the decree as per the order dated 21.11.1992 in I.A.1470 of 1991 is immaterial for computing the period of limitation. The trial court rejected this contention raised by the defendant and held that the application is not barred by limitation. The trial court also passed a final decree by the "order" impugned in this revision.

4. When a final decree is passed, it is appealable. Though the plea of limitation is also dealt with in the application for passing the final decree, that

does not alter the character and nature of the final decree. Therefore, the order impugned is not revisable. On that short ground, C.R.P. is liable to be dismissed. However, since the revision was admitted, despite the objections having been raised by the Registry that the revision is not maintainable, it is only appropriate to consider the case on the merits.

5. Counsel for the revision petitioner placed reliance on the decision reported in 1978 KLT 624 -Ouseph vs. Lona and contended that the amendment of the decree has no relevance in computing the period of limitation for filing the execution petition. In Ouseph vs. Lona, the execution petition was filed after 12 years of passing of the decree, but within 12 years from the date of the amendment of the decree. It was held that although the decree underwent a change with its amendment on 24.07.1962, until the date of the amendment, the decree in its original form was enforceable as from the date on which it was passed, that is 28.06.1961. It was further held that the crucial date for computing the period of limitation is the date of passing of the decree and not the date on which the decree was amended. The decision in Ouseph vs. Lona was considered in 1988(1)KLT 188 -Oommen Nainan vs. Somasundaram Pillai. But it was distinguished on facts and also on the ground that the decree in Ouseph's case was executable even before the amendment. In Oommen Nainan's case, a suit for recovery of money was decreed. But while drafting the decree, it was

provided that the judgment debtor could pay off the amount decreed in instalments and in default, the decree holder could apply for the passing of a final decree. But the decree was evidently not in conformity with the judgment. When the decree holder put the decree in execution, it was found that there was no executable decree, which necessitated the withdrawal of the execution petition. On the application filed by the decree holder, the decree was amended and later it was put in execution. At that juncture, the judgment debtor raised a contention that the execution petition was filed beyond the period of 12 years. That contention was repelled in Oommen Nainan's case and it was held that the execution petition was filed within time. Article 136 of the Limitation Act provides a period of limitation of 12 years where the decree or order becomes enforceable. In Oommen Nainan's case, it was held that a decree becomes enforceable only when there is no impediment for the decree holder to enforce the decree.

6. In the present case, as per the judgment, the decree holder had to apply for a final decree. But as per the decree, he could straightaway execute the decree. On the basis of the decree, he filed an execution petition. Judgment debtor raised objections and contended that the decree was not executable as the decree was not in conformity with the judgment. The judgment debtor himself applied for amendment of the decree and got it amended to make it in conformity with the judgment. After the amendment of

the decree, the decree holder was compelled to apply for passing of a final decree. He could not file an application for passing of a final decree on the basis of the decree which was available before the amendment. The decree holder could not apply for passing of a final decree at any time before 21.11.1992, the date on which the decree was ordered to be amended. The right to apply for passing final decree accrued only after 21.11.1992, the date on which the decree was ordered to be amended. The period of limitation under Article 137 of the Limitation Act begins to run from the time “when the right to apply accrues”. Therefore the period of limitation has to be reckoned from 21.11.1992. The contention raised by the judgment debtor is to be accepted. If it is to be taken that the decree was enforceable as such, then, the judgment debtor could not have resisted the execution petition filed by the decree holder. The judgment debtor has taken inconsistent stand in the Execution Petition and in the present proceedings. Having successfully raised the contention that the decree was not executable on the ground that it was not in conformity with the judgment, which compelled the decree holder to file a petition for amendment of the decree, the judgment debtor cannot be heard to contend that the application for passing a final decree as per the amended preliminary decree is barred by limitation. The period of limitation begins to run from the date on which the application for passing of a final decree could be filed. The decree holder had filed the application for passing the final decree only after the petition to amend the preliminary decree was allowed, i.e.

21.11.1992. He could not do so, from the date of the judgment, i.e., 31.10.1989, till 21.11.1992. I am fortified by the decision of this Court in **Jane Andrew Austine v. State Bank of Travancore** (1998(2) KLT 804 = 1998(2) KLJ 596) in arriving at the above conclusions.

I am of the view that the application for passing the final decree was filed within time and the court below has not committed any error in rejecting the contention that the application for passing the final decree is barred by limitation. C.R.P. is accordingly dismissed without any orders as to costs.

**K.T.SANKARAN,
JUDGE.**

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