**(1997) 07 KAR CK 0050**

**In the Karnataka High Court**

**Case No :** Regular Second Appeal No. 677 of 1986

Krishnaji Moreshwar Joshi APPELLANT

Vs

Bhakatram Sadashiv Patil and Others RESPONDENT

**Date of Decision :** 28-07-1997

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 2, Order 34 Rule 5, Order 34 Rule 8
Limitation Act, 1963 — Section 137

**Citation :** AIR 1998 Kar 177 : (1997) ILR (Kar) 2346

**Hon'ble Judges :** T.N. Vallinayagam, J

**Bench :** Single Bench

**Advocate :** Sri G.S. Visveswara, for the Appellant; Sri Balakrishn Shastry, for the Respondent

## Judgement

1. The plaintiff, decree-holder is the appellant in this second appeal: His application for drawing final decree in FDP 2 of 1982 on the file of the Additional Munsiff, Chikodi, was allowed by the Trial Court on 31-8-1984. On appeal in R.A. 104 of 1984, the learned Additional Civil Judge, Chikodi has allowed the appeal on 14-8-1986 and dismissed the application. The question of law that is framed in this second appeal is as follows:

"Whether Article 137 of the Limitation Act applies in respect of an application filed under Order 34, Rule 8, CPC particularly when there is no decree for foreclosure"?

2. The averments in the application are that in the suit for redemption of possessory mortgage for Rs. 700/-, a preliminary decree has been passed to redeem the mortgaged property which are, 29 guntas in RS No. 174/6, apart from 1/8th right to take water. The decree-holders contended that the amount has been paid in due time and therefore he sought for the final decree. The judgment-debtor resisted the application contending that the decree-holders are not entitled to file the present application as they have failed to comply with the terms of the decree. In the additional statement of objections filed by them they

 

claimed damages for the improvement they have made to the suit property. An amount of Rs. 700/- was to be deposited as per the decree, and it is seen that the same was deposited on 20-2-1973. A preliminary decree was passed on 18-8-1972, giving six months period for redemption. According to the judgment-debtor, the amount should have been deposited on 18-2-1973, but it was paid only on 20-2-1973; there is a delay of two days. It is also seen that an appeal was preferred against the preliminary decree in R.A. 104 of 1973 which came to be dismissed on 8-8-1977. The Trial Court rejected the claim of the bar of limitation set up by the defendants and ordered for final decree. The Appellate Court held that the amount was not deposited by the plaintiff in time as per the order of the Court. The Appellate Court found that when the suit was decreed on 18-8-1972 and though an appeal was filed and disposed of on 6-8-1977, the plaintiffs filed an application for final decree only on 1-3-1982, i.e., after three years from the date of passing of the order of the Appellate Court. The Appellate Court also held that the application for passing final decree must have been made within three years from the date of deposit and the Appellate Court has not even taken into consideration the pendency of the appeal which was disposed of on 6-8-1977. In this view, the Appellate Court held that the application for final decree is barred by limitation and dismissed the same.

3. In this second appeal, it was contended that for an application under Order 34, Rule 8, CPC, Article 137 of the Limitation Act does not apply, for an application requesting the Court to draw final decree, no period of limitation applies. In fact, drawing up of a final decree is the duty of the Court; immediately after deposit of Rs. 700/-, it was incumbent upon the Court to draw the decree. The application contemplated under Order 34, Rule 8 is only by way of reminder just as in the partition suit. It was further submitted that as long as there is a decree for foreclosure declaring that the mortgagor has lost all his rights, the mortgagee''s right to redeem cannot be defeated. In this case, admittedly there is no decree for foreclosure declaring that the mortgagor has lost the right to redeem and has lost right to get possession. If that be so, the application under Order 34, Rule 8, CPC is maintainable.

4. Contra, it was contended that though the delay is only two days the money having not been deposited within the time granted by the Court, the right of redemption is lost. In any event, the application for passing final decree ought to have been filed on or before 8-8-1980, that is, within three years from the date of disposal of the appeal in R.A. 104 of 1973 and consequently the application is barred by limitation. The Counsel for the appellant relied upon a decision of this Court reported in Ramaiah v Veeraiah, wherein this Court has held as follows:--

"It is a well established principle of law that an application for final decree could be made so long as the relationship of mortgagor and mortgagee subsists and the limitation is prescribed for redemption. It was earlier sixty years under the old Limitation Act. That being so, the residuary Article, viz., 137, would not apply to the facts of the case".

 

The Counsel for the appellant contended that Article 137 will not apply in this case. The Counsel for the respondent relied upon a decision in Subramaniam Chettiar v Muthaiah Filial, wherein it is held as follows:

"A preliminary decree for redemption was passed on 21-6-1936, granting two months time for payment of the amount. The plaintiff paid the amount within the time fixed but did not make an application for passing a final decree directing the mortgagee to deliver the documents and possession of the property. He filed two execution petitions, E.P. Nos. 252 and 253 of 1949, in the Chief Court of Pudukottah, but they were dismissed as being barred by limitation. This appeal arises out of the application filed by the plaintiff on 2-11-1951 for passing a final decree".

"The cause of auction for an application arises on payment and the period of limitation provided for such an application must be held to be governed by Article 181 of the Limitation Act, which will be three years from the date of the deposit. Here the application was filed long after the date of the deposit and as such it is barred by limitation. The principle of the decision above referred to is not applicable to the facts of the present case and the lower Courts have wrongly applied that decision to the present case. The lower Courts have erred in holding that the plaintiff''s application for a final decree is not barred by limitation".

Therefore, the Counsel for the respondent contended that the application is barred by limitation. The learned Counsel for the respondent also relied upon a decision in Bhagabat Sit Vs. Balaram Sit, , wherein it is found:

"Section 5 has no application, to an application under Order 34, Rule 8 of the Civil Procedure Code. Under Order 34, Rule 8, CPC the plaintiff can make payment into Court of all amounts due from him under sub-rule (1) of Rule 7 before a final decree debarring the plaintiff from all rights to redeem the mortgaged property, has been passed or before the confirmation of the sale held in pursuance of a final decree passed under sub-rule (3) of Rule 8. The period of limitation to the mortgagee to file an application for granting a final decree is three years from" the date of the deposit under Article 181 of the Limitation Act. The mortgagor can make the deposit at any time before the passing of a final decree for foreclosure or sale on good cause shown and upon the terms to be fixed by the Court from time to time. For an application for passing a final decree by a mortgagor the period of limitation is three years from the date he makes payment into Court".

He also relied upon a decision of a Division Bench of this Court in Gajanan Chintaman Deshpande v Karnatak Glass Industries, which is to the following effect:

"If a preliminary decree passed by the Trial Court is challenged in appeal, it is the decree of the Appellate Court of final jurisdiction that has to be treated as the preliminary decree in the case and not the decree of the Trial Court. If the preliminary decree passed by the Trial Court is not challenged in appeal and is thereby allowed to become final and conclusive, the decree of the Trial Court alone becomes the basis for making an application for a final decree under Order 34, Rule 5, CPC.

In this case, the preliminary decree passed by the Trial Court against defendant 1, who alone had mortgaged the properties, was not challenged by any one in appeal and therefore the decree of the Trial Court alone could be the basis for the application under Order 34, Rule 5 and that having been made in 1961 was barred under Article 181 Limitation Act".

Reliance was also placed by the Counsel for the respondent in the decision in Venkatesh Virupax Deshpande Vs. Central Bank of India, , Paragraph 5 of the said judgment reads thus:

"It is not possible to accept this contention. It is a settled position of law that when an appeal is preferred, whether it be by the plaintiff or by the defendants-judgment-debtors against the preliminary decree passed in a suit for recovery of the mortgaged money by sale of mortgaged properties, it would be open to the decree-holder to file an application for drawing up of a final decree after the appeal is disposed of one way or other. The decree-holder would have three years to make an application under Order 34, Rule 5 of the C.P.C. from the date of the decree in appeal as in such a case three years would run from the date of the decree in the appeal. It is also open to him to file an application under Order 34, Rule 5 of the C.P.C. even during the pendency of the appeal preferred from a preliminary decree. In such a case, the question of applying Article 137 of the Limitation Act does not arise as he can apply at any time during the pendency of the appeal. The Supreme Court in Sital Parshad Vs. Kishorilal, , has observed thus:

"It is true that if no final decree has been passed before the appeal from the preliminary decree is decided, the decree-holder gets three years from the date of the decree in appeal from the preliminary decree to apply for a final decree. That, however, is a question of limitation and Courts have held that in such a case three years run from the date of the decree in appeal from the preliminary decree. But if the decree-holder does not wish to await the result of the appeal from the preliminary decree he can ask for a final decree in the meantime, and if the preliminary decree is confirmed in toto, the final decree will need no change and can be executed as it stands. The decree-holder in such a case need not apply for a fresh final decree and can execute the final decree already passed in the meantime".

Therefore, it is clear that during the pendency of the appeal it would be open to the decree-holder either to wait till the disposal of the appeal or apply for a final decree. If the decree-holder applies for a final decree" during the pendency of the appeal from a preliminary decree, there is no question of applying the period of limitation as contemplated in Article 137 of the Limitation Act. In the light of the observations of the Supreme Court referred to above, we are of the view that the executing Court is right in over-ruling the objection, though the reasons given by it cannot be held to be wholly correct. We see no ground to admit this appeal. It is accordingly rejected".

5. A reading of Order 34, Rule 8 makes it clear that the plaintiff should be debarred from all rights to redeem the mortgaged property and to that effect a final decree has to be passed. Therefore, it is clear that till a final decree is passed debarring the plaintiff, the plaintiff-mortgagor is entitled to ask for passing of the final decree. In fact, the section goes to the extent of saying that even before the confirmation of a sale held in pursuance of the final decree, the plaintiff can make payment into Court of all the amount due from him under sub-rule (1) of Rule 7. It is necessary to refer to Order 34, Rules 7 and 8, which are to the following effect:

"7. Preliminary decree in redemption suit.--(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree.-

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for.-

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and;

(iii) other costs, charges and expenses properly incurred by him upto that date, in respect of his mortgage security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing.-

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges, and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver upto the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree.-

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold; or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all rights to redeem the property.

(emphasis supplied)

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest".

"8. Final decree in redemption suit.--(1) Where, before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of Rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree, or, if such decree has been passed, an order.-

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary.-

(b) ordering him to retransfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary.-

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchaser-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf.-

 

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in Rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree Chat the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same".

Under Rule 7(b) the Court has to pass a preliminary decree declaring the amount due. Under Rule 7(c), a direction must be given by the Court that if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which such amount is declared due by Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, etc., then the defendant shall deliver to the plaintiff all documents in possession etc. Rule 7(1)(c)(ii) says that if payment of the amount found and declared as due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due, the defendant shall be entitled to apply for a final decree. There is also some more concession shown under Rule 7(2). The Court may, even if there be delay in payment made or cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1). Therefore, the intention of the legislature under Rule 7(1) and (2) is always to make the mortgage redeemable and even if there is delay in payment such delay may be condoned.

6. Rule 8 contemplates a stage when a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed. "Now the question is when does such contingency arise". Sub-clause (ii) of Order 34, Rule 2 speaks about debar. It says:

"(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property".

Therefore, the defendant can be debarred only when the mortgagee applies for a final decree debarring the defendant from all rights to redeem the property. Till an application is so made by the mortgagee, there cannot be a bar on the right of redemption by the mortgagor. This debar applies in a suit for foreclosure. In a suit for redemption, the debar again comes into effect only when "the defendant shall be entitled to apply for a final decree that the plaintiff be debarred from all rights to redeem the property". This is found in clause (c) of sub-rule (2) b). Therefore, it is clear that till an application is made by the mortgagee for passing a final decree with a prayer that the plaintiff be debarred from all rights to redeem the property, the mortgagor is entitled to come forward with the application for redemption. Therefore, the question of limitation under the Limitation Act will not apply. So also Article 137. This view of mine is fortified by the decision relied upon by the respondents. In fact in Subramaniam Chettiar''s case, supra, this aspect has been considered in the following manner:

"The learned Judge took the view that insofar as the payment is concerned, no period of limitation is provided and it will be open to the mortgagor-plaintiff to pay under Order 34, Rule 8, CPC at any time before the final decree debarring the plaintiff from all rights to redeem the mortgaged property had been passed. In that case the mortgagee-defendant did not take advantage of the provision in Rule 8, sub-rule (3) and apply for a final decree debarring the plaintiff from all rights to redeem the property; and so long as the mortgagee-defendant did not have recourse to such a provision, it was always open to the mortgagor-plaintiff to deposit the amount at any time and no application for extension was necessary; and since no application for extension of time fixed for payment was necessary, no question of any period of limitation would arise".

It is made clear by the learned Judge that till the mortgagor is debarred, no question of any period of limitation would arise. The Division Bench in the case of Gajanan Chintaman, supra, did not mention this aspect of debar at all and the decision was rendered on a different point. The latter Division Bench in Venkatesh Virupax''s case, supra, was considering the question about running of the period of limitation after the disposal of the appeal against the final decree has been taken. The Division Bench held that no question of applying the period of limitation is contemplated under Article 137 of the Limitation Act, if the application is made during the pendency of the appeal. Therefore, this decision also did not consider the position as to when exactly the mortgagor is debarred from exercising his right of redemption after passing of the preliminary decree. In this case, admittedly, no application has been taken up by the mortgagee to pass a final decree and therefore the question of application of "debar" does not arise. Accordingly, no time has run against the plaintiff so far as this case is concerned, as contended by the mortgagee. In this view, Article 137 will not apply to this case at all.

7. In view of the above discussion, the judgment of the First Appellate Court is set aside and the order of the Trial Court allowing the final decree application is restored. The second appeal is, therefore, allowed. But, under the circumstances, no costs.