

(1995) 02 KL CK 0058
In the High Court Of Kerala
Case No : A.S. No. 5 of 1995

Thazhepurakkat Shyamala alias T.P. Shyamala	APPELLANT
Vs	
Kuzhichal Vasudevan and Others	RESPONDENT

Date of Decision : 14-02-1995

Acts Referred:

Kerala Civil Rules of Practice, 1971 — Rule 238(4)
Limitation Act, 1963 — Section 12, 12(2)

Citation : AIR 1996 Ker 4 : (1995) 2 ILR (Ker) 419

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : K.V. Sohan, for the Appellant;

Judgement

1. This appeal by the legal representative of the first defendant in a suit for partition is directed against the final decree. The final judgment was rendered by the Subordinate Judge's Court of Thalassery on 16-7-1993. The final judgment directed the deposit of the value of the non-judicial stamps within 15 days, to engross the final decree. The judgment did not specify as to who should produce the non-judicial stamp paper or place any obligation on the plaintiffs to do so in the first instance.
2. No one produced the non-judicial stamp papers within the time specified by the court. On 1-2-1994, the plaintiff filed I. A. 649 of 1994 praying for condoning the delay in producing the non-judicial stamp papers. By order dt. 28-2-1994 the court below allowed that application. The non-judicial stamp papers were received in court on 18-4-1994 and the final decree for partition was drafted on 18-6-1994.
3. The appellant herein, who was respondent No. 11 in the final decree proceedings, made an application for certified copy of the judgment and

decree on 22-3-1994. The copying sheets were called for, on 19-8-1994. They were produced on 25-8-1994. Copies were ready on 25-10-

1994 and 1-11-1994 was notified as the date for appearance to receive the copies. Copies were delivered over to the appellant on 29-10-1994

and this appeal was filed in this court on 4-1-1995. The office noted that the appeal was barred by time on the basis that the time started to run

against the appellant from 16-7-1993, the date of the final judgment. The appellant took the stand that since the decree was drafted only on 18-6-

1994, time starts to run only from that date in the light of the decision in Sukumaran Thankal v. Janaki Amma 1977 KLT 200. Reliance was also

placed on Rule 238 of the Civil Rules of Practice. It is not disputed by the appellant that if the time for appeal had started to run from 16-7-1993,

the appeal is out of time. But as noted, the case of the appellant is that the time starts to run only from 18-6-1994 when the final decree was in fact

drafted.

4. Section 12 of the Limitation Act provides for exclusion of time the party spends in obtaining the copy of the judgment and decree appealed

from. The corresponding provision under the Limitation Act of 1908 was amended and an Explanation was added to make it clear that any delay

in the office of the court in drawing up a decree or order before the application for a copy thereof is made, shall not be excluded. On the scope of

the Explanation to Section 12 of the Limitation Act, there was controversy in this court. The question was whether a person who had not applied

for the certified copy immediately after the pronouncement of the judgment but had made it only after the decree was drawn up by the office of the

court, could get the period between the date of the judgment and the date of the preparation of the decree excluded. His Lordship Justice Krishna-

moorthy Iyer in the decision reported in Kochapi Kunji v. Kali Kochupillai, 1973 KLT 389 took the view that the period can be excluded under

the Explanation. But His Lordship Justice Subramonian Poti in the decision reported in E. Muhammed v. Kun-hummad Haji, 1973 KLT 666 took

the view that it cannot be excluded. A Division Bench of this court in the decision in Sukumaran Thankal v. Janaki Amma, 1977 KLT 200 agreed

with the view expressed by Mr. Justice Krishnamoorthy Iyer and did not agree with the view expressed by Mr. Justice Subramonian Poti. In other

words, the Division Bench held that even though a party had not applied for the copy immediately on the pronouncement of the judgment, time

against him would not run so long as the decree had not been drafted.

5. As noticed, Section 12 of the Limitation Act, 1908 did not contain the exclusion which was introduced by the Limitation Act, 1963. In

construing Section 12 of the Act of 1908 the Supreme Court in *Lala Balmukund (Dead) through Lrs. Vs. Lajwanti and Others*, , observed as

follows (para 21):

In our opinion the expression ""time requisite"" as used in Section 12(2) in the phrase in question, means all the time counted from the date of the

pronouncement of the judgment (the same being under Order 20, Rule 7, Civil P.C., the date of the decree) which would be properly required for

getting a copy of the decree, including the time which must ex-necessitas elapse in the circumstances of the particular case, before a decree is

drawn up and signed. If any period of the delay in preparing the decree was attributable to the default or negligence of the appellant, the latter shall

not be entitled to the exclusion of such period u/s 12(2) of the Limitation Act, 1990"".

In the same judgment, their Lordships also observed that their Lordships were not pronouncing on the scope of the Explanation added to Section

12, by the Limitation Act of 1963. The scope of the Explanation thus added by the Limitation Act of 1963, came up for consideration before their

Lordships in *Udayan Chinubhai v. R. C. Bali*, (1977) 4 SCC 309 : (AIR 1977 SC 2319). In paragraph 32 of the judgment, their Lordships held

that u/s 12(2) read with the Explanation, a person cannot get exclusion of the period that elapsed between pronouncement of the judgment and the

singing of the decree if he made the application for a copy only after preparation of the decree. Thus, it is clear that the benefit of the period

between the date of pronouncement of the judgment and the date of preparation of the decree will not be available to an appellant if he, had not

made an application for copy on, the pronouncement of the judgment and before the preparation of the decree. This decision is clearly at variance

with the ratio of the decision in *Sukumaran Thankal v. Janaki Amma*, 1977 KLT 200 The latter decision cannot therefore be taken as laying down

the correct law.

6. In Udayan Chinubhai's case AIR 1977 SC 2319 their Lordships observed (at p. 2327 of AIR):

The time requisite for obtaining a copy u/s 12(2) must be that time which is ""properly required"" for getting a copy of the decree (see Lala

Balmukund (Dead) through Lrs. Vs. Lajwanti and Others, . It is not possible to conceive how a person may obtain a copy of a decree if that

decree, in view of the recitals in the judgment pronounced, cannot be prepared without some further action by a party. A judgment which is

unconditioned by the requirement of any action by a party, stands on a different footing and in that event the date of the judgment will necessarily

be the date of the decree. In such a case, a party cannot take advantage of any ministerial delay in preparing the decree prior to his application for

a copy, that is to say, if there is no impediment in law to prepare a decree immediately after pronouncement of the judgment, no matter, if, in fact,

the decree is prepared after some time elapses. No party, in that event, can exclude that time taken by the court for preparing the decree as time

requisite for obtaining a copy if an application for a copy of the decree has not been made prior to the preparation of the decree. It is only when

there is a legal impediment to prepare a decree on account of certain directions in the judgment or for non-compliance with such directions or for

other legally permissible reasons, the party, who is required to comply with such directions or provisions, cannot rely upon the time required by

him, under those circumstances, as running against his opponent"".

The learned counsel for the appellant relying on this passage submitted that a final decree in a suit for partition cannot be drawn up immediately on

the pronouncement of the judgment. According to him, only on production of the non-judicial stamp papers can the decree be prepared. Normally

it is for the plaintiff to produce the non-judicial stamp papers and if the plaintiff fails to produce the requisite stamp papers it cannot be said that the

time would start to run against the defendant who proposes to file an appeal, even if he had not made an application for copy. He emphasised the

observations of the Supreme Court in the said decision (at p. 2327 of AIR):

When a judgment is delivered in the presence of the parties clearly announcing certain steps to be taken by the plaintiff before the decree can be

prepared, the matter stands on an entirely different footing. In the present case

without deposit of the deficient court-fees by the plaintiff the decree could not be instantly prepared under the law. Time was given to the plaintiff for that purpose and there could be no decree in existence in law until the plaintiff supplied the court-fees. Without the existence of the decree, any application for a copy of the decree would be futile. Therefore, on the facts of this case, in view of the operative part of the judgment, the date of the decree was when the plaintiff furnished the court-fees as ordered. He submitted that though the preliminary judgment did not specifically direct the plaintiff to deposit the value of the non-judicial stamps to engross the final decree, as per the scheme of Civil Rules of Practice, Kerala, the plaintiff had to produce the requisite non-judicial stamp papers and so long as the plaintiff had not produced them, it cannot be said that a decree would come into existence in the present case as well.

7. It now becomes necessary to notice the relevant provisions in the Civil Rules of Practice, Kerala. Rule 235 read with Rule 182 indicates the particulars that must be included in a final decree for partition. Rule 236 provides that the court shall, in its judgment, direct the parties to deposit in court the amount required for the non-judicial stamp paper for engrossing the decree in proportion to the value of their shares and any party failing to deposit the amount as directed within the time limit shall be deemed to be in default and shall be liable for the costs of the adjournment. Rule 237 suggests that a decree in a partition suit shall be prepared on non-judicial stamp paper of the requisite value. Rule 238 as amended on 12-6-1978, provides that if parties fail to produce the amount required for the stamp papers as provided, the records of the case shall be consigned to the record room without drawing up the final decree and that if a party subsequently desires to have the decree prepared, he shall move the court by a petition producing at the same time the amount required for the stamp papers. Sub-rule (4) of Rule 238 provides that any application for copy of a final decree in a case in which the records have been consigned to the record room without preparing the final decree, shall be returned to the applicant stating that the final decree has not been prepared.

8. It is the submission of learned counsel for the appellant that in view of this scheme of the Civil Rules of Practice (Kerala) appreciated in the light of the observations relied on by him in Udayan Chinubhai's case AIR 1977 SC

2319 no time will run in this case until the plaintiff produced requisite non-judicial stamp paper and even if the appellant had filed an application for copy prior thereto, the same would have been returned in terms of Rule 238(4) of the Rules. It is to be noted that the final judgment in the case did not make any specific direction as to who should produce the non-judicial stamp papers for engrossing the final decree. Rule 236 of the Civil Rules of Practice also does not indicate that the obligation to produce the non-judicial stamp papers is only on the plaintiff or at the first instance, is on the plaintiff. In fact, the rule postulates that the court should direct the parties to deposit in court the amount required for the non-judicial stamp paper for engrossing the decree in proportion to the value of their shares and making the party failing to deposit the amount as directed within time, liable for the costs of the adjournment. The rule no doubt also indicates that the court may allow any party to deposit the entire amount or the share of any other party and direct the same to be realised from the party liable for the same. In the nature of the direction made in the final judgment and in the light of Rule 236 of the Civil Rules of Practice, the legal representatives of the first defendant had the obligation to deposit the proportionate amount due to the share of the first defendant within the time stipulated by the final judgment and if they had not made the deposit they would be taken to be in default to do something directed by the final judgment to be done. On the scheme of Rule 236 of the Civil Rules of Practice, the legal representatives of the first defendant could have sought permission of the court even to deposit the entire amount required for the non-judicial stamp paper and for recovery of the proportionate shares thereof due from the other sharers. As the appellant or the other legal representatives of the first defendant did not resort to any such course, going by the ratio in Udayan Chinubhai's case AIR 1977 SC 2319 it appears to me that the appellant by her own inaction delayed the preparation of the decree and clearly therefore could not take advantage of the time that elapsed before making the application for the copies of the judgment and decree, in view of the Explanation to Section 12 of the Limitation Act.

9. The contention that even if the appellant had made an application for copy of the decree before the production of non-judicial stamp papers by

the plaintiff the same would have been returned to her in view of Rule 238(4) of the Civil Rules of Practice cannot also be of avail to the appellant

to contend that her appeal is in time. In terms of Rule 236, she could have produced the value of the non-judicial stamp paper and averted the

contingency contemplated by Rule 238(4). Moreover, the appellant admittedly, made no application for copy and consequently there was no

question of her application being returned to her in terms of Rule 238(4) of the Rules. In such a situation, the appellant cannot claim exclusion of

the entire period until she actually made the application for the copy of the decree. In terms of Rule 238(4), the appellant could have made an

application for copy and if it had been returned to her for the reason that the records have been consigned to the record room and consequently

the final decree has not been prepared, she could have represented the application as and when the final decree was drawn up and could have

taken advantage of the original date of application. Rule 238(4) of the Civil Rules of Practice would not enable a person like the appellant to get

over the effect of Section 12 of the Limitation Act.

10. Moreover, in view of the clear pronouncement by the Supreme Court in Udyan Chinubhai's case AIR 1977 SC 2319 on the scope of Section

12 of the Limitation Act in the light of the explanation introduced in the 1963 Act, it is doubtful whether the procedure laid down in Sub-rule (4) of

Rule 238 of the Civil Rules of Practice, Kerala can be of any assistance to a person like the appellant. The appeal is governed by the Limitation

Act and what the court has to look to is the provisions of the Limitation Act and necessarily to Section 12 thereof. Only the period permitted by

the said section in obtaining the copies, could be excluded and no other. Rule 238(4) of the Civil Rules of Practice, Kerala even if it is construed as

making it futile for a person like the appellant to apply for a certified copy, cannot prevail over or whittle down the rigour of Section 12 of the

Limitation Act as interpreted by the Supreme Court in Udyan Chinubhai's case AIR 1977 SC 2319 It cannot also be said that Rule 238(4) of the

Rules disables a person from applying for the certified copy of the final decree in a suit for partition. Rule 238(4) of the Kerala Civil Rules of

Practice cannot control the effect or the understanding of Section 12 of the Limitation Act and at best it may enable an applicant for copy to

represent his application after the final decree is actually drawn up in case he had earlier filed an application and got it returned. In my view, Rule

238(4) of the Civil Rules of Practice (Kerala) is inconsistent with Section 12 of the Limitation Act as interpreted by the Supreme Court in Udayan

Chinubhai's case AIR 1977 SC 2319 and the scheme of Rule 236 of the Rules.

In view of my conclusion as above, the appellant is not entitled to exclude the time from the date of the judgment till the date of the making of the

application for the copy of the decree. Hence the present appeal is out of time. The appellant is given an opportunity to make an application for

condoning the delay in filing the appeal.