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**(2004) 10 KL CK 0043**

**High Court Of Kerala**

**Case No:** C.R.P. No. 1505 of 2003

Santhappu Ali

APPELLANT

Vs

Bhaskaran

RESPONDENT

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**Date of Decision:** Oct. 12, 2004

**Acts Referred:**

- Limitation Act, 1963 - Article 137, 61
- Transfer of Property Act, 1882 - Section 60

**Citation:** (2005) 1 ILR (Ker) 301 : (2005) 1 KLT 819

**Hon'ble Judges:** P.R. Raman, J

**Bench:** Single Bench

**Advocate:** K.S. Hariharaputhran, N.D. Sasikumar, P.J. Joseph and George Mathew, for the Appellant; G.S. Reghunath, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

P.R. Raman, J.

Petitioners are defendants in O.S. No. 283/2002, a suit for redemption of the mortgage instituted by mortgagor, the respondents herein. A composite decree was passed in favour of the plaintiff on 11.4.1990. Though the defendants preferred an appeal as A.S. No. 641/1990 before the District Court, Trivandrum, the same was dismissed on 30.8.1995 confirming the decree passed by the Trial Court.

The operative portion of the Judgment of the Trial Court is extracted hereunder:

"(1) Plaintiffs are entitled to redeem the disputed mortgage and kuzhikkanam liability over plaint A schedule property including plaint B schedule buildings from the defendants on deposit of mortgage price of Rs. 500 + and value of improvements Rs. 4,363 before Court.

(2) The plaintiffs are entitled for interest at 12% for the mortgage amount so deposited from the date of receipt of notice concerning the deposit by the

defendants for 3 years or till the date of delivery of property whichever event comes first.

(3) Defendants are entitled to withdraw the amount which will be in deposit being the mortgage price and value of improvements on handing over possession of the property and on production of the documents."

2. That the plaintiff deposited the amount as fixed by the Court below only on 12.2.1999. However, even before making the aforesaid deposit an execution petition E.P. 52/98 was filed by the decree-holders/mortgagors, which was dismissed by the execution Court taking notice of the fact that the deposit was not made on the date of the execution petition. A copy of the order passed in E.P. No. 52/98 was made available in the course of the argument by the learned Counsel for the petitioners herein which shows that the judgment-debtors took up a contention that the plaintiffs/decrees-holders ought to have deposited the amount within six months as contemplated under Order XXXIV Rule 7 of the C.P.C. On the other hand, the plaintiffs wanted to sustain their plea that the amount need be deposited within a period of 12 years as provided under Article 136 of the Limitation Act. The execution Court took notice of the fact that the deposit was made only on 12.2.1999 after filing the execution petition and no petition was filed by the decree-holders for extension of time or condonation of delay for not depositing the amount within a period of six months from the date of the decree. In such circumstances, the plaintiffs have not complied with the conditions mentioned in the decree. It was held that there is no executable decree.

3. Thereafter, the plaintiffs (respondents herein) preferred an I.A. No. 6080/2002 u/s 5 of the Limitation Act seeking to condone the delay in making the deposit of the mortgage amount. This was opposed by the petitioners herein contending that the decree has become unexecutable as the amount was not deposited within six months from 6.4.1990 (being the date of the decree of the Trial Court) and further contended that the application is not maintainable after the dismissal of execution petition by the execution Court. On the other hand the respondents herein contended that the deposit having been made on 12.2.1999 long before the remedy was barred and since sufficient grounds have been made out to condone the delay, they are entitled to have the deposit made regularised so as to enable them to execute the decree.

4. The Court below found that as against the judgment and decree of the Trial Court there was an appeal and the Appellate Court decree was passed on 30.8.1995 and that the deposit was made on 12.2.1999. Undisputedly there was no time limit fixed for deposit of the mortgage money as per the decree. According to the respondents, mortgage would be alive till 25.10.2004. Since the mortgage deed was of the year 1962 and a period of 12 years was fixed for payment of the mortgage amount, 25.10.2004 will be the date of expiry of 30 years from 25.10.1974. Therefore the deposit made in 1999 is to be regularised as otherwise, according to them, they will

be deprived of their valuable right to execute the decree.

5. The Court below found that the mortgage has not been fore closed so far and the property has not been put to sale and the mortgage will be alive till 2004. Hence, the Court below held that this is a fit case to condone the delay in making deposit of the mortgage money and value of improvements. The contention that the dismissal of the E.P.No. 52/98 will operate as *res judicata* was found against. It is true that an observation was made by the Court below that there is no specific plea in the objection that the order of execution Court would operate as *res judicata*, in view of Explanation VII of Section 11 C.P.C. which is disputed by the petitioner in this Revision Petition. It was contended on behalf of the respondents that the plea of *res judicata* is not available to be raised since the execution Court has no right or power to condone the delay or extend the time for depositing the mortgage money.

6. The short question that arises for consideration is as to whether in the case of a redemption of a usufructuary mortgage, the provision contained in Order XXXIV Rule 7(ii) of the C.P.C. has any application and whether the Court below has power to extend the time for making the deposit if any from time to time and whether the order passed by the Court below is illegal or suffers from any material irregularity or lack of jurisdiction.

7. Heard the learned counsel for the petitioner as well as the learned counsel for the respondents and perused the order passed by the Court below.

8. According to the learned counsel for the petitioner, as per Order XXXIV Rule 7 of the C.P.C (Central Act) in the absence of any time limit fixed for making the deposit, the maximum period available for making such deposit is six months from the date of the decree and at any rate it should have been deposited within a period of three years as provided under Article 137 of the Limitation Act. Since the appellate decree was passed on 30.8.1995 and the deposit having been made only on 12.2.1999, the same is beyond time, even if the period of three years as provided under Article 137 of the Limitation Act applies to the case. It is also contended that in view of the dismissal of the execution petition (E.P. No. 52/98), the present application filed for regularising the deposit made, after condoning the delay is hit by the principles of *res judicata*.

9. The learned counsel for the respondents, on the other hand, would contend that in the case of a usufructuary mortgage Order XXXIV Rule 7 or Rule 8 (Central Act) (Corresponding to Order XXXIV Rules 4 and 5 as amended by Kerala Act) has no application and the right to redeem the mortgage is governed by the provisions of Section 60 of the Transfer of Property Act and so long as the right to redeem the property is not extinguished, there is no delay in the matter of making the deposit of the mortgage amount and even an application for condonation of delay may not be necessary in the present case though filed as an abundant caution. According to him, the right to redeem a mortgage will be lost only after the expiry of the period

of 30 years, which in the present case would be on 25.10.2004 and as such the deposit made on 12.2.1999 is well within time and he is entitled to execute the decree and in that view of the matter, the order passed by the Court below cannot be assailed on any valid ground. It is also contended by the learned counsel for the respondents that the right of the mortgagor to execute the decree will be lost only after the expiry of 12 years from the date of the decree and the deposit of the mortgage amount can be made within 12 years as governed by Article 136 of the Limitation Act. He also placed reliance on the decision of the Apex Court in [Achaldas Durgaji Oswal \(Dead\) through Lrs. Vs. Ramvilas Gangabisan Heda \(Dead\) through Lrs. and Others](#), He also contended that the dismissal of the execution petition will not operate as resjudicata, since the question of extending the time or regularising the deposit made is not within the jurisdiction of the execution Court.

10. Before considering the rival submissions made, it will be convenient to refer to the provisions contained in Order XXXIV Rule 7 of the C.P.C. (Central Act) which is extracted hereunder:

"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 up to 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 up to 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; re-transfer 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 interests, 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 right to redeem the property.

(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."

11. Order XXXIV substituted by the Kerala Amendment vide K.G.No. 46 dated 20.11.1990 as is applicable to the State more particularly Rules 4 and 5 which alone are relevant, are also extracted as hereunder:-

"4. Decree in redemption suit.- In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree:

(a) declaring the amount due to the defendant at the date of such decree for:

(i) principal and interest on the mortgage;

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

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

(b) directing-

(i) that, if the plaintiff pays into Court the amount so declared due with subsequent interest and costs as are mentioned in Rule 7 on a day within six months of the decree to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he 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, if necessary, put the plaintiff in possession of the property; and

(ii) that, if such-payment is not made on or before the date so fixed, the plaintiff shall in the case of a mortgage by conditional sale or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, be debarred from all rights to redeem the property and also, if necessary, put the defendant in possession of the mortgaged property; and that if desired by the defendant in the suit itself, in the case of any mortgage other than a usufructuary mortgage, a mortgage by conditional sale or such an anomalous mortgage as aforesaid, the mortgaged property or a sufficient portion thereof be sold and the proceeds of the sale after deducting therefrom the expenses of the sale be 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 and that, in case the net proceeds of such sale be insufficient to pay the amount due to the defendant, the balance be paid by the plaintiff personally if the balance is legally recoverable from the plaintiff otherwise than out of the property sold."

"5. Date of payment:- The Court may, upon good cause shown and upon such terms, if any, as it thinks fit, postpone the date fixed for payment under this Order from time to time."

12. The Apex Court in [Achal Das Durgaji Oswal \(Dead\) through Lrs. Vs. Ramvilas Gangabisan Heda \(Dead\) through Lrs. and Others](#), considered the scope of Rules 7 and 8 of the Central Act and its application to usufructuary mortgage. In that case a preliminary decree was passed, but the deposit was not made within time. However, subsequently the deposit was made with necessary permission and a final decree application was filed. In that case also an application for extension of time was filed to make the deposit as directed in the preliminary decree which was rejected by the Civil Judge and the said order was not challenged by the plaintiff therein, but he obtained a permission to make necessary deposit which was complied with by him. An objection was raised on the ground that the same was not maintainable as being barred by limitation. It was also contended that an application for extension of time having been dismissed by the Court earlier, the present proceedings were not maintainable. The Court accepted this plea and dismissed the application for passing the final decree. A revision filed before the High Court was allowed against which an appeal was preferred to the Apex Court.

13. The Apex Court held in paragraph 10 of the aforesaid judgment as follows:

"The right of the mortgagor, it is now well-settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of his ownership which is not absolute, but qualified by reason of the right of the mortgagee; to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed, by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependant on the mortgagor giving the mortgagee reasonable notice of his intention to redeem, and on his fully performing

his obligations under the mortgage."

14. After referring to Section 60 of the Transfer of Property Act, the Apex Court held that a right of redemption, thus, was statutorily recognized right of a mortgagor as an incidence of mortgage which right subsists so long as the mortgage itself subsists, and the proviso appended to Section 60, however, only confines the said right so long as the same is not extinguished by act of the parties or by decree of Court. In paragraph 16 the Court observed that the question which falls for consideration in this appeal must be considered keeping in view the statutory right of the mortgagor in terms of Section 60 of the Transfer of Property Act and by reason of Article 61 of the Limitation Act, 1963, the limitation provided for a suit to redeem or recover the possession of immovable property mortgaged by a mortgagor is thirty years from the date of accrual of right to redeem or recover possession. Article 137 which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided. The Apex Court after referring to the provisions contained in Order XXXIV Rule 7 of the C.P.C. held that a bare perusal of the aforementioned provisions would clearly show that Sub-clause (ii) has no application in relation to usufructuary mortgage. Sub-rule (2) of Rule 7 of Order XXXIV empowers the Court to extend the time fixed for payment. Rule 8 of Order XXXIV provides for final decree in redemption suit. The right of the mortgagor to file an application for passing a final decree has been provided in the manner laid down therein. It was also held that the statutory provisions, as noticed herein before, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage money, or partly in lieu of interest and partly in payment of mortgage money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received (d) there is no remedy by sale or foreclosure. It was further held that Order XXXIV Rules 7 and 8 do not confer any right upon the usufructuary mortgage to apply for final decree. By reasons of Sub-rule (1) of Rule 8 of Order XXXIV, a mortgagor is entitled to make an application for final decree at any time before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of sale held in pursuance of a final decree passed under Sub-rule (3) of this rule. No such application is again contemplated at the instance of the usufructuary mortgagee. By reason of Sub-rule (1) of Rule 8 of Order XXXIV, a right of redemption is conferred upon the mortgagor of a usufructuary mortgage. Such a provision has been made evidently having regard to the right of redemption of a mortgagor in terms of S. 60 of the Transfer of Property Act and further having regard to the fact that a usufructuary mortgagee would be entitled to possess the property in question till a final decree of redemption is passed. In paragraph 22 of the said judgment it was held "The right of redemption of mortgagor being a statutory right, the same can be taken away only

in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties."

15. The above dictum was laid down by the Apex Court with reference to Order XXXIV R Rules 7 and 8 of the Central Act and with reference to the application for passing a final decree/but in this case a composite decree was passed. But the same principle equally applies in deciding as to whether the application for extension of time for deposit is maintainable when the right of redemption itself is subsisting.

16. In the present case, admittedly, the deposit having been made on 12.2.1999 which is well within the time provided u/s 60 of the Transfer of Property Act, the right of the mortgagor is not extinguished as on the date on which the deposit was made. If that be so, the mere fact that the deposit was not made within the period of six months or within a period of 3 years as provided under Article 137 will not in any way take away the right of the mortgagor to redeem the mortgage. Article 137 applies only in cases where the period of limitation is not otherwise provided. Article 61 of the Limitation Act prescribes the period for 30 years for filing, a suit for redemption or recovery of possession. Thus, it cannot be said that the Court below was wrong in regularising the deposit made on 12.2.1999. As a matter of fact, there was no need for an application for condonation of delay, since as already held by the Apex Court that Order XXXIV Rule 7 has no application to a case of a usufructuary mortgage.

17. The contention that the present application seeking for extension of time till the deposit was made on 12.2.1999 or condonation of delay, as the case may be, is hit by the principles of res judicata, has also to be rejected, as without any merit. The execution petition was dismissed holding that the deposit was not made as on the date of execution petition. The Court only relied on the fact that the petitioner did not seek for any extension of time, but as rightly pointed out by the learned counsel for the respondents that whether or not the time should be extended is not within the jurisdiction of the execution court. As such any observation made by the execution Court in the execution petition in this regard is without jurisdiction and cannot operate as res judicata. At any rate, even a subsequent E.P. may not be barred provided it is filed within a period of 12 years from the date of the decree. It must be noticed that in the present case there was no preliminary decree passed necessitating the passing of a final decree. As a matter of fact, it was a composite decree passed as enabled by the Kerala amendment as already noticed earlier.

18. As per Rule 5 of Order XXXIV as is amended by the Kerala Act, it can be seen that even as per the said rule, the Court may, upon good cause being shown and upon such terms, if any, as it thinks fit, postpone the date fixed for payment under this order from time to time. A Division Bench of this Court in *Sulaikha Kunju v. Krishna Pillai* 1985 KLT 81 held that the Court has jurisdiction under Order XXXIV Rule 5 of the C.P.C. as amended in Kerala for extension of time fixed for deposit under Order XXXIV Rule 4, until such time as the mortgage is itself extinguished by resort to the



provisions of foreclosure or sale that may be applicable to mortgages other than usufructuary mortgages as provided for in Order XXXIV Rule 4(b)(ii) of the C.P.C. as amended in Kerala.

19. That is also a case for usufructuary mortgage and a suit for redemption was decreed on 3.8.1976, but directed to make deposit within six months. It was also held that such time can be extended from time to time under Rule 5 of Order XXXIV as amended in Kerala.

20. In any view of the matter, the deposit made in the present case is well within the time and before extinguishment of the right to redeem the mortgage and as such the order passed by the Court below condoning the delay and extending the time for making the deposit till 12.2.1999 cannot be said to be an order vitiated for any reason. There is no illegality or jurisdictional error committed by the Court below in passing the order impugned.

Accordingly, the C.R.P. is dismissed. In the facts and circumstances of the case, there will be no order as to costs.