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**(2016) 09 KL CK 0029**

**High Court Of Kerala**

**Case No:** O.P. (C) No. 1951 of 2011 (Appeal against the Order in O.S. No. 57 of 2009 of Subordinate Court, Ottapalam)

Mayilvahanam Funds  
(P) Ltd.

APPELLANT

Vs

Sheena, P.

RESPONDENT

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**Date of Decision:** Sept. 28, 2016

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2

**Citation:** (2017) 1 ILRKerala 558

**Hon'ble Judges:** Mr. K. Ramakrishnan, J.

**Bench:** Single Bench

**Advocate:** Sri Santheep Ankarath and Sri Sumodh Madhavan Nair, Advocates, for the Respondents; Sumathy Dandapani, Senior Advocate and Sri Millu Dandapani, Advocate, for the Petitioner

**Final Decision:** Disposed Off

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### **Judgement**

**Mr. K. Ramakrishnan, J.** - The plaintiff in O.S No. 57 of 2009 on the file of the Sub Court, Ottappalam has filed this petition challenging the order passed on a preliminary issue on the question of limitation under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioners filed Ext. P-I suit as O.S. No. 57 of 2009 before the Sub Court, Ottappalam for recovery of amount due on a chitty transaction. According to the petitioners, the first respondent joined a chitty on 3-9-2003 and he auctioned the chitty on 3-10-2003 and an amount of ₹ 5,25,000 was disbursed to him and respondents 2 and 3 are guarantors and all the respondents have executed an agreement dated 13-12-2003 agreeing to pay the future instalments and also agreed as per the terms of the agreement that the guarantee agreement will be in force for a period of three years from the date of last payment of the instalments. The first respondent paid up to ten instalments, thereafter committed default in payment of the amount. Notice has

been issued on 5-11-2005 demanding the amount. But they did not pay the amount. So the suit was filed for realisation of the entire amount.

3. The respondent entered appearance and admitted the signatures in the documents and also receipt of the amount. But, according to them, their signatures were obtained in certain blank typed documents and they were not aware of the contents of the document and they also contended that the suit is not maintainable as the chitty was not registered in accordance with law and the amounts claimed is not proper. They also contended that the suit is barred by limitation. They also contended that they have paid 30 instalments and that was not properly accounted. So according to them, they discharged the entire amount and no amount is due to the plaintiff from them and the amount paid has not been properly accounted and they prayed for dismissal of the suit. The court below had framed an issue "whether the suit is barred by limitation" and it was taken as a preliminary issue and passed Ext. P-3 impugned order stating that except the last instalment other instalments are barred and directed the petitioner to produce the statement. This order is being challenged by the petitioner by filing this petition.

4. Heard Smt. Sumathi Dandapani, senior counsel appearing for the petitioner and Sri Santheep Ankarath, counsel appearing for the respondents.

5. Counsel for the petitioner submitted that this is not a case where the court ought to have disposed of the suit under Order 14, Rule 2 (2) of Code of Civil Procedure and after the amendment Act of 1976, court is expected to answer all issues framed unless it falls under Order 14, Rule 2 (2) where the court is of opinion that the case or any part there of may be disposed of either on the basis of question of law only, if it may try that issue first if that relates to (a) the jurisdiction issue or bar to the suit created by any law for the time being in force. In all other cases the court will have to decide the question on the basis of evidence. Question of limitation cannot be treated as a question of law alone as it is only a question of law and fact and in such circumstances that issue cannot be decided as a preliminary issue. The learned senior counsel has relied on the decisions reported in **Panchanan Dhara and others v. Monmatha Nath Maity (Dead) Through LRs and another, (2006) 5 S.C.C. 340, Lufthansa German Airlines v. Vij Sales Corporation, (1998) 8 S.C.C. 623, Gunwanthbhai Mulchand Shah v. Anton Elis Farel and others, (2006) 3 S.C.C. 634, Gomes v. Manual Gomes and others, 2012 (1) K.L.J. 87, Taj Kerala Hotels and Resorts Ltd. v. Easytec India Pvt. Ltd., 2013 (4) K.L.T. 621, Anil Kumar v. Bobby Joseph, 2014 (1) K.L.T. 114** in support of her contentions.

6. On the other hand, counsel for the respondent submitted that the limitation for filing the suit on the basis of chitty transaction will arise depending on the date of default and not on the termination of the chitty and court below had correctly applied the law and rightly held that portion of the amount claimed is barred by limitation and that was rightly decided as a preliminary issue. He had relied on the decision reported in **John C.J. and others v. Oriental Kuries Ltd. and others, 2009 (1) K.H.C. 850, Krishnan Madhavan v. Narayanan Jayadevan, 1974 K.H.C. 92, Sukumaran v. Sankaran, 1977 K.H.C. 290**

and **Chirag Enterprises v. Star Traders and another**, I.L.R. 2012 (4) Kerala 266 in support of his case.

7. It is an admitted fact that the plaintiff filed the suit for realization of amount alleged to be due on the basis of chitty transaction claiming the entire balance amount due after deducting the instalments paid with interest and cost. They have relied on Ext. A-I agreement in order to save limitation by which it has been stated that all the respondents have agreed that the guarantee agreement will survive for a period of three years from the termination of the chitty transaction. It is on that basis that the suit has been filed. Respondents who are the defendants in the court below filed written statement admitting the chitty transaction and also disbursal of the amount but they have contended that they have not executed any document and their signatures were obtained in blank papers and also on typed documents. They were not aware of the contents of the documents. They also contended that they have paid the entire 30 instalments to the agents of the plaintiff and they have not properly accounted the same. So there is no amount due from them and they prayed for dismissal of the suit. It appears from the contentions that court below had framed several issues, one of such issues was whether the suit was barred by limitation and decided the question as a preliminary issue and came to the conclusion that Article 36 of Limitation Act has no application and Article 37 is applicable and if Article 37 is applicable, then the period of limitation start from the date of default in payment of the amount and not on the termination of the chitty agreement and decided the part of the case and came to the conclusion that except the 30th instalment other instalments are barred by limitation and directed the case to be posted for trial on other aspects. This is being challenged by the petitioner.

8. Order 14, Rule 2 reads as follows:

**"2. Court to pronounce judgment on all issues.-**(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to,-

(a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

9. The intention of legislature appears by the amendment after 1976 was that notwithstanding that the case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub rule (2) pronounce judgment on all issues and further sub rule (2) of Rule (2) says where the issue of both law and fact arise on the same suit and

the court is of the opinion that the case or any part thereof may be disposed on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of court or (b) a bar to the suit created by any law for the time being in force and for that purpose if it thinks fit, postpone the settlement of other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue.

10. In this case the question is as to whether the suit is barred by limitation or not. The decisions relied on by the counsel for the respondent namely **John C.J. and others v. Oriental Kuries Ltd. and others, 2009 (1) K.H.C. 850. Krishnan Madhavan v. Narayanan Jayadevan, 1974 K.H.C. 92. Sukumaran v. Sankaran, 1977 K.H.C. 290 and Chirag Enterprises v. Star Traders and another, I.L.R. 2012 (4) Kerala 266**, are all arising out of the final disposal of the suit after taking evidence and where the question of limitation has been decided as part of the disposal of the case, then, that was decided in those decisions and this Court has come to the conclusion declaring the law of limitation as to how it will have to be applied in the case of chitty transaction. So it cannot be taken as a decision rendered by the court on the question as to whether limitation can be tried as a preliminary issue under Order 14, Rule 2 (2) of the Code of Civil Procedure.

11. But this question has to be considered by the apex court in the decision reported in **Panchanan Dhara and others v. Monmatha Nath Maity (Dead) Through LRs and another, (2006) 5 S.C.C. 340** and held that the question of limitation cannot be treated as a clear question of law alone amenable to be decided as a preliminary issue under Order 14, Rule 2 (2) of Code of Civil Procedure. This view has been approved by the apex court in another decision reported in **Lufthansa German Airlines v. Vij Sales Corporation, (1998) 8 S.C.C. 623** and **Gunwanthbhai Mulchand Shah v. Anton Elis Farel and others, (2006) 3 S.C.C. 634** and followed by this Court in the decision reported in **Gomes v. Manual Gomes and others, 2012 (1) K.L.J. 87. Taj Kerala Hotels and Resorts Ltd. v. Easytec India Pvt Ltd., 2013 (4) K.L.T. 621** and **Anil Kumar v. Bobby Joseph, 2014 (1) K.L.T. 114** and held that the question of limitation being a mixed question of fact and law, that cannot be decided by the court as a preliminary issue under Order 14, Rule 2 (2) of Code of Civil Procedure and only after deciding the issue on the basis of the evidence, the court can record finding as to whether the suit is barred by limitation or any portion of the claim made is barred by limitation or not. So, under such circumstances, the procedure followed by the court below in taking the question of limitation as a preliminary issue and passing the impugned order is unsustainable in law and the same is liable to be set aside.

12. Further in this case petitioner is relying on Ext. A-1 agreement for saving limitation and that was specifically pleaded in the plaint as well. Further the execution of that document has been disputed by the defendants. So, under such circumstances, without taking evidence on the question of execution of the document on which the petitioner is relying on for the purpose of saving limitation, court below ought not have decided the question of limitation as a preliminary issue as has been done in this case.

13. Further, the defendant is also pleading discharge. That also has to be considered on the basis of evidence. So, when the question of limitation itself depend on as to how the parties have understood the clause in the agreement regarding the running of limitation for recovery of the amount, the court below is not expected to proceed on the basis of preliminary issue to decide the question of limitation and the procedure adopted by the court below in this case is unsustainable in law and is illegal and the same is liable to be set aside on that ground also.

In the result, the order passed by the court below on the question of limitation is set aside and the matter is remitted to the court below with direction to the court below to give opportunity to the parties to adduce evidence on the whole issues and thereafter decide the question afresh on the basis of the evidence untrammelled by the observations made regarding the question of limitation decided in the impugned order. Considering the fact that the case is of the year 2009, court below is directed to expedite disposal of the case as expeditiously as possible, at any rate, within four months from the date receipt of this judgment or from the date on which the parties are directed to appear before the court, whichever is earlier. Both the counsel submitted that if a date is fixed for appearance, they will appear before the court below so that the delay in disposal can be avoided. So parties are directed to appear before the court below on 28-10-2016. Registry is directed to communicate this judgment to the court below at the earliest.