



2024/KER/21134

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

TUESDAY, THE 19TH DAY OF MARCH 2024 / 29TH PHALGUNA, 1945

OP (FC) NO. 629 OF 2022

EP NO.9 OF 2015 OF FAMILY COURT, THODUPUZHA

PETITIONER/PETITIONER/DECREE HOLDER

BINCY SCARIA

W/O. SAJU ALEX, THEKKEL (H), PRAVITHANAM KARA, NOW
RESIDING AT MUTHUKATTIL (H), PUTTADY KARA, ANAKKARA
VILLAGE,, PIN - 685551

BY ADVS.

M.NARENDRA KUMAR

HARSHADEV M.

RESPONDENT/RESPONDENT/1ST JUDGMENT-DEBTOR

JOSEPH @ JOSEMON

S/O. GEORGE, KANJIRAKOMBIL (H), VAZHITHALA KARA,
MANAKKAD VILLAGE. THODUPUZHA,, PIN - 685590

BY ADVS.

SRI. George Mathew

PRAVEEN S. (K/001398/1998)

M.D.SASIKUMARAN(S-237)

SUNIL KUMAR A.G(K/000741/2003)

DIPU JAMES(K/1315/2003)

MATHEW K.T. (K/001047/2018)

GEORGE K.V. (K/000060/2019)

STEPHY K REGI(K/001025/2020)

ADARSH KURIAN(K/154/2020)

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON
29.2.2024, THE COURT ON 19.03.2024 DELIVERED THE FOLLOWING:



C.R.

ANU SIVARAMAN & C.PRATHEEP KUMAR, JJ.-----
OP (FC). 629 of 2022
-----Dated : 19th March, 2024**JUDGMENT**C.Pratheep Kumar, J.

1. This is a petition filed by the decree holder in E.P.9/2015 in O.P.No.664 of 2002 on the file of the Family Court, Thodupuzha. In the above OP, the Family Court granted a decree for realization of value of gold and patrimony from the judgment debtor. Before this Court the parties settled the dispute in Mat.Appeal No.211/2007 and a compromise decree was passed. In execution of the above compromise decree, an extent of 83 cents of property belonging to the judgment debtor was put to sale and the petitioner herein purchased the same on 6.11.2017 for a sum of Rs.15,66,350/-. The respondent/judgment debtor filed E.A.No.45/2017 under XXI Rule 90 of CPC praying for setting aside the sale. As per Ext.P2 order, the Execution Court dismissed the E.A on 15.5.2018 and on the same day the sale was confirmed. Thereafter, on 3.6.2018, the respondent filed E.A.No.15/2018 praying for restoring E.A.45/2017. The petitioner herein filed Ext.P4 counter to E.A.No.15/2018. On 22.5.2019 the Execution Court dismissed E.A.15/2018, as per Ext.P5 order. Thereafter, on 11.10.2019 the petitioner filed E.A.31/2019 under Order



XXI Rule 95 CPC for delivery of the property purchased by him. Ext.P6 is the copy of E.A.31/2019.

2. The respondent filed Ext.P7 counter to Ext.P6 opposing Ext.P6 mainly on the ground that it is filed after the expiry of the period of limitation as provided under Article 134 of the Limitation Act. The Execution Court, after accepting the contention raised by the respondent, dismissed E.A.31/2019 as per Ext.P8 order holding that it is barred by limitation. Aggrieved by the above order, the decree holder preferred this petition raising various grounds. Now the points that arise for consideration are the following :-

- (i) Whether E.A.31/2019 filed under Order XXI Rule 95 of CPC is barred by limitation ?

- (ii) Whether the impugned order of the Execution Court dismissing E.A.31/2019 is liable to be interfered with, in the light of the grounds raised in the application ?

3. Heard both the parties.
4. The points 1 and 2 :- It was argued on behalf of the respondent/judgment debtor that by virtue of Article 134 of the Limitation Act, an application under Order XXI Rule 95 CPC is to be filed within a period of one year from the date of confirmation of sale. It was contended that in the instant



case, the sale was confirmed on 15.5.2018 and as such E.A.31/2019 filed on 11.10.2019, after the expiry of 1 year is barred by limitation. Therefore, it was argued on behalf of the respondent that the impugned order passed by the Execution Court is perfectly valid. On the other hand, the learned counsel for the petitioner would argue that after the confirmation of sale on 15.5.2018, the respondent filed Ext.P3 E.A.No.45/2017 for restoring E.A.No.15/2018. Thereafter, the Execution Court passed Ext.P5 orders dismissing E.A.15/2018 on 22.5.2019 and as such the application filed for delivery on 11.10.2019 is within the period of limitation prescribed under Article 134 of the Limitation Act. Therefore, it was further argued that the impugned order dismissing E.A.15/2018 is unsustainable and liable to be interfered with.

5. Relying upon the decision of the Hon'ble Supreme Court in **United Finance Corporation v. M.S.M.Haneefa, 2017 (1) KHC 647 [SC]**, it was argued by the learned counsel for the petitioner that where there is an appeal from an order of Execution Court disallowing application to set aside the sale, the sale will not become absolute until the disposal of the appeal, even though Execution Court may have confirmed the sale. In the above case, the judgment debtor has filed two applications, one to set aside the sale alleging that the property was sold for a lower price and as a result of which he sustained substantial injury. The other application was for



appointing an Advocate Commissioner to assess the value of the property. As against the order dismissing the Commission application, the judgment debtor filed a revision before the High Court. The High Court dismissed the revision on 9.7.2003. In the above factual background the Apex Court held that the sale in that case became absolute only on 9.7.2003 and hence it was held that the application filed under Order XXI Rule 95 of CPC on 30.8.2003 was well within the period of limitation.

6. Relying upon the decision in **United Finance Corporation** (supra), the learned counsel for the petitioner would argue that in the instant case also, the sale became absolute only on 22.5.2019 when E.A.15/2018 was disposed of, and as such, according to him, the application for delivery filed on 11.10.2019 is well within the period of limitation. As argued by the learned counsel for the petitioner, if the dictum laid down in **United Finance Corporation** (supra) is followed, the ancillary proceedings in this case came to an end only on 22.5.2019 and if so, the application for delivery filed on 11.10.2019 is within the period of limitation.
7. However, if the decision in **Pattam Khader Khan v. Pattam Sardar Khan, 1996 KHC 494**, the Hon'ble Supreme Court held that upon confirmation of the sale under Order XXI Rule 95 CPC the sale become absolute and as such, the application under Order XXI Rule 95 is to be filed within a period of one year from the date of confirmation of sale. In



the above decision, the sale was confirmed by the Court on 7.8.1984. The sale certificate was issued by the Court on 9.11.1989. The auction purchaser filed an application under Order 21 Rule 95 CPC on 9.11.1989. In the above factual situation it was held that the application for delivery filed after the expiry of one year from the date of confirmation of sale is hit by Article 134 of the Limitation Act.

8. Before a Full Bench of this Court in **Danish Varghese v. Jancy Danish, 2021 (1) KHC 1**, the starting point for reckoning one year period under Article 134 of the Limitation Act came up as ancillary point for consideration. After analyzing various provisions and case laws, in paragraph 19, the Full Bench held that :-

“.....Above judicial precedents reiterate that the date when the sale becomes absolute as referred in Article 134 need not correspond to the date of sale or to the date of issuance of sale certificate or passing of the order making the sale absolute under Order XXI Rule 92. Passing of such an order under Order XXI Rule 92 is mandatory obligation of the executing court, if no application is made under Rules 89, 90 and 91 of Order XXI or if such an application is filed, after it is dismissed. However, in case of pendency of consequential proceedings in which Court sale is under challenge, starting of limitation period under Article 134 of the Limitation Act may get extended depending on the pendency of such proceedings. This is evident from the judgment of Supreme Court in United



Finance Corporation (supra) wherein it was held that Legislature consciously adopted the expression “when the sale becomes absolute” in Article 134 and not when sale was confirmed. So long as revision filed against an order passed in the Court of execution proceeding was pending, it could not be held that, sale has become absolute, it was observed. Sale becomes absolute on the culmination of above proceedings. This is the starting point of limitation in filing application under Section 134 of Limitation Act, 1973.”

9. The above divergent views of two different Two-Judge Benches of the Hon'ble Supreme Court in **Pattam Khader Khan** (supra) and **United Finance Corporation** (supra) regarding the starting period of limitation under Article 134 of the Limitation Act, came to the attention of another Two-Judge Bench of the Hon'ble Supreme Court in **Bhasker v. Ayodhya Jewellers, 2023 KHC 6790**. After discussing the above decisions in detail, the Division Bench decided to refer the matter to a Larger Bench. In paragraph 11 of the judgment in **Pattam Khader Khan** (supra) the Two-Judge Bench held that :-

“Order 21 Rule 95 providing for the procedure for delivery of property in occupation of the judgment-debtor etc, requires an application being made by the purchaser for delivery of possession of property in respect of which a certificate has been granted under Rule 94 of Order 21. There is nothing in Rule 95 to make it incumbent for the purchaser to file the certificate along with the application. On the sale becoming



absolute, it is obligatory on the Court though, to issue the certificate. That may, for any reason get delayed. Whether there be failure to issue the certificate or delay of action on behalf of the Court or the inaction of the purchaser in completing the legal requirements and formalities, are factors which have no bearing on the limitation prescribed for the application under Article 134. The purchaser cannot seek to extend the limitation on the ground that the certificate has not been issued. It is true though that order for delivery of possession cannot be passed unless sale certificate stands issued. It is manifest therefore that the issue of sale certificate is not "sine qua non" of the application, since both these matters are with the same Court. The starting point of limitation for the application being the date when the sale becomes absolute i.e. the date on which title passed, the evidence of title, in the form of sale certificate, due from the Court, could always be supplied later to the Court to satisfy the requirements of Order 21 Rule 95. See in this regard Babulal Nathoolal Vs. Annapurnabai, AIR 1953 Nagpur 215, which is a pointer. It therefore becomes clear that the title of the Court auction-purchaser becomes complete on the confirmation of the sale under Order 21, Rule 92, and by virtue of the thrust of Section 65 CPC, the property vests in the purchaser from the date of sale; the certificate of sale, by itself, not creating any title but merely evidence thereof. The sale certificate rather is a formal acknowledgement of a fact already accomplished, stating as to what stood sold. Such act of the Court is prestinely a ministerial one and not judicial. It is in the nature of a formalisation of the obvious. "



10. In paragraph 11 of **United Finance Corporation** (supra), the correctness of the above observation of Two-Judge Bench in **Pattam Khader Khan** (supra) was raised by the Hon'ble Supreme Court in the following words :-

“By careful reading of Order XXI Rule 95 C.P.C., the language of the provision is indicative that application for delivery of possession of property purchased in the Court auction can be filed where “a certificate in respect thereof has been granted under Rule 94 of Order XXI. Having regard to the language of Order XXI Rule 95 C.P.C. “a certificate in respect thereof has been granted in Rule 94.....” “..... the court shall, on the application of the purchaser, order delivery to be made.....” we have our own doubts regarding the view taken by this Court in the case of Pattam Khader Khan's case (supra) “.....that there is nothing in Rule 95 to make it incumbent for the purchaser to file the certificate along with the application.....” and “.....that the issuance of sale certificate is not a sine qua non of the application....”. However in the facts and circumstances of the present case, we are not inclined to refer the question to a larger Bench - whether issuance of sale certificate is a sine qua non or not for filing the application under Order XXI Rule 95 C.P.C. and the question is left open. ”

11. After noticing the divergent views in **United Finance Corporation** and **Pattam Khader Khan**, the Hon'ble Supreme Court in **Bhasker** (supra) held that :-



“19. Prima facie, it appears to us that the only way of avoiding inconsistency between Rule 95 of Order XXI of CPC and Article 134 of the Limitation Act is to read into Article 134 that the starting point for making an application under Rule 95 of Order XXI of CPC is the date on which a certificate recording confirmation of auction sale is actually issued to the purchaser. Such interpretation will satisfy the three tests laid down in the case of Inco Europe Limited & Ors. Therefore, in our considered view, the decision of the Coordinate Bench in the case of Pattam Khader Khan and especially, what is held in paragraph 11, requires reconsideration by the larger Bench. In our considered view, the larger Bench will have to decide the issue relating to the starting point of limitation for making an application under Rule 95 of Order XXI of CPC. We direct the Registrar (J - I) to place this appeal along with a copy of this order before the Hon'ble Chief Justice of India to enable him to take appropriate decision on the administrative side. “

12. It was further argued by the learned counsel for the appellant that till the larger bench takes a final decision on the matter, the doubted decision would prevail. In the decision of the Hon'ble Supreme Court in **Union Territory of Ladakh v. Jammu and Kashmir National Conference, 2023 KLT OnLine 1810 (SC)**, the Hon'ble Supreme Court held that mere reference to a Larger Bench does not unsettle the declared law. In paragraph 35, the Apex Court held that :-

“We are seeing before us judgments and orders by High



*Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in *National Insurance Company Limited v. Pranay Sethi*, (2017 (4) KLT 662 (SC) = (2017) 16 SCC 680) (See Paragraphs 27 and 28 in the report on this point). The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it.”*

13. In the light of the above decisions, it can be seen that merely because the Hon'ble Supreme Court has referred the decisions in **United Finance Corporation** (supra) and **Pattam Khader Khan** (supra) to a Larger Bench, till a final decision is taken by a Larger Bench, the law existing till then is binding on this Court. As seen from paragraph 19 of the decision in



Bhasker, (supra), the point mainly referred to the Larger Bench is to decide an issue relating to the starting point of limitation for making an application under Rule 95 of Order XXI of CPC. The question which arose for consideration in **Pattam Khader Khan's case** (supra), especially the findings in paragraph 11 thereof was whether the failure to issue sale certificate or delay of the court or inaction of the purchaser in completing legal requirements are factors having any bearing on the limitation prescribed for the application under Article 134 of the Limitation Act. In paragraph 11 it was held that there is nothing in Rule 95 to make it incumbent for the purchaser to file the sale certificate along with the application under Rule 95 and that the issuance of a sale certificate is not *sine qua non* for the application under Rule 95. However, in **United Finance Corporation's case** (supra), the pointed question was where the sale had been made absolute and the sale certificate issued in favour of the auction purchaser, whether the application for delivery of possession is barred by limitation so long as a revision was pending before the High Court, it was held that where there is an appeal from the order of the execution court disallowing the application for set aside sale, the sale will not become absolute until the disposal of the appeal. This position has been reiterated by the Full Bench of this Court as well. In the instant case, the issue to be decided is whether the sale had become absolute only with



the dismissal of all ancillary proceedings, that is, only on E.A. No.15/2018 filed by the respondent herein being dismissed on 22.5.2019, we are of the opinion that the question raised is squarely answered in **United Finance Corporation's case** (supra).

14. In the above view of the matter, the point referred to the larger bench by the Supreme Court being whether a sale certificate is *sine qua non* for making an application under Order XXI Rule 95, we are of the opinion that the decision in **United Finance Corporation's case** (supra) holds the field. Therefore, in the light of the decision in **United Finance Corporation** (supra) and **Danish Varghese** (supra) it is to be held that in case there is any ancillary proceedings to set aside the sale, only after the final disposal of those proceedings, the sale will become absolute. The above principle applies to the facts of this case also. In the instant case, the ancillary proceedings came to an end only on 22.5.2019. Therefore, the one year period stipulated under Article 134 of the Limitation Act commences only from 22.5.2019. In the above circumstance, the application for delivery filed under Order XXI Rule 95 CPC on 11.10.2019 is well within the period of one year provided under Article 14 of the Limitation Act.

15. In the above circumstances, this OP(FC) is allowed. The impugned order of the Family Court Thodupuzha, dismissing E.A No.31 of 2019 is set



aside. E.A. 31 of 2019 is allowed. The petitioner is allowed to seek delivery of the property through the Execution Court.

Sd/-

Anu Sivaraman, Judge

Sd/-

C.Pratheep Kumar, Judge

APPENDIX OF OP (FC) 629/2022**EXHIBITS**

- Exhibit-P1** THE TRUE COPY OF THE ORDER DATED 06.11.2017 IN E.P. NO. 9 OF 2015
- Exhibit-P2** THE TRUE COPY OF THE ORDER DATED 15.05.2018 IN E.A. NO. 45 OF 2017 IN E.P. NO. 9 OF 2015 IN THE FAMILY COURT, THODUPUZHA
- Exhibit-P3** THE TRUE COPY OF THE APPLICATION E.A. NO. 15 OF 2018 IN E.A. NO. 45 OF 2017 IN E.P. NO. 9 OF 2015
- Exhibit-P4** THE TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONER TO EXHIBIT-P3
- Exhibit-P5** TRUE COPY OF THE ORDER DATED 22.05.2019 DISMISSED E.A. 15 OF 2018 IN E.A. NO. 45 OF 2017 IN E.P. NO. 9 OF 2015
- Exhibitp-P6** TRUE COPY OF THE E.A. NO. 31 OF 2019 IN E.P. NO. 9 OF 2015
- Exhibit-P7** TRUE COPY OF OBJECTION TO EXHIBIT - P6
- Exhibit-P8** TRUE COPY OF THE ORDER DATED 17.10.2022 IN E.A. NO. 31 OF 2019 IN E.P. NO. 9 OF 2015