
(1918) 12 MAD CK 0001
In the Madras High Court

A.C. Ganapathiya Pillai and Another

APPELLANT

Vs

Gopala Aiyer and Others

RESPONDENT

Date of Decision : 03-12-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5, 48
Transfer of Property Act, 1882 — Section 89

Citation : 56 Ind. Cas. 563

Hon'ble Judges : Spenser, J;Sadasiva Aiyar, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—The decree-holders are the appellants. Their application was u/s 89 of Act IV of 1882 for an order absolute. The

application was made in 1914 within three years of a previous application of December 1911 for the same relief, the right to obtain that relief under

the decree of December 1905 having accrued in March 1909. That application was dismissed by the Munsif on the ground?:

(a) that Article 181 (old Article 178) applied to the application for an order absolute under the ruling in Rungiah Goundan & Co. v. Nantappa

Row 26 M.P 780 : 13 M.L.J. 412; 23 Ind. Cas. 649 : 16 Bom. L.R. 395 : 18 C.W.N. 963 : 19 C.L.J. 626 : 27 M.L.J. 17 : (1914) M.W.N. 485

: 16 M.L.L. 44 : 1 L.W. 483 that, therefore, it was barred as made after three years from March 1909;

(b) that the decree-holders had no right to apply for an order absolute but could apply only for the passing of a final decree according to the

provisions of the new Civil Procedure Code.

(c) The District Judge confirmed the order of the District Munsif on only the ground (c), namely, that the decree holder had no right to apply for an

order absolute but only for a final decree and such an application was barred under Article 181.

2. Following the reasoning of the decision in *Balaji Rao v. Harirama chetty* 32 Ind. Cas. 39 which. approves of the decision in *Mahommad Husain*

v. Abdul kareem 29 Ind. Cas. 237 : 17 M.L.T. 424 I would hold that the decree passed in December 1908 u/s 88 of Act IV of 1882 gave a

vested right to the decree-holder to obtain an order absolute in execution proceedings and that he could, therefore, apply u/s 89 of Act IV of 1882

for such an order.

3. Though sections 86 and 89 of the Transfer of Property Act had been repealed before the time allowed to the judgment-debtor for making the

payment (March 1909), the vested right of the decree holder to apply in execution for an order absolute on the expiry of the time granted to the

judgment-debtor for payment cannot be taken away by the said repeal [see Section 6 of Clauses (c) and (e) of the General Clauses Act]. If his

right to apply u/s 89 is held to have been taken away by the new Code, he cannot also obtain a final decree under Order XXXIV, rule 5, as a final

decree presupposes a preliminary decree under Order XXXIV, rule 4, and the decree of December 1908 was not a preliminary decree (see

Malikarjunadu Setti v. Lingamurthi Pantulu 25 M.P 244 : 12 M.L.J. 279.

4. The result would be that the decree-holders have got a final decree under Section 88 of Act IV of 1882 but can neither get an order absolute

nor a final decree to make it executable.

5. The respondents' learned Vakil relied on the case in *Nimmala Mahankali v. Kallakuri Subba Rao* 41 Ind. Cas. 268 : 32 M.L.J. 455 I am not

quite sure whether I have been able to correctly understand the language of that judgment and the facts, though I have carefully gone through the

records (including the printed papers and the judgment). The District Munsif's judgment in that case was passed in September 1908, but the case

went up to the High Court in second appeal and the judgment and the decree in second appeal were passed on 28th July 1910. That decree is

referred to in *Nimmala Mahankali v. Kallakuri Subba Rao* 41 Ind. Cas. 268 : 32 M.L.J. 455 as "" the final decree on second appeal."" It is doubtful

on the language whether the learned Judges meant that it was the decree which was passed finally by the High Court in the litigation. or whether

there was at first a preliminary decree and the High Court afterwards passed a final decree on 29th July 1910. But a perusal of the records shows that they intended the former.

6. The next question is whether the High Court's decree of 29th July 1910 must (like the District Mansif's decree in that suit) be taken to have

been passed: u/s 83 of Act IV of 1882 or as a preliminary decree under Order XXXIV, rule. 4 (1) of the new Civil Procedure Code. After the

best consideration I have been able to give to the question, I think that the learned Judges treated it as a preliminary decree passed by the High

Court under the new Code " and then they applied Article 181 to the application for a final decree. They yet held, however, that the application of

1914 to pass the final decree following the preliminary decree of 1910 was not barred because they say ""it was conceded"" (evidently by the Vakil

for appellants) ""that if time accrued from the date of the appellate decree the present application would not be bared by limitation."" What facts,

such as an acknowledgment by the judgment-debtor of the existence of the right to apply made within three years or an acknowledgment that the

application of 1914 could be treated as a renewal of previous application made within three years of July 1910, led the appellant's Vakil to make

that concession does not appear from the records,

7. I think that I can say with some confidence that the learned Judges could not have considered the High Court's decree of 1910 as one passed

u/s 88 of Act IV of 1832, as they applied Article 181 not Article 182 to the application of 1914 and one of the learned Judges who decided

Nimmala Mahankali v. Kallakuri Subba Rao 41 Ind. Cas. 268 : 32 M.L.J. 455 (Mr. Justice seshagiri Ayyar) was a party to the prior decision in

Mahammad Husain v. Abdul Kareem 29 Ind. Cas. 237 : 39 M.P 544 : 17 M.L.T. 424 which clearly hall [following Abdul Majid v. Jiwahir Lal 23

Ind. Cas. 649 : 16 Bom. L.R. 395 : 18 C.W.N. 963 : 19 C.L.J. 626 : 27 M.L.J. 17 : (1914) M.W.N. 485 : 16 M.L.L. 44 : 1 L.W. 483 that not

with standing Rungiah Goundan & Co. v. Nanjappa Row 26 M.P 780 : 13 M.L.J. 412 Article 182 (old 178) and not Article 181. (old Article

178) applied to an application made for the passing of an order absolute u/s 89.

8. In the result I would set aside the decisions of the lower Courts and hold [following Mohammad Husain v. Abdul Kareem 29 Ind. Cas. 237 : 39

M.P 544 : 17 M.L.T. 424 which decided that applications for an order absolute can be renewed at intervals of not more than three years till 12

years expire that the decree holders' application of 1914 to pass an order absolute u/s 89 is legally sustainable and competent and that it is not

barred. An order absolute is, therefore, directed to be drawn up by the District Munsif in favour of the decree holder, following the terms of

Section 89 of Act IV of 1882. The 1st respondent will pay the plaintiffs' costs throughout, such costs being also a charge on the mortgaged

property to be added to the decree amount.

Spencer, J.

9. In this case there was an application for an order absolute for sale within three years of the passing of the decree u/s 88 of the Transfer of

Property Act, namely, on December 2nd, 1911.

10. When that application was dismissed for default, the dismissal of the application did not have the effect of causing the suit to be dismissed or of

making the decree already passed null and void. Within three years of that date, viz., on 29th April 1914, a fresh application was made quoting

Section 89 of the Transfer of Property Act, although by that time the provisions of the Transfer of Property Act for enforcing mortgages had been

superseded by the provisions of Order XXXIV of the new Civil Procedure Code.

11. Under the authority of the Privy Council in Abdul Majid v. Jawahir Lal 23 Ind. Cas. 649 : 16 Bom. L.R. 395 : 18 C.W.N. 963 : 19 C.L.J.

626 : 27 M.L.J. 17 : (1914) M.W.N. 485 : 16 M.L.L. 44 : 1 L.W. 483 an application to make an order absolute in a suit upon a mortgage for

sale governed by the Transfer of Property Act falls within the purview of Article 179 of the Limitation Act of 1877, and this was followed in

Mohammad Husain v. Abdul Kareem 29 Ind. Cas. 237 : 39 M.K 544 : 17 M.L.T. 424 [see also Balaji Rau v. Harirama chetty 32 Ind. Cas. 39.

12. The application of 2nd December 1911 being a step-in-aid of execution within the meaning of Article 182 of the Limitation Act of 190)

(corresponding to Article 179 of the Limitation Act of 1877), the present application is not barred either by Article 182, Limitation Act, or by

Section 48, Civil Procedure Code.

13. If, however, it be held that on account of the date fixed for payment in this case falling on 10th March 1909 after the Code of 1908 came into

force, the decree-holder should apply for a final decree under Order XXXIV, rule 5, instead of applying for an order absolute, then I consider that

such an application being an application in the suit", it is open to the plaintiff to continue the suit until the stage of final decree is reached, provided

that the suit is not meanwhile dismissed for any cause, [see *Lakshmi Achi v. Subbarama Aiyar* 29 Ind. Cas. 142 : 39 M.P 488 : 2 L.W. 403 : 26

M.L.J. 491 : (1915) M.W.N. 327 : 17 M.L.T. 385 In this view I consider that the preliminary decree holders might be permitted to treat both

their applications of 1911 and 1914 as applications under Article 181 for a final decree and to treat the 2nd as a continuation or revival of the first

application.

14. I agree that the appeal should be allowed with costs and that the case should be sent back to the District Munsif's Court for passing the

necessary orders.