

(1936) 11 MAD CK 0053
In the Madras High Court

Etasseri Munootta Mangalath Illath Kesavan Nambudri and
Another

APPELLANT

Vs

Puthusseri Theva Amma and Others

RESPONDENT

Date of Decision : 26-11-1936

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : AIR 1938 Mad 41

Hon'ble Judges : Burn, J

Bench : Division Bench

Judgement

Burn, J.—The only point that has been pressed before me in this appeal is the question of limitation. The plaintiffs filed this suit on 7th August

1928 to set aside an order passed upon their claim petition on 10th November 1923. Under Rule 63 of Order 21, Civil P.C., the suit must be filed

with, in one year from the date of the order and prima facie the suit is long out of time. The plaintiffs claimed that they were entitled to exclude from

the period of one year all the time which was taken by them in preferring appeals (A.S. No. 174 of 1925 on the file of the sub-Court and A.S. No.

28 of 1924 on the file of the District Court) from the order of the executing Court dated 10th November 1923. The learned Subordinate Judge

reversed the decision of the executing Court by his decree dated 17th July 1925. A second appeal was preferred to the High Court, which was

disposed of by the High Court on 11th November 1927. The High Court held that the claim was one preferred Under Rule 58, Order 21, Civil

P.C., and that it was not a matter coming u/s 47 and consequently no appeal lay to the District Court from the order of the executing Court. The

learned Subordinate Judge's decree was set aside. This suit was filed, as already

stated, on 7th August 1928, and there is no dispute that if the whole period occupied from the date of the preferring of the appeal to the District Court to the date of the disposal by the High Court of the second appeal is excluded, the suit will be in time. The learned District Munsif and the learned Subordinate Judge have held that this is a matter falling u/s 14, Limitation Act, and that the period can be excluded under that section. Section 14, Sub-section 2, Limitation Act, provides that: In computing the period of limitation, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

2. Mr. Govinda Menon on behalf of the appellant contends that this period cannot be excluded because the reason, which rendered the plaintiffs'

appeal to the District Court infructuous, was not a defeat of jurisdiction or other cause of like nature. As to this it must be noted that a Bench

decision of this Court reported in *Marivittil Mathu Amma v. Pathram Kunnot Cherukot* (1907) 30 Mad 215 in a precisely parallel case, had held

that the claimant's remedy was by an application u/s 244, Civil P.C., and not by a separate suit. It was only when this case itself was referred to a

Full Bench, whose decision is reported in *A. Narayanan Nambudri Vs. Puthisseri Theva Amma and Others*, that the decision in *Marivittil Mathu*

Amma v. Pathram Kunnot Cherukot (1907) 30 Mad 215 was overruled and it was held that the proper remedy of the claimant was by means of a

suit and not by an application u/s 47. The learned District Munsif and the learned Subordinate Judge are therefore undoubtedly right in saying that

the plaintiffs preferred the appeal bona fide and it is not in fact too much to say that if the plaintiffs had attempted to file a suit, their suit would have

been rejected at once upon the view of the law expounded in *Marivittil Mathu Amma v. Pathram Kunnot Cherukot* (1907) 30 Mad 215 and they

would have been referred to an appeal. The only other question is whether this is a cause of a like nature with defect of jurisdiction within the

meaning of Section 14, Limitation Act. Mr. Govinda Menon relies upon the case reported in *Ganapachi Mudaliar v. Kriahnamachari* AIR (1922)

Mad 417 where it was held that:

Where a person misconceived his remedy and instead of proceeding by an application to set aside an execution sale brought a suit which was

eventually dismissed, the time taken in prosecuting the suit and an appeal therefrom cannot be deducted u/s 14, Limitation Act.

3. Their Lordships there held that the failure of the appellant in the prosecution of his claim could not be attributed to anything connected with the

jurisdiction of the Court. The reasoning appears to be that the plaintiff's suit in that case failed because the plaintiff had no right of suit and not on

account of any defect in the jurisdiction of the Court supposing that, a suit lay. That reasoning is obviously not applicable to this case. Under the

interpretation of the law in *Marivittil Mathu Amma v. Pathram Kunnot Cherukot* (1907) 30 Mad 215 the plaintiff had no right of suit. He had a

right of appeal to the District Court and it was only after the Full Bench decision in *A. Narayanan Nambudri Vs. Puthisseri Theva Amma* and

Others, that it was discovered that no appeal lay to the District Court. On these facts, I am prepared to hold that the failure of the plaintiff in his

appeal to the District Court was due to a cause of a like nature with want of jurisdiction. I have been referred to the decision in 68 *Siddalingana*

Gowd v. Bhimana AIR (1935) Mad 731 to which I was a party, but the facts of that case are quite different. That was a question of restitution u/s

144, Civil P.C., in which we saw reason to hold that the proceedings for restitution were not conducted in good faith, It was not possible in that

case for the plaintiffs to point to any decision of this Court which would have justified their application by way of restitution.

4. The only other question in the appeal is whether the properties belong to Krishnan Nair and Ramunni Nair or to the tavazhi to which the

plaintiffs Krishnan Nair and Ramunni Nair belong. Mr. Govinda Menon recognizes that this is a question of fact, the decision of which can not be

contested in second appeal. For these reasons, this second appeal is dismissed with costs of respondents 2, 4, and 5. Leave to appeal is refused.