
(1915) 03 MAD CK 0053
In the Madras High Court

Lakshmi Achi

APPELLANT

Vs

Subbarama Aiyar and Others

RESPONDENT

Date of Decision : 10-03-1915

Acts Referred:

Transfer of Property Act, 1882 — Section 89

Citation : AIR 1916 Mad 528 : (1916) ILR (Mad) 488 : (1915) 2 LW 403 :
(1915) 28 MLJ 491

Judgement

1. One Arunachellan Chetty died leaving two widows. Prior to his death, he executed a will on the 25th July 1904. Two persons were appointed executors under it. They brought O.S. No. 49 of 1911 on a deed of mortgage executed in favour of the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased, to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

2. Mr. Section Srinivasa Aiyangar raised the preliminary objection that no appeal lies against the order of the lower court. The question has been argued very fully before us by the learned vakils for the appellant and respondent; we have come to the conclusion that the preliminary objection must be upheld.

3. Mr. T. Rangachariar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument is not open to the appellant after the amendment of the Code

of Civil Procedure, which by Order XXXIV now regulates the procedure relating to the execution of mortgage decrees. It was held in *Mallikarjunadu Setti v. Lingamurthi Pantulu* ILR (1900) M. 244 that the preliminary decree passed in a mortgage suit is the only executable decree and that proceedings for obtaining the final decree could be taken only by way of execution. This view was based mainly on the language of Section 89 of the Transfer of Property Act which says "" the plaintiff or the defendant as the case may be may apply to the Court for an order absolute for sale of the mortgaged property."" The recent decision of the Judicial Committee in *Abdul Majid v. Jawahir Lal* ILR (1914) A 330 is in favour of the view taken in the Madras Full Bench case. The use of the word order in Section 89, in contradistinction to the word decree in Section 88 was responsible for numerous decisions which were not easily reconcilable. The legislature intervened and in Order XXXIV speaks of both the adjudications as decrees: (See Rules 2 and 3). Therefore after passing of the preliminary decree, the suit is continued until the stage of final decree is reached. It is not by the process of execution that the final decree is obtained. Mr. Rangachariar refers to the explanation to the definition of decree, and argues that when read with Section 47, the proceedings referred to in the explanation really relate to execution. Had it not been for the deliberate change in the language of Order XXXIV, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain v. Gauri Sahai* (1910) 33 A. 264 and *Munna Lal v. Sarat Chunder* (1914) 21 C.L.J. 118 relate to the language of Sections 88 and 89 of the Transfer of Property Act and not to the amended provision in the Code of Civil Procedure. In the former case, counsel expressly stated that under the code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned vakil that as the preliminary decree relating to possession (under Order XX, Rule 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not strictly speaking the final stage of the decree for possession. They relate to two different rights; and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

4. Mr. Rangachariar's next contention is that his client is a person on whom the estate has devolved upon the death of the executors and that her

application must be treated as one falling under Order XXII, Rule 10 of the Code of Civil Procedure. We were at first inclined to think that the

devolution referred to in this rule was of the same character as is referred to in the definition of "Legal Representative" in the code (Section 2,

Clause 11). Mr. Section Srinivasa Aiyangar has satisfied us that Rule 10 is not open to that interpretation. The term legal representative is used in

Rules 3 and 4 of the order and does not find a place in Rule 10. The plain language of the rule suggests that the devolution of the interest must be

that of the plaintiff who has instituted the suit. The words "assignment" and "creation" indicate that it is the person suing that assigns and creates the

interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of

the party to the suit. Under the corresponding rule in the Judicature Act (Order XXII, Rule 2) it was held that where a tenant for life who brought

the suit died, the remainderman was not entitled to continue the suit. *Ferral v. Gurran* (1899) 2 Irish Rep. 470. The " same construction must be

adopted with reference to Rule 10.

5. The legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of

action the deceased plaintiff sought to enforce as representing his estate. Rules 3 and 4 of Order XXII read with Section 2 Clause (11) cover such

cases. It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rihhai Rai v. Sheo Pagan Singh* ILR

(1910) A. 15 and *Gandi Ramaswami v. Puramsetti Pdamunayya* (1914) 17 M.L.T. 186. It has to be noted that the application of the appellant in

the lower Court was under Rule 3 of Order XXII., The Legislature has chosen not to give a right of appeal against orders passed under that rule,

whereas under Order XLIII, Rule (1)(1) orders with reference to Rule 10 are appealable. We must therefore hold that this appeal is incompetent.

6. The appellant will pay the costs of the respondents.