

(1934) 10 MAD CK 0010
In the Madras High Court

Muchi Dola Behara and Others

APPELLANT

Vs

Jujisti Jami and Others

RESPONDENT

Date of Decision : 29-10-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 5
Limitation Act, 1963 — Section 5
Transfer of Property Act, 1882 — Section 89

Citation : 157 Ind. Cas. 758

Hon'ble Judges : Curgenven, J; Cornish, J

Bench : Division Bench

Judgement

1. The appellants are the decree-holders in a mortgage suit. They obtained a preliminary decree for Rs. 15,000 odd on March 16, 1925. Time for redemption was allowed up to June 16. The debt was not redeemed and a first application for passing a final decree was made on February 10, 1927. The decree-holders failed to take certain steps in connection with the issue of notice and the application was dismissed on October 3, 1927. A second application, the one out of which this appeal arises, was filed on July 6, 1928. This was more than three years after the date of redemption. Taking into account the effect of the Court's vacation the latest date on which it could have been filed was July 2. It was accordingly four days late. On an application being filed u/s 5 of the Limitation Act to excuse the delay, the lower Court has found that the delay of one of those four days has not been satisfactorily accounted for. It also appeared doubtful whether Section 5 would apply to such a case. The application was, therefore, dismissed as time-barred.

2. In this appeal from that order the appellants' learned Advocate instead of

pursuing the line of argument used in the Court below proposes to surmount the difficulty by the application of a different principle. He contends that the first application was wrongly dismissed and it should, therefore, be regarded as still subsisting at the time when the second application was made, so that that latter application may be regarded as merely a continuation of it. The first application was dismissed after the great majority of the defendants had been served and after the Court had called upon the decree-holders to propose a fresh guardian for defendants Nos. 28 and 29, the existing guardian being said to be dead, and to state if it was true that the 30th defendant was dead, and if so, what was the date of his death. This order requiring these steps to be taken was passed on September 20, 1927. When the case was next taken up on October 1, it was noted that the petitioner's Vakil was absent and it was adjourned until the 3rd. On the 3rd again the Vakil was absent as was also the decree-holders and the application was dismissed in toto.

3. Now, it is contended before us that all this procedure of serving the defendants and of requiring the decree-holders to take certain steps to that end was unnecessary because the Court does not contemplate the issue of notice before a final decree is passed in a mortgage suit. Order

XXXIV, Rule 5(3), Civil Procedure Code, as it stands at present, provides that where payment of the amount due under the preliminary decree

has not been made within the time specified, the Court shall on application and after notice to all the parties pass a final decree. But the amendment

notice to all parties was brought into force so far as this Presidency is concerned only on August 20, 1931, and before that time so far as the terms

of this rule are concerned all that was expressly required was that payment should not have been made into Court within the time given and that an

application should have been made to pass a final decree. From this it has been argued that the Court was wrong in requiring the decree-holders to

take out notice before passing such a decree. If we are to regard the terms of the Code, there would appear to be grounds for this view, but we

find that there are several decisions which have a contrary effect. An early decision in *Bibi Tasliman v. Harihar Mahto* 32 C 253 : 9 C W N 81

was passed under the terms of Section 89, of the Transfer of Property Act, which was then in force and under that section the judgment-debtor

could make his payment either into Court or to the plaintiff. It may be that that decision was affected by that circumstance; and it is unnecessary to

rely upon it. There are several cases of this Court which deal with the question whether an ex parte final decree in a mortgage suit can be set aside-

-decisions which of course imply that the Court would have taken the right course in issuing notice before passing such a decree. The earliest of

these is Kankasundaram Pillai v. Soma-sundaram Pillai 35 M L J 375 : 48 Ind. Cas. 71 and this has been followed by Kumarasawmi Sastri and

Wallace, JJ. in Maruthiswamier v. Subramania Aiyar 118 Ind. Cas. 831 : 118 Ind. Cas. 831 : 29 L W 393 : A I R 1929 Mad 393 : Ind. Rul. 863

where they express the view that if a plaintiff having obtained a preliminary decree wants a final decree to be passed, he should give notice to all

parties. The learned Judges do not, however, say under what provision of law they think that such a notice is necessary. These cases were again

considered by Wallace and Pakenham Walsh, JJ. in Rasan Chettiar Vs. Rangayan Chettiar, . In this case it is recognised that there is no express

provision making notice in such a case compulsory so that it could not be said that a failure to issue notice would be an illegality which ipso facto

renders the decree void. At the same time it was open to the Court and as Wallace, J. says, "" in practice it is advisable"", to issue such notice. And

it was further held that if any party was aggrieved by the omission to issue such a notice he could get the decree set aside upon that ground. In this

state of the law we find it quite impossible to hold that the Court below in directing notice to issue before passing a final decree was doing

something which it was incompetent to do or unjustified in doing. If it was justified in directing notice to issue, it follows we think that it was

incumbent upon the decree-holders to do what was necessary on their part in order to give effect to it. It is impossible to accept the position that it

was open to them to commit default in so seconding the efforts of the Court on the ground that it was open to the Court not to issue notice. If then

it was incumbent upon the decree holders to take the steps required of them. We think that it is impossible to find that the Court was wrong in

dismissing the application, to the extent to which failure to take steps would justify such dismissal. That being so, we cannot unreservedly apply the

principle which the appellants' learned Advocate invites us to apply, viz., that the order passed being erroneous and without jurisdiction, on the

principle of such cases as Chandra Shekhar and Another Vs. Amir Begam , AIR 1933 229 (Oudh) and AIR 1934 209 (Oudh) the earlier

application may be regarded as subsisting and the present application may be regarded as a continuation of it.

4. That is with regard to the general position. It remains to be noticed, however, that of the large number of defendants steps remained to be taken

only in the case of three, defendants Nos. 28 to 30. So far as the remaining defendants were concerned, excluding those who had been

exonerated, they had all been served and matters were ripe for passing a final decree. On the analogy of Order IX, Rule 5, Civil Procedure Code,

we think that the Court would have been fully justified and indeed better advised in restricting the dismissal of the application to the case of those

defendants in respect of whom the necessary steps had not been taken, and in passing a final decree against the remainder. These others could

have had no possible grievance to such a course as they had all been duly served. In the special circumstances of this case accordingly we think

that as regards these defendants the order of dismissal was not the proper order to pass and that the current application may be regarded as part

and parcel of the previous one so far as these defendants are concerned. That being so, no question of limitation arises.

5. We allow the appeal to the extent indicated, set aside the order of the Court below and direct it to pass a final decree for the sale of the

mortgage property. The appellants will pay the respondents' costs in the Court below. We make no order as regards the costs of appeal.