

(1934) 10 MAD CK 0054
In the Madras High Court

Muchi Dola Behera and Others

APPELLANT

Vs

Jujisti Janni and Others

RESPONDENT

Date of Decision : 29-10-1934

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 1935 Mad 716

Hon'ble Judges : Curgenven, J

Bench : Division Bench

Judgement

Curgenven, J.—The appellants are the decree-holders in a mortgage suit. They obtained a preliminary decree for Rs. 15,000 odd on 16th March 1925. Time for redemption was allowed up to the 16th June. The debt was not redeemed and a first application for passing a final decree was made on 10th February 1927. The decree-holders failed to take certain steps in connexion with the issue of notice and the application was dismissed on 3rd October 1927. A second application, the one out of which this appeal arises, was filed on 6th July 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 the 2nd July. It was accordingly four days late. On an application being filed u/s 5, Lim. 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 28 and 29, the existing guardian being said to be dead, and to state if it was true that defendant 30 was dead and if so what was the date of his death. This order requiring these steps to be taken was passed on 20th September 1927. When the case was next taken up on 1st October 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 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 34, Rule 5(3), Civil P.C. 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 requiring notice to all parties was brought into force so far as this Presidency is concerned only on 20th August 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.

4. 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. Harlhar Mahto* (1905) 32 Cal 253, was passed under the terms of Section 89, T.P. 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 *Kanakasundaram Pillai v. Somasundaram Pillai* 1919 Mad. 964 and this has been followed by *Kumaraswami Sastri and Wallace, JJ., in Maruthi Swamiar v. Subramani Ayyar* 1929 Mad. 393, 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 v. Rengayyan Chettiar* 1930 Mad 105. In this case it is recognized 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.

5. 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 then 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 Shekar v. Amir Begam* 1927 All. 439, *Puran Lal v. Komal Singh* 1933 Oudh 229 and *Girdhar Gopal v. Nawab Ali* 1934 Oudh. 209 the earlier application may be regarded as subsisting and the present application may be regarded as a continuation of it.

6. That is with regard to the general portion. 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 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 9, Rule 5, Civil P.C. 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 for 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 those defendants are concerned. That being so, no question of limitation arises. 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.