
(1920) 04 MAD CK 0007
In the Madras High Court

Muhammad Abdul Kadir Marakayar by guardian Muhammad
Kasim Marakayar and Others APPELLANT

Vs

Samipandia Tevar and Others RESPONDENT

Date of Decision : 08-04-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107

Citation : (1920) ILR (Mad) 835 : (1920) 12 LW 304 : (1920) 39 MLJ 431

Hon'ble Judges : Seshagiri Aiyar, J; Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—The first question raised in this appeal is whether the plaintiffs, mortgagors, are entitled to execute their decree, one for

redemption, by asking the Court to sell the mortgaged property. It is prima facie concluded in their favour by *Govinda Taragan v. Veeran* 21

M.L.J. 941 since we have been shown no case, in which that decision has been doubted and one, C.M.A. No. 99 of 1915, in which it has been

followed, and since Mr. Anantakrishna Ayyar for defendants has declined to argue against its correctness. He has relied only on the fact that the

decree provides for a sale at the instance only of the mortgagee. But that appears to have, been the case also in the decision referred to. The

objection to the order under appeal must therefore be disallowed.

2. The more important contention before us is however that the plaintiff's application for execution was made too late ; and certainly it was so,

unless time ran, as they contend, from the date, 10--2--1915, on which an order was passed by this Court returning their memorandum of appeal

against the decree for presentation to the District Court, as the proper Court to entertain it. Was the High Court in these circumstances "" the

Appellate Court "" and was this its "" final order "" within the meaning of Article No. 182, Schedule I. Limitation Act.

3. This Court's order in no degree decided the appeal ; and its final character has been supported mainly by comparison of its effect with that of

the withdrawal of the appeal, reference to which as a starting point was introduced into the Article by its amendment in 1908. But this argument is

unsustainable, if, as in *Peria Kovil Ramanuja Peria Jeeyangar v. Lakshmi Doss* 16 M.L.J. 393 and *Fazlur-Rah-man v. Shah Muhammad Khan* ILR

(1908) All. 285 which were reproduced in the amendment, there is besides the withdrawal an order dismissing the appeal as withdrawn. Further

there is an order of the Appellate Court, such as the Article contemplates directly. And it may be doubted whether there can be cases of

withdrawal without such an order. For the procedure for the withdrawal of a suit with leave to sue again under Order XXIII corresponds with

nothing in the specification of the powers of the Appellate Court in Section 107, C.P.C. But it is useless to consider further the applicability of the

reference in the Article to withdrawal or the analogy between it and the order in question at present, when in my opinion plaintiffs must fail, because

this Court was not "" the Appellate Court,"" inasmuch as the proceedings before it were not within its jurisdiction.

4. In *Akshoy Kumar Nundi v. Chancier Mohun Chathati* I.L.R (1888)Cal. 260 it was held that an appeal is presented for the purpose of the

Limitation Act, when it is presented to the proper Court ; and in the present case, in which this Court returned the appeal memorandum for want of

jurisdiction, there was no legally constituted appeal and no final order by the Appellate Court. It is suggested that the order of return was final so

far as this Court was concerned, and that it was the order of the Appellate Court, because this Court has appellate powers, a distinction being

attempted between failures of jurisdiction on territorial grounds and on the pecuniary grounds, referred to in this Court's order. I am unable to

follow that distinction and it was supported by no authority. The remainder of the argument is inconsistent with the reference to ""the,"" not "" an

Appellate Court in the article and its best support was the reference to *Krishnaswami v. Kanakasabai* 1 M.L.J. 234 and the cases therein cited.

But the principle for which plaintiffs contend, was referred to only obiter in this Court's decision and was applied in *Matra Mondal v. Hart Mohan*

Mullick ILR (1889) Cal. 155 and Nidhi Lal v. Mazhar Hussain I.L.R.(1885) All. 436 to proceedings actually completed in the wrong Court

through mistake and without objection and was authorized by the reference in the various Civil Courts" Acts concerned to the jurisdiction in

question as concurrent. Here we are concerned with the more general principle that no party shall be allowed to obtain a longer period of limitation

on the ground of his own mistake ; and no attempt has been or indeed could fairly be made to invoke Section 14 or any other provision of the

Limitation Act, by which exceptions to it are recognized, as authorizing plaintiff's contention. As there was no final order of the Appellate Court,

time cannot be calculated from one, and the application was therefore out of time and should have been dismissed.

5. The appeal is allowed, the Lower Appellate Court's order being set aside and that of the Subordinate Judge being restored with costs

throughout.

Seshagiri Aiyar, J.

6. The decree under execution is one for redemption and was passed on the 19th March 1898. The time fixed for payment expired before the new

C.P. Code came into force. An Appeal was preferred to the High Court within the time limited by law. It was returned on the 10th February,

1915, for presentation to the proper Court, as the High Court was of opinion that the appeal lay to the District Court and not to itself. The present

application for execution was made on the 21st September, 1916, for sale of the mortgaged property.

7. Two objections were taken to it. The first was that under the decree, the mortgagor is not entitled to apply for sale. The second that the

application was barred by limitation. The District judge overruled both these objections.

8. The first point is covered by Govind Taragan v. Veeran ILR (1911) Mad. 32 . In that case, the learned Judges were of opinion that, although

express power was given by Section 93 of the Transfer of Property Act only to the mortgagee to apply for sale, the mortgagor had also an

inherent right to apply for a similar order. This decision was followed in C.M.A. No. 99 of 1915 to which my learned brother was a party.

Speaking for myself, I should have required more argument to convince me of

the correctness of the view taken in these two decisions and would have suggested a reference to the Full Bench, if our decision depended upon the first point alone. Notwithstanding the argument addressed to us by the learned Advocate-General regarding the procedure adopted in England by which power is reserved to the mortgagor to apply for sale where a decree for redemption is passed, I am not convinced that we should read into Section 93 of the Transfer of Property Act or into Order 34, Rules 7 and 8 such a power. However, as the conclusion which I have come to is not dependent upon the view I take on the first point and as Mr. Anantakrishna Iyyar, who appeared for the appellant, did not ask us to dissent from the view in *Govind Taragan v. Veeran* ILR (1911) Mad. 32 but only attempted to distinguish that case from the present, I do not propose to say anything more about it.

9. The second question is actually bare of authority. The point for determination is that, where an appeal is presented to a Court to which appeals do not ordinarily lie and that Court ultimately passes an order returning the appeal for presentation to the proper Court, whether such an order is within Article 182, Clause (2) of the 3rd column of the first Schedule of the Indian Limitation Act. That clause runs thus :--"" Where there has been an appeal the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal."" The words "" or the withdrawal of the appeal "" were inserted by the amending Act of 19,05. Is the order of the High Court returning the plaint for presentation to the proper Court an order of the Appellate Court or can it be regarded as a withdrawal of the appeal ?

10. Under the Civil Courts Act III of 1873, Section 13 the legislature has prescribed which shall be the Appellate Court and the circumstances under which appeal's from one Court can be taken to another in conformity with that Act. In the present case, the view of the High Court was that the subject matter of the original suit was above Rs. 2,500 and below Rs. 5,000 in value and that consequently, an appeal lay to the District Court and not to the High Court. The language of the 2nd clause of Article 182 which I have quoted, refers to the appellate Court. In my opinion, that language means that the Appellate Court should be the proper Appellate Court, not any Appellate Court, which a party bona fide or otherwise has chosen to file an appeal in. The learned Advocate-General who appeared for the

respondent, contended that the High Court has a general power of hearing appeals from the Subordinate Courts. It is true that, by virtue of Section 24 of the Code of Civil Procedure, the High Court, can withdraw any appeal from any of the Subordinate Courts and hear it itself ; but the disposal of an appeal in the exercise of the powers given by Section 24 would not constitute the High Court the Appellate Court, as contemplated by Clause (2) of Article 182 of the Limitation Act.

11. It was also contended before us that all appellate authorities must be regarded as possessing fundamental jurisdiction to hear appeals. The argument was, as was held in *Krishna-swami v. Kanakasabai* I.L.R.(1890) Mad. 183 as there is a general power in a Subordinate Judge to hear suits which, ordinarily, a District Munsif alone can try, similarly, there is a general power in the High Court to hear appeals, although ordinarily, such appeals, would be heard only by a District Judge or a Subordinate Judge.

12. The language of Section 24, which contemplates an order of transfer, does not indicate the existence of such a general power. The right of appeal is the creature of the statute and the right to resort to particular grades of tribunals is equally a statutory right, and not a common law right. It is because of the powers of supervision which are vested in the High Court under the Charter Act and by the Letters Patent Act that the legislature has enacted u/s 24 of the CPC that the High Court can withdraw to its own file appeals pending in the Lower Courts. Moreover Section 15 of the CPC provides that every suit shall be instituted in the Court of the lowest grade competent to try it. In my opinion, this provision is applicable to appeals also.

13. Section 96 of the Code provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decision of such a Court. I take it that the authorisation herein referred to is what is contained in the Civil Courts Act of each of the Presidencies. Apart from authority, therefore, on the construction of the above sections and on general principles of jurisprudence, I am of opinion that Clause 2 of Article 182 should be interpreted as referring to the appellate court which ordinarily is empowered to hear appeals from the Subordinate Courts. If we make a departure from this rule, there is nothing to prevent a suitor from claiming that the time

during which an appeal has been pending in a Revenue Court, in which he has wrongly filed an appeal, should be deducted in computing the period of limitation.

14. In this connection, I am not clear that even if the High Court can be regarded as the appellate court within the meaning of that expression in

Clause 2 of Article 182 whether the order directing the return of the plaint for presentation to the proper Court is within the same clause. I attach

no importance to the fact that the order itself was not complied with as the appeal was never presented to the Subordinate Judge. As at present

advised, I am of opinion that the order contemplated is one which disposes the appeal on the merits in some form, and not simply one which

intimates to the party that the appeal should be filed elsewhere. I may here refer to the decision of the Judicial Committee in *Batuk Nath v. Munni*

Dei 27 M.L.J. 1 (P.C.) where it was held that an order of the Privy Council dismissing an appeal for default of prosecution is not an order in

Council, contemplated by Article 182. The reason for that dictum is that there was no adjudication on the merits. I confess that the introduction of

the clause by the Amending Act "" or the withdrawal of the appeal "" to some extent weakens this suggestion of mine ; but in the case of a

withdrawal, I take the withdrawal to be an unconditional one, there is an end to the litigation ; but from the order returning the appeal for

presentation of the appeal to a proper Court, the same result does not necessarily follow. It is not a strained construction upon the 2nd Clause of

Article 182, to say that the decree, order or withdrawal contemplated must all have the effect of putting an end to the litigation. However that may

be, as I am of opinion that the order in question was not passed by the Court contemplated in Clause (2), the respondent is not entitled to claim

that limitation starts against him only from the 10th February 1915, and not earlier. When we remember that under the Indian Law, there is nothing

to prevent a party entitled to a benefit under the decree from executing that decree, there is no necessity for reading into this article words which

are not to be found there. *Wazir Mahton v. Lulit Singh I.L.R.(1882) Cal. 100* contains observations which, to some extent, support the

respondent. The appeal in that case was certainly a competent one. I do not feel pressed by the obiter dictum contained in that judgment, *Akshoy*

Kumar Nundi v. Chancier Mohun Ghathati ILR (1888) Cal. 250 is not entirely reconcilable with the observations in Wazir Mahaton v. Lulit Singh

I.L.R.(1882) . C. 100 relied on by the District Judge. Very recently the Judicial Committee held that where an application was presented bona fide

to a Court which had no jurisdiction to execute a decree, the application was not one made to the proper Court in accordance with the law within

the meaning of those words in Clause 5 of Article 182. The principle of that decision applies equally to the present case--Vide Ramachandra Raju

Bahadur v. Maharaja of Jeypore ILR (1919) Mad. 813.

15. For all these reasons, I am of opinion that the decision of the District Judge must be reversed and the execution application should be

dismissed with costs.