

(1927) 05 MAD CK 0025
In the Madras High Court

(Parambath Parkum Mattole) Kunhammad Hajee and Others	APPELLANT
Vs	
Chathoth Parkum Kozhuvammal and Others	RESPONDENT

Date of Decision : 05-05-1927

Acts Referred:

Transfer of Property Act, 1882 — Section 89

Citation : AIR 1928 Mad 38

Judgement

1. The mortgagee decree-holder is the appellant. This C.M.S.A. arises out of an application filed by him to execute the decree which he obtained in a suit for sale of the mortgaged properties. The decree sought to be executed is a compromise decree. It provides for the sale of the properties if the decree amount is not paid within a certain time. It also provides that if the proceeds of the sale are insufficient, the judgment-debtor is to be personally liable to pay the balance to the decree-holder. After obtaining this decree, thinking that a final decree was necessary in this case, the appellant applied on three occasions for obtaining a final decree. On each of these occasions his application was dismissed. Then he made an application under Order 21, Rule 11, Civil P.C., for execution of the original decree.

2. The respondent contended that the decree being only a preliminary decree there could be no execution till a final decree has been obtained and that the application "was barred by limitation. The learned District Munsif overruled both these contentions. On appeal the learned District Judge upheld the contentions and dismissed the appellant's petition for execution.

3. The same contentions against the execution of the decree are urged before us by the judgment-debtor respondent. As regards the first contention, we are of opinion that it is not necessary to get a final decree in this case. Paragraphs 1 and 2 of the decree comply with the requirements of the usual preliminary and the final decrees in a mortgage decree for sale, and para. 3 distinctly makes provisions for the usual personal decree. The decree is a composite one; and though it is irregular and is not strictly warranted by the provisions of Order 34,

Civil P.C., it cannot be said to be inexecutable on that account. Further, even if it is held that there is no final decree, the decree in question being a compromise decree, and the parties having agreed that the decretal amount should be realized in a particular way, the Court has full jurisdiction to carry out the intentions of the parties. That this can be done has been held in *Abir Praminak v. Juhar Mahomed Mandal* [1907] 34 Cal. 886. The fact that it was a decision u/s 89 of the old Transfer of Property Act does not affect the principle enunciated in it: see also the observations of the learned Judges in *Sital Singh and Others Vs. Baijnath Prasad and Others*, that strictly speaking Order 34, Rule 5 has no application to a compromise decree. On both these grounds we think it was not necessary for the appellant to obtain a final decree in the circumstances of this case.

4. The respondent's next contention is that the execution is barred by limitation. If the three applications for the final decree can be considered to be steps-in-aid of execution, then it is admitted that the execution is not barred. It is first urged that there is no executable decree at all in this case and, therefore, there can be no application which may be called a step-in-aid of execution. To this the reply is, as we have already held, that in this case there is an executable decree and, that being a compromise decree, the parties are entitled to agree as to how the decree should be realized. The next argument is that an application for a final decree is not an application for execution. This is no doubt true; but the question is whether the applications in question, though styled applications for final decree can, with reference to their contents, be considered to be "steps-in-aid " of execution. The decree-holder by applying for a final decree was endeavouring to get an order which he thought at the time was necessary before executing his decree. Afterwards, due to better advice he gave up that attempt and applied for the execution of the decree without getting a final decree as that was unnecessary. This was what had happened in this case. In these circumstances we fail to see why the Court should not consider that the prior three applications were steps-in-aid of execution; for, as we have already said, the plaintiff was asking the Court to make an order which was thought necessary before taking out actual execution of the decree. As the ultimate object of these petitions was to hasten the actual realization of the decree amount we are satisfied that they were "steps-in-aid " of execution. In this view the execution application which has given rise to this C.M.S.A. is not barred by limitation.

5. We set aside the decree of the District Judge and restore that of the District Munsif with costs here and in the Court below.