

(1926) 04 MAD CK 0040
In the Madras High Court

Siva Subramania Pillai

APPELLANT

Vs

Poovalingam Pillai

RESPONDENT

Date of Decision : 15-04-1926

Acts Referred:

Citation : AIR 1926 Mad 941 : 97 Ind. Cas. 502 : (1926) 24 LW 280

Hon'ble Judges : Phillips, J

Bench : Division Bench

Judgement

Phillips, J.—In this case a certain property was sold in execution of a mortgage decree. In subsequent proceedings it was held that the property was trust property and therefore could not be sold in execution of the prior mortgage decree and the sale proceedings taken in execution were declared to be void. The appellant then presented an application under Order 34, Rule 6, Civil P.C. for a personal decree against the mortgagor. Two questions have arisen (1) whether this remedy is open to the appellant, and (2) whether, if so, this petition is in time.

2. As far as the first point is concerned, there is the authority of Radha Kishun Lal Vs. Kashi Lal and Another, in appellant's favour. That case was not one of an application under Order 34, Rule 6, but of ordinary execution proceedings, and it was held that when a sale in execution had been set aside, it was open to the decree-holder to execute the decree again. As I think the appellant must fail on the second question, namely limitation, it is not necessary to discuss this point any further. Under Order 34, Rule 6, the right to apply for a personal decree accrues when the net proceeds of any sale, in execution of a mortgage decree, are found to be insufficient to pay the amount due to the plaintiff. In the present case, as soon as the decree declaring the sale to be void was passed, it must be deemed to have been found that the sale of the property was insufficient to pay the mortgage debt. On the passing of the decree, therefore, the plaintiff's right to apply for a personal decree accrued. As he has come in more than three years after that date his application is barred by limitation. The appellant has relied on

Ramianudi Venkata Appa Rao v. Lokkoju Chinna Ayyanna [1907] 30 Mad. 209 and Mangamma Nayakuralu Vs. B.M. Ramdasappa Nayanimavary and Others, . Neither of these cases are under Order 34, and the question, that had to be considered was when the right to apply accrued. On this ground the cases may be distinguished. I may observe that even in these cases the date of the order for refund of money was held to be the date when the right to apply accrued and not the actual date of the refund of money itself. Similarly, applying that to the present case, it will be the date of the order declaring the sale void and not the actual date of dispossession.

3. The appeal fails and is dismissed.