

(1908) 09 MAD CK 0029
In the Madras High Court

Sultan Sahib Marakayar and Others

APPELLANT

Vs

Chidambaram Chettiar and Others

RESPONDENT

Date of Decision : 28-09-1908

Acts Referred:

Citation : (1909) ILR (Mad) 136 : 1 Ind. Cas. 998

Hon'ble Judges : Sankaran Nair, J; Miller, J

Bench : Division Bench

Judgement

1. The decree-holder purchased in an execution sale in 1899 certain property of the judgment-debtor and in 1900 obtained a sale certificate. The

decree was not completely satisfied by the sale, and further proceedings were taken to which it is not necessary to refer, otherwise than to say that

they may be taken to have arisen out of applications for execution or to take steps-in-aid of execution. Then, in 1907 the decree-holder for the first

time applied for delivery of possession, of the property to which he became entitled by virtue of his sale certificate of 1900.

2. The question is, whether his application is within time? and the case has been argued on the footing that the answer must be in the affirmative if

Article 179 of schedule II of the Limitation Act is applicable to the case, and, in the negative, if it is not applicable, Article 178 being in that event

the appropriate article.

3. We are of opinion that Article 178 is the article applicable, and that the application for delivery of possession is not one for the execution of a

decree. In Muttia v. Appasami (1) it is true one of the learned Judges expressed an opinion that Article 179 would decide whether an application

u/s 318 of the CPC is or is not within time, and the other learned Judge also

expressed an opinion that an application u/s 318 of the CPC is substantially an application for execution. But the question which they had to decide was between a period of thirty days" limitation and a period of three years. Their decision on the question of limitation would have been the same had they applied Article 178 and not Article 179 of schedule II of the Limitation Act. We cannot, therefore, take this case as a decision on the point before us.

4. There is no case to which we have been referred which actually decides this question on a consideration of the difference between the two articles, but the Bombay High Court has held more than once that Article 178 ought to be applied, (*Basapa v. Marya* 3 B.k 433, *Hanmantrav Pandurang Joglekar v. Subaji Girmaji* 8 B.k 257 and *Kashinath Trimbak Joshi v. Daming Zuran* 17 Bk 228 in the case of an application u/s 318 of the Civil Procedure Code, and we think these decisions are right.

5. It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree, and though we may be bound by a number of decisions to hold that such an application raises a question relating to the execution of the decree, it does not follow, and we do not think, that it is an application for execution. To hold that it is an application for execution might involve injustice. In a case, for instance, like that decided in

Basapa v. Marya 3 B. 433 an application though made within three years of the sale certificate, would, if Article 179 is applicable, have to be held

barred by limitation under that article, if not made within three years of the next preceding application to take a step-in-aid of execution; and so it

might happen that in a case where, in execution, a sale is held say eleven years after the date of the decree, an application for possession made

within three years of the sale certificate would, with reference to Section 230 of the Civil Procedure Code, have to be rejected as barred by

limitation if it is to be treated as an application for the execution of the decree. These consequences of applying Article 179 to an application u/s

318 cannot have been intended and can be avoided by applying Article 178. It was contended that, in the case last suggested, the application for

possession would be treated as an application in a pending execution proceeding,

but that is clearly not a sound contention. Apart from Section 318, Civil Procedure Code, which requires an application by the purchaser, an application for execution by way of an auction sale could not contemplate delivery of possession to the applicant as a consequence of the sale.

6. For these reasons we reverse the order of the lower Court and dismiss the application with costs throughout.