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v.  
A LWAR  
MANIKKAM.

the decision is to the effect that paragraph C of this section does not refer solely to a question of jurisdiction, but that the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement.

The third point relied upon on behalf of the petitioner is that the plaint, on the face of it, discloses a right to sue. As to this I see no reason to differ from the conclusion at which the Munsif has arrived.

That being my view with regard to the three points raised on behalf of the petitioner, I hold that it has not been shown that the District Munsif failed to exercise a jurisdiction vested in him by law or that he acted illegally or with material irregularity.

I dismiss the petition with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.*

PANDU PRABHU (DEFENDANT No. 1), APPELLANT,

*v.*

JUJE LOBO (PLAINTIFF), RESPONDENT.\*

*Transfer of Property Act—IV of 1882, ss. 86, 87—Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside.*

A plaintiff in a foreclosure suit obtained a decree for foreclosure under section 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under section 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:

*Held*, that the view of the majority of the Court in *Mallikarjunadu Setti v. Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), which related to proceedings under section 89 was applicable to proceedings under section 87, and that such proceedings are proceedings in execution of the decree passed under section 86. In the present case, the application had been made within one year of the date of

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\* Appeal against Appellate Order No. 37 of 1902, presented against the order of J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 301 of 1901, presented against the order of T. V. Anantan Nair, District Munsif of Mangalore, on Regular Miscellaneous Petition No. 1205 of 1901 (in Regular Suit No. 283 of 1901).

the decree, and, in consequence, under section 248 of the Code of Civil Procedure, no notice was necessary to the defendant.

*Narayana Reddi v. Papayya*, (I.L.R., 22 Mad., 133), proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of section 87—a view which has been dissented from by the Full Bench in *Vedapuratti v. Vallabha Valiya Rajah* (I.L.R., 25 Mad., 300).

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APPLICATION to cancel an order passed under section 87 of the Transfer of Property Act debaring the defendant in a foreclosure suit from redeeming the mortgaged property, and directing delivery of possession to the plaintiff in the suit. No notice of the application had been given to the defendant, the present petitioner. The District Munsif dismissed the petition. On appeal, the District Judge said: "The plaintiff obtained a foreclosure decree under section 86 of the Transfer of Property Act against the defendants on the 16th March 1901. The decree allowed the defendants three months' time to make payment and ordered that, in default of such payment, the defendants should be absolutely debarred of all right to redeem. On the 10th June 1901, the third defendant applied for further time. This application was rejected on the 6th July and, no payment having been made, the plaintiff applied for execution on the 9th idem. An order was passed on the 10th idem under the second clause of section 87 directing foreclosure and delivery of the property to the plaintiff. Delivery was made on the 31st July, obstruction offered by some of the defendants having been removed. The first defendant then applied on the 11th September for the cancellation of the delivery made to the plaintiff and for restoration of the property to himself. This application was dismissed and the first defendant appeals. The ground taken in appeal is that an order under the second clause of section 87 or an 'order absolute' as it is called in the last clause should not have been passed without notice to the defendants and *Narayana Reddi v. Papayya* (1) has been quoted as authority for this position." He dealt with that case and also with the decisions in *Elayadath v. Krishna* (2), *Ramasami v. Sani* (3) and *Vallabha Valiya Rajah v. Vedapuratti* (4) and concluded as follows:—"The result of these decisions, in my opinion, is that when a mortgagor has, by failing to make payment within the time limited by a decree

(1) I.L.R., 22 Mad., 133.

(2) I.L.R., 13 Mad., 267.

(3) I.L.R., 17 Mad., 96.

(4) I.L.R., 19 Mad., 40 at p. 48.

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under section 86 or under section 92, allowed the decree to become final, he cannot be allowed to take advantage of the proviso to section 87 or section 93 and that he is not entitled to notice for the purpose of enabling him to take such advantage. In the present case, the decree was less than a year old and notice was not required on any other ground. Hence I think that the order passed under the second clause of section 87 and subsequent delivery of the property to the plaintiff were not bad for want of notice." He confirmed the Munsif's order and dismissed the appeal.

The petitioner (defendant) preferred this appeal.

*K. Narayana Rau* for appellant.

*K. P. Madhava Rau* and *A. Srinivasa Rau* for respondent.

JUDGMENT.—The respondent obtained a decree for foreclosure under section 86, Transfer of Property Act, and the time limited for redemption by the defendant having expired without being extended, the respondent applied under section 87 for an order absolutely debarring the defendant from redeeming and for an order for delivery of possession of the property to him. The orders were accordingly made. It is contended by the appellant that the orders are null and void because no notice of the application was given to the defendant, appellant and the case of *Narayana Reddi v. Papayya*(1) is relied upon. That case, no doubt, supports the contention, but that decision proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of section 87, a view which has been dissented from by the Full Bench in *Vedapuratti v. Vallabha Vabiyarajah*(2). Following the decision of the majority of the Full Bench in the case of *Mailikarjunadu Setti v. Lingamurti Pantulu*(3) which related to proceedings under section 89 of the Transfer of Property Act, we hold that the same view is applicable to proceedings under section 87 and that such proceedings are proceedings in execution of the decree passed under section 86 of that Act. In the present case the application was made within one year of the date of decree and therefore under section 248, Civil Procedure Code, no notice was necessary to the judgment-debtor (defendant).

(1) I.L.R., 22 Mad., 133.

(2) I.L.R., 25 Mad., 300.

(3) I.L.R., 25 Mad., 244.