

which the plaintiff undertook to swear were sufficient to dispose of the suit, the defendant must, if the oath had been taken, have had a decree made against them. MOYAN
v.
PATHUKUTTI.

Unless then by the action of the plaintiff, evidence which would have been available for the defendants has been lost to them (and that is, as I have said, not here alleged) I do not think the Court, subject, of course, to its discretion to refuse an adjournment of the trial, is entitled to refuse to receive the evidence for the plaintiff, and I therefore concur in the order proposed by my Lord, the Chief Justice.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

SARALA SUBBA RAU (PLAINTIFF), APPELLANT,

v.

KAMSALA TIMMAYYA AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

1907
October 34.

Civil Procedure Code, Act XIV of 1882, ss. 278, 283—Limitation Act, Act XV of 1877, sched. II, art. 11—Order dismissing claim for default not an order made after investigation and need not be set aside within one year under art. 11 of sched. II of the Limitation Act.

An order dismissing a claim presented under section 278 of the Code of Civil Procedure for default is not an order made after investigation within the meaning of that section and is not conclusive under section 283 of the Code of Civil Procedure. Article 11, schedule II, of the Limitation Act does not apply to such orders; and the party against whom the order is made can maintain a suit to establish his right within the ordinary period of limitation applicable to such suit, although he has not had the order set aside within one year.

Koyyana Chittemma v. Doosy Gavaramma, (I. L. R., 29 Mad., 225), referred to.

Sarat Chandra Bisu v. Turivi Prosad Pal Chowdry, (11 C. W. N., 487), approved.

SUIT to establish plaintiff's right to and to recover possession of plaint property from defendants.

* Second appeal No. 210 of 1905, presented against the decree of A. M. Slight, Esq., District Judge of Kurnool, in Appeal Suit No. 121 of 1903, presented against the decree of M. B. Ry J. S. Theagaraja Ayyar, District Munsif of Nandyal, in Original Suit No. 41 of 1903.

SARALA
SUBBA RAU
v.
KAMSALA
TIMMAYYA.

The plaintiff's case was that the house belonged to his aunt Krishnammal, who devised the same to him by will dated 11th August 1894. Before Krishnammal's death in February 1895 the plaintiff house was attached by the first defendant in execution of a decree obtained by him against the plaintiff and one Bhagamma. Krishnammal then put in a claim petition under section 278 of the Code of Civil Procedure, which was dismissed for default on 6th June 1893. The property was brought to sale and purchased by the second defendant. At the time of delivery of possession a petition was preferred by Krishnammal in which she alleged the house belonged to her. That petition was rejected under section 335 of the Civil Procedure Code on the 11th June 1894.

The present suit was brought in 1903 within twelve years of sale but more than one year after the dismissal of the claim.

The defendants contended that the suit was barred, as the order of 6th June 1893 had not been set aside within one year as prescribed in article 11, schedule II, of the Limitation Act and had thus become conclusive.

The District Munsif held that the order was not passed on investigation, and neither article 11 of schedule II of the Limitation Act, nor sections 280 to 282 of the Code of Civil Procedure applied to such orders. He accordingly decreed for plaintiff.

His judgment was reversed by the District Judge on appeal.

The plaintiff appealed to the High Court.

Dr. S. Swaminadhan for appellant.

The respondent was not represented.

JUDGMENT.—We are of opinion that the decree of the lower Appellate Court cannot be supported. The application put in by the claimant under section 278 of the Code of Civil Procedure was dismissed for default of appearance by him. The question is, in these circumstances, does article 11 of the second schedule to the Limitation Act apply? It is impossible to hold there has been in this case any investigation on the merits so as to satisfy the test which the law requires. See *Koyyana Chittamma v. Doosy Gavaramma* (1).

In *Kallar Singh v. Toril Mahton and another* (2), an application was dismissed for default of appearance and the Court held there had been no investigation within the meaning of section 278 of the

(1) I. L. R., 29 Mad., 225.

(2) I. O. W. N., 24.

*Civil Procedure Code. This case was followed in *Sarat Chandra Bisu and others v. Tarini Prosad Pal Chowdry*(1). We agree with these decisions. We must set aside the decree of the lower Appellate Court and remand the case to that Court for disposal on the merits.

Costs will abide the event.

SARALA
SUBBA HAU
v.
KAMSALA
TIMMAYYA.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

RANGASAMI NAIKEN (PLAINTIFF), APPELLANT,

v.

ANNAMALAI MUDALI AND OTHERS (DEFENDANTS NOS. 2, 1
AND 3), RESPONDENTS.*

1907
September
20, 30.

Transfer of Property Act—Act IV of 1882, s. 78—Gross negligence - Failure to get possession of title-deed does not necessarily amount to gross negligence where system of registration exists—Delay, effect of, in registration of documents.

A mortgaged property to B on 21st December 1896 and subsequently mortgaged the same property to C on 20th January 1897. A wilfully delayed the registration of the mortgage-deed to B, which was finally registered on the 21st April 1897. The title deeds of the property were not given to B, but were given to C when the property was mortgaged to him. The mortgage was executed outside Madras and was in respect of property in the mofussil. In a suit by C to recover the amount due on his mortgage deed, C claimed priority over B on the ground that B was guilty of gross negligence in not obtaining possession of the title deeds:

Held, that the failure on B's part to obtain the title-deeds from A did not, under the circumstances, amount to gross negligence within the meaning of section 78 of the Transfer of Property Act and did not postpone his mortgage to that of C.

Held further, that the delay in the registration being due to the default of A which B could not have anticipated, did not make B's failure in obtaining the title-deeds amount to gross negligence.

* What amounts to gross negligence must be determined according to the circumstances of each case; and one of the circumstances to be taken into consideration in this country is that a universal system of registration is established by law. As registration puts subsequent incumbrancers in a position, with the exercise of reasonable care, to find out prior encum-

(1) 11 C.W.N., 487.

* Second Appeal No. 1494 of 1904, presented against the decree of M.R.Ry. T. Sadasiva Ayyar, Subordinate Judge of Coimbatore, in Appeal Suit No. 102 of 1903, presented against the decree of M.R. Ry. K. Krishnamachariar, District Munsif of Udamalpet, in Original Suit No. 803 of 1902.