

## APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915.  
September  
21 and 22.

DHARMARAJA AYYAR AND ANOTHER, APPELLANTS,

v.

29 M. L. J. 708 K. G. SRINIVASA MUDALIAR AND FOUR OTHERS, RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 8, proviso—Preliminary mortgage-decree by Appellate Court—Power to extend time for payment, only for first Court—Order of extension by Appellate Court—Appeal against, non-maintainability of—Civil Procedure Code (Act V of 1908), sec. 148, no power to extend time under.*

No appeal lies from an order extending time for payment of the mortgage-amount due under a decree; such an order is not a decree within section 2, clause (2) of the Code of Civil Procedure.

Even in cases where the preliminary mortgage-decree is passed by the Appellate Court, it is only the Court of First Instance that can extend time for payment under Order XXXIV, rule 8, proviso, of the Civil Procedure Code (Act V of 1908).

*Venkatkrishna Ayyar v. Thiagaraya Chetti* (1900) I.L.R., 23 Mad., 521, *Sheonarain v. Churni Lal* (1901) I.L.R., 23 All., 88 and *Ram Dhanu Sahu v. Lalit Singh* (1909) I.L.R., 31 All., 328, followed.

Section 148 of the Civil Procedure Code (Act V of 1908) does not enable a Court to extend time for doing acts allowed by a decree.

*Het Singh v. Tuka Ram* (1912) 9 A.L.J., 381 and *Suranjan Singh v. Rama Bahal Lal* (1912) 17 I.C., 912, followed.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Original Petition No. 927 of 1912 in Appeal No. 653 of 1909, preferred against the decree of the District Munsif of Mannargudi in Original Suit No. 136 of 1908.

The material facts appear in paragraph 4 of the judgment.

S. Varadachariyar for T. R. Venkatarama Sastriyar for the appellants.

G. S. Ramachandra Ayyar for the respondents.

The following judgment of the Court was delivered by SADASIVA AYYAR, J.:—There is a preliminary objection taken that no appeal lies against the order of the lower Court

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\* Civil Revision Petition No. 711 of 1915. Subsequently converted into Civil Miscellaneous Appeal No. 213 of 1913.

extending the time for payment of the mortgage-amount, an order passed under the proviso to Order XXXIV, rule 8, and under section 148 of the Civil Procedure Code ; (as regards that portion of the order of the lower Court which effected an addition of parties under Order XXII, rules 10 and 11, we were told that this appeal was not directed against that portion).

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We think that the preliminary objection is sound. The order extending time does not come within the definition of a decree (see section 2, clause (2) of the Civil Procedure Code). We are clear that it does not determine any question coming within section 47 as was ingeniously contended by the appellant's learned vakil Mr. S. Varadachariyar.

We, however, allow this appeal to be converted into a revision petition under section 115, Civil Procedure Code.

The question for consideration on this footing will be whether an Appellate Court which passed the preliminary decree in a mortgage-suit (which was treated as a combined suit for redemption as regards a prior mortgagee and for sale as regards the mortgagor) has jurisdiction to entertain an application for extension of time under Order XXXIV, rule 8, proviso and section 148.

As regards section 148, we concur with the decisions in *Het Singh v. Tika Ram*(1) and *Suranjan Singh v. Rama Bahal Lal*(2) that that section does not apply to the extension of time for doing acts allowed by decrees.

As regards Order XXXIV, rule 8, we agree with *Venkatakrishna Ayyar v. Thiagaraya Chetti*(3), *Sheonarain v. Churni Lal*(4), *Ram Dhani Sahu v. Lalit Singh*(5) and *Shamuldhun Dutt v. Lakhmani Debi*(6), that it is the Court of First Instance to which the suit was remitted after the preliminary decree was passed by the Appellate Court which has the exclusive jurisdiction to deal with an application under Order XXXIV, rule 8, proviso. Section 37 quoted by the respondents' learned vakil has no relevancy as Order XXXIV, rule 8, proviso, does not contain the expression "Court which passed a decree" or "words to that effect" but only the one word "Court" occurring in that

(1) (1912) 9 A.L.J., 381.

(3) (1900) I.L.R., 28 Mad., 521.

(5) (1909) I.L.R., 31 All., 323.

(2) (1912) 17 I.O., 912.

(4) (1901) I.L.R., 23 All., 83.

(6) (1911) 13 C.L.J., 459.

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expression. But it is argued that the word "Court" meant from the context in the former portions of that rule 8, only the "Court which" (actually) "passed the decree" even if that Court be the Appellate Court. But even if the word "Court" has that meaning in the former portions, we do not see that the single word "Court" constitutes the expression "Court which passed a decree" or "words to that effect" when that single word is not followed by any words corresponding to the words "which passed a decree." The said words "Court" in the clauses (1), (2) and (4) of that rule 8 which relates to the passing of final decrees in mortgage suits would no doubt mean the same thing as the expression "Court which passed a decree" when the Court which passed the preliminary decree was (as it would ordinarily be) the Court of First Instance. But to argue therefore that the word *must* mean in all cases "the Court which passed the decree" even if that Court was the Appellate Court and not the Court of First Instance and that therefore the word "Court" in the proviso also means only the Appellate Court if that is the Court which passed the decree and does not include the Court of First Instance except by a reference to section 37 seems merely to beg the question in issue. Further section 37 includes the Court of First Instance only where proceedings have to be taken "in relation to the execution of decrees" in certain contingencies. The application now in question does not, in the first place, relate to the execution of any decree and, in the second place the decree-holder seeks, not to include the Court of First Instance on the strength of section 37 but to either include or to mean only the Appellate Court.

In the result, we allow the revision petition and direct the Sub-Court to return the petition so far as it prays for an extension of time, to be presented to the Court of First Instance. Costs hitherto will abide. A fair copy of the petition might be attached to the original petition (which is really a combination of two separate petitions); when the latter is represented to the Court of First Instance, the words "may be pleased to add them as plaintiffs Nos. 3, 4 and 5" being omitted from the fair copy so attached.