VELLIAPPA v. SUBRAHMANYAM. — SESHAGIRI AYYAR AND NAPIER, JJ.

We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although section 143 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the legislature regards such provisions as directory in their nature and not mandatory. We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued. Appellants are entitled to their costs in this Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915. March 2, 3, 5 and 10.

LAKSHMI ACHI (PETITIONER), APPELLANT,

v.

SUBBARAMA AYYAR AND THREE OTHERS (RESPONDENTS), RESPONDENTS.*

28 M. L. J. 769

Civil Procedure Code (Act V of 1908), sec. 47, and O. XXII, r. 10—Decree in mortgage suit—Preliminary decree—Final decree, procedure to, not by way of execution—Application to continue the suit after preliminary decree, order disallowing, not appealable.

After the passing of the preliminary decree in a mortgage suit, the suit is continued until the stage of the final decree is reached.

Ashfaq Husain v. *Gauri Sahai* (1911) I.L.R., 33 All., 264 and *Munna Lal* v. *Sarat Chunder* (1915) 21 C.L.J., 118, explained.

Where under the will of *A*, his executors filed a suit on a mortgage and one of them died before, and the other after the passing of the preliminary decree, and his senior widow made an application to continue the suit,

Held, that an order disallowing such an application is not appealable, under O. XXII, r. 10 of the Code.

Ferrall v. *Curran* (1899) I.R., 2 Ir. R., 470, followed.

* Civil Miscellaneous Appeal No. 151 of 1914.

APPEAL against the order of P. S. SESHA AYYAR, the Subordinate Judge of Mayavaram, in Judicial Application No. 6 of 1914, in Original Suit No. 40 of 1911.

The facts appear from the judgment.

S. Srinivasa Ayyangar for the respondent.—I raise a preliminary objection that the appeal does not lie. Section 47 does not apply, for this is not in execution. [*T. Rangachariyar* for the petitioner.— I rely on section 47 also because Privy Council has decided that an application for decree absolute is in execution.] Order XXII rule 10 does not apply; the phrase used is not only "devolution of interests", but also "either by assignment or creation"; only rule 4 applies. It is not an interest which comes to her by the death of the executor. She has a pre-existing interest. It must be an interest that devolves. Under Order XXII there are two instances of appeal and nothing more. Order XLIII has to be read with section 104. The ground that it is an order in execution proceedings is not tenable. In *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1) they so held. But in a later case—*Rungiah Gounden Co.* v. *Nanjappa Row*(2)—they held it so for purposes of limitation. In *Ashfaq Husain* v. *Gauri Sahai*(3) which is a decision under the new Code, they have held it is not an executable decree. [SESHAGIRI AYYAR, J.—There is a later Privy Council decision in *Abdul Majid* v. *Jawahir Lal*(4).] If there is a preliminary decree, the question is whether it is executable. *Munna Lal* v. *Sarat Chunder*(5) and other cases have no application because they are under the old Code. They refer to order absolute and not a decree absolute. In *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1), BHASHYAM AYYANGAR, J. says: "There is only one decree and that is the earlier decree. In order to bring it in line with English practice, they introduced the new Order. The legislature has repealed the sections of Transfer of Property Act and brought them in the Procedure Code under a different procedure." The original wording is "pass an order". The old section is section 89. Therefore it was treated as an order in execution. The only decision under the new Code is *Ashfaq Husain* v. *Gauri Sahai*(3) followed in

(1) (1902) I.L.R., 25 Mad., 244. (2) (1903) I.L.R., 26 Mad., 780.
(3) (1911) I.L.R., 33 All., 264. (4) (1914) I.L.R., 36 All., 850 (P.C.).
(5) (1915) 21 C.L.J., 118.

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Vembu Iyer v. *Srinivasa Iyengar*(1). This Court follows the Allahabad view and says limitation follows from the second decree. [NAPIER, J.—Mr. Rangachari's contention seems to be inconsistent with the Code.] The whole question rests on Order XXXIV, rule 5. What is execution is execution under the Code. There being a special provision in Order XXII, section 47 is excluded.

T. Rangachariyar for the petitioner.—Under section 36 of the Code, execution applies to orders; see section 47, clause (3); the language of section 47 read with section 36 speaks of decrees. Decree includes both preliminary and final. [NAPIER, J.—Does not section 47 merely give the form?] It gives the right. There may be a purely preliminary decree. It may be preliminary and final or final decree. [NAPIER, J.—Did you put it in the form of an execution petition?] No form is prescribed. The word execution is not defined in the Code. [NAPIER, J.—We must understand it in conformity with the Code.] A preliminary decree gives a right to the final decree. A preliminary decree may enforce a personal covenant and is in that sense final. My argument is that "decree" "includes preliminary decree" [reads definition of decree]. [SESHAGIRI AYYAR, J.—The suit continues.] The suit may not be disposed of. It may exist for other purposes. My friend's contention is that section 47 applies to final decrees; if not, why is it not applicable in this case? [NAPIER, J.—Because there is distinct chapter; if it is kept in the Transfer of Property Act, will you call it execution?] So they put it; the chapter applies to the execution of orders and decrees. The word "execution" must include an order to get a right to execute the decree. [NAPIER, J.—Why is it not included in Order XXI?] Because they want a special provision for mortgage suits. The order provides forms of decrees as in suits for accounts—partnership accounts. Order XXI, rule 15 onwards to dissolution. [SESHAGIRI AYYAR, J.—This Court has held that there is no decree in ordinary partition suits till the final decree.]

My second point is:—On the death of both the executors, property devolved on the widows; and therefore Order XXII, rule 10 applies. [NAPIER, J.—Is it a statutory vesting; how does it vest in the widows?] The language of Order XXII, rule 10

(1) (1912) 23 M.L.J., 638 at p. 644.

runs thus :—"in other cases of any devolution of any interest, etc." There is a case of vesting by consent of executor. [See sections 112 and 113 of the Probate and Administration Act.] The assent operates to transfer the property from the executor to the legatee. In such a case it will be devolution. Here the executor has died; and by operation of law, the property has devolved. [NAPIER, J.—What does the Act provide?] It does not provide. All that can be done is to take out execution—See sections 20, 21 and 18 and succeeding sections. [NAPIER, J.—This is by proving the will and that does not affect the question.] It must be left to the general law. Then it comes under Order XXII, rule 10, and therefore there is a right of appeal.

S. Srinivasa Ayyangar in reply:—Section 36 helps me: the definition of decree does not help my friend. [SESHAGIRI AYYAR, J.—How does your client come in?] She has been brought in and a decree passed in her favour. I only raise the question of appeal or no appeal.

The following Judgment of the Court was delivered by SESHAGIRI AYYAR, J.—One Arunachellam Chetty died leaving two widows. Prior to his death, he executed a will on the 25th July 1904. Two persons were appointed executors under it. They brought Original Suit No. 49 of 1911 on a deed of mortgage executed to the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

Mr. S. Srinivasa Ayyangar raised the preliminary objection that no appeal lies against the order of the lower Court. The question has been argued very fully before us by the learned vakils for the appellant and respondent; we have come to the conclusion that the preliminary objection must be upheld.

Mr. T. Rangachariyar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument

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is not open to the appellant after the amendment of the Code of Civil Procedure which by Order XXXIV now regulates the procedure relating to the execution of mortgage decrees. It was held in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(1), that the preliminary decree passed in a mortgage suit is the only executable decree and that proceedings for obtaining the final decree could be taken by way of execution. This view was based mainly on the language of section 89 of the Transfer of Property Act which says: "The plaintiff or the defendant as the case may be may apply to the Court for an *order* absolute for sale of the mortgaged property." The recent decision of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal*(2) is in favour of the view taken in the Madras Full Bench case. The use of the word *order* in section 89, in contradistinction to the word *decree* in section 88 was responsible for numerous decisions which were not easily reconcilable. The legislature intervened, and in Order XXXIV speaks of both the adjudication as decrees: See rules 2 and 3. Therefore after the passing of the preliminary decree, the *suit* is continued until the stage of final decree is reached. It is not by the process of execution that the final decree is obtained under the new Code. Mr. Rangachariyar refers to the explanation to the definition of decree and argues that when read with section 47, the proceedings referred to in the explanation really relates to execution. Had it not been for the deliberate change in the language of Order XXXIV, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain* v. *Gouri Sahai*(3) and *Munna Lal* v. *Sarat Chunder*(4), relate to the language of sections 88 and 89 of the Transfer of Property Act and not to the amended provision in the Code of Civil Procedure. In the former case, counsel expressly stated that under the Code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned vakil that as the preliminary decree relating to possession (under Order XX, rule 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not strictly

(1) (1902) I.L.R., 25 Mad., 244. (2) (1914) I.L.R., 36 All., 350 (P.C.).
(3) (1911) I.L.R., 33 All., 264. (4) (1915) 21 C.L.J., 118 (P.C.)

speaking the final stage of the decree for possession. They relate to two different rights; and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

Mr. Rangachariyar's next contention is that his client is a person on whom the estate has devolved upon the death of the executors and that her application must be treated as one falling under Order XXII, rule 10, of the Code of Civil Procedure. We were at first inclined to think that the devolution referred to in this rule was of the same character as is referred to in the definition of *Legal Representative* in the Code (section 2, clause 11).

Mr. S. Srinivasa Ayyangar has satisfied us that rule 10 is not open to that interpretation. The term "legal representative" is used in rules 3 and 4 of the order and does not find a place in rule 10. The plain language of the rule suggests that the devolution of the interest must be that of the plaintiff who has instituted the suit. The words "assignment" and "creation" indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of the party to the suit. Under the corresponding rule in the Judicature Act (Order XVII, rule 2), it was held that where a tenant for life who brought the suit died, the remainder man was not entitled to continue the suit—*Ferrall* v. *Curran*(1). The same construction must be adopted with reference to rule 10. The legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of action the deceased plaintiff sought to enforce as representing his estate. Rules 3 and 4 of Order XXII read with section 2, clause 11, cover such cases. It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rikhai Rai* v. *Sheo Pujan Singh*(2) and *Gandi Ramaswami* v. *Puramsetti Pedamunayya*(3). It has to be noted that the application of the appellant in the lower Court was under rule 3 of Order XXII. The legislature has chosen not to give a right of appeal against orders passed under that rule, whereas under Order XLI (1) (*l*) orders with

(1) (1899) L.R., 2 Ir.R., 470. (2) (1911) I.L.R., 33 All., 15.
(3) (1915) 17 M.L.T., 186.

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reference to rule 10 are appealable. We must therefore hold that this appeal is incompetent.

The appellant will pay the costs of the respondent.

S.V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. February 24 and March 5 and 12.

M. BALKRISHNA RAO (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF CUDDAPAH (DEFENDANT), RESPONDENT.*

Madras Forest Act (XXI *of* 1882), *ss.* 6, 10, 16 *and* 17—*Notification under section* 16—*Notice under section* 6, *a condition precedent—Irregularity due to absence of notice, not cured by knowledge under section* 17—*Grant of personal inam of lands, including poramboke, meaning of.*

A Forest Settlement Officer who is constituted a court for the decision of claims to lands which it is proposed to include in a reserved forest, has, in the absence of notice required by section 6 of the Act, no jurisdiction to make any decision affecting the right to those lands.

Nusserwanjee Pistonjee v. *Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadur* (1885) 6 M.I.A., 134 and *Sanmby* v. *London* (*Ont*) *Water Commissioners* (1906) A.C., 110, followed.

Poramboke in the phrase, grant of "lands besides poramboke," means poramboke or unassessed waste.

Secretary of State for India v. *Raghunathathathacharia*r (1913) 24 M.L.J., 31, followed.

Narayanasami Naidu v. *Secretary of State for India* (1913) 24 M.L.J., 36, distinguished.

APPEAL against the decree of Diwan Bahadur V. SUBRAHMANYAM PANTULU, the District Judge of Cuddapah, in Original Suit No. 10 of 1911.

K. Srinivasa Ayyangar for the appellant.—I submit that notice, under section 6, to the owner of lands to be included is a condition precedent to the vesting of jurisdiction in the

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* Appeal No. 208 of 1913.