APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

1918. July 30 and 31, August 6.

SUBBALAKSHMI AMMAL (FIRST DEFENDANT) APPELLANT,

v.

RAMANUJAM CHETTY AND FOUR OTHERS (PLAINTIFF 2 AND 3 DEFENDANTS 2 TO 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 2, 47 and 96, O. XXXIV, r. 5, cl. (2)—Suit for sale—Preliminary decree—Final decree, application for—Order of dismissal—Appeal, whether competent—Limitation Act (IX of 1908), sec. 19 and art. 181, applicability of—Acknowledgment, sufficiency of.

An order dismissing an application for a final decree in a suit for sale on a mortgage, is not an order under section 47 of the Civil Procedure Code but a decree in the suit and is appealable as a decree under section 96 of the Code.

Where a mortgagee, having obtained a preliminary decree for sale, applied for a final decree more than three years after the date fixed for payment in the former decree, but it appeared that, in a previous application by the decree-holder for sale, the mortgagor applied for adjournment of the sale stating in his petition that he had asked the decree-holder for an extension of time to pay the decree amount and that the latter had consented thereto.

Held (on objection being taken that the application was barred by limitation) that article 181 and section 19 of the Limitation Act were applicable to an application for final decree in a mortgage suit; and that there was sufficient acknowledgment within the terms of section 19 of the Act.

The right to take legal steps for enforcing a right need not be expressly acknowledged, if the right itself is acknowledged.

Sukhamoni v. *Ishan Chunder Roy* (1889) I.L.R., 25 Calc., 844 (P.C.), applied,

Venkatrav Bapu v. *Bijesingh Vithalsingh* (1886) I.L.R., 10 Bom., 108, followed.

APPEAL against the order of T. M. FRENCH, Temporary Subordinate Judge of Vellore in Appeal Suit No. 22 of 1917 preferred against the order of RAVI VARMA RAJA, District Munsif of Tiruppattur, in I.A. No. 908 of 1914, in O.S. No. 1240 of 1910.

The respondent obtained a preliminary decree for sale on the 27th October 1910, against the appellant and some others; the decree amount was payable by the 27th April 1911. He applied for execution of the decree by sale of the mortgaged property but had not previously obtained a final decree in the

* Appeal Against Appellate Order No. 123 of 1917.

suit. The Court directed him to apply for a final decree, and he accordingly filed the present application, on the 16th September 1914, for a final decree in the suit. The appellant pleaded that the application was barred by limitation under article 181 of the Limitation Act. The respondent relied on a petition filed by the appellant (M.P. No. 178 of 1912) as furnishing a valid acknowledgment under section 19 of the Act and as saving the bar of limitation. The petition referred to was filed by the appellant in the course of the previous application in execution filed by the decree-holder, and prayed for an adjournment of the sale in Court auction in pursuance of the application for execution filed by the decree holder as above mentioned. The petition of the mortgagor was in these terms :—

"Petition put in respectfully by the first defendant.—In the said suit, date of sale in auction has been fixed for the 17th instant of this month. I have applied for the extension of time till the re-opening of the Court to pay to the plaintiff the decree amount. The plaintiff has also consented. I therefore pray that the Court may be pleased to pass orders upon this petition only directing that the auction to be held on the 17th instant may be stopped and that the sale may be adjourned till the re-opening of the Court without any further sale proclamation.

(——) Mark of Subbalakshmi Ammal, 16-4-1912."

The District Munsif dismissed the respondent's application for obtaining a final decree as barred by limitation. On appeal the Subordinate Judge held that the application was not barred by limitation and directed the passing of a final decree. The first defendant preferred this Civil Miscellaneous Second Appeal against the decree and judgment of the Subordinate Judge.

M. Patanjali Sastri for the appellant.

C. V. Anantakrishna Ayyar for the respondent.

The JUDGMENT of the Court was delivered by—

KRISHNAN, J.—The two questions raised for our decision in this case are (1) whether an appeal lay to the lower Appellate Court and (2) whether M.P. No. 178 of 1912 contains a sufficient acknowledgment under section 19 of the Limitation Act to give a fresh starting point for first respondent's application. KRISHNAN, J.

The first plaintiff sued to recover the amount due to him under a simple mortgage bond by sale of the property mortgaged.

SUBBA-LAKSHMI AMMAL v. RAMANUJAM CHETTY.

KRISHNAN, J.

On 27th October 1910 a preliminary mortgage decree was passed in his favour giving defendants time till 27th April 1911 to pay the amount found due. Money was not so paid and the present application from which the Civil Miscellaneous Second Appeal before us arises was filed by the first respondent on 16th September 1914 under Order XXXIV, rule 5, clause (2) for a final decree for sale. The first Court dismissed the application as barred by limitation under Article 181 of the Limitation Act. On appeal the lower Appellate Court reversed that order and has passed a final decree. The first defendant has appealed to us against that decision.

On the first question raised, the appellant is right in his contention that the order cannot be treated as one under section 47, Civil Procedure Code, in execution of the preliminary decree. It is an order in the suit itself. The effect of the order is to dismiss the plaintiffs' suit so far as it prayed for the realization of the mortgage money by sale of the mortgaged property. It is a final adjudication on that part of the plaintiffs' case so far as the Munsifs' Court is concerned and therefore falls within the definition of decree under section 2, Civil Procedure Code. A formal decree was drawn up by the Munsif dismissing the petition but it did not expressly dismiss the suit for sale. This, however, seems immaterial as the effect of the order was to so dismiss. In *Suppu Nayakan* v. *Perumal Chetti*(1) this Court held that an order declaring that a suit had abated because the legal representative of the deceased defendant had not been brought on record in time was a decree and appealable as such though no formal decree dismissing the suit had been drawn up. The principle of that decision applies to the present case. If the plaintiffs' application had been allowed by the Munsif and a final decree passed, there can be no doubt that an appeal would have lain against it. It would be an anomalous position if we were to hold that an appeal does not lie where the application is refused. The ruling of the Full Bench in *Madho Ram* v. *Withal Singh*(2) shows that appeals are allowed in that province from such orders, as appeals from decrees in suits. We think that is the right view and that the appeal to the

(1) (1916) 30 M.L.J., 486.

(2) (1899) I.L.R., 38 All., 21.

lower Appellate Court was a competent one under section 96 of the Civil Procedure Code.

On the question of limitation it is now settled that article 181 applies to an application under Order XXXIV, rule 5, clause (2) [see *Nimmala Mahankali* v. *Kallakuri Seetharamiah*(1)] and it is clear that section 19 of the Limitation Act also applies. The question then to be decided is whether there is a sufficient acknowledgment in the present case. M.P. No. 178 of 1912, relied on by the plaintiffs as containing the necessary acknowledgment, was put in by the mortgagor for obtaining an adjournment of the sale of the mortgaged properties in Court auction. It should be explained that at one stage of the proceedings in this suit the Court had treated the first decree as an executable decree and had ordered sale of the properties. It was during the time that this view was in force that M.P. No. 178 of 1912 was filed. Subsequently the Court ruled that a final decree should be obtained before execution and that order has now become final between the parties so that no question about the executability of the first decree itself having become *res-judicata*, arises. In M.P. No. 178 of 1912 the first defendant says "The date of sale in auction has been fixed for the 17th of this month. I have applied for extension of time till the re-opening of the Court to pay to the plaintiff the decree amount. Plaintiff has also consented. I pray that the Court may be pleased to pass orders directing that the auction to be held on the 17th instant may be stopped and the sale may be adjourned till the re-opening of the Court without issuing any further sale proclamation." There can be no doubt that the mortgagor already acknowledges by it plaintiffs' right to the decree amount and their right to realize it by sale of the suit properties. Appellant's vakil, however, urges that such an acknowledgment is not sufficient to save the present application and that the acknowledgment must expressly be of the right to apply for a final decree and he relies on *Andiappa Chetty* v. *Devarajulu Naidu*(2). Under section 19, the acknowledgment of liability must be in respect of the right in respect to which the application is made. What then is that right in the present case? Is it the right to apply for a final decree as appellant contends or the right to realize the

(1) (1917) 32 M.L.J., 455. (2) (1911) 21 M.L.J., 1024.

SUBBA-LAKSHMI AMMAL v. RAMANUJAM CHETTY.

KRISHNAN, J.

decree amount by sale of the mortgaged properties through Court as the respondent argues? The substantial right the plaintiff has is the latter, his application to Court is only for obtaining a final decree to enable him to enforce that right. The Privy Council has laid down in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy*(1) that

> "it is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged."

Similarly the right to take legal steps for enforcing the right itself need not be expressly acknowledged if the right itself is acknowledged. The language of section 19 is clear on the point that the right itself should be acknowledged and not the right to apply. In *Venkatrav Bapu* v. *Bijesingh Vithalsingh*(2) an application for the postponement of a sale under a mortgage decree, which said the mortgagor would pay the amount of the decree, was held to contain a sufficient acknowledgment to give a fresh starting point for the plaintiff's subsequent application to execute the decree. The only difference between that case and the present one is that here the application is to get a final decree before applying for execution. This does not seem to be a material difference in this connexion. The acknowledgment of plaintiffs' right to sell the properties in Court auction involves an acknowledgment of their right to get the final decree for the purpose.

We think the Subordinate Judge is right in holding that there was a sufficient acknowledgment in this case. The respondent's vakil has not attempted to support the Subordinate Judge's view on the question of waiver and on the question of previous execution applications giving fresh starting points for limitation under article 181, which are obviously wrong. His decree is, however, right and this appeal must be dismissed with costs.

K.R.

(1) (1889) I.L.R., 25 Calc., 844 at p. 851 (P.C.). (2) (1886) I.L.R., 10 Bom., 108.