

APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice
Ramesam.*

1921,
February
23.

SANKARA NAINAR PILLAI AND OTHERS (PETITIONERS'
LEGAL REPRESENTATIVES), APPELLANTS,

v.

PUTHIYA VEETHIL THANGAMMA AND OTHERS
(RESPONDENTS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 182, cl. 5—Step in aid of execution, what is—Decree for redemption providing also for sale—Application by mortgagor for extension of time, whether step in aid, for application for sale.

An application by a mortgagor for extension of time to pay money due under a decree for redemption which also provided for sale in default, is a step in aid of execution, under article 182, clause 5 of the Limitation Act, in respect of a subsequent application for sale by him.

An application to be a step in aid of execution need not be made in a pending execution.

APPEAL against the decree of K. A. KANNAN, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 49 of 1919 (Appeal Suit No. 173 of 1919 on the file of the District Court), preferred against the order of R. NAGESWARA AYYAR, Principal District Munsif of Calicut, in Execution Petition No. 102 of 1918 in Original Suit No. 794 of 1910.

The facts are set out in the judgment of RAMESAM, J.

T. R. Ramachandra Ayyar for appellants.

K. Kuttikrishnan Menon for respondents.

SPENCER, J.

SPENCER, J.—The decree that was passed by the District Munsif upon this suit for redemption, though styled a preliminary decree and passed under the Code

of Civil Procedure, 1908, provided for sale of the mortgaged properties if the money required for redemption was not paid by a certain date. There was thus no need for anyone to apply for an order for sale. But in a redemption suit, the decree-holder being the mortgagor, it has been held in *Govinda Taragan v. Veeran*(1), *Govinda Menon v. Kombunni Mannadiar*(2) and *Abdul Kadir v. Samipandia Tevar*(3) that he as well as the mortgagee has a right to execute the decree by applying for sale, and I think we should follow those decisions.

As regards the applications of 4th April 1916 and 23rd June 1916 for an extension of time for depositing the redemption money in Court, it may be conceded that they did not aid the particular form of execution which has ultimately been reached, but if they were bona fide they may well be said to have been in aid of that portion of the decree which related to redemption, and I think the decree must be treated as a whole and not split up into sections. This is the view taken in a recent decision, *Venkata Reddayya v. Yarakayya*(4) to which I was a party. If they were in any sense aids to execution they should be treated as steps in aid of execution.

In *Abdul Kader Rowther v. Krishnan Malavai Nair*(5) SADASIVA AYYAR, J., observed that an application by the decree-holder to give time to the judgment-debtor merely as a matter of grace would be a step in retardation. In the present case the applicant though he was the decree-holder was the person who had to pay and he was applying for time not as a matter of grace to a judgment-debtor, but in order the better to enable himself to execute the decree, the execution of which

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(1) (1913) I.L.R., 36 Mad., 32. (2) C.M.S.A. No. 99 of 1915 (undreported)
(3) (1920) I.L.R., 43 Mad., 835. (4) (1922) I.L.R., 45 Mad., 35.

(5) (1915) I.L.R., 38 Mad., 695.

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would have been completed as soon as the redemption money was paid.

The Subordinate Judge in appeal made the comment on these applications that it could not be said that they were made in execution. The law only requires that they should be applications in accordance with law to the proper Court and they appear to have been that.

I therefore agree with my learned colleague that this Appeal should be allowed with costs in both Courts.

RAMESAM, J.

RAMESAM, J.—This is a matter arising in the execution of a decree for the redemption of a usufructuary mortgage in South Malabar. The final decree of the High Court, dated 16th October 1913, allowed three months' time for redemption. The three months expired on the 16th (not 15th) January 1914. In his present application, dated 22nd December 1917, the decree-holder (plaintiff) applied for sale.

It has been held in *Nani Nair v. Kandan Ashtamoorthi Nambudripad*(1) that in cases falling under the Malabar 'Tenants' Improvements Compensation Act, the provisions of Order XXXIV, Civil Procedure Code, are modified by section 6 of that Act in so far as they are inconsistent with the latter, and that under the local Act only one decree in redemption suits need be passed. This was also acted upon by the Subordinate Judge in an earlier stage of the proceedings of this case. In this view, the question decided in *Govinda Taragan v. Veeran*(2), in *Govinda Menon v. Kombunni Mannadiar*(3) and in *Abdul Kadir v. Samipandia Tevar*(4), whether a mortgagor who obtained a decree for redemption can apply for sale when no final decree is passed under Order XXXIV, rule 4, which enables the mortgagee

(1) (1918) M.W.N., p. 551.

(2) (1913) I.L.R., 36 Mad., 32.

(3) C.M.S.A. No. 99 of 1915 (unreported). (4) (1920) I.L.R., 43 Mad., 835

only to apply for the passing of a final decree, does not arise, though I may add that, if it arises, I am inclined to follow those decisions and do not share the doubts expressed by SESHAGIRI AYYAR, J., in the last of them.

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But it has also been pointed out in *Nani Nair v. Kandan Ashtamoorthi Nambudripad*(1) that

“Provisions like directions for sale in default, allowing time to pay moneys declared as due and so on, not inconsistent with the Improvements Act and directed or allowed by the new Civil Procedure Code to be mentioned in a decree for redemption or ejection can, of course, be mentioned in decrees passed in suits falling under the Compensation Act also.”

It follows that the mortgagor is entitled to apply for extension of the time allowed to him in the decree for redemption. In this case, two such applications were filed by the decree-holder on 4th April 1916 and 23rd June 1916. The District Munsif held that they operated as steps in aid of execution and saved the present application from being barred by limitation. The Subordinate Judge reversed the order of the District Munsif on the ground that they were not in aid of the execution because (1) the applications were not made when any execution application was pending and it cannot be said that they were made in execution (which is true) and (2) they retard execution and do not aid it.

In my opinion there is no warrant for the view that an application to take a step in aid of execution should be made in execution, and no authority has been cited by the Subordinate Judge or the learned vakil for the respondent in its support.

On the second ground also, I am unable to agree with the learned Subordinate Judge. Ordinarily, it is the judgment-debtors that have to pay or do some act

(1) (1918) M.W.N., 551, p. 553

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under decrees in order to avoid sale, and applications by them for extension of time retard execution and do not aid it. But it does not follow that, in redemption decrees and similar decrees, where the decree-holder has to pay before obtaining execution and asks for extension of the time allowed to him for payment, such application does not aid him though it may retard execution of the decree. It aids him in the execution of the portion of the decree relating to redemption which he cannot get without extension of the time : see *Pitām Singh v. Tota Singh*(1). As my learned brother observed in the course of the argument, late redemption is better than no redemption. It may be that those applications do not aid the particular kind of execution now sought, viz., sale which was a relief granted as an alternative to the relief of redemption. It is enough that they aid the decree-holder in the execution of some portion of the decree [*vide Kalidas Manchand v. Varjivan Ranji*(2)] especially when that was the primary object of the decree-holder, even though, in the events that happened, the decree-holder did not derive the assistance sought. In my opinion the proper test in deciding such a question is whether the step aids the execution. The other test, viz., whether it accelerates or retards execution [see *Kartick Nath Pandey v. Jagganath Ram Marwari*(3), *Abdul Kader Rowther v. Krishnan Malavai Nair*(4)] though in many cases it amounts to the same thing, may in some cases (such as this) turn out to be fallacious.

I would reverse the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

N.R.

(1) (1907) I.L.R., 29 All., 301 at p. 302.

(2) (1891) I.L.R., 15 Bom., 245 note. (3) (1900) I.L.R., 27 Calc., 285.

(4) (1915) I.L.R., 38 Mad., 695.