APPELLATE CIVIL.

Before Mr. Justice Curgenven.

1929, November 7.

RAMANATHAN CHETTY (FIFTH RESPONDENT), PETITIONER,

v.

ALAGAPPA CHETTY AND OTHERS (PETITIONERS AND RESPONDENTS 1 TO 4, 6 TO 13), RESPONDENTS.*

Limitation Act (*IX of* 1908), *art.* 181—*Suit for dissolution of a partnership and for accounts, etc.*—*Preliminary decree*—*Application by party for passing a final decree, more than three years after preliminary decree, whether barred*—*Suit, whether pending between preliminary and final decrees.*

A suit for the dissolution of a partnership and for accounts, in which a preliminary decree has been passed, must be considered to be pending until final decree; hence an application to pass a final decree in such a suit is not subject to any limitation. *Srinivasa Mudaly* v. *Ramasami Mudaly*, (1915) M.W.N., 725, followed.

PETITION under section 115, Civil Procedure Code, to revise the order of the Court of the Subordinate Judge of Devakottai, in I.A. No. 574 of 1926 in Original Suit No. 31 of 1913 on the file of the Temporary Subordinate Judge of Rāmnād.

The material facts appear from the judgment.

C. S. Venkatachari for appellant.

C. Padmanabha Ayyangar for respondent.

JUDGMENT.

This revision petition is presented against the order of the Principal Subordinate Judge of Devakottai in the following circumstances. The suit out of which it arises was instituted for the dissolution of a partnership and for accounts in the Court of the Subordinate Judge of

* Civil Revision Petition No. 817 of 1927.

Rāmnād. It was transferred to the then existing Temporary Subordinate Judge of Rāmnād and he passed a preliminary decree, on 23rd October 1913, dissolving the partnership from the date of the plaint and appointing a Commissioner to examine and report upon the accounts. The Commissioner presented his report on 14th January 1915 and the Temporary Subordinate Judge passed a final decree on 22nd March 1915. It is with the legal aspect of a passage in this decree that we are now concerned. The decree contains certain provisions such as normally find place in a final decree for the dissolution of a partnership and then occurs the following passage:

"This Court doth further direct that the first defendant do take the good outstandings due to the firm as found in the Commissioner's report and that he do account to the other partners for the same."

This is based upon a passage in the judgment which says:

"As the first defendant has always been the managing partner and as he has been instituting suits for recovery of all outstandings, etc., the good outstandings due to the firm as found in the Commissioner's report will be taken by him and he will account to the partners for the same."

It appears from the Commissioner's report that the parties failed to assist in the realization of the assets and the settlement of their accounts and accordingly he had to propose to the Court the appointment of a receiver for this purpose, and the Court decided to take the course abovementioned. The first defendant appealed against this decree to the High Court but died before the appeal was disposed of. Nevertheless, the above-quoted passage was reproduced in the appellate decree. So far as we are concerned, it is agreed that we may disregard the appellate decree in this respect and may base ourselves upon the terms of the decree, dated 22nd March 1915. No attempt was made by any of the parties to enforce

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

the direction given to the first defendant until 14th October 1925, when the sixth defendant, son of one of the partners, applied to the Additional Subordinate Judge of Rāmnād at Madura to pass a final decree in pursuance of that direction. About a year later the application was returned by the Additional Subordinate Judge on the ground that he had no jurisdiction and it was represented to the Temporary Subordinate Judge of Devakottai.

I will deal first with an objection, which, however, has not been strongly pressed, that the lower Court had no jurisdiction to deal with the suit. I have said that it was originally disposed of by the Temporary Subordinate Judge of Rāmnād. That Court was abolished on 1st January 1926, two Subordinate Judges being attached to the Sub-Court of Rāmnād at Madura from that date. The application now in question had been filed before the change took place and assuming that the suit to which it related was a pending suit, it should have been transferred to the Rāmnād or to the Devakottai Court, since in the case of a pending suit a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit; *Subramanya Iyer* v. *Swaminatha Chettiar*(1), and *Chokkalinga Pillay* v. *Velayudha Mudaliar*(2). I infer that what took place was that all suits at the time pending before the Temporary Subordinate Judge of Rāmnād were distributed between Rāmnād and Devakottai, but that, inasmuch as the present suit had to all appearances been disposed of, no such order was made with regard to it. Section 37 of the Code of Civil Procedure would have sufficiently provided for any subsequent proceedings if the suit had already been disposed of; but if, as I propose to hold, the suit was

---

(1) (1928) 28 L.W., 886. (2) (1924) 47 M.L.J., 448.

still pending, a transfer order was technically necessary. Since, however, it has now been dealt with by the Court which has jurisdiction over the place where the cause of action arose, and to whose file it would certainly have been transferred if any transfer had been ordered, I think that the irregularity is no more than technical and does not form a fit subject for revision.

In the order under consideration the learned Subordinate Judge has given reasons for holding that the direction in the final decree is of an interlocutory character, that by force of it the suit is still pending and that the application, which is in its nature an application to pass a final decree, is not subject to the law of limitation. He has, therefore, decided to take the suit on his file and proceed with it. This order has been attacked on two alternative grounds—

(1) the direction given to the first defendant is not in the nature of a preliminary decree, but if it is,

(2) the application is barred under article 181 of the second schedule of the Limitation Act, as having been made more than three years from the date of the decree.

It was in point of fact made about ten and a half years after the trial Court's decree and six years after the High Court's decree.

It is contended in the first place that the Code contemplates only one preliminary decree and one final decree, whereas what we must refer to here as the final decree is in fact a composite decree, part final and part preliminary; so that the preliminary portion would require a further final decree to be passed. This position cannot, I think, be substantiated either by the terms of the Code or by any case-law. The definition of "decree" in section 2 (2) concludes with an explanation which says that a decree may be partly preliminary and partly

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

final; and I can find nothing in the Code repugnant to the notion that more than one preliminary or more than one final decree may be passed. There are some observations of KRISHNAN, J., in *Ghulusam Bivi* v. *Ahamadsa Rowther*(1), which deals with a partition suit, to the effect that the Code does not contemplate more than one preliminary decree and one final decree in one suit, and that to have two final decrees and to call the first one a final decree would be a misnomer. I do not think he intended to say that, where circumstances so require, the Court has no jurisdiction to pass a composite decree. A situation rather similar to the present forms the subject of some observations by MUKHERJEE, J., at page 260, *Raja Peary Mohan* v. *Manohar*(2). He says,

"It may be conceded that the legislature contemplated that ordinarily there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. But as observed by PIGGOTT, J., in *Bharat Indu* v. *Yakub Hasan*(3), there may be exceptions and the case before us furnishes an instance. Here the original suit was for the removal of the *shebait*, for cancellation of the judicial sale and for recovery of the trust property. The decree made in the suit has directed the removal of the *shebait* and the cancellation of the sale subject to the investigation of accounts to be rendered by the *shebait* in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein."

There is another Calcutta case, *Jashoda Dasee* v. *Upendra Nath*(4), where it was found necessary to pass a supplementary final decree dealing with the portion undisposed of in the earlier final decree, that suit being one for partition. I do not think there can be any serious doubt that there is nothing illegal in passing more than

(1) (1918) I.L.R., 42 Mad., 296.
(2) (1923) 38 Calc. L.J., 255.
(3) (1913) I.L.R., 35 All., 159.
(4) (1918) 44 I.C., 671.

one final decree, and in fact Mr. C. S. Venkatachariar does not go so far as to suggest it. What he does say is that such a course is so unusual that neither the Court nor the parties can be held to have contemplated it, and so far as the Court is concerned he points as an indication of intention to the omission to adjourn to a further date. He supports his argument by reference to Daniell's Chancery Practice, 8th edition, Vol. I, page 686, where the test whether a judgment is interlocutory or final is said to consist in whether it adjourns the consideration of the cause or not. Where there is a final judgment, liberty to apply may be given without however altering the final nature of the judgment. I do not think, however, that inferences derived from Chancery practice can be safely applied to procedure in India, and it seems to me that no conclusive inference can be drawn from the mere circumstance that the Court failed to provide for any further hearing. We must, I think, look to the terms of the decree rather than speculate upon the Court's intentions, and ask ourselves what is the nature of this part of the so-called final decree. The plaint was framed in terms customary to a suit of this character and asked for the realization and distribution of the assets. Normally then the final decree should be such as is given in Form 22 of Appendix D to the Code of Civil Procedure, providing for the distribution of the fund in Court which has been realized by the receiver or otherwise. It is quite clear that the suit, when it was disposed of by the decree on 22nd March 1915, had not been brought to its natural end, judged by these tests. In the Privy Council case *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*(1), the trial Court had originally passed a decree for a declaration and for possession of immovable property

(1) (1896) I.L.R., 19 All., 155.

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

without deciding the question of mesne profits. About the mesne profits, indeed, the decree made no mention. Even so their Lordships held that the inquiry into mesne profits in the suit should proceed; and the following passage deserves quotation:—

"The Subordinate Judge had before him a case consisting of two parts; a question of title and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties, and they proposed, that the first should be decided and the second reserved for decision. In point of fact, the first part has been the subject of successive appeals by the defendant who successfully struggled against the trial of the second part pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition."

These remarks I think apply *mutatis mutandis* to the present case. A decree means something which "conclusively determines" (a phrase substituted for "decides" by the Code of 1908) "the rights of the parties". Here it has left undermined and undisposed of the distribution of assets to be realized by the first defendant, and the duty of the Court has accordingly not been completely discharged. I hold, therefore, that upon this point the learned Subordinate Judge is clearly right. Even were the correctness of his decision less clear, it would scarcely be for this Court in revision to interfere where the Court below has declared its willingness to conduct the matters outstanding between the parties to their final conclusion.

Granting then that the direction to the first defendant amounts to a preliminary decree, it is further contended that where, as here, there is no adjournment order, further application should have been made within the time prescribed, and article 181 is said to prescribe that time. Whether this is so or not depends, I think, on

whether it is to be held that between preliminary and final decrees the suit is pending, because it can hardly be contended that an application in a pending suit, as we ordinarily use that expression, is subject to limitation. Mr. Venkatachariar contends that after a preliminary decree has been passed the suit is not pending in the sense that the rights of the parties have still to be decided. Before going through some of the cases cited for this proposition, I will allude to the special case of mortgage suits. It has no doubt been held that applications for a decree absolute and for a personal decree, under Order XXXIV, rules 5 and 6, respectively, are subject to article 181: the decree-holder must apply within three years. See *Ghulusam Bivi* v. *Ahamadsa Rowther* (1), *Mummadi Venkatiah* v. *Boganatham Venkata Subbiah* (2), *Rama Venkatasubba Iyer* v. *Shanmukam Pillai*(3), and *Pell* v. *Gregory*(4). I do not think, however, that from these special cases a general proposition can be deduced. The rules under the Code make express provision for such applications and the Court has no duty cast upon it in the absence of them. The view I take in the present case is that the Court should itself have disposed of the suit, and that the Court, rather than the party, was responsible for further action.

On the question of the pendency of the suit, I have been taken through a number of cases under the old Code, mainly originating in Madras and Calcutta. There was under that Code no such device as a preliminary and a final decree for the trial of partnership and partition suits, and different notions arose as to when the single decree should be passed and how much should be left over for execution, difficulties which no doubt gave rise to the introduction of the preliminary and

(1) (1918) I.L.R., 42 Mad., 296.
(2) (1921) 42 M.L.J., 51.
(3) (1913) M.W.N., 867.
(4) (1925) I.L.R., 52 Calc., 828.

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

final decrees. In *Seshan* v. *Rajagopala*(1) the decree passed for partition was in the nature of what we should now call a preliminary decree and the remainder of the operations had to be done in execution. In *Appadu* v. *Venkataranga Rau*(2), on the other hand, the view taken was that in a partition suit the decree should ensue upon the actual division. The position was laid down in general terms by BHASHYAM AYYANGAR, J., at page 277 in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(3), with regard to partition suits. He had of course to deal with a single decree, and when he said that a suit terminates only when the decree is fully effectuated and that it includes proceedings in execution, it may be conceded that the terms he used were used in a wider sense than we have to employ them here. The difficulties which arose in dealing with partition suits under the old Code are illustrated in *Latchmanan Chetty* v. *Ramanathan Chetty*(4), where the learned Judges found it impossible to decide what precisely was the decree in the suit. These cases, however, are not of much assistance here. More in point is *Srinivasa Mudaly* v. *Ramasami Mudali*(5). In that case a compromise decree for partition had been passed, and the question arose whether an application for the appointment of a commissioner to work out the shares recoverable under it was barred by limitation. This depended on whether the application was in execution or in the suit. The learned Judges held that such an order could have been made by the lower Court at any time of its own motion as a step in the disposal of the suit, and that there could be no question of any bar of limitation in connexion with the application for it.

---

(1) (1889) I.L.R., 13 Mad., 236. (2) (1907) 18 M.L.J., 23.
(3) (1902) I.L.R., 25 Mad., 244. (4) (1904) I.L.R., 28 Mad., 127.
(5) (1915) M.W.N., 725.

Turning to the Calcutta cases, *Kedarnath Dutt* v. *Harra Chand Dutt*(1) related to a partition, and in 1870 a decree was passed directing a commission to issue to effect the partition. For reasons which I need not go into, no effectual steps were taken for over 10 years, when the plaintiff applied for proceedings to continue. He was met by a plea of limitation, but WILSON, J., held that, the application being one in a pending suit, the right to apply was a right which accrues from day to day, and therefore it was not barred by lapse of time. It will be noted that this related to a stage in the cause after the only decree then provided for by the Code had been passed. This case was followed by STEPHEN, J., in *Surendra Keshub Roy* v. *Khetter Krishto Mitter*(2).

In the Full Bench case *Puran Chand* v. *Roy Radha Kishen*(3), it was held that where the decree provided that mesne profits should be ascertained in the execution department, no rule of limitation attached to an application to ascertain them. The view taken was that for that purpose the suit was still pending, and that the Court was bound, even without any application, to fix a date for the inquiry. The learned Judges say,

"There is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment."

This case was followed in *Dwarka Nath Misser* v. *Barinda Nath Misser*(4) in regard to an application to appoint an arbitrator in a partition suit, and printed with the report is a judgment of PRINSEP and GHOSE, JJ., to the same effect. It follows *a fortiori* that, on the principles underlying these decisions, an application for a final decree is an application in the suit and is not subject to any limitation.

(1) (1882) I.L.R., 8 Calc., 420. (2) (1903) I.L.R., 30 Calc., 609.
(3) (1891) I.L.R., 19 Calc., 132. (4) (1895) I.L.R., 22 Calc., 425.

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

As regards the position under the present Code, the petitioner relied mainly on the Full Bench case *Perumal Pillay* v. *Perumal Chetty*(1). The question referred for decision was whether Order XXII, rules 3 and 4, of the Code of Civil Procedure, applied to cases of death after the passing of the preliminary decree. The answer given was that the provisions did not apply and that the suit did not abate so as to vacate the preliminary decree. This question does not strictly concern us, but Mr. Venkatachariar has sought to derive from some observations of the learned CHIEF JUSTICE, who delivered the opinion, the principle that a suit for all purposes is concluded by the preliminary decree. I have been unable to discover any such unqualified proposition in the judgment. The principle relied upon was that the right of action had been determined before the death of the defendant by the passing of the preliminary decree and the learned CHIEF JUSTICE went on to say that this was so because

> "the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree."

It is nowhere said that the proceedings which take place between the two decrees are not in the nature of a suit, nor, of course, is it suggested that all the matters in issue between the parties are finally disposed of by the preliminary decree. Indeed it may often happen that most of the contentious work has to be done after a preliminary decree has been passed, and has to be settled by the final decree. It may be observed that the learned referring Judges in that case assumed that the suit was still pending. In the Privy Council case *Lachmi Narain Marwari* v. *Balmakund Marwari*(2) cited in this judgment, a case which related to a dismissal for

(1) (1928) I.L.R., 51 Mad., 701. (2) (1924) I.L.R., 4 Pat., 61.

default of a partition suit after the preliminary decree, the simple principle laid down is that

"after a decree has once been made in a suit, the suit can not be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

I do not find therefore, that this case is authority for the proposition for which it is cited.

It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation. So far as the examples shown to me go, applications which are so governed will be found not to be of this character. In *Kalyani Pillai* v. *Thiruvenkadaswami Ayyangar*(1), the application was to bring on record the legal representatives of a respondent to a Privy Council appeal. *Mangamma Nayakuralu* v. *Ramadasappa Nayanimvary*(2) related to execution. *Saminatha Pillay* v. *Rajagopala Mudaliar*(3), was an unusual case where a trustee who had brought a suit died and application was made to transpose a co-trustee defendant as plaintiff. It is difficult to say whether, in the interval between death and transposition, the suit could be held to be pending. The case in *Hindustan Bank* v. *Mehraj Din*(4), related to the Indian Companies Act. Indeed, the only case in point, *Srinivasa Mudaly* v. *Ramasami Mudaly*(5), to which I have already referred, appears to me very good authority against the application of the Limitation Act.

(1) (1924) I.L.R., 47 Mad., 618. (2) (1924) 48 M.L.J., 563.
(3) (1920) 40 M.L.J., 208. (4) (1920) I.L.R., 1 Lah., 187.
(5) (1915) M.W.N., 725.

RAMANATHAN CHETTY v. ALAGAPPA CHETTY.

I think, accordingly, that the learned Subordinate Judge is right in his view that no question of limitation arises, as well as in the construction which he has placed upon the disputed passage in the decree. It is unnecessary for me to add therefore that, even had I felt less convinced of these propositions, I should much have doubted the desirableness of interfering in revision. The Civil Revision Petition is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

1929, July 19.

VAPU ROWTHER (DEFENDANT—COUNTER-PETITIONER), PETITIONER,

v.

SIVAKATAKSHAM PILLAI (PLAINTIFF—PETITIONER), RESPONDENT.*

Indian Limitation Act (IX of 1908), *art.* 182, *cl.* (5)—*Application by decree-holder for leave to bid and to set off price against decree amount—Step in aid of execution of a decree.*

An application for leave to bid and to set off the price against the decree amount, filed by a decree-holder, is a step in aid of execution, falling within article 182 (5) of the Limitation Act, 1908.

Nabadip Chandra Maiti v. *Bepin Chandra Pal,* (1908) 12 C.W.N., 621, followed.

PETITION under section 115, Civil Procedure Code, to revise the order of the District Court of East Tanjore in A.S. No. 278 of 1926, preferred against the order of

---

* Civil Revision Petition No. 876 of 1928.