states that there can be little doubt that a person cannot be held to be a minor until he is born. He therefore considers that, if a child in embryo is deemed to be a minor in existence on the date of the conception, the period of eighteen years' minority, which would determine the disability, would run from that date. In my view, therefore, section 6 of the Limitation Act can be taken advantage of by the plaintiff. The case must, therefore, be sent back to the referring Court to be disposed of in accordance with this answer. The costs of the reference will be costs in the appeal.

RAMESAM J.—I agree.

KING J.—I agree.

[Final orders were accordingly passed by the Bench on 20th February 1935.]

G.R.

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## APPELLATE CIVIL—FULL BENCH.

*Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam and Mr. Justice King.*

ABDUL AZIM SAHIB AND THREE OTHERS (DEFENDANTS), APPELLANTS,

*v.*

CHOKKAN CHETTIAR AND ANOTHER (PLAINTIFF AND NIL), RESPONDENTS.*

1934, December 21.

1935, February 8.

*Indian Limitation Act (IX of 1908), art. 180—Decree-holder-auction-purchaser—Application by, for delivery of possession—Applicability of article 180.*

An application by a decree-holder-auction-purchaser for delivery of possession of property purchased by him is governed

* Appeal against Order No. 42 of 1932.

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by article 180 and not article 182, clause (5), of the Indian Limitation Act, 1908.

*Muttia* v. *Appasami*, (1890) I.L.R. 13 Mad. 504, *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*, (1908) I.L.R. 32 Mad. 136, *Ramaswami Aiyar* v. *Abdul Aziz Saib*, (1916) 3 L.W. 191, *Lakshmanan Chettiar* v. *Kannammal*, (1900) I.L.R. 24 Mad. 185, and *Kannan* v. *Avvulla Haji*, (1926) I.L.R. 50 Mad. 403, considered.

The procedure to be followed when a decree-holder-auction-purchaser seeks delivery of possession of the property purchased by him pointed out.

APPEAL against the order of the District Court of North Arcot at Vellore, dated 15th December 1931, and made in Appeal No. 193 of 1931 preferred against the order of the Court of the District Munsif of Tiruppattur, dated 22nd July 1931, in Miscellaneous Petition No. 371 of 1931 in Original Suit No. 128 of 1921, District Munsif's Court, Salem.

The facts and the arguments appear fully in the order of reference by MADHAVAN NAIR J. and in the opinion of the Full Bench delivered by RAMESAM J.

This appeal came on for hearing and the Court (MADHAVAN NAIR J.) made the following

ORDER :—

The judgment-debtors are the appellants. The appeal is against an order of remand passed by the learned District Judge of North Arcot at Vellore remanding to the District Munsif's Court Miscellaneous Petition No. 378 of 1931 in Original Suit No. 128 of 1921 (Salem District Munsif's Court).

The facts are these. In execution of the decree in Original Suit No. 128 of 1921, the decree-holder (respondent) purchased the suit property and the sale in his favour was confirmed on 14th March 1924 after the dismissal of an application by the judgment-debtors to set aside the sale. The judgment-debtors preferred an appeal against the order disallowing their

application, and, when this was dismissed, filed a civil revision petition to the High Court, which was also dismissed on 12th October 1927. It is conceded before me that, for the purpose of this appeal, 12th October 1927 may be taken to be the date when the sale may be deemed to have become absolute. Within three years of the High Court's order, that is 1st September 1930, the decree-holder-purchaser (respondent) applied by Miscellaneous Petition No. 561 of 1930 for delivery of possession of the property. This petition was dismissed on 26th September 1930, as delivery could not be given on account of obstruction by third parties; whereupon he again applied on 13th October 1930, that is, within three years of his previous application, by Miscellaneous Petition No. 769 of 1930 for delivery of the property free from obstruction. This petition was also dismissed on the preliminary objection taken by the objectors that the petition was filed more than thirty days after the date of the obstruction. Then the decree-holder-purchaser filed on 13th March 1931, under Order XXI, rule 95, Miscellaneous Petition No. 378 of 1931, out of which this civil miscellaneous appeal arises, for delivery of the property purchased by him in execution of the decree. One of the contentions of the judgment-debtors is that this petition is barred by limitation under article 180 of the Limitation Act—the petition having been filed more than three years after the sale had become absolute on 12th October 1927. Article 180 of the Limitation Act prescribes three years from the time "when the sale becomes absolute" as the period of limitation for an application by a purchaser of immovable property at a sale in execution of a decree for delivery of possession. In reply, the respondent relies on article 182, clause (5), of the Limitation Act and argues that the petition is not barred by limitation, as the previous applications (Miscellaneous Petitions Nos. 561 of 1930 and 769 of 1930) should be construed to be steps taken by him in aid of the execution of the decree, and that the present application is within three years of the last application. Article 182 provides for the execution of a decree . . . . a period of three years from the date of the decree or order (Clause 1) or ("where the application next hereinafter mentioned has been made") the date of applying in accordance with law or to take some step in aid of execution of the decree or order (Clause 5). This argument is met with the reply that article 182, clause (5), does not apply to the present case, as the application

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in question is not one for the execution of a decree and, that the proper article is article 180 under which there is no provision for regarding any prior application for possession as a step in aid of execution. If article 180 applies, which seems *prima facie* to be the article applicable having regard to the nature of the present application which is one by a purchaser of an immovable property for delivery of property, then the present application is clearly barred by limitation; on the other hand, if article 182, clause (5) can be applied, then it is not barred by limitation. The question for determination is which view is correct.

There are decisions in this Court supporting either view. In *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1) it was held by MILLER and SANKARAN NAIR JJ. that "an application by a decree-holder (who was, as in the present case, himself also the purchaser of the property) under section 318 of the Civil Procedure Code of 1882 (Order XXI, rule 95, of the present Code) to be put in possession of the property purchased by him at a sale in execution of the decree is not an application for the execution of the decree and for purposes of limitation falls within article 178 and not within article 179 of Schedule 2 of the Limitation Act of 1877 (article 182 of the present Act) and that such application is barred when presented more than three years after the grant of a certificate of sale.

It will be observed that article 180 of the present Limitation Act did not exist in the previous Act and the question for consideration in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1) was whether article 179 would apply, and if it did not, whether the case would fall under the residuary article 178 which corresponds to the present article 181 which provides three years from the time "when the right to apply accrues" as the period of limitation for "applications for which no period of limitation is provided elsewhere in this Schedule or by section 48 of the Code of Civil Procedure, 1908." However, the learned Judges held distinctly that the application for delivery of possession is not one for execution of a decree. This decision was followed by SADASIVA AYYAR and MOORE JJ. in *Ramaswami Aiyar* v. *Abdul Aziz Saib*(2). It may be stated that by the time this decision was given the Limitation Act had been amended by the introduction in it of

(1) (1908) I.L.R. 32 Mad. 136. (2) (1916) 3 L.W. 191.

article 180 specifically dealing with applications for delivery of possession by a decree-holder. The learned Judges held, following *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1), that "an application for possession by a decree-holder-purchaser is not an application to execute a decree, that article 182 of the Limitation Act cannot therefore apply, and that the question of the saving of limitation by steps taken in aid of execution does not arise in respect of such applications." They therefore held that "article 180 of the new Limitation Act expressly applied to such an application and no other article could therefore be applied." All the points urged by the appellants are fully supported by these two decisions, the latter of which specially supports the appellants.

As against these above-mentioned decisions, the respondent strongly relies on *Kannan* v. *Avvulla Haji*(2) and *Appathurai Aiyar* v. *Panayappan Servai*(3). In *Kannan* v. *Avvulla Haji*(2) it was held that "an application by a decree-holder-purchaser for delivery of property purchased by him in execution is a step in aid of execution within article 182, clause (5), of the Limitation Act." This decision fully supports the respondent and is directly opposed to the decision in *Ramaswami Ayyar* v. *Abdul Aziz Saib*(4). It may be observed that in this decision the two decisions just mentioned, namely, *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1) and *Ramaswami Aiyar* v. *Abdul Aziz Saib*(4), have not been noticed at all, while in those cases the previous decision of our Court, *Lakshmanan Chettiar* v. *Kannammal*(5) followed in *Kannan* v. *Avvulla Haji*(2), has not been noticed. In *Lakshmanan Chettiar* v. *Kannammal*(5) it was held that "the execution was not complete so long as the purchaser had not secured possession and that the execution petition (dealt with in that case) might fairly be called an application to take a step in aid of execution." In *Appathurai Aiyar* v. *Panayappan Servai*(3) I held, following *Kannan* v. *Avvulla Haji*(2), that an application to obtain delivery of possession of property by the decree-holder who has himself purchased the property in execution of his decree is a step in aid of execution within the meaning of article 182, clause (5), of the Limitation Act. It may be pointed out that the respondent was not represented in this case and my judgment

(1) (1908) I.L.R. 32 Mad. 136. (2) (1926) I.L.R. 50 Mad. 403.
(3) (1929) 57 M.L.J. 468. (4) (1916) 3 L.W. 191.
(5) (1900) I.L.R. 24 Mad. 185.

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was based solely on the decision in *Kannan* v. *Avvulla Haji*(1). The two previous decisions, *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(2) and *Ramaswami Aiyar* v. *Abdul Aziz Saib*(3), are not referred to in the judgment, nor is there in it any discussion of the question on its intrinsic merits. In all these cases the applicant for the delivery of possession of property was the decree-holder-purchaser. These above cases exhaust the decisions of this Court which have a direct bearing on the question under consideration. The respondents' learned Counsel brought to my notice another decision of this Court, *Appavoo Nainar* v. *Lakshmana Reddi*(4). But it is not disputed that the question, whether the application was barred by limitation or not in that case, was based upon the construction which the Court put upon one of the previous orders passed in the course of the proceedings in execution. This appears to be clear from the following sentence appearing in the judgment: "I am of opinion that the order 'closed' was not a proper disposal of the petition on 22nd September 1921 and all the subsequent petitions for delivery must be taken to be simply reminders to the Court that this petition was pending."

Having regard to the conflict of authorities in this Court, *Ramaswami Aiyar* v. *Abdul Aziz Saib*(3) and *Kannan* v. *Avvulla Haji*(1), on the question whether article 182, clause (5), can be applied to an application made by a decree-holder-auction-purchaser for delivery of possession of property, I refer to the decision of a Full Bench the question whether the petition (Miscellaneous Petition No. 378 of 1931) in this case is barred by limitation.

This appeal came on for hearing before a Bench and the Court (MADHAVAN NAIR and CORNISH JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

After hearing arguments, we think that the question in dispute can only be satisfactorily determined by a Full Bench. Two Benches of this High Court in *Lakshmanan Chettiar* v. *Kannammal*(5) and *Kannan* v. *Avvulla Haji*(1) have decided the question in one way and two other Benches in *Sultan Sahib*

(1) (1926) I.L.R. 50 Mad. 403. (2) (1908) I.L.R. 32 Mad. 136.
(3) (1916) 3 L.W. 191. (4) (1933) 65 M.L.J. 305.
(5) (1900) I.L.R. 24 Mad. 185.

*Marakayar* v. *Chidambaram Chettiar*(1) and *Ramaswami Aiyar* v. *Abdul Aziz Saib*(2) have decided it in the opposite way. The decision in *Lakshmanan Chettiar* v. *Kannammal*(3) which was followed in *Kannan* v. *Avvulla Haji*(4) does not appear to have been brought to the notice of the Court in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1) or in *Ramaswami Ayyar* v. *Abdul Aziz Saib*(2); nor does it appear that *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(1) or *Ramaswami Aiyar* v. *Abdul Aziz Saib*(2) was cited to the Court in *Kannan* v. *Avvulla Haji*(4). In these circumstances the decision of another Bench would only add to the existing conflict of decision. We would therefore place the matter before His Lordship the CHIEF JUSTICE to consider whether the question in dispute should not be referred to a Full Bench. The order dated 5th April 1934 by MADHAVAN NAIR J. may be accepted as the Order of Reference by this Bench.

ON THE REFERENCE :—

*A. Sundara Ayyar* for *B. C. Seshachella Ayyar* for appellants.

*A. Viswanatha Ayyar* and *A. Ramaswami Ayyar* for respondents.

*Cur. adv. vult.*

## OPINION.

RAMESAM J.—The facts out of which this reference to a Full Bench arises may be shortly stated. The respondent in the High Court obtained a decree in Original Suit No. 128 of 1921 and in execution of the decree brought certain properties of the judgment-debtors to sale and purchased the properties. The sale was confirmed in his favour on 14th March 1924 after the dismissal of an application by the judgment-debtors to set aside the sale.

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(1) (1908) I.L.R. 32 Mad. 136.
(2) (1916) 3 L. W. 191.
(3) (1900) I.L.R. 24 Mad. 185.
(4) (1926) I.L.R. 50 Mad. 403.

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There was an appeal and also a revision to the High Court. The revision petition was dismissed on 12th October 1927. It is conceded by all the parties that 12th October 1927 may be taken to be the date when the sale became absolute. Within three years of the High Court's order, i.e., 1st September 1930, the decree-holder, by Miscellaneous Petition No. 561 of 1930, applied for delivery of possession of the properties purchased. The properties purchased comprised a house and certain lands. The house was item 2 of the application. When the amin proceeded to deliver possession of the house, one Abdul Gaffar Sahib, claiming that his wife Amina Bi had a share in the house, bolted the outer door from inside and locked the same and prevented the amin and the auction-purchaser from going inside. Afraid of a disturbance, the amin returned and sent his report on the 11th September 1930. Nothing is stated by the amin as to the delivery of possession of the lands. When the matter came up before the District Munsif, he passed the following order: "possession was not given on account of obstruction. Petition dismissed." This is dated 26th September 1930, i.e., four days before the end of the quarter.

It is our duty to point out that this order is a very improper order. In the first place nothing was done by the amin as to the other item, viz., the lands. Even as to the house, the obstruction was by a person claiming a share in it. It is true that the house is probably not divided by metes and bounds and it is difficult to deliver physical possession of the remaining share, as to which there was no obstruction. But in such a case the

Court ought to deliver such possession as the intangible interest may be capable of. Instead of doing this the District Munsif simply says that the petition is dismissed. One thing is noticeable that throughout, i.e., at the time of the attempted delivery and at the time of the order, there was no obstruction or opposition on the part of the judgment-debtors. When there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, there is no reason why the portion, as to which there was no obstruction by the third person and no opposition by the judgment-debtors, should not be delivered. And it is also clear that the District Munsif never meant to refuse such a relief. The order is passed in a mechanical way without adverting to the details of the matter before him, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter. It has again and again been held that such a disposal is not a judicial disposal on the merits. It cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an appellate Court.

The decree-holder again filed a petition on the 13th October 1930, obviously under Order XXI, rule 97. The third person who made the obstruction on the former occasion objected to this petition on the ground that it was filed more than thirty days after the date of the obstruction. The petition was accordingly dismissed.

So far as the obstructor is concerned, the decree-holder's remedy is only by a regular suit.

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But again it is noticeable that there was no objection by the judgment-debtors and the obstructor's objection was always only as to a share. The decree-holder then filed the present petition on 13th March 1931 against the judgment-debtors for delivery of possession. This petition can be regarded as a petition for the delivery of only the remaining share in the house, as to which there never was an obstruction, and also for possession of the lands. Nothing was said about the lands up to now, there was no obstruction, nor opposition by the judgment-debtors, nor even an attempt to deliver. So far therefore as the lands and the share of the house as to which there was no obstruction are concerned, this is merely a continuation of the first petition which was never legally disposed of on the merits but only closed for statistical purposes. Objection is now taken that this is barred by limitation as being more than three years after the right to delivery accrued. The District Munsif dismissed the petition. On appeal the District Judge held that it was not barred by limitation or *res judicata* and sent back the petition for disposal according to law. The judgment-debtors have filed this appeal. The matter originally came on before our brother MADHAVAN NAIR J. Before him the objection that the decree-holder's petition was barred under article 180 was repeated. The respondent relied on article 182. After noticing the conflict in the decisions, our brother referred the matter to a Bench of two Judges, who then referred to a Full Bench the question whether the present application by the decree-holder is barred by limitation.

On the bare question whether article 180 or article 182 of the Limitation Act applies to this case, the matter admits of very little difficulty. In *Muttia* v. *Appasami*(1) it was held that an application by a decree-holder purchaser for delivery of possession was governed by article 179 which corresponds to article 182 of the present Act. In *Lakshmanan Chettiar* v. *Kannammal*(2) a decree-holder-purchaser applied for delivery. Some of the properties purchased were delivered. He afterwards applied for the delivery of the remaining properties. It was held that the second application was an application taken as a step in aid of execution and was not barred though it was more than three years after the purchase. In *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*(3) it was held that an application by a decree-holder-purchaser for delivery of property does not fall within article 179 but within article 178 which was the residuary article in the old Act corresponding to article 181 in the present Act. There is no need to differ from the reasoning in these cases at the present day, for, under the present Act, besides article 182 which provides for applications for execution and article 181 which is the residuary article providing for applications not otherwise provided for, we have got a new article—article 180—providing for application for possession by a purchaser. No such article existed under the old Act. The meaning of this article is plain because the word "purchaser" in this article includes cases of a

(1) (1890) I.L.R. 13 Mad. 504. (2) (1900) I.L.R. 24 Mad. 185.
(3) (1908) I.L.R. 32 Mad. 136.

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decree-holder-purchaser and a purchaser who is not a decree-holder.

The respondent refers to article 138, as to which it has been held by Court that the word "purchaser" means only a non-decree-holder-purchaser, for a decree-holder-purchaser cannot bring such a suit according to the decisions of some of the High Courts. In such cases, the word "purchaser" is to be confined to non-decree-holder-purchaser. But there is no analogy between that article and article 180, for it has never been held that a decree-holder-purchaser cannot apply for delivery of possession. Article 180 therefore applies to both kinds of purchasers. The attempt of the respondent to confine article 180 to non-decree-holder-purchasers therefore fails. And if article 180 applies, the residuary article 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So article 182 cannot apply. Article 180 being the more specific article must therefore apply.

But this conclusion does not dispose of this case. We have yet to decide whether the petition of 13th March 1931 is barred by limitation, that being the question referred to us. I have already observed in the opening of this judgment that the decree-holder's application, so far as the items other than the house are concerned, has never been considered and has never been decided against him, and it is impossible to regard the order on the first petition of September 1930 as an order refusing to deliver the properties to him in such a way as to make it incumbent on him to appeal. It was an order passed only for statistical

purposes. The present application of March 1931 must therefore be regarded in the circumstances of the case as a continuation of the petition of September 1930 for delivery of possession of the lands. Similar considerations apply so far as the share of the house, as to which there was no obstruction, is concerned. As to both these items, there never having been any objection by the judgment-debtors and there never having been any adverse order against the decree-holder and there never having been any valid disposal of the petition, the present petition must be regarded either as a continuation of the petition of September 1930 or as a reminder to the Court to take up that matter again. In this view the application of the decree-holder for delivery of possession of such items as are still with the judgment-debtors and have got to be delivered is not barred by limitation. So far as the obstructor's share is concerned, the execution is complete and the decree-holder has no remedy in execution. His only remedy is by a regular suit.

At this stage it would be desirable to make some remarks as to the procedure to be observed when a decree-holder-purchaser seeks delivery of possession of the properties purchased. Unless the executing Courts do their work very carefully, there is great danger of serious miscarriage of justice in such cases. Where a decree-holder-purchaser seeks delivery of possession of an item of property and the judgment-debtor obstructs, the decree-holder should make a complaint under Order XXI, rule 97, Civil Procedure Code, and the matter must be disposed of in execution. If the judgment-debtor and a third party both obstruct,

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the decree-holder-purchaser has to complain against the judgment-debtor and, if he chooses, against the third party also, under Order XXI, rule 97, and the complaint can then be disposed of. But if the judgment-debtor is quiescent, raises no objection and makes no opposition either before the amin or before the Court, it is clear that, so far as he is concerned, there is no objection to the delivery. But in such a case the third party may object and on account of the third party's objection physical possession of the property cannot be given. In such a case it is the duty of the Court to note the fact and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned. It is always better that this formal procedure is observed; otherwise, in a regular suit which the purchaser has to bring against the obstructor, the suit being necessitated by his obstruction only, the judgment-debtor may have to be made a formal party and then objection may be raised that so far as he is concerned a regular suit does not lie, execution not being complete against him. The obvious reply is that delivery could not be completed not on account of any obstruction by him but on account of the obstruction by the third party. So far as he is concerned, there is nothing more remaining with him to be delivered and therefore the execution proceedings are complete and there is no bar to a regular suit. This is what myself and CORNISH J. held in Appeal No. 372 of 1926. But, lest it should be said that such a conclusion can only be arrived at after a certain amount of straining in favour of the decree-holder, the proper thing is for the Courts to record

that, there being no obstruction by the judgment-debtor, delivery is completed so far as he is concerned and leave the purchaser to take proceedings against the obstructor. On such a view, in the present case it may be said that so far as the other share of the house is concerned there was a delivery so far as the judgment-debtor is concerned. But, even if it is so, one ought to make a note of it in that form. But, on the view we take of the nature of the present petition of September and the manner in which it was disposed of, it is unnecessary to resort to this. The lower Courts will now proceed to make a note that, so far as the share of the house to which objection is raised is concerned, the delivery is complete as against the judgment-debtors and also direct delivery of the share, as to which there is no obstruction, i.e., such delivery as it is capable of, unless there is some other matter to be considered. And, so far as the lands are concerned, another order for actual delivery should be made provided there is no further matter to be considered.

I am therefore of the opinion that the present petition is not barred by limitation and the order of the District Judge directing a remand should stand. The case will go back to the Bench with this opinion.

BEASLEY C.J.—I agree.

KING J.—I agree.

[Final Orders were accordingly passed by the Bench on 8th February 1935.]

G.R.