

APPELLATE CIVIL.

*Before Sir Lionel Leach, Chief Justice, and
Mr. Justice Wadsworth.*

1939,
January 18.

A. VEERAN KUTTI (FIRST RESPONDENT), APPELLANT,

v.

P. P. KOYA KUTTI AND FOUR OTHERS (PETITIONERS
1, 2 AND 4 TO 6), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Mortgage suit—Final decree in—Execution of—Starting point of limitation for—Appeal filed against preliminary decree—Final decree passed by trial Court after—Appeal against preliminary decree subsequently dismissed—Stay of proceedings not obtained pending appeal from preliminary decree—Fresh final decree after dismissal of appeal—Necessary, if.

In a suit on a mortgage a preliminary decree was passed by the District Munsif on 21st July 1925. The mortgagor-defendant preferred an appeal but did not obtain a stay of the proceedings in the trial Court pending the appeal. On 9th November 1925 the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on 16th March 1927. On 15th March 1930 the mortgagee decree-holder applied for execution of the final decree.

Held :—(i) Limitation for execution ran from the date of the appellate decree and the application for execution was therefore not barred by the law of limitation.

Sriramachandra v. Venkateswara(1) followed.

(ii) The obtaining of a fresh final decree or of an amendment of the original decree after the decision of the appeal against the preliminary decree was not a condition precedent to the mortgagee decree-holder's right to execute the final decree obtained by him on 9th November 1925.

* Letters Patent Appeal No. 113 of 1936.

(1) I.L.R. [1939] Mad. 252.

Gajadhar Singh v. Kishan Jiwan Lal(1) and *Jowad Hussain v. Gendan Singh*(2) distinguished.

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APPEAL under Clause 15 of the Letters Patent against the judgment of VENKATARAMANA RAO J., dated 26th October 1936 and passed in Appeal Against Appellate Order No. 152 of 1933, preferred to the High Court against the order of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 205 of 1931 (Registered Execution Petition No. 442 of 1930 in Original Suit No. 273 of 1924, District Munsif's Court, Parapanangadi).

K. Kuttikrishna Menon for appellant.

K. P. Krishna Menon for respondents.

The JUDGMENT of the Court was delivered by LEACH C.J.—The appellant was the defendant in a suit on a mortgage filed in the Court of the District Munsif of Parapanangadi. A preliminary decree was passed against him on 21st July 1925 and he preferred an appeal. No stay of the proceedings in the trial Court was obtained pending the hearing of this appeal and on 9th November 1925 the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on 16th March 1927. On 15th March 1930 the decree-holder-respondents applied for execution of the final decree. Objection was taken by the appellant on the ground that the application for execution was barred by the law of limitation, as it had been filed more than three years after the passing of the final decree. The District Munsif rejected this contention, but dismissed the application because the second defendant had died and his legal representatives had not been brought on the record. The appellant appealed to the Subordinate Judge against the order

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(1) (1917) I.L.R. 39 All. 641 (F.B.). (2) (1926) I.L.R. 6 Pat. 24 (P.C.)

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dismissing the application and the Subordinate Judge sent the case back to the District Munsif for reconsideration. The District Munsif maintained the opinion that the application was within time, but as the legal representatives of the second defendant had still not been brought on the record he again dismissed the petition. The appellant filed an appeal against this order and the Subordinate Judge held that the application was barred by the law of limitation. The decree-holders appealed to this Court and VENKATARAMANA RAO J. allowed the appeal, agreeing with the view of the District Munsif that the application for execution was in time. A further point was taken before the learned Judge, namely, that the decree-holders were not entitled to execute the final decree obtained by them on 9th November 1925 and should have obtained a fresh final decree after the decision of the appeal against the preliminary decree. The learned Judge also decided this question against the present appellant.

When the appeal was before VENKATARAMANA RAO J. there was a conflict between a decision of this Court and a Bench decision of the Patna High Court. In *Ahammad Kutty v. Kottekkat Kutti*(1) MADHAVAN NAIR J. held that where during the pendency of an appeal from a preliminary decree in a partition suit, the trial Court passes a final decree in the suit and there is no appeal, the period of limitation for execution of the final decree runs from the date of the final decree and not from the date of the decree of the appellate Court in the appeal from the preliminary decree. In *Somar Singh v. Deonandan Prasad Singh*(2) the Patna High Court took the opposite view and VENKATARAMANA RAO J. accepted the Patna decision.

(1) (1932) I.L.R. 56 Mad. 458.

(2) (1927) I.L.R. 6 Pat. 780.

It is not, however, necessary for us to consider whether he was right in so doing because the question has since been decided by a Bench of this Court consisting of KING and KRISHNASWAMI AYYANGAR JJ. in *Sriramachandra v. Venkateswara*(1) where it was held that the period of limitation ran from the date of the appellate decree. In this case there was an application to set aside an *ex parte* decree but this was dismissed. Against the order of dismissal some of the defendants appealed to the High Court which allowed the appeal, extending its benefits to the defendants who had not appealed on condition that they deposited the decree amount within three months. The deposit was not made and the *ex parte* decree therefore stood as against the defendants who had not appealed. The decree-holder filed his application more than five years after the date of the *ex parte* decree. It was held that it was in time because limitation ran from the date of the appellate decree. This decision governs this case and the question must therefore be decided against the appellant.

With regard to the second contention, namely, that there can be no execution proceedings until a second final decree has been obtained, it falls to be observed that this objection was not taken in the Court of the District Munsif or in the Court of the Subordinate Judge, and, as VENKATARAMANA RAO J. has pointed out, if the objection had been taken it would have been open to the District Munsif to treat the application for execution as an application for a final decree and pass a final decree if it was necessary. Although it was not necessary in these circumstances for the learned Judge to decide the question, he did so and came to the conclusion that a fresh application for a final decree or an

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amendment of the original decree was not necessary. With this conclusion we are in entire agreement. No authority has been quoted to the contrary. The learned Advocate for the appellant has relied on certain observations of BANERJI J. and of TUDBALL J. in *Gajadhar Singh v. Kishan Jiwan Lal*(1) approved of by their Lordships of the Privy Council in *Jowad Hussain v. Gendan Singh*(2). BANERJI J. said :

“ It seems to me that this rule ” i.e. the rule regulating application for final decree in mortgage actions “ contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause.”

TUDBALL J. said :

“ When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties.”

The question now under consideration was not under consideration in those cases. The fact that an appeal was preferred against the preliminary decree did not prevent the Court from passing the final decree. As I have pointed out no order staying proceedings was obtained and it was the duty of the trial Court to proceed to pass the final decree. That decree remains binding and in full force until set aside. The preliminary decree was confirmed on appeal and therefore did not affect the validity of the final decree which had been passed. For the reasons indicated the appeal will be dismissed with costs.

A.S.V.

(1) (1917) I.L.R. 39 All. 641 (F.B.). (2) (1926) I.L.R. 6 Pat. 24 (P.C.).