

K.A. Subbarayalu Nayudu Vs. Sundararaja Nayudu and ors.

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Court : Chennai

Decided On : Nov-15-1917

Reported in : (1918)35MLJ507

Appellant : K.A. Subbarayalu Nayudu

Respondent : Sundararaja Nayudu and ors.

Judgement :

1. The question involved in this appeal is one of limitation. The appellant's assignor obtained a preliminary decree on a mortgage which allowed six months for payment of the mortgage amount, and in default of payment, the property was to be sold. The decree was passed on the 4th August, 1910 and the six months' time would expire on the 4th February 1911. In the meantime, an appeal had been preferred against the preliminary decree, and the appellate court in the result upheld the decree of the first court on the 11th April 1913. The present application for a final decree under Order 34, Rule 5, Civil Procedure Code was made on the 26th January 1916, that is within 3 years from the date of the appellate decree but more than 3 years after the expiration of the six months from the date of the decree of the first court. The Subordinate Judge has held that the application is barred reckoning time from the 4th February 1911, the date on which the six months allowed by the original decree expired. He; seems to have proceeded upon a ruling of a Division Bench of the Allahabad High Court in *Madho Ram v. Nihal Singh I.L.R. (1915) A. 21*, but that decision has been overruled by a later Full Bench decision of that court in *Gajadhar Singh v. Kishen Jivan (1917) 15 A.L.J. 734*, There is also a decision of this Court to the same effect in *Nimmala Mahankali v. Kallakuri Seetharamiah (1917) 32 M.L.J. 445*. We are inclined to accept this view of the law. There is no doubt that Article 181 of the Limitation Act applies. That article says that every application, for which no period of limitation is provided elsewhere in the first schedule, is to be made within three year; from the date when the right to apply accrues. The question before us then is, when did the right to apply for a final decree accrue to the appellant. No doubt, if there had been no appeal preferred against the preliminary decree, his right to apply would arise on the expiration of 6 months from the date of the original decree; but there having been an appeal and a decree of the appellate court, it is that decree which is to be enforced. The appellate decree, ordinarily speaking, must be taken to supersede the decree of the first court. Further, as pointed out by the Allahabad High Court, if the contention of the respondents were to be accepted, there would be more than one final decree, which, we do not think, could have been within the contemplation of the legislature. Mr. T. Rangachariar appearing for the 5th respondent has argued that the decisions of the Full Bench of the Allahabad High Court and of this Court already referred to are wrong; and, in support of this contention, has referred us to the cases *Thathara Nannabha Chatty v. Kuppal Krishnammal (1912) 16 I.C. 799*, *Ramaswamy Kone v. Sundara Kone I.L.R. (1907) Mad. 28* and *Manavikraman v. Unniappan I.L.R. (1891)*

Mad. 170. But those cases do not seem to us to have any application to the present case. In all those cases, the question was, where the original decree lays down a certain period of time for the performance of certain conditions and that time has expired, whether, by reason of the mere fact that there has been an appeal and the appellate court has confirmed the decree of the lower court without extending the time fixed by the first court for the performance of the condition, the time laid down by the first court is to be imported into the decree of the appellate court. All that those decisions lay down is that in such cases, the time fixed by the first court could not be made part of the decree of the appellate court without the appellate court having expressly made it so. We have no hesitation in accepting that proposition but in this case the decree holder has not to perform any act for which any period of time was fixed by the first court and therefore it is difficult to say how the principle underlying the decisions relied on by Mr. T. Ranga-chariar can apply to the present case. It was contended that here also there was six months' time given for the payment of money by the mortgagor, as a condition precedent and the properties could not be sold before this time expired. Hence it is argued that the right to apply under Article 181 of the Limitation Act must be taken to arise after the expiration of the six months. But this overlooks the fact that an appeal had been preferred from the decree of the first court. Although the appellate court confirmed the decree of the first court ultimately the right to apply for a final decree, must, in our opinion, be taken to accrue from the date of the appellate decree which is the binding decree in the matter.

2. We reverse the Judgment of the Subordinate Judge; the petition will be remanded to the lower court for disposal according to law. Costs will abide the result.

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