

## **Gauri Shanker And Anr. vs Jamilluddin And Ors. on 15 July, 1955**

**Equivalent citations: AIR1955ALL664, AIR 1955 ALLAHABAD 664**

### **JUDGMENT**

Randhir Singh, J.

1. This is a second appeal arising out of an application made for the passing of a final decree under Order 34, Rule 5, Civil P. C.

2. It appears that a preliminary decree under Order 34, Rule 1, Civil P. C. was obtained jointly by Cauri Shankar and Maharaj Din on the basis of a mortgage deed, in 1934. "Usual six months time for payment was granted. This decree was subsequently amended under the Agriculturists' Relief Act and intsalments were granted. In 1942 the plaintiffs-decree-holders applied for the passing of a final decree and when this application was pending an application for amendment of the decree under the U. P. Debt Redemption Act was made by the judgment-debtors.

The decree was once again ordered to be amended under the Debt Redemption Act and an order was passed on the application of the decree-holders for a final decree in the following words :

"Decree has been amended. Consigned to records. Let the decree-holder file fresh application."

3. This order was passed on 11-7-1942. An application was made on 21-5-1945 for the sale of the mortgage property. This application was resisted by the judgment-debtors on the ground that the decree-holders could not ask for the sale of the property without first obtaining a final decree for sale under Order 34, Rule 5, Civil P. C. An application for the passing of a final decree was then made on 24-9-1945.

The judgment-debtors contested that application and pleaded that the application was barred by time inasmuch as the decree amended on 11-7-1942, i.e., more than three years before the date of the application for the framing of the final decree. This contention of the judgment-debtors found favour with the trial Court and the application was dismissed.

The decree-holders then went up in appeal and the learned District Judge of Rae Bareli agreeing with the view taken by the trial Court dismissed the appeal. The decree-holders have now come up in second appeal.

4. One of the decree-holders, namely, Maharaj Din died during the pendency of the appeal and his heirs not having been brought on the record, the appeal so far as Maharaj Din was concerned has abated.

5. A preliminary, objection has been taken on behalf of the respondents that the appeal has abated as a whole. This point is not altogether free from difficulty; but it may not be necessary to decide this point in the view which we propose to take on the merits of the appeal.

6. It has been contended on behalf 'of the appellant that the application made on 21-5-1945, for the sale of the property may be deemed to be an application for the passing of a final decree. Reliance has been placed on a ruling of the Madras High Court, -- 'Natesa Udayan v. Annasami Udayan', AIR 1917 Mad 669 (A).

.Unfortunately the grounds on which' the learned Judges held that an application for sale implies a prayer for making the decree absolute are not given in the brief judgment and it is difficult to rind out on what basis the view was taken. The learned Judges have referred to other cases in their judgment. A perusal of the reports of some of those cases shows that those cases related to applications made when Ss. 88 and 89, Transfer of Property Act ware in force.

Before the coming into force or the Code of Civil Procedure, 1908, applications for making a decree absolute were treated as applications for execution and if an application for sale of the property was treated under these circumstances by the Court as an application for the passing of a final decree it cannot be so treated under the present law inasmuch as an application for the passing of a final decree has to be made not to the execution court but to the Court in which the case is pending.

A suit does not come to an end after the passing of a preliminary decree but would be deemed to be pending till a final decree is passed. An application made to the execution court could not, therefore, be treated now as an application for the passing of a final decree. This view also finds support in -- 'Ram Nath v. Deokinandan Krishna', AIR 1947 All .83 (B), to which reference has, also been made by the lower appellate Court.

We are unable, therefore, to agree with the contention that the application of 21-5-1945, could be treated as an application for the passing of a final decree.

7. Another point which has been pressed on behalf of the appellant is that the order dated 11-7-1942, should not be treated as one dismissing the earlier application for the making of the final decree but should be deemed to be an interlocutory order only. If the trial Court had only ordered the record to be consigned the interpretation sought to be put could perhaps have been accepted. There are, however, certain words in the order which are clearly indicative of the fact that the Court had dismissed the application.

The last sentence in the order was let the decree-holder file a fresh application". These words clearly show that the Court dismissed the earlier application and gave to tbe decree-holders the right to make a fresh application. The last application which was made on 24-9-1945, was clearly barred by

time.

8. There is thus no force in any of the two contentions raised by the learned counsel for the appellant and the view taken by the lower appellate Court appears to be correct.

9. In view of the fact that the appeal has no force it is not necessary to decide whether the whole of the appeal has or has not abated on account of the death of Maharaj Din. The appeal is dismissed. The parties shall bear their own costs.