

Madras High Court

Narayana Aiyar vs Singaravelu Vannian And Ors. on 1 August, 1917

Equivalent citations: (1917) 33 MLJ 543

JUDGMENT

1. The decree sought to be executed is a mortgage decree passed before the present Code of Civil Procedure came into force. It is in the form (then usual) of a combined decree directing the defendants to pay a certain sum on or before a certain date, directing a sale of the mortgaged properties in default of payment, and also decreeing that the defendant do pay any deficiency that might arise if the sale proceeds proved insufficient to satisfy the amount decreed with interest and costs.

2. The decree was passed on the 8th October 1898. The mortgaged properties were sold on the 12th January 1903 and the sale was confirmed on the 17th February 1903. As the sale proceeds were insufficient the decree-holder filed several applications in execution between 1903 and 1912. He filed an execution application in 1906 and execution was ordered after notice to the judgment-debtors. This order is final and it cannot be contended in subsequent execution proceedings that the decree was not executable owing to the want of a final decree. *Lakshmiammal v. Subramania Pillai* (1913) 14 M.L.J. 103. It was ultimately dismissed for default of the decree-holder's appearance. Subsequent applications were put in, the last of which was allowed by the District Munsif, who was of opinion that it was not barred by limitation. On appeal the District Judge took the contrary view and dismissed it as barred.

3. Though the decree was irregular having regard to the provisions of the Transfer of Property Act we do not think it is open to the judgment-debtors to raise the question in execution proceedings. *Raja of Kalahasti v. Varadachariar* 21 M.L.J 1036 *Abbaki v. Krishnayya* I.L.R. 32 M. 534 and *Dhinabandhu v. Masuda* 16 C.L.J. 313 are clearly in point. As the decree specifically decreed that the defendants were to pay any deficiency that might arise, it was not necessary to obtain another separate decree or order under Section 90 of the Transfer of Property Act. *Periasami Kone v. Muthiah Chettiar* I.L.R. 38 M. 677.

4. The only question that remains is whether execution of the decree is barred under the provisions of Section 48 of the Civil Procedure Code. It is clear that the remedies against the mortgaged properties were exhausted only in February 1903 when the sale of the mortgaged properties was confirmed by the Court. The decree-holder has therefore twelve years from that date to enforce his claim for the deficiency by execution. The recent Full Bench decision in *Iyyasami Aiyar v. Venkatachalla Mudali* (1916) 31 M.L.J. 513 concludes the question as the view taken by the referring judges and the majority of the judges composing the Full Bench is that the 12 years period of limitation under Section 48, Civil Procedure Code for recovery of the deficiency runs from the date when the remedy against the mortgaged properties is exhausted. We do not think that the order of the District Munsif directing the decree-holder to apply formally for a decree absolute which was under the circumstances of the present case wholly unnecessary would render the previous execution applications useless for the purpose of saving limitation.

5. We reverse the order of the District Judge with costs in this and the Lower Court. In C.M.S.A. No. 32 of 1914 we set aside the order of the District Munsif and direct him to dispose of the application for payment according to law.