Privy Council Appeal No. 19 of 1944

V. E. A. Annamalai Chettiar – – – – – *Appellant*

v.

Valliammai Achi and another – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1945

Present at the Hearing:

LORD PORTER
LORD GODDARD
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from an order of the High Court of Judicature at Madras, dated 19th August, 1942, affirming an order of the Subordinate Judge of Devakottai, dated the 10th July, 1940. The appeal raises the question whether an application for execution, No. 72 of 1940, preferred on the 25th November, 1939, for execution of a decree dated the 3rd November, 1934, is barred by the Indian Limitation Act, and that depends on the construction of article 182 of the Act.

That article is in the following terms:—

Description of Application.	Period of Limitation.	Time from which period begins to run.
182. For the execution of a decree or order of any Civil Court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure 1908.	Three years	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review 4. . . . 5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order, or . . .

The application is clearly barred by paragraph 1 of article 182 unless it can be brought within one of the later paragraphs. Paragraph 2 has no application since there was no appeal against, or affecting the validity of, the decree; nor does paragraph 3 apply since there was no application for review of judgment. Paragraph 4 is irrelevant so far as this case is concerned.

The question, therefore, is whether the case falls within paragraph 5. To bring the case within that paragraph it must be shown that there was an application made in accordance with law to the proper Court, either for execution or to take some step in aid of execution of the decree, and if there was such an application time runs from the date of the final order passed thereon. It is necessary, therefore, to look somewhat closely at the facts, which are not in dispute, in order to see whether the requisite application was made and finally disposed of within three years from the 25th November, 1939.

On the 3rd November, 1934, a decree was passed on a promissory note in Original Suit No. 118 of 1934 by the Subordinate Judge of Devakottai, decreeing in favour of the present appellant payment of a sum of Rs.13,716.12.0. with interest and costs by the defendants who were two widows. It was ordered that the decree should be against the property of the joint family of which the husbands of the two widows had been members, and against the assets of a maker of the promissory note in the hands of the defendant. So the decree was not executable against the private property of the widows. For the purposes of this appeal it may be taken that the respondents represent the judgment-debtors under that decree, the appellant being the judgment-creditor.

On the 14th December, 1934, the judgment-creditor presented a petition which was numbered E.P. No. 418 of 1934, under Rule 11 of Order 21 of the Code of Civil Procedure, asking that the decree should be executed by the attachment of two sums of money in the hands of garnishees, alleged to be owing to the first defendant.

On the 21st January, 1935, the learned Judge made an order on this petition "rule absolute", which presumably meant that there was an order absolute for attachment of the monies in the hands of the garnishees.

On the 11th February, 1935, the judgment-creditor made an application, No. 123 of 1935 in E.P. No. 418 of 1934, asking that he might be appointed receiver to realise the amounts in the hands of the garnishees.

On the 19th February, 1935, an application No. 175 of 1935 was made in E.P. No. 418 of 1934 by the second defendant in the suit, asking that the order of attachment of the amounts in the hands of the garnishees might be set aside, her contentions being, in short, that she had not been served with the application for attachment and that the monies attached were her personal property and therefore not subject to the decree.

On the 10th July, 1935, the learned Subordinate Judge on this application directed that there was no need to set aside the order of attachment but that the petitioner should prefer a claim petition which might be enquired into under section 47 of the Code of Civil Procedure and the matter was adjourned to the 25th July. On the same date, namely, the 10th July, 1935, the learned Judge dismissed the judgment-creditor's application, No. 123 of 1935, for his appointment as receiver, directing that he could make an application after the second defendant's claim was disposed of.

On the 25th July, 1935, the second defendant made an application, No. 527 of 1935, in E.P. 418 of 1934, under section 47 of the Code praying that the attachment of the monies in the hands of the garnishees be raised, and on the 2nd August, 1935, in view of the pendency of the last mentioned application, application No. 175 of 1935 for the raising of the attachment was dismissed. On the 22nd October, 1936, the learned Subordinate Judge allowed the second defendant's application and raised the attachment and it is to be noticed that that Order was made in E.A. No. 527 of 1935, in E.P. No. 418 of 1934, and in O.S. 118 of 1934. On the making of this order the execution of the decree was open; the judgment-creditor could either accept the order and seek to execute his decree by some method other than that asked for in E.P. 418 of 1934, or he could appeal against the order of the Subordinate Judge. He elected to adopt the latter course and on the 3rd December, 1936, he presented a memorandum of appeal to the High Court at Madras in E.A. 527 of 1935

in E.P.418 of 1934 and in O.S. 118 of 1934, asking that the order of the lower Court be set aside, and on the 27th September, 1938, this appeal was dismissed by the High Court.

On the 25th November, 1939, as already mentioned, the judgment-creditor filed execution petition No. 72 of 1940, in O.S. No. 118 of 1934, asking that the decree of the 3rd November, 1934, might be executed by attachment of certain movable property in the hands of defendants 2 and 3. The question for determination is whether this petition is in time.

The High Court of Madras in the judgment under appeal took the view that from the 10th July, 1935, there was no execution petition or application outstanding and that the petition No. 72 of 1940, being presented more than three years after that date, was out of time. Their Lordships are unable to appreciate this view which ignores the fact that on the 10th July, 1935, an application by one of the judgment-debtors to set aside the "attachment" was pending on the records of the Court and the further fact that on the 27th September, 1938, this application was finally disposed of by an order made by the High Court of Madras in E.P. 418 of 1934, which could not have been done had that petition terminated in July, 1935.

Subject to the question whether the High Court of Madras was the proper Court within article 182 (5) their Lordships are clearly of opinion that the appellant brings his case within both branches of that paragraph. Execution petition No. 418 of 1934 was an application made according to law for execution of the decree and it was finally disposed of by the order of the Court of Appeal made on the 27th September, 1938, which brings the case within the first branch. Further, the application to the Court of Appeal of the 3rd December, 1936, to set aside the order of the Subordinate Court raising the attachment was an application according to law to take a step in aid of execution of the decree. There has been some difference of opinion in the Courts in India as to what amounts to taking a step in aid of execution and the judgment under appeal discusses various decisions, including a decision of the High Court of Madras in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1922), I.L.R. 45 Mad. 466, in which it was held that there could not be a step in aid of execution if there was not an application for execution then pending, and another decision of the same Court in *Krishna Patter* v. *Seetharama Patter* (1927) I.L.R. 50 Mad. 49, in which it was held that a step in aid of execution must be one in furtherance of execution and not merely one seeking to remove an obstruction to possible future execution. Their Lordships do not find it necessary to express any opinion on these questions since in the present case there was at all material times an application for execution pending, and upon any view of the matter an application to set aside an attachment is a step, in the circumstances the only step open, in aid of execution.

The only other point to be considered, and this was the point principally stressed on this appeal, is whether the High Court of Madras was the proper Court within article 182 (5). Explanation 2 to article 182 enacts that the proper Court means the Court whose duty it is to execute the decree or order. In *Govinddas Rajaramdas* v. *Ganpatdas Narotamdas* (1923), I.L.R. 47 Bom. 783, an Appeal Bench of the Bombay High Court held that an appeal to the High Court against an order in execution was not an application according to law to the proper Court, and Mcleod C.J. stated: "It certainly cannot be said that an appeal to the High Court against an order in a dharkast is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Courts." This view was accepted by the High Court in the judgment under appeal, but their Lordships think that it is fallacious. Under section 107 of the Code of Civil Procedure an Appeal Court has the same powers, and is required to perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction. Where an application for execution is dismissed by the lower Court, the Appeal Court is the proper and indeed the only, Court which can then execute the decree. No doubt

in practice a High Court does not itself generally execute the decrees of lower Courts; normally it remands the case to the lower Court with directions to execute according to law on the basis of the High Court's decision; but in a proper case the High Court would no doubt execute the decree or order itself. In their Lordships' view there can be no doubt that the High Court of Madras was the Court whose duty it was to execute the decree of 3rd November, 1934, in the manner asked for in E.P. 418 of 1934, if such manner were legal, after the attachment had been raised by the lower Court. The appellant therefore has brought himself within paragraph 5 of article 182 and his petition No. 72 of 1940 being presented within three years of the Order of the High Court finally disposing of the execution petition No. 418 of 1934 is in time. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the matter should be remitted to the High Court of Madras with directions that the execution petition No. 72 is within time and should be dealt with according to law. The respondents must pay the costs to date of execution petition No. 72 of 1940 including the costs of this appeal.

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