APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMASAMI (PETITIONER), APPELLANT,

v.

ANDA PILLAI (COUNTER-PETITIONER), RESPONDENT.*

1890. April 14.

Civil Procedure Code, ss. 231, 232—Joint decree-holder—Application for execution of decree—Limitation Act, Act XV of 1877, sched. II, art. 179.

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:

Held, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, s. 231, and the father's application for execution was barred by limitation.

APPEAL under section 15 of the Letters Patent from the order of Mr. Justice Wilkinson, dated 5th September 1889, made on appeal against appellate order No. 2 of 1889, reversing the order of H. T. Knox, Acting District Judge of Tanjore, made on civil petition No. 387 of 1888.

The above order of the District Judge was made on appeal from the order of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, on execution petition No. 252 of 1888. This petition prayed for the execution of the decree passed in favor of the petitioner in original suit No. 245 of 1878 (which was a suit for partition between the petitioner and other members of his family) and it was preferred after the lapse of more than three years from the last application for execution made by the petitioner. It appeared however that in original suit No. 29 of 1881, the petitioner's son obtained a decree against the petitioner establishing his right to a one-fifth share of whatever the latter acquired by virtue of the decree in the earlier suit; and that the son had since applied for execution of the decree now sought to be

* Letters Patent Appeal No. 20 of 1889.

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executed stating that he made the application alone because his father refused to join him in it, and notice of this application was served on the father who did not contest the son's right to have the decree executed for the benefit of all.

The District Munsif, and on appeal the District Judge, held that by reason of the son's application, the present petition was not barred by limitation.

Upon this point the District Judge said:

"The sole question now raised in the hearing of the appeal is, "does that application operate to save limitation under article 179 "of schedule II of Act XV of 1877; for if not, this application "is barred. I hold that it does so operate. There was not only an "application to execute, but an actual step taken in execution. It "is too late for the defendant to contend that the application was "not in accordance with law. The proceedings taken have estab- "lished that the decree was executed on behalf of the father as well "as on behalf of the son, and the point cannot be now reopened. "The son by the effect of the decree in original suit No. 29 of "1881 became an assignee of the decree, and on that ground alone "was entitled to take out execution as he in fact did."

The counter-petitioner, against whom it was sought to execute the decree, preferred the above appeal to the High Court.

Sivasami Ayyar for appellant.

Ramanuja Charyar for respondent.

WILKINSON, J.—The only question for determination is whether the application by the son takes the case out of the Statute of Limitation. I think the question must be answered in the negative; neither section 231 nor section 232 of the code appears to me to apply. The decree obtained by the father does not become a joint decree, because the son subsequently obtained a decree against the father declaring his (the son's) right to a one-fifth share of the debt due under the former decree. The father would be liable to the son whether or not he had realised the decree debt. Nor do I think it can be said that the effect of the decree in the partition suit was to assign to the son the decree obtained by the father against a third party. Even if it did so operate, the son was only entitled to a one-fifth share, and could not therefore take out execution of the whole. The fact that defendant (appellant) did not oppose the son's execution does not estop him from now pleading that the execution by the father is

barred. The orders of the Lower Courts must be reversed and the application for execution dismissed with costs throughout.

The petitioner preferred this appeal under letters patent, section 15, against the above order of Wilkinson, J. The case came on for hearing before Muttusami Ayyar and Handley, JJ.

Ramanuja Charyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—The decision appealed against is correct. Assuming that there was an assignment by operation of law in consequence of the decree in the partition suit, the assignment operated not to make the son a joint decree-holder with his father in respect of the entire decree, but to entitle him only to a fifth share of the decree debt in severalty. The father and the son were not therefore joint decree-holders within the meaning of section 231 of the Civil Procedure Code, and the application for execution made by the latter cannot save the limitation in favor of the former under article 179 of the Act of Limitation. Nor can the order made on the son's application operate against the judgment-debtor as an estoppel. The decision of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*(1) can only apply when the parties to both applications are the same.

This appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

1889. March 25.

TIRUNARAYANA (RESPONDENT NO. 1 IN APPEAL NO. 144 OF 1885), PETITIONER,

v.

GOPALASAMI AND OTHERS (APPELLANTS NOS. 1 TO 4 AND RESPONDENTS IN APPEAL NO. 144 OF 1886), COUNTER-PETITIONERS.*

Civil Procedure Code, s. 595—Final decree—Leave to appeal to Privy Council.

The plaintiff in a suit to recover certain property set up an adoption. The Court of First Instance held that the adoption was not proved and dismissed the suit without trying the issues framed with reference to other allegations in the

(1) L.R., 8 I.A., 123. * Civil Miscellaneous Petition No. 975 of 1888.