# APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar.*

TIRTHASAMI (COUNTER-PETITIONER No. 3), APPELLANT, 1894. Nov. 8, 12.

*v.*

ANNAPPAYYA (PETITIONER), RESPONDENT.*

*Code of Civil Procedure—Act XIV of* 1882, *s.* 158—*Act VI of* 1892, *s.* 4—*Proceedings in execution—Dismissal of petition for default.*

The dismissal of a petition for execution for default does not bar a fresh application, section 158 of the Code of Civil Procedure being inapplicable, since by reason of section 4 of Act VI of 1892, it does not apply to proceedings in execution. *Dhonkal Singh* v. *Phakkar Singh* (I.L.R., 15 All., 84), *Hajrat Akramnissa Begam* v. *Valiulnissa Begam* (I.L.R., 18 Bom., 429) and *Delhi and London Bank* v. *Orchard* (L.R., 4 I.A., 127) followed.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, presented against the order of U. Babu Rau, District Munsif of Udipi, in execution petition No. 311 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

*Ramachandra Rau Saheb* for appellant.

*Madhava Rau* for respondent.

JUDGMENT.—This was an application for execution of the decree in original suit No. 121 of 1882 on the file of the District Munsif of Udipi in the district of South Canara. The appellant is the representative of the Puttige Mutt at that station, and respondent, Annappaya, is the execution-creditor. The decree was passed against appellant's predecessor, but on his dismissal from his office and on appellant's succession to the office, respondent attempted to execute it against the latter. The District Munsif refused the execution, but on appeal the Judge held that execution should be granted if respondent showed in execution proceedings that the decree debt was one contracted for purposes of the Mutt. From this order respondent preferred no second appeal and it became final. The application for execution in which the above orders were made was not further proceeded with.

* Appeal against Order No. 114 of 1893.

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Meanwhile, execution was taken out by other decree-holders against the appellant and similar orders were passed by the District Munsif and by the Judge. In one of them, in which one Budan Saheb was execution-creditor, there was a second appeal.

As reported in *Sudindra* v. *Budan*(1) the High Court held in that case that the decree should be executed against appellant unless he set it aside by a new suit for fraud and collusion. Thereupon, appellant instituted suits to set aside several decrees passed against his predecessor, and brought original suit No. 334 of 1882 against respondent in September 1889. The District Munsif dismissed the suit, and in December 1891 the Judge confirmed the decision in appeal suit No. 441 of 1889. From this decision, a second appeal is still pending.

Meanwhile, another application for execution of the decree in original suit No. 121 of 1882 was made in No. 455 of 1889. The District Munsif called upon respondent to prove that the decree debt was binding on the Mutt and allowed him time for that purpose till the 28th June 1890. However respondent produced no evidence, and the District Munsif dismissed his petition for execution. On the 14th August 1893, respondent again applied for execution by attachment of immovable property. In support of his claim, he alluded to the order of the High Court in the execution of Budan Saheb's decree in original suit No. 334 of 1888 brought by appellant against respondent, and to the dismissal of that suit. Appellant opposed this application as barred by the order on respondent's former application, which was passed in No. 455 of 1889. The District Munsif observed that that order operated as a decree under section 2 of the Code of Civil Procedure, and barred the present application. On appeal, the Judge considered that the mere striking off of the application did not amount to an adjudication, that the order granting time to prove that the debt was binding on the Mutt was not one passed under section 158 of the Civil Procedure Code, that appellant was under no obligation to produce his evidence, and that he was therefore not barred from renewing his application for execution. It is contended on second appeal that the order dismissing the application for execution No. 455 of 1889 was passed under section 158, Civil Procedure Code, and that it precludes, under

(1) I.L.R., 9 Mad., 80.

section 13, Civil Procedure Code, any fresh application for execution of the same decree.

I agree in the opinion of the Judge that the dismissal of a petition for execution for default does not bar a fresh application. The Judge states that section 158 is inapplicable, because the order on the prior application does not purport to have been made under that section, and that there is nothing to show that time was granted at the instance of the respondent. I also think that section 158 is inapplicable, but I prefer to rest my opinion on the general ground that by reason of section 4 of Act VI of 1892—nothing in Chapter VII or XIII of the Code of Civil Procedure applies to proceedings in execution. It was held by the Full Bench of the Allahabad High Court in *Dhonkal Singh* v. *Phakkar Singh*(1) that when an execution case is struck off the file or dismissed upon a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right is barred by limitation, or by any other law, or on some ground touching the merits, its dismissal whether termed as dismissal for default or as struck off the file does not operate to bar a fresh application for execution.

In *Hajrat Akramnissa Begam* v. *Valiulnissa Begam*(2) the High Court of Bombay held that while there is no statutory authority for restoring to the file an application for execution which has been once dismissed for default, the order of dismissal is ineffectual to bar a subsequent application for execution. In *Delhi and London Bank* v. *Orchard*(3) the Privy Council held that an order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*. The real question is whether the order of the District Judge that respondent's right to execute the decree against appellant can only be recognized on proof that the decree debt is binding on the Mutt is still in force, and whether it bars execution until the condition mentioned therein is complied with. I must answer the question in the affirmative. That the order in question was made is not denied. That it became final is also admitted. It is clear that whatever order the High Court made in execution of Budan Saheb's decree cannot affect the respondent who was no party to that order. The former order being then still in force, it must be complied

(1) I.L.R., 15 All., 84. (2) I.L.R., 18 Bom., 429. (3) L.R., 4 I.A., 127.

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with and the decree could not be executed as if it had no existence. It is open to respondent to apply for a review of that order and to have it vacated. It is suggested that by instituting original suit No. 334 of 1888 respondent waived the benefit of the previous order and that he is not now at liberty to fall back upon it. But the suit and the order are not necessarily inconsistent with each other. The judgment may not be tainted by fraud and the debt may yet not bind the Mutt. I am unable to hold that, as a matter of law, there was a waiver. I am therefore of opinion that, so long as the order of the District Judge is legally in force, execution must be refused unless the condition mentioned in it is complied with. On this ground I reverse the order of the Judge and restore that of the District Munsif. In the special circumstances of the case, each party will bear his costs here and in the Lower Appellate Court.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar.*

1894.
October 22.
November 8.

SUBBARAYUDU (DEFENDANT), PETITIONER,

*v.*

ADINARAYUDU (PLAINTIFF), RESPONDENT.*

*Partnership—Advance made by one partner to another in respect of the latter's share of a partnership debt—Whether a suit for contribution lies.*

A and B were partners. A decree was passed against them for the payment of a certain debt, each partner being liable for the whole sum and being bound to indemnify the other against the payment of more than his share. A paid B's share as well as his own and brought a suit against B for contribution. B contended that that A's claim, being in respect of a partnership transaction, ought to be adjusted when the partnership account was settled, and that the suit did not lie:

*Held*, that the advance made by A to B by paying his share was not an advance to the partnership, but to the other partner in respect of what he had to contribute, and that, consequently, A was entitled to contribution from B.

PETITION praying the High Court to revise the decree of V. Lakshminarasimham Pantulu, District Munsif of Masulipatam, in Small Cause Suit No. 1866 of 1892.

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* Civil Revision Petition No. 690 of 1893.