APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SURYANARAYANA SASTRI (PLAINTIFF), APPELLANT,

v.

RAMAMURTI PANTULU (DEFENDANT), RESPONDENT.*

1897. October 11, 12.

Transfer of Property Act—Act IV of 1882, *s.* 135—*Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree.*

A, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which B asserted an adverse claim. Pending an application by A for a succession certificate, B sued the Bank and the widow for the money and A was joined as a defendant. A decree was passed in 1889 by which it was ordered that the Bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1892. A meanwhile had obtained the succession certificate and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money.

Held, that the suit was not barred by limitation and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, section 135 (*d*), since on the true construction of the decree of 1889 all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants.

APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in Original Suit No. 36 of 1894.

The plaintiff sued as the assignee of one Ramamma to recover from the defendant Rs. 2,279-6-0 with interest. Ramamma was the widow of one Subbarayadu who died in 1887, leaving a will by which he bequeathed the abovementioned sum then deposited in a Bank at Vizianagaram to her, and appointed the present plaintiff Suryanarayana Sastri to be her guardian until she should come of age. Suryanarayana Sastri in his capacity of guardian of the minor widow applied for a succession certificate in 1888 to enable him to collect the money; but before it was issued Ramamurti Pantulu, the present defendant, asserted a claim to the money as assignee from the undivided brothers of the deceased and the father and natural guardian of the widow. This claim

* Appeal No. 40 of 1897.

SURYA-NARAYANA SASTRI v. RAMAMURTI PANTULU.

not being recognized by the Bank, he instituted Original Suit No. 357 of 1888 on the file of the District Munsif of Vizianagaram to recover the money. In that suit, in which the plaintiff impugned the genuineness of the will, the original defendants were the Bank and the widow and the alleged assignors, and Suryanarayana Sastri was subsequently brought on to the record as sixth defendant. The District Munsif held that the Bank was justified "in withholding payment to the plaintiff not because there was "any doubt as to the minor third defendant being the widow of the "late Subbarayadu, but because the sixth defendant also claimed "the money as being guardian to the widow under a will." But in view of the facts that no certificate had yet been issued to Suryanarayana Sastri, and that the Bank was not in a financially sound position, instead of dismissing the suit he passed a decree by which it was ordered that the Bank "do pay to plaintiff the "suit amount on condition of his giving sufficient security to return "the money to sixth defendant on his producing the certificate from "the District Courtof Vizianagaram, and that the Bank on payment "of money into Court be exonerated from all liability to pay the "money to any one else and that sixth defendant do look to plaintiff "for payment of the money." This decree was dated 29th April 1889, and the plaintiff having furnished the required security received the money in January and March 1892. Suryanarayana Sastri obtained the succession certificate on the 14th of February 1890. Ramamma came of age in or about 1892 and on the 14th of March 1894 she assigned her rights to him and he instituted the present suit on 6th November 1894.

The plaintiff, contended that his claim was *res judicata*, but the District Judge held that it had not been the subject of adjudication, and disposed of the case on the merits. The will was upheld, and it was found that the money was part of the testator's self-acquisitions and that the suit was not barred by limitation; that the consideration for the plaintiff's assignment was Rs. 1,450 only, and that the subject of the assignment was an actionable claim within the meaning of Transfer of Property Act, section 135, it being impossible for the money to be recovered except by a suit. The District Judge accordingly on the authority of *Nilakanta* v. *Krishnasami*(1) passed a decree for Rs. 1,450 and interest from the date

(1) I.L.R., 13 Mad., 225.

of the assignment and costs thereon and disallowed the rest of the plaintiff's claim.

The plaintiff preferred this appeal and the defendant filed a memorandum of objections.

Ramachandra Rau Saheb for appellant.

Patlabhirama Ayyar for respondent.

JUDGMENT.—The first question for consideration is what was the price for the assignment. The Judge has found that only Rs. 1,450 was actually paid and that there was no satisfactory evidence of the payment by plaintiff either of the litigation expenses—Rs. 290—or of the sum of Rs. 1,900 under the receipt exhibit B. Notwithstanding the execution of this receipt exhibit B by Ramamma we agree with the Judge in believing her evidence that no money was paid her on that receipt. The evidence in proof of payment is not of a credible character, and the omission of the plaintiff to state whence he procured this large sum of money indicates that he never had it. It would have been easy for him to show how he happened to get the money if he really did get it. The payment of the Rs. 1,900 is therefore not proved. As regards the Rs. 290 for legal expenses, there can be no doubt that plaintiff must have spent a considerable amount of money in litigation on behalf of Ramamma. There is to begin with the stamp of Rs. 60 on the succession certificate which he obtained on her behalf and she admits that she has paid nothing to plaintiff on account of litigation expenses. The sum mentioned by plaintiff and admitted in the assignment itself, viz., Rs. 290, may be accepted as correct, as it is not extravagant.

It is then contended for the plaintiff that he is entitled to recover on the assignment the whole amount mentioned therein as the consideration, even if the whole amount was not paid. If the case fell under clause (*d*) of section 135 of the Transfer of Property Act that would be so, but we think that in this case the claim had neither been affirmed nor was ready for affirmation by a Court, and it therefore remained an actionable claim. The decision in the suit against the Bank did not determine whether Ramamma or the defendant was entitled to the money. That was left for future determination. All that the Court then decided in reference to the money was as to who should hold the custody of it, pending the settlement of the rights of the rival claimants. We must therefore hold that the plaintiff can recover only the price he

SURYA-NARAYANA SASTRI v. RAMAMURTI PANTULU.

paid and that we have found to be Rs. 290 over and above the sum allowed by the Lower Court. The decree of the Lower Court will be modified by adding this sum, and the incidental expenses attaching to the assignment, viz., Rs. 46 to the amount decreed to plaintiff. The appellant and the respondent will have and pay proportionate costs in this and in the Lower Appellate Court on the amounts now allowed and disallowed. There is nothing in the memorandum of objections. We agree with the Judge as to the genuineness and validity of the will of Ramamma's husband and, as the defendant received the money within three years of suit, no question of limitation arises. The memorandum of objections is therefore dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

1897. October 15, 21

NARAYANA CHETTI (DEFENDANT), PETITIONER,

v.

LAKSHMANA CHETTI (PLAINTIFF), RESPONDENT. *

Contract Act—Act IX of 1872, s.43—Joint promissors—Suit for money against person carrying on business of a dissolved partnership—Objection taken on ground of non-joinder.

In a suit for money due on account of dealings in clothes from 1889 to 1895, it appeared that the dealings had taken place between the plaintiff and the firm consisting of the defendant and another till 1894 when the firm was dissolved since which date the defendant had carried on the business and dealt with the plaintiff:

Held, that the suit was not bad for non-joinder of the late partner.

Per cur: it is not incumbent on a person dealing with partners to make them all defendants in a suit.

PETITION under Provincial Small Cause Courts Act, section 25, praying the High Court to revise the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in Small Cause Suit No. 54 of 1896.

The plaintiff sued to recover a sum due on account of dealings in clothes from March 1889 to January 1895. Up to 1894 the

---

* Civil Revision Petition No. 525 of 1896.

dealings took place between the plaintiff and the firm consisting admittedly of the defendant and another. In that year the firm was admittedly dissolved, and the business was carried by the defendant. The defendant pleaded, *inter alia*, non-joinder of his late partner The District Munsif passed a decree for plaintiff.

The defendant preferred this petition.

S. Subramania Ayyar for petitioner.

Tirumalasami Chetti for respondent.

JUDGMENT.—According to the law declared in the Contract Act, section 43, especially when taken with section 29 of the Civil Procedure Code, it is clear that it is not incumbent on a person dealing with partners to make them all defendants. He is at liberty to sue any one partner as he may choose. *Lukmidas Khimji* v. *Purshotam Haridas*(1)

The petition must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

SURYANARAYANA PANDARATHAR (LEGAL REPRESENTATIVE OF DECEASED COUNTER-PETITIONER AND DEFENDANT No. 2), APPELLANT,

1897. October 22.

v.

GURUNADA PILLAI (PETITIONER AND TRANSFEREE-PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 179—Application for execution—Continuation of previous application.

In June 1892, an application was made for execution of a decree and it was dismissed, the applicant being relegated to a suit to establish his right. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed. He then sued and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued:

Held, that the petition was barred by limitation.

APPEAL against the order of T M. Horsfall, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 19 of 1896, reversing the order of S. Dorasami Ayyar, District Munsif of Tanjore, in

(1) I.L.R., 6 Bom., 700.

* Appeal against Appellate Order No. 28 of 1897.

SURYA-NARAYANA PANDA-RATHAR v. GURUNADA PILLAI.

Execution Petition No. 789 of 1895, in the matter of Original Suit No. 103 of 1880, on the file of the Additional District Munsif's Court of Tanjore.

The facts of the case were stated by the District Judge as follows :—

"In 1879 the late Zamindar of Gandarvakottai was sentenced to transportation for life for abetment of dacoity. On the 20th September 1880 one Seshayyangar got a decree against him (Original Suit No. 109 of 1880). In 1881 the Government, which had declared the estate to be forfeited to Government, released its lien thereon in favour of the zamindar's minor son, the estate being placed under the Court of Wards.

"Seshayyangar made a series of attempts to execute his decree. The first four applications were all against the minor. They are dated 17th September 1883, 17th September 1886, 25th September 1889 and 21st June 1892. All were dismissed, for reasons which are not now of any consequence.

"Seshayyangar died, and in 1892 his heir transferred the decree to one Gurunada Pillai, who is the present petitioner. On the 19th September 1892, this plaintiff put in the fifth execution petition. This time it was against the former zamindar, who was then still alive. The Court of Wards objected and the petition was again dismissed, petitioner being referred to a regular suit. Then plaintiff filed a suit (Original Suit No. 632 of 1892) to have his right established to execute the decree against the zamindar's property in hands of the Court of Wards.

"The Court of Wards set up various pleas, only one of which now concerns us. It was that the decree being 12 years old was incapable of execution.

"The Lower Court held, on 29th November 1893, that, as no application to execute the decree had ever been granted, the decree could still be executed, and on appeal by the present zamindar, I upheld that finding (Appeal Suit No. 586 of 1894) on 18th March 1895.

"On the 3rd October 1895, plaintiff has now put in the sixth application for execution, this time against the present zamindar."

The petition was presented under Civil Procedure Code, sections 274 and 623, and paragraphs 6 and 10 of the petition were as follows :—

"*Previous execution, if any.*—Petition was put in on the 17th September 1883 and nothing was recovered. The petition presented on the 17th September 1886, having been returned, another petition was put in on the 24th September 1886 and notice was ordered, and it was dismissed for non-payment of batta. Petition was presented on the 25th September 1895 and it was dismissed for non-payment of batta for notice. Petition was put in on the 21st June 1892, praying that I may be treated as assignee-plaintiff and that the amount found deposited in the Taluk may be attached; and the execution petition was dismissed on the 5th September 1892, directing me to institute a regular suit. A petition was put in on the 19th September 1892 praying that I may be treated as assignee-plaintiff and that the immovable properties may be attached, it was ordered on the 20th October 1892 that a regular suit may be instituted. In obedience to the said order I filed Suit No. 632 of 1892 of this Court and Appeal Suit No. 586 of 1894 of the District Court, Tanjore, and a decree was passed on the 18th March 1895 directing me among other things to go on with the execution of the decree in Original Suit No. 103 of 1880 as assignee-plaintiff.

"*Relief prayed for.*—As it was decided, in Original Suit No. 632 of 1892 on the file of this Court and in Appeal Suit No. 586 of 1894 preferred thereon on the file of the District Court, Tanjore, on the 18th March 1895, that I should be treated as assignee-plaintiff so as to enable me to execute the decree, in accordance with the order directing me to bring a regular suit, dated 20th August 1892, passed on the petition presented by me on the 19th September 1892, praying that I may be made assignee-plaintiff in this suit and that the amount may be recovered (for me), I pray that the Court may be pleased to restore to its file the petition, dated 19th September 1892, and to order that the immovable properties mentioned in the list presented with this petition and referred to in the decree in Original Suit No. 632 of 1892, and also described in the list attached to this petition, may be attached for the amounts mentioned in columns 7 and 8 herein and also for subsequent interest and execution charges, &c., and sold at auction and the amount recovered for me."

The District Munsif dismissed the petition on the ground that three years had elapsed between the dates of the second and third petitions for execution. The District Judge held that it was not

SURYA-NARAYANA PANDA-RATHAR v. GURUNADA PILLAI.

open to the zamindar to raise this point and that the present petition should be regarded as a continuation of the previous proceedings—as to which he referred to *Chandra Prodhan* v. *Gopi Mohun Shaha*(1) and *Narayana Nambi* v. *Pappi Brahmani*(2). He accordingly reversed the order of the District Munsif and granted the relief sought.

The zamindar preferred this appeal.

Pattabhirama Ayyar for apellant.

V. Krishnasami Ayyar for respendent.

JUDGMENT:—This is an appeal from the District Judge allowing an execution petition on the ground that though dated more than three years after the last preceding application it is in effect a mere revival or continuation of it. In June 1892, the respondent had put in a petition which was dismissed, the petitioner being relegated to a regular suit to establish his right. He did not bring a suit, but in September 1892 put in a fresh application to execute. This was dismissed as he had not chosen to take the course suggested when his previous application had been dismissed. After this the respondent filed his suit to have his right established and that suit ended in his favour on the 18th March 1895. On the 3rd October 1895 more than three years after his last petition was dismissed, he put in the present application asking to have the former application of September 1892 revived or continued. Both the Courts held that this application was not barred because it was in effect a mere revival of the last previous application.

We think this decision is wrong. Had there been any reason for saying that the proper order on the hearing of the last application should have been one which could hold the decision in suspense pending the decision of the regular suit, it might well be that there would be some reason for saying that this application could be treated as an application to proceed with a pending application, but that is not the case here. The only proper order that could have been made in the circumstances was an order absolutely dismissing the application inasmuch as the order that preceded it had relegated the petitioner to a regular suit which he had not chosen to bring. We cannot therefore view the decision as one suspending the application for execution, nor can we agree that, where an order finally and properly dismisses an application for

(1) I.L.R., 14 Calc., 385. (2) I.L.R., 10 Mad., 22.

execution, a fresh application for execution can be treated as a renewal of it, even though such application may contain apt words for the purpose. Moreover we know of no process by which an application, which has properly been dismissed, can be revived.

For these reasons, without going into the other contentions raised, we allow the appeal.

We reverse the order of the District Judge and restore that of the District Munsif. The respondent must pay the appellant's costs in this and the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

SASIVARNA TEVAR (ASSIGNEE-PLAINTIFF), APPELLANT,

1897. October 15.

v.

ARULANANDAM PILLAI AND ANOTHER (DEFENDANT No. 2 AND HIS REPRESENTATIVE), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 178, 179—Application for execution "struck off the file"—Further application for execution—Renewal of previous application.

An application for execution of a decree of a District Munsif was made in April 1893, but was struck off the file on 20th July 1893, on a stay of execution having been ordered by the Subordinate Judge. After the termination of the proceedings in the Subordinate Court, the decree-holder applied again for execution on 6th July 1896:

Held, that the latter application should be regarded as a continuation of the former, and was not barred by limitation.

APPEAL against the order of S. Russell, District Judge of Madura, in Civil Miscellaneous Appeal No. 18 of 1896, affirming the order of N. Sambasiva Ayyar, District Munsif of Sivaganga, in Execution Petition No. 416 of 1896 (in Original Suit No. 365 of 1887).

The facts were stated by the District Judge as follows:—

"Application, dated 14th April 1893, was presented for exe-"cution. The Subordinate Court, by injunction, stayed the "execution of the application. The District Munsif passed an

---

* Appeal against Appellate Order No. 23 of 1897.