APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

CHALAVADI KOTIAH AND OTHERS (COUNTER-PETITIONERS—JUDGMENT-DEBTORS), APPELLANTS IN BOTH,

v.

POLOORI ALIMELAMMAH AND ANOTHER PETITIONERS—ATTACHING-CREDITORS), RESPONDENTS IN BOTH.*

1907. November 21. December 13.

Limitation Act—Act XV of 1877, sched. II, arts. 178, 179—No limitation as long as proceedings initiated by decree-holder are pending—Fresh application barred if presented more than three years after removal of bar.

Where a bar to execution proceedings is removed by the order of a lower Court, the fact that an appeal is preferred against such order will not when execution is not stayed in consequence of such appeal, prevent limitation from running against the execution creditor until the disposal of the appeal. A fresh application for execution presented more than three years after the date of the order of the lower Court will be barred by limitation.

The dismissal of an execution-petition without notice to the parties and without removing the attachment made thereunder, is a mere direction to the officers of Court to remove the application from the pending list. The execution proceedings are not closed thereby and must be considered pending. The decree-holder's right to apply for their continuance accrues from day to day and will not be barred till three years have elapsed after such proceedings cease to be pending.

When an execution application is dismissed as aforesaid, a subsequent application, in so far as it asks for the sale of properties already attached under the former application is one for continuance of proceedings and not a fresh application for execution.

Kedarnath Dutt v. *Harra Chand Dutt*, (I. L. R., 8 Calc., 420), followed.

EXECUTION petition.

The facts are briefly these:

One P. Rajam Setti obtained a decree in Civil Suit No. 94 of 1896 in the High Court against one C. Kondiah, and another decree, in Civil Suit No. 180 of 1906, against one K. Papiah. Those decrees were transferred to Nellore for execution. In original Suit No. 260 of 1893, C. Kondiah and K. Papiah were joint

* Civil Miscellaneous Second Appeal Nos. 16 and 17 of 1907, presented against the appellate orders of M. R. Ry. T. M. Rangachariar, District Judge of Guntur, in Appeal Suit Nos. 36 and 37 of 1906, respectively, Presented against the orders of M.R.Ry. D. Venkoba Row, District Munsif of Ongole, in Execution Petition Nos. 609 and 610 of 1905 (Original Suit No. 260 of 1893).

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decree-holders. In execution of the decrees in Civil Suit No. 94 of 1896, and Civil Suit No. 180 of 1906, P. Rajam Setti attached the interests of C. Kondiah and K. Papiah in Original Suit No. 260 of 1893. On the 3rd October 1899, P. Rajam Setti applied (Petition No 1036 of 1899) to execute the decree in Original Suit No. 260 of 1893. Thereupon the judgment-debtors presented a petition stating that the decree had been satisfied even before it was attached. That petition was dismissed on the 31st October. The judgment-debtors appealed to the District Court and obtained an order for stay of execution until the disposal of the appeal. On receipt of that order the Munsif passed the following order on the execution application: "Execution ordered to be stayed. Petition dismissed" The application showed that certain immoveable property had been attached.

The case was remanded by the District Judge. The Munsif now (25th January 1901) held that judgment-debtors' contention should prevail. Upon that Rajam Setti appealed to the District Court with the result that the order of the Munsif was reversed on 11th December 1901. There was an appeal to the High Court which was dismissed on 29th October 1903. Rajam Setti having died his executors have put in the present execution application on 10th July 1905.

The point for decision is whether the application is within time.

The Munsif held that the application was barred. His decision was reversed by the District Judge who allowed the application in its entirety.

The judgment-debtors appealed.

Dr. *S. Swaminadhan* for appellant.

V. V. Srinivasa Ayyangar for respondent.

JUDGMENT.—On the 3rd October 1899 an application was made to execute the decree in Original Suit No. 260 of 1893 by attachment and sale of certain immoveable property mentioned in the application. An order was obtained on the 7th October 1899. The judgment-debtor objected that the decree had been satisfied, but that objection was disallowed on the 31st of October. The judgment-debtor appealed to the District Judge, and obtained an order for stay of execution pending the hearing of the appeal. Upon this the District Munsif, on the 15th of December 1899, passed the following order on the execution petition, "Execution

ordered to be stayed, petition dismissed." On the same day as a diary entry shows the immoveable property was attached. The District Judge disposed of the appeal on the 20th July 1900, remanding the matter for further enquiry, and on the 25th of January 1901 the District Munsif decided that the decree had been satisfied before attachment. On the 11th December 1901 the District Judge reversed this order, and, on the 29th of October 1903, his decision was confirmed by the High Court.

The execution-petition now under consideration was presented on the 10th of July 1905; it asks for a notice under section 248 of the Code of Civil Procedure for the attachment of certain immoveable property; for the issue of a proclamation of sale of the property already attached; for the attachment of moveables and for the arrest of the defendant.

The question for our decision is whether this petition is barred by limitation as held by the District Munsif, or not so barred as held by the District Judge in appeal from him.

There is no doubt that when on the 11th December 1901 the District Judge reversed the District Munsif's order declaring the decree already satisfied, it was open to the decree-holder to proceed with the execution, and the fact that an appeal was preferred to the High Court presented no obstacle, no order for stay of execution having been obtained. It is impossible therefore to accede to the contention that limitation commences to run from the date of the decree of the High Court, and the petition of the 10th July 1905 is clearly barred so far as it is a fresh application for execution, that is to say, so far as it asks for the attachment of property not proceeded against in the proceedings instituted by the application of the 3rd of October 1899. In so far as it asks only for a proclamation of the sale of the property already attached in pursuance of the petition of 1899, the case is different. For the appellant, it is contended that, the order of the 15th December 1899 dismissing the petition, closed the proceedings, that the attachment closed with them, and the subsequent application is throughout a new petition for execution. If that be the true position the respondents must fail not merely on the ground of limitation but also because they do not ask for reattachment of the property previously attached. But that is not the position. There is nothing to show that the order of the 15th December 1899 was passed after notice to either party. It is not stated in the

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order that either party was heard, and the diary entry does not indicate any hearing on the 15th December. It has been held in *Sasivarna Tevar* v. *Arulnandam Pillai*(1) that the Court has no legal authority to dismiss a petition for execution simply because execution has been stayed, but if that is so, the order of dismissal is not necessarily ineffective to dispose of the proceedings. If wrong, an appeal might be to set it right. But here the order being made without notice and in the absence of both parties cannot be regarded as an order between the parties at all. It amounts to no more than a direction to the officers of the Court to remove the proceedings from the pending list (compare the case of *Narayan* v *Sono*(2). Indeed it appears not improbable that this is the view taken of the matter by the District Munsif himself, for the record contains no indication of any order to remove the attachment or for costs.

However that be, the order had not the effect of closing the proceedings and they must be considered to have been still pending when the application was made in 1905.

The question then arises whether, even in that view, it was not necessary, in order to save limitation to present the application within three years of the District Judge's order, dated the 11th of December 1901. A number of cases have been cited at the bar in which applications similar to that in question have been treated as applications to revive or continue earlier proceedings, and, in some of those cases, article 178 of schedule II of the Limitation Act is referred to as applicable to the matter, while in others no reference is made to any particular provision of the law. The cases establish the position that, when execution has been stopped by the interposition of some obstacle, the proceedings may be "revived" or "continued," by an application made within three years of the removal of the obstruction, and though in some cases, notably in the decision of the Privy Council in *Qamar-Ud-Din Ahmad* v. *Jawahir Lal*(3), the application is referred to as reviving a pending execution, it was not necessary in any of them to decide whether article 178 ought to be applied to the case. It is not clear what course the proceedings took in *Narayan* v. *Sono*(2), whether execution was stayed pending the decision of the High

(1) I.L.R., 21 Mad., 261. (2) I.L.R., 24 Bom., 345 at p. 349.
(3) I.L.R., 27 All., 334.

Court in *Nagamma* v. *Naja Rangayya Appa Row* (1) or whether the Court of First Appeal replaced the obstacle removed by the Court of First Instance. It seems to have been assumed on both sides that the obstacle was not removed until the date of the decision of the High Court and the petition under the consideration of the learned Judges was within three years from that date. No doubt there is remark in the Judgment to the effect that there was no bar under article 178 because the application was not a "fresh application for execution"; but it is not quite clear as the report stands what is the precise import of that remark, for if the application was a fresh application for execution it would *primâ facie* be governed by article 179.

There are however cases not cited before us from which we may derive the rule that article 178 ought not to be applied, when the Court is asked to do something, which it is bound to do [vide *Kylasa Goundan* v. *Ramasami Ayyan* (2) and *Vithal Janardan* v. *Vithojirav Putlajirav* (3)], and that so long as proceedings are pending, limitation will not begin to run against an applicant [vide *Kedarnath Dutt* v. *Harra Chand Dutt* (4)]. In *Venkatappiah* v. *Jagannadahrao* (5) an application made in 1898 was held to be made in proceedings initiated in 1886, and still undisposed of in 1898, and so not barred, and that case is also authority for the rule that, if in an execution petition a decree-holder asks for sale as well as attachment of the property of the Judgment-debtor, a subsequent application for sale of the same property will not be barred by article 178, though not made within three years of the attachment. The decision in *Joobraj Singh* v. *Buhooria Alumbasee Koer* (6), seems to proceed on the assumption that in that case a separate application for sale was necessary; the question is not discussed.

It may be somewhat difficult to reconcile the view taken in *Kylasa Gundan* v. *Ramasami Ayyan* (2), with that taken in *Pachaippa Achari* v. *Poojali Seenan* (7), where it was held that an application for execution not as such, in accordance with law, will suffice to save limitation if it contains an application for the issue of a notice under section 248 of the Code of Civil Procedure.

(1) S.A. No. 133 of 1892 (unreported).
(2) I.L.R., 4 Mad., 172.
(3 I.L.R., 6 Bom., 586.
(4) I.L.R., 8 Calc., 420.
(5) 12 M.L.J., 24.
(6) 7 C.L.R., 424.
(7) I.L.R., 28 Mad., 557.

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The Court is by section 248 directed to issue a notice, and by section 316 to order a certificate, and in neither case is any application required by the Code. If then an application for a notice is an application within the meaning of article 179, it is not very easy to see why an application for a certificate is not an application within the meaning of article 178.

Possibly we are on safer ground if we hold with Wilson, J., in *Kedarnath Dutt* v. *Harra Chand Dutt* (1) that so long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, *i.e.*, on every day on which the Court does not *sou motu* continue them. The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending.

Whichever be the better view the result is the same and the petition under our consideration is not barred in so far as it asks for sale of the property attached under the petition of the 3rd October 1899.

The decree of the District Judge must be modified accordingly. Execution must proceed only against the immoveable property described in the execution-petition of the 3rd October 1899 (Execution Petition No. 1086 of 1899). The parties will bear their own costs throughout.

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(1) I.L.R., 8 Calc. 420.