

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1907.
October 31.
November
6.

RAMAYYAN AND OTHERS (PETITIONERS--PLAINTIFFS,
Nos. 2 TO 6), APPELLANTS.

v.

KADIR BACHA SAHIB (DEFENDANT), RESPONDENT.*

Transfer of Property Act, Act IV of 1889, s. 89—Limitation Act, Act XV of 1877, sched. II, art. 179—Application under s. 89 of the Transfer of Property Act is an application for execution and s. 235 of the Code of Civil Procedure applies to it—Unverified application substantially in accordance with law sufficient to save limitation.

An application for an order absolute under section 89 of the Transfer of Property Act, is an application for execution of the decree and is subject to the provisions of section 235 of the Code of Civil Procedure and falls within article 178 or 179 of schedule II of the Limitation Act. Such an application, when defective, cannot be treated as a mere step in aid of execution, neither can it, when no notice is prayed for or issued, be treated as an application for issue of notice under section 248, which, as a stop in aid of execution, will save the bar of Limitation.

When such an application unverified but filed with the decree does not fully comply with the requirements of section 235 of the Code of Civil Procedure, and is defective only in minor particulars which can be easily gathered from the decree filed therewith, it may be treated as substantially an application for execution in accordance with law, sufficient to save limitation under article 179 or schedule II of the Limitation Act.

THE decree in this case was one for sale, dated 14th February 1901, and provided four months for payment of the amount. An application, dated 12th August 1903, styled an execution application, was put in by the decree-holder praying that the decree should be made absolute. This application was not verified and was not in the form prescribed by section 235, Code of Civil Procedure. It was rejected as the defects in form were not rectified although returned for amendment. The present execution application was put in on 25th October 1905. A plea of limitation was taken in bar of this execution petition.

* Civil Miscellaneous Second Appeal No. 5 of 1907, presented against the order of Arthur F. Pinhey, Esq., District Judge of Madura, in Appeal Suit No. 24 of 1906, presented against the order of M.R.Ry. V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Civil Miscellaneous Petition No. 140 of 1905 (Original Suit No. 2 of 1901).

The Munsif held that the application was not barred and ordered execution. The District Judge reversed his judgment.

The petitioners appealed to the High Court.

T. Rangachariar and *S. Venkatachariar* for appellant.

The Hon. the Acting Advocate-General for respondent.

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JUDGMENT.—In this case the appellants who are the holders of a mortgage decree in order to save limitation seek to rely on an unverified petition put in by them under section 89 of the Transfer of Property Act praying that the decree should be made absolute, which petition was returned to them by the Court as not being in accordance with the Civil Rules of Practice. It has been contended on their behalf that even accepting the decision of the majority of the Full Bench (by which we are bound) as to the scope of section 89 in *Mallikarjunadu Setti v. Lingamurti Pantulu*(1) still an application for an order absolute under section 89 is something different from an application for execution of the decree, and may be made separately, and that when so made separately, it amounts to a step in aid of execution and that as no special form is provided for making such application the present petition is an application to take a step in aid of execution sufficient to save limitation. All that was actually decided, it is said in *Mallikarjunadu Setti v. Lingamurti Pantulu*(1) was that an application under section 89 relates to the execution of the decree and is appealable under section 244 of the Civil Procedure Code. We are unable to accept this contention. In our opinion the effect of the decision of the majority in that, an application under section 89 is an application for execution of the decree subject to the provisions of section 235 of the Civil Procedure Code, and falling as an application for execution under article 179 of the Limitation Act when that article can be applied and under article 178 when it cannot—as to which see the judgment of Sir Bhashyam Ayyangar, J., in *Rungiah Founden & Co. v. Nanjappa Row*(2).

It was next contended that as the decree was more than a year old, the application must be regarded as an application for notice to the judgment-debtor; although it does not specifically ask for notice, because the Court would in the ordinary course send notice. There was in fact no application for notice and the Court did not

(1) I.L.R., 25 Mad., 244.

(2) I.L.R., 26 Mad., 780.

RAMAYYAM send any, and the case does not, in our opinion, fall within the
 KADIR⁹ rule laid down in *Pachaippa Achuri v. Poojali Seenan*(1) and
 BACHA followed in *Nagireddi v. Venkatarreddi*(2).
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Lastly; it was contended that, even as it stands, the present petition, filed as it was with the decree, was an application for execution in accordance with the law sufficient to save a limitation. Although it asks in terms for an order to make the decree absolute, it is put in under section 89 and must be construed as asking for the only proper order under section 89 which, according to the majority of the Full Bench, is an order for execution. The petition does not state, as required by section 234 of the Civil Procedure Code, whether there had been an appeal or any previous application for execution, but these defects, it is said, are not material as there had not in fact been any such appeal or application. All the other particulars required by the section, it is said, either appear in the petition or may be readily gathered from the decree filed therewith, and Rule 163 of the Civil Rules of Practice does not add substantially to the requirements of section 234 of the Civil Procedure Code. Under these circumstances it is contended that, in spite of the defective statement of particulars and the absence of the requisite verification, the petition is none the less substantially a petition for execution in accordance with so law and sufficient to save limitation. The defects are not, to use the language of *Rama v. Varada*(3), calculated to prejudice the judgment-debtor or mislead the Court and we think, following the decisions of this Court in *Ramanadan Chetti v. Periatambi Shervai*(4), *Rama v. Varada*(3) and *Samia Pillai v. Chockalinga Chettiar*(5), by which we are bound, that, in spite of these defects, the application must be regarded as substantially in accordance with law. We accordingly allow the appeal, set aside the order of the District Judge and restore that of the Subordinate Judge with costs in this and the lower Appellate Court.

(1) I. L. R., 28 Mad., 557.

(2) C.M.S.A., No. 87 of 1905 (unreported).

(3) I. L. R., 16 Mad., 143.

(4) I.L.R., 6 Mad., 250.

(5) I.L.R., 17 Mad., 76.