BENSON, C.J., AND MUNRO, J.

SRI RAJA CHELIKANI RAMA RAU v. SECRETARY OF STATE FOR INDIA.

In Second Appeal No. 1434 of 1904 the appellant has succeeded in part only. Each party will pay and receive proportionate costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1909. March 1, 2, 3, 5, 17.

S. R. M. A. RAMASWAMI CHETTIAR (PETITIONER), APPELLANT,

v.

OPPILAMANI CHETTI AND ANOTHER (DECREE-HOLDER AND PURCHASER), RESPONDENTS. *

Decree, execution of—Who ought to be made representative—Person with the best primâ facie *title sufficiently represents estate.*

A decree-holder who has to apply for execution against the legal representative of the deceased judgment-debtor, may select, from among several rival claimants, as legal representative, the one whom he believes honestly to have the best *primâ facie* title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found out some other person is the true legal representative.

Khiarajmal v. *Daim*, [(1905) I.L.R., 32 Calc., 296], explained.

APPEAL against order of V. Subramaniyam, Subordinate Judge of Tanjore, in Execution Application No. 619 of 1905 in Execution Petition No. 45 of 1903 (Original Suit No. 23 of 1889).

Application under sections 244 and 311 of the Civil Procedure Code of 1882 to set aside sale of villages in execution of a mortgage decree.

One O obtained a mortgage decree against K as guardian of his minor son P. Subsequent to the decree P attained majority and died issueless. K thereupon took possession of the properties under color of a will alleged to have been executed in his favor by P. Certain persons claiming to be the sapindas of the deceased P, and, as such his heirs, sold their rights in the estate of P to one R. R filed a suit to set aside the alleged will of P and to recover possession of the properties. While the suit was pending O applied for execution of the decree making K the legal representative of the deceased P, and the two villages in respect of which

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* Civil Miscellaneous Appeal No. 183 of 1905.

the present application is made were sold. Shortly before the sale, in the suit brought by R, it was declared that the will set up by K was not genuine and that the sapindas were the heirs of P.

The present application was made by R to set aside the sale of the two villages chiefly on the ground that it was void, because the proper legal representative of P was not brought on the record.

The Subordinate Judge dismissed the application.

R appealed to the High Court.

The Hon'ble Mr. *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for appellant.

P. R. Sundaram Ayyar and *S. Gopalaswami Ayyangar* for respondents.

JUDGMENT.—In our opinion the Subordinate Judge was right in holding that the estate of the deceased zamindar was sufficiently and properly represented by his natural father Krishnaswamy Panikondar for the purpose of the execution proceedings under our consideration. At the death of the zamindar in 1900 Krishnaswamy Panikondar was in possession of the zamindari and claimed title thereto under a will of the deceased. Some remote sapindas of the zamindar claimed to be his heirs and denied the genuineness of the will, but the District Registrar registered it "after a severe contest" (to quote the Subordinate Judge). The sapindas then sold their claims to the appellant.

Now the first respondent having obtained in the life-time of the zamindar an order for the sale of the property mortgaged to him had, in order to bring the property to sale, to apply for execution against the legal representative of the mortgagor. He knew that the true legal representative in the eye of the law was one of the rival claimants but he did not know which. It was not contended that he was bound to wait until a decision had been obtained or a settlement arrived at on all the conflicting claims of the rivals or, it may be, of speculators who might have purchased those claims or portions of them. To compel the creditor so to wait would, as was pointed out in an analogous case (*Janaki* v. *Dhanu Lall*(1)), put it in the power of his debtor's representatives to deprive him altogether of his dues by the simple expedient of delaying the settlement of the question "who is the representative." Mr. Krishnaswamy Ayyar's contention seemed to be in

(1) (1891) I.L.R., 14 Mad., 454.

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effect that the creditor must, if he does not wait, pick out the legal representative from among the rivals at his peril. If in the course of years it be finally decided that one of the other claimants is entitled in law to succeed to the estate, all the proceedings had in the interval, are, if not null and void, voidable at the option of the finally successful claimant.

We do not find anything in the judgment of the Privy Council in *Khiarajmal* v. *Daim*(1), to compel us to accept this contention. Their Lordships recognise that representation for the purposes of litigation may be incomplete and yet sufficient, and though they confine their observations on this point to cases in which all the representatives are the members of a family, the case before them being of that kind, they do not lay it down that those cases exhaust the matter, but rather indicate that the sufficiency of the representation may be in part a question of fact. The estate of Naurez, they say at page 315, was not represented "either in law or in fact."

The first respondent had in this case before us to choose whether to apply for execution against one of several rival claimants or against them altogether. It seems to us that in selecting one he has made the choice of a course which is obviously the most convenient course, and which is in accordance with the principles on which the law must be applied where, as here, there is no power to give letters of administration to a creditor (*vide Janaki* v. *Dhanu Lall*(2). The creditor must, if he is not to be liable to lose his money, be permitted to apply for execution against that one of the rival claimants whom he honestly and reasonably believes to be the legal representative: and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceeding in question are identical with those of his rivals, and if he acts without fraud or collusion, it is hard to see any reason why his representation should not be held to be sufficient. It is not necessary to go the full length of the decision in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(3), which does not relate to execution proceedings; but the principle of section 368 of the Civil Procedure Code of 1882, by which the plaintiff nominates the representative

(1) (1905) I.L.R., 32 Calc., 296. (2) (1891) I.L.R., 14 Mad., 454.
(3) (1903) I.L.R., 26 Mad., 230.

of the defendant, who is appointed by the Court subject to intervention of rival claimants, seems applicable also to the appointment of a representative in execution proceedings.

And the principle of selecting from among rival claimants that one who has the best *primâ facie* right is recognised in the Indian law. When there are rival claimants to an estate, the law allows the Court in certain circumstances to select the one having *primâ facie* the best title, and to empower him to collect outstanding debts of the estate, and to give a good discharge to debtors [section 7 (3) of the Succession Certificate Act].

The same principle may well be applied to a case in which disputes among claimants to an estate threaten to prevent a judgment-creditor from realising within a reasonable time the fruits of his decree.

And here the first respondent nominated as representative the claimant who held possession and whose claim had the support of the District Registrar's decision after enquiry—the other claimants being out of possession and apparently not agreed among themselves which was the heir or whether all were heirs together. He clearly selected the one having the best *primâ facie* title, and one too who was in every other respect the most competent to represent all the claimants in the particular proceeding then in progress. Krishnaswami Panikondar had conducted, on behalf of the deceased Zamindar, the litigation with the first respondent on his mortgage, and was evidently as knowing all the facts, the best able to resist the execution, if resistence was in any way honestly possible. His interests were absolutely identical in this matter with those of his rivals and he was better able than they to protect them. There existed, therefore, no reason why if one of the claimants was to represent the estate it should not be he, and no fraud or collusion has been proved in this case to vitiate his representation.

There is then no good reason why as the person with the best *primâ facie* title, and holding possession of the property, Krishnaswami Panikondar should not be held to have sufficiently represented his natural son's estate in fact.

Mr. Sundara Ayyar cited several cases, which we do not think it necessary to discuss, in support of the view that the claimant in possession may represent the estate, and, on the other side, Mr. Krishnaswami Ayyar referred us to *Chathakelan* v. *Govinda*

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Karumiar(1). This case however is clearly distinguishable from the present on the ground that the stranger in possession of the assets there was not a claimant of the estate to which the assets belonged (*vide Chuni Lal Bose* v. *Osmond Beeby*(2)). Reliance was placed on *Sambasiva Chetti* v. *Veera Perumal Mudali*(3) as showing that the true legal representative cannot intervene in a proceeding after decree; but that case decides only that the representative cannot initiate the proceedings. Here, neither the sapindas of the deceased Zamindar, nor their transferee intervened before 1904 (when the application of the appellant was held to be too late) and it is very possible that they, and the receiver appointed in 1903, were satisfied with the representation of the estate by Krishnaswami Panikondar. However that may be, there is nothing that we can see in the procedure indicated by the Code of 1882 as applicable to proceedings after decree, which would make it inequitable or illegal to accept Krishnaswami Panikondar as a sufficient and proper representative in this case.

Nor do we think the appointment of a receiver in 1903 can make any difference. At most it was irregular to proceed without him; but the interests which he was appointed to protect did not cease, upon his appointment, to be represented by Krishnaswami Panikondar, and he did not apply to be made a party to the execution proceedings.

There is no other substantial question in the case. Assuming it to be open to the appellant to raise the question of limitation, he fails to show that there is any bar. The case was at first put on the ground that the fourth application (that of the 17th October 1899) being unverified was not in accordance with law, and, that consequently, the fifth (dated the 23rd March 1900) and all succeeding applications are barred by limitation. This case fails when it is seen that the interval between the third application (dated the 23rd April 1897) and the fifth (dated the 23rd March 1900) is less than three years.

Then it was contended that the third application was itself not in accordance with law as it was not accompanied by a verified statement of property. The contention based on this fact was not substantiated by reference to the record. Sale was ordered on

(1) (1894) I.L.R., 17 Mad., 186. (2) (1903) I.L.R., 30 Calc., 1044 at p. 1058.
(3) (1905) I.L.R., 28 Mad., 361.

the third application, the 23rd March 1897 and on the 26th of April in the same year a verified statement was called for. We are not prepared to assume in the absence of evidence that the Court treated as in accordance with law an application which was not so at the time when the order was made on it. It has not been shown to us that the verified statement called for in April 1897 was not furnished before the 23rd of August of that year. The next proceeding application (the 2nd) was in 1896, so that in no case was the third barred by time. It is thus unnecessary to discuss the question whether an unverified application may not be called in aid to save limitation.

The objections to the sale taken under section 311 of the Code of 1882, are of no avail for two reasons. They fail when it is held that Krishnaswami Panikondar represented the estate sufficiently, and they fail whether he did so or not because there is not the slightest proof that the sale caused loss to the appellant. It was contended on the strength of an observation in *Krishnayya* v. *Unnissa Begam*(1) that we ought to hold that substantial injury is the necessary result, to the true legal representative, of a sale of his property behind his back. But apart from the fact that the observation cannot be universally true, there is this difference here that a person perfectly competent and *primâ facie* anxious to protect the interests of the legal representative was a party to the proceedings. As a matter of fact it was decided by the Subordinate Judge on enquiry that the property sold was worth in the market only Rs. 21,000, while at the sale it fetched Rs. 43,000. The appeal is dismissed with costs.

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(1) (1892) I.L.R., 15 Mad., 399 at p. 400.