APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

ABDUL KADER ROWTHER AND ANOTHER (COUNTER-PETITIONERS—JUDGMENT-DEBTORS), APPELLANTS,

1913. December, 19.

v.

KRISHNAN MALAVAL NAIR (KARNAVAN AND MANAGER OF THE TARWAD), (PETITIONER—DECREE-HOLDER), RESPONDENT.*

Limitation Act (XV of 1877), art. 179—Execution, step in aid of—Application, oral, for adjournment.

An application to take a step in aid of execution under article 179 of the Limitation Act need not be in writing.

Amar Singh v. *Tika* (1886) I.L.R., 8 All., 139 and *Maneklal Jagjivan* v. *Nasia Raddha* (1891) I.L.R., 15 Bom., 405, followed.

An application by the decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further is an application to get an order in aid of execution.

Sheshdasacharya v. *Bhimacharya* (1912) 14 Bom. L.R., 1204, *Haridas Nanabhai* v. *Vithaldas Kisandas* (1912) I.L.R., 36 Bom., 638, *Pitam Singh* v. *Tota Singh* (1907) I.L.R., 29 All., 301 and *Kunhi* v. *Seshagiri* (1882) I.L.R., 5 Mad., 141, referred to.

APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 904 of 1911, preferred against the order of P. J. ITTEYERAH, the Subordinate Judge of South Malabar at Palghat, in Execution Petition No. 751 of 1911 in Original Suit No. 40 of 1903.

The respondent got a decree on 16th December 1903 and after various infructuous applications presented Execution Petition No. 751 of 1911 on 28th October 1911 for the execution of his decree. This application would have been time-barred unless the oral application he made on 7th August 1908 for adjournment in connection with execution proceedings then pending could be considered to be a step in aid of execution. The Court of First Instance held that it was not a step in aid of execution and dismissed the application as barred by limitation. The Lower Appellate Court held that such an oral application

* Appeal Against Appellate Order No. 5 of 1913.

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was an application within the meaning of article 179 of the Limitation Act and was consequently not barred by limitation and set aside the order of the Court of First Instance.

The judgment-debtors appealed.

K. Narayana Rao for the petitioners.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Unless the oral application for an adjournment of the hearing of a previous execution petition, made by the decree-holder on the 7th August 1908 is held to be an application to take a step in aid of execution, the present execution application of 3rd July 1911 is clearly barred by limitation.

The question is not free from difficulty. In *Kartick Nath Pandey* v. *Juggernath Ram Marwari*(1), there is an *obiter dictum* showing that an application for adjournment to enable the decree-holder to conduct his petition further with effect is not an application to take a step in aid of execution.

A different view was taken in *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2), where the point directly arose.

The learned vakil for the judgment-debtors (appellants before us) sought to distinguish *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2) from the present case on two grounds :—

(*a*) that the application for adjournment relied on in *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2) was in writing and not oral;

(*b*) that the application in that case was an application for an adjournment to enable the decree-holder to produce an affidavit as evidence to carry on those execution proceedings further, whereas it was not so in the present case.

I think that neither of these contentions is sound. There is nothing in article 179 of the Limitation Act which requires the application to take some step in aid of execution to be in writing. *Amar Singh* v. *Tika*(3) and *Maneklal Jagjivan* v. *Nasia Raddha*(4) are direct authorities to the contrary and I am prepared to follow them.

(1) (1900) I.L.R., 27 Calc., 285. (2) (1909) 14 C.W.N., 486.
(3) (1880) I.L.R., 3 All., 139. (4) (1891) I.L.R., 15 Bom., 405 at p. 407

Then as regards the other distinction sought to be made, I am unable to see that the application for an adjournment to enable the decree-holder to produce affidavit-evidence in aid of further proceedings [which was the application in *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(1)], stands on a better footing than an application for an adjournment to enable the decree-holder to produce an encumbrance certificate in respect of the attached property in aid of further proceedings in execution.

Then reliance is placed by the appellant's vakil on the reason given in the *obiter dictum* in *Kartick Nath Panday* v. *Juggernath Ram Marwari*(2). That reason is that an application for adjournment is in retardation of the execution proceedings and not in aid of the execution proceedings. I think that there is a fallacy in this reasoning. When an application for adjournment is made by the judgment-debtor, it is almost invariably to retard the execution proceedings. As regards an application by the decree-holder it may be one of three things :—

(*a*) It may be to get an order in aid or

(*b*) it may be to get an order in retardation or

(*c*) it may be to get an order which is neither.

An application by the decree-holder to give time to the judgment-debtor merely as a matter of grace is a step in retardation. An application for an adjournment to enable the decree-holder to produce records or evidence necessary to effectively conduct the execution proceedings further will be an application to get an order in aid. *Sheshdasacharya* v. *Bhimacharya*(3); *Haridas Nanabhai* v. *Vithaldas Kisandas*(4) ; *Pitam Singh* v. *Tota Singh*(5) and *Kunhi* v. *Seshagiri*(6).

An application by the decree-holder to draw money deposited in Court or to obtain copies of sale lists (without anything to indicate that they were necessary to aid further execution) will be application neither in aid nor in retardation.

In the present case, I think that the application for an adjournment was for an order in aid.

I think that the Legislature is a little harsh on decree-holders in fixing the date of applying for execution as one of the starting points for limitation for calculating the three years' period for

(1) (1909) 14 C.W.N., 486.
(2) (1900) I.L.R , 27 Calc., 285.
(3) (1912) 14 Bom. L.R., 1204.
(4) (1912) I.L.R., 36 Bom., 638.
(5) (1907) I.L.R., 29 All., 301 at p. 302.
(6) (1882) I.L.R., 5 Mad., 141.

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the next subsequent application in execution instead of the date on which the proceedings in the previous application for execution *terminated*, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step in aid to be also a starting point and I think that if even an oral application is really for an order which will be a step in aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on the article 179 so as to enable a decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

SPENCER, J. SPENCER, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. November 7 and 28 and December 23.

KRISHNAMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

M. SOUNDARARAJA AIYAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Previous suit for specific performance of an agreement to sell—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession against the vendors—Suit not barred.

Where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants,

Held, that the suit was not barred by Order II, rule 2 of the Civil Procedure Code (Act V of 1908).

At the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the deed of conveyance.

Narayana Kavirayan v. *Kandasami Goundan* (1898) I.L.R., 22 Mad., 24, disapproved.

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* Second Appeal No. 1125 of 1912.