APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

VARADARAJA MUDALI (RESPONDENT, JUDGMENT-DEBTOR), APPELLANT,

v.

MURUGESAM PILLAI AND FOUR OTHERS (FIRST RESPONDENT AND HIS MINOR SONS), RESPONDENTS.*

1915, August 16 and 19.

30 M.L.J. 460

(*Indian*) *Limitation Act* (*IX of* 1908), *art.* 182—*Interpretation, principle of—Execution application—Article* 182, *clause* (6)—*Notice, issue of, whether, gives a fresh starting point.*

Article 182 of the Limitation Act should receive a fair and liberal but not too technical a construction, so as to enable the decree-holder to obtain the fruits of his decree.

The issue of notice referred to in clause (6) of article 182 of the Act need not be in respect of an application made in accordance with law. The words "in accordance with law" found in clause (5) should not be introduced into clause (6) when the legislature has not thought fit to do so.

Jamna Dut v. *Bishnath Singh* (1909) 6 A.L.J., 944 and *Deo Narain Singh* v. *Sri Bhagwat Naik* (1911) 10 I.C., 411, followed.

A decision especially on procedure cannot be treated as *res judicata* when that procedure itself is changed by the Statute Law.

APPEAL against the decree of H. O. D. HARDING, the District Judge of Trichinopoly, in Appeal No. 632 of 1912, preferred against the decree of S. SUBBAYYA SASTRI, the District Munsif of Namakkal, in Execution Petition No. 812 of 1912, the Original Suit No. 253 of 1894, on the file of K. RAMACHANDRA AYYAR, the District Munsif of Trichinopoly.

One of the applications for execution filed by the respondent who had obtained a money decree against the appellant on 7th March 1896, was on 13th September 1905, upon which notice was issued to the appellant on 22nd September 1905; but the petition was afterwards dismissed. Thereafter another petition for execution was filed on 4th March 1908 and the same was dismissed by the District Munsif as barred by limitation on the ground that the petition of 13th September 1905 was not one in accordance with law. On appeal the District Judge reversed the same and remanded the application for disposal on merits. Against that the judgment-debtor filed the present appeal.

* Appeal against Appellate Order No. 67 of 1914.

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SADASIVA AYYAR, J.

T. R. Venkatarama Sastriyar for the appellant.

K. S. Ganesa Ayyar for the respondents.

SADASIVA AYYAR, J.—The judgment-debtor is the appellant. His learned vakil T. R. Venkatarama Sastriyar has raised two contentions in his arguments before us, those two contentions being—

(*a*) that the application in execution made by the decree-holder dated 4th March 1908 was barred by limitation, and

(*b*) that the relief prayed for in that application could not be granted to the decree-holder, the matter being *res judicata* against the decree-holders by reason of a prior execution petition, dated 13th September 1905, praying for the same relief having been dismissed on the ground that by section 99 of the Transfer of Property Act the decree-holder could not bring to sale the attached property subject to the decree-holder's own mortgage in execution of the money decree, though that decree was obtained on a cause of action other than the mortgage document. (Some other contentions suggested before us need not be noticed as they have not been raised in the grounds mentioned in the memorandum or on decree of appeal.)

Contention (*a*) on the question of limitation is based on the argument that the application of 13th September 1905 was not in accordance with law as it prayed for a relief which could not be legally granted by the Court and that an application not in accordance with law cannot furnish a fresh starting point of limitation as the expression used in clause (5) of article 182 of the Limitation Act is the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order."

But the learned District Judge does not rely on clause (5) of article 182 but on clause (6) of the same article. Mr. Venkatarama Sastriyar, therefore, further argued that clause (6) though it used the wide phrase "the date of issue of notice to person against whom execution is applied for to show cause why the decree should not be executed against him" must be confined to the date of the issue of such notice *in respect of an execution application made in accordance with law* and ought not to be extended to the date of issue of notice in respect of an application not in accordance with law. (The execution petition of 1905 was dated 13th September 1905 and the date of the

issue of such notice seems to have been about a week later. I see no sufficient reason why the words "in accordance with law" found in clause (5), should be introduced into clause (6) when the legislature has not thought fit to do so. Mr. Venkatarama Sastriyar argued that if those words are not introduced the mere issue of a notice in respect of an execution petition which is itself barred by limitation might be contended to give a fresh starting point for limitation. The answer to this objection is that a fresh starting point can be given to a right to sue or to apply only when the right had not become barred on the date of the alleged fresh starting point and that a right to sue or to apply once barred by limitation cannot be revived. This was the answer made to a similar argument addressed for the judgment-debtor in *Jamna Dut* v. *Bishnath Singh*(1).

Next it was argued that the issue of notice in respect of an execution application not made to the proper Court might be contended to give a fresh starting point of limitation if the clause was given too wide an interpretation. The answer to the question is that an application made to a Court having no jurisdiction will be treated as waste paper and the notice issued on such an application by such a Court is also of no value in the eye of the law.

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. That the language of the article ought not to be strained in the judgment-debtor's favour has been held in numerous cases which are quoted at page 470 of Rustomjee's Book on Limitation.

In *Deo Narain Singh* v. *Sri Bhagwat Naik*(2), MOOKERJEE and CASPERSZ, JJ., held that the issue of a notice under section 248 of the old Civil Procedure Code was sufficient to save a decree from the bar of limitation under the old article 179 corresponding to present article 182 even though it was issued upon an application which was not in accordance with law.

In *Kamakshi Pillai* v. *Ramasamy Pillai*(3), MILLER and MUNRO, JJ., held the same view following *Nagi Reddi* v. *Subba*

(1) (1909) 6 A.L.J., 944. (2) (1911) 10 I.C., 411.
(3) (1908) 18 M.L.J., 14.

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Reddi(1) and *Pachiappa Achari* v. *Poojali Seenan*(2). I am prepared to follow these two decisions and the decision in *Jamna Dut* v. *Bishnath Singh*(3), as the dangers alleged to arise by giving too wide an interpretation to clause (6) are not real dangers as I have already tried to point out. *Kamakshi Pillai* v. *Ramasamy Pillai*(4) does not expressly refer to clause (5) of article 179 of the old Code corresponding to clause (6) of the present article 182 and in some of the other cases quoted before us, the application for issue of notice was itself treated as a step in aid of execution so as to fall under clause (4) of article 179 of the old Code [corresponding to clause (5) of article 182 of the new Limitation Act]. However, the decisions in *Deo Narain Singh* v. *Sri Bhagwat Naik*(5) and *Jamna Dut* v. *Bishnath Singh*(3) refer to clause (5) of article 179 and are direct authorities which as I said I shall follow. I would therefore overrule the first contention as to limitation.

As regards *res judicata*, the dismissal of the earlier application of 1905 was based on the then existing law of procedure when properties are sought to be brought to sale after they are attached subject to a mortgage in the decree-holder's own favour. A decision especially on a question of procedure cannot be treated as *res judicata* when that procedure itself is changed by the Statute Law ; where substantive rights are decided in an order passed in execution proceedings, such decision is, no doubt, *res judicata* in subsequent execution applications: see *Vyapuri Goundan* v. *Chidambara Mudaliar*(6). The only judicial determination on the application of 1905 was that on the procedure law as it then stood, the decree-holder could not pursue the line of remedy which he then wanted to follow. The new remedy in execution given by the new statute created a new right to apply in execution for the remedy formerly disallowed and the dismissal of a former application on the ground that there was then no right to apply for that particular line of remedy cannot be *res judicata* when the new right to apply is relied on. A plaintiff can maintain a suit on a new cause of action which did not exist when he brought a former

(1) Civil Miscellaneous Second Appeal No. 87 of 1905.
(2) (1905) I.L.R., 28 Mad., 557.
(3) (1909) 6 A.L.J., 944.
(4) (1903) 18 M.L.J., 14
(5) (1911) 10 I.C., 411.
(6) (1914) I.L.R., 37 Mad., 314

suit for the same relief though that suit was dismissed on the ground that the plaintiff was not entitled to that relief on the cause of action on which he based it. A decree-holder can, therefore, it seems to me, similarly maintain an application for a new line of remedy granted by a new statute even though his former application for the same relief had been rejected before his right to the new relief arose. As was said by the Privy Council in *Amanat Bibi* v. *Imdad Hussain*(1) : "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right, merely because *at an earlier date*" (1853) "he may have had no right to the property at all?" (The respondent had brought a former suit for possession basing his right on an alleged proprietorship right created in 1853 and had failed in that suit.) "The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit."

Let us again take a case where the brother of the husband of a childless Hindu widow sued during her lifetime for recovery of property in her hands on the ground that he and her husband were undivided in interest and she took an unlawful possession of the property and his suit was dismissed on the ground that he and his brother were divided in interest and the properties sued for belonged to his brother solely. If after the dismissal of such a suit, the widow conveyed the properties to him and he again sued for possession on the strength of that conveyance, his new claim cannot surely be defeated by the plea of *res judicata*. I see no difference in principle whether the second suit or application is based on a new cause of action or on a new right created in the plaintiff or applicant by new Statute law. The whole question has been elaborately considered by Sir V. BHASHYAM AYYANGAR, J., in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2) and it is difficult to add anything useful to the considerations mentioned in his judgment as to the principles to be applied by a Court in coming to a decision on the plea of *res judicata*. [I would however just refer to the two cases — *Alimunnissa Chowdhurani* v. *Shama Charan Roy*(3) and *Baij Nath Goenka* v. *Padmanand Singh*(4) — in which it was held that a fresh suit

(1) (1888) 15 I.A., 106 at pp. 111 and 112.
(2) (1903) I.L.R., 26 Mad., 760. (3) (1905) I.L.R., 32 Calc., 749.
(4) (1912) I.L.R., 39 Calc., 848.

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or application will lie even though a former suit or application of a similar nature was decided on an erroneous *view of the law* between the same parties.]

I would, in the result, dismiss the appeal with costs.

NAPIER, J.

NAPIER, J.—I agree.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Tyabji and Mr. Justice Phillips.

1915. August 26.

Re SUBBARAYA CHETTI (ACCUSED IN CALENDAR CASE No. 242 OF 1915 ON THE FILE OF R. SARANGAPANI, THE STATIONARY SECOND-CLASS MAGISTRATE OF PALLADAM).*

Criminal Procedure Code (Act V of 1898), ss. 110 and 167—Proceedings under section 110—Power to remand under section 167.

In proceedings under section 110 of the Code of Criminal Procedure (Act V of 1898) the Magistrate has no power to remand an accused person to custody. Section 167 of the Code applies to proceedings under Chapter XIV and not to those under section 110.

Emperor v. *Basya* (1903) 5 Bom. L.R., 27, referred to.

CASE referred by A. R. CUMMING, the District Magistrate of Coimbatore, for orders of the High Court under section 438, Criminal Procedure Code (Act V of 1898).

Facts appear from the following letter of reference :—

"I have the honour to submit the following case for the orders of the High Court under section 438, Criminal Procedure Code :—

"One Subbaraya Chetti aged twenty years was arrested on suspicion by the police at Dharapuram on the 30th of March 1915 with a view to his being put up before the Sub-Divisional Magistrate, Erode, for being bound over to be of good behaviour under section 11, Criminal Procedure Code. On the 31st of the month the accused was produced before the Stationary Sub-Magistrate, Dharapuram, with a request that he should be remanded for four days for production before the Sub-Divisional Magistrate, Erode. The Stationary Sub-Magistrate accordingly remanded him till 3rd April 1915. On the afternoon of the same day, the Sub-Inspector of Police reported

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* Criminal Revision Case No. 440 of 1915 (Referred Case No. 46 of 1915).