KANDASAMI GOUNDAN v. KUPPU MOOPPAN. — KRISHNAN, J.

In the present case though the plaintiff prayed expressly for a decree under Order XXXIV, rule 6, against the ancestral property the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose The plaintiff is therefore entitled to a decree as he asks for under rule 6 against the first defendant personally and against the ancestral property of himself and his sons.

The further point raised in this case is that the father's share liable for the mortgage decree is a one-fourth share and not a one-fifth share as one of his sons now on record, the fifth defendant, was born after the mortgage was executed. This is not denied and therefore the decrees of the lower Courts should be modified by also stating that a one-fourth share of the mortgaged property is saleable under the mortgage decree. With the above modifications the second appeal is dismissed but without costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1919, December, 3.

HARI KRISHNAMURTI (FIFTH DEFENDANT AND SIXTH COUNTER-PETITIONER), APPELLANT,

v.

AKELLA SURYANARAYANAMURTI AND TWO OTHERS (PETITIONERS NOS. 1 AND 2 AND SECOND COUNTER-PETITIONER), RESPONDENTS.*

Limitation Act (IX of 1908), Art. 182, cl. 5—Application for execution of decree by transferee—Injunction against transferee—Subsequent application by persons entitled to execute decree—Limitation—Bar, whether saved by previous application.

An application for execution of a decree, made by a transferee of the decree after he has been restrained by injunction from "executing it or otherwise realizing the decree-debt," will operate to save the bar of limitation in respect of a later application for execution made by persons held to be legally entitled to execute the decree.

APPEAL against appellate order of T. VARADARAJULU NAYUDU Garu, the Acting District Judge of Gōdāvari, in Appeal Suit No. 207 of 1917, preferred against the order of MIRZA HASAN ALI ISPAHANI SAHIB BAHADUR, the Temporary District Munsif of Razole at

* Appeal against Appellate Order No. 34 of 1918.

Amalapur, in E.P. No. 1460 of 1916 (in Original Suit No. 55 of 1904 on the file of the Principal District Munsif's Court, Amalapur).

One Narayanamurti instituted this suit (Original Suit No. 55 of 1904) on a mortgage bond, but died without issue during the pendency of the suit. His widow Ramalakshamma was brought on record as his legal representative and a preliminary decree for sale was passed in her favour on 15th December 1904. She transferred the decree on 4th February 1911 to one Narasayya, who filed an execution petition on 16th June 1911 for recognition of the transfer and for sale of the property. After notice to the judgment-debtors and the grandsons of Narayanamurti, who claimed to be entitled to the decree under the will of the latter, the transfer was recognized on 30th September 1911, and a final decree on the mortgage was passed in his favour on 30th January 1912. Against this order the grandsons preferred an appeal which was dismissed as incompetent. Thereupon, the grandsons filed a suit against the transferee (Narasayya) and the transferor, but the judgment-debtors were not made parties to the suit. A decree was passed on 14th April 1914 in favour of the plaintiffs (grandsons) declaring the right of the plaintiffs to execute the decree in Original Suit No. 55 of 1904 and restraining the transferee as well as the transferor by an injunction from "executing the decree or otherwise realizing the decree-debt." However, the transferee filed two execution petitions on 18th June 1914 and 22nd October 1914, and they were dismissed by the Court after notice to the judgment-debtors, as the transferee took no further steps. The grandsons filed the present application for execution on 23rd March 1916 in Original Suit No. 55 of 1904. The sixth defendant in the said suit, who was a puisne mortgagee, objected on the ground that the present application was barred by limitation. The District Munsif dismissed the application as barred; on appeal, the Subordinate Judge held that the application was not barred by limitation and remanded the application for due disposal. The sixth defendant (who was one of the judgment-debtors) preferred this Civil Miscellaneous Second Appeal.

C. Rama Rao for *P. Narayanamurti*, for the appellant.

V. Ramesam for *N. Rama Rao* for the respondent.

HARI KRISHNA-MURTI v. SURYA-NARAYANA-MURTI.

SPENCER, J.

SPENCER, J.—The question is whether the execution petition filed on 23rd March 1916 to execute the decree in Original Suit No. 55 of 1904 is in time and the answer to this question depends on whether the execution petitions filed on 18th June 1914 and 22nd October 1914 by the transferee decree-holder, M. Narasayya, were made in accordance with law. It is true that on those dates Narasayya was restrained from executing the decree or otherwise realizing the decree debt by reason of the decree obtained by the plaintiffs in Original Suit No. 835 of 1911, who are respondents in this appeal, and it is argued that as no execution could take place without an execution petition being presented to the Court, the restraint order would render any application made in that connexion by Narasayya illegal, as being in contravention of a decree of Court.

On the other hand, it is clear that the only person competent at that date to apply for execution was the transferee decree-holder, Narasayya, whose transfer had been recognized on 30th September 1911 in proceedings to which the grandsons of Narayanamurti, who are the respondents in this appeal, were parties. The respondents' prior application to be added as supplemental decree-holders had failed by the dismissal of their execution petition on 23rd October 1910, and they did not again apply to be placed on the record till 23rd March 1916. So that at the date when Narasayya filed his two execution petitions he was on the face of the decree the only person competent to execute it. The executing Court not having notice of the result of Original Suit No. 835 of 1911, had no concern with the rights of any other person other than the right of the person appearing on the face of the decree as the decree-holder, as it did not then appear that any other person had taken the decree-holder's place; see *Jasoda Deye* v. *Kistibash Dass*(1). As the Court was not then in a position to refuse to admit Narasayya's application, and as he acted in the interest of whosoever might ultimately be found entitled to execute the decree in the litigation then pending which terminated in the High Court's decree, dated 15th August 1917 in appeal against the decree in Original Suit No. 835 of 1911, I am of opinion that his application was a bona fide one made in accordance with law, and that the

(1) (1891) I.L.R., 18 Calc., 639.

District Judge was right in treating the present application of the respondents as saved thereby from becoming barred by limitation. As my learned brother is of the same opinion, the Lower Appellate Court's order returning the executing petition to the first Court for execution is confirmed, and the appeal will be dismissed with costs.

SPENCER, J.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The facts which have given rise to the question of law are these: One Narayanamurti, whom I shall hereafter call the testator, brought Civil Suit No. 55 of 1904 on a mortgage; he died *pendente lite*; his widow was placed on the record and obtained a preliminary decree. The testator left more than one will. There was litigation respecting the genuineness of these testamentary instruments, between the widow on the one hand and her daughters' sons who claimed as residuary legatees subject to the payment of a fixed sum to the widow. In the meantime, the widow transferred the decree to one Narasayya. On his application the final decree was passed on the 30th January 1912; he then applied to execute the decree but was resisted by the grandsons. The objection was overruled. The grandsons preferred an appeal against the order permitting Narasayya to execute the decree. It was dismissed *in limine* on the ground that as they were not on the record of the suit as legal representatives of the testator, they had no *locus standi* to prefer the appeal. This order is conclusive of the contention that they were also co-nominee parties to the decree by virtue of a previous infructuous application. After the dismissal of the appeal, the grandsons brought a regular suit in 1911 to which the widow and Narasayya were parties but not the judgment-debtor in the first suit. The prayers in the grandsons' suit were for a declaration that they alone were entitled to execute the decree and that Narasayya should be restrained by an injunction from executing it. This suit was decided in favour of the grandsons. The terms of the decree are important. It was in these terms:

"This Court doth order and declare that the defendants, or either of them, have no right to execute the decree in O.S. No. 55 of 1904 on the file of the Amalapur District Munsif's Court, that the plaintiffs are entitled to recover the said mortgage decree debt by executing the decree, and restrain the defendants by means of an

HARI KRISHNA-MURTI v. SURYA-NARAYANA-MURTI.

SESHAGIRI AYYAR, J.

injunction from executing the decree or otherwise realizing the decree amount."

This was passed on the 14th of April 1914. Against the decree in favour of the grandsons, Narasayya appealed to the High Court. Pending the decision in appeal and apprehending that the decree in the mortgage suit may become barred, he applied for execution on 18th June 1914 and on 22nd of October 1914 to the Court which passed the decree. They were dismissed and no money was realized by Narasayya. The grandsons applied on 23rd March 1916 to execute the mortgage decree. It was pleaded that the application was barred by limitation. The bar was sought to be saved by the two applications made by Narasayya in June and October 1914. The question is whether it is open to the grandsons, who are the respondents before us, to take advantage of these applications as steps in aid of execution. The point is free of authority. I am inclined to agree with Mr. Ramesam that the two applications saved limitation. It is common ground that there was no injunction directed to the Court which passed the decree nor against the judgment-debtor. Can it be said that the personal injunction against Narasayya rendered his applications illegal? Clause (5) of Article 182 of the Limitation Act provides that the application should be to the proper Court and should be in accordance with law. The applications were certainly to the proper Court, because the Munsif was not prohibited from executing the decree. They were in accordance with law, because there was no prohibition against applying to take a step in aid of execution. The decree in the respondents' suit which I have set out only prevented them from realizing moneys. The language is "from executing or otherwise realizing the moneys." The word 'executing' must be read *ejusdem generis* with realizing; and the word 'otherwise' makes this clear. The prohibition should be understood as applying to the recovery of the money and not as interdicting applications which had the effect of saving limitation.

The authorities quoted by Mr. Ramesam, namely, *Jasoda Deye* v. *Kistibash Dass*(1) and *Monmotho Nath Mittier* v. *Bakkal*

(1) (1891) I.L.R., 18 Calc., 639.

Chandra Jewary(1), show that so long as there is a person on the record as decree-holder, the Court is bound to entertain his application for execution. There has been no order removing Narasayya from this position until March 1916. In my opinion, therefore, the decree was alive in March 1916, and the application of the respondents was in time. Mr. Rama Rao argued that the personal restraint made the applications of Narasayya illegal. To whatever disabilities Narasayya might have exposed himself by applying, certainly the applications made by him were such as the executing Court was bound to entertain; therefore they were not illegal. In my opinion the civil miscellaneous second appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

M. P. M. R. M. N. RAMANATHAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

K. R. S. V. MUTHIAH CHETTY AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

1919, December, 2 and 3.

Minor—Guardian—Agent appointed by guardian—Liability of agent to account to minor—Settlement of accounts by arbitrator or mediator—Whether liable to be re-opened.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts even though he received properties belonging to the minor.

A settlement of account by arbitrators or mediators cannot be re-opened except on the ground of fraud.

APPEAL against the decree of K. A. KANNAN, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 98 of 1914.

The material facts appear from the Judgment of ABDUR RAHIM, J.

The Hon'ble the Advocate-General (*S. Srinivasa Ayyangar*) and *T. V. Muttukrishna Ayyar* for the appellant.

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(1) [1909] 10 C.L.J., 396 at p. 406.

* Appeal No. 97 of 1917.