APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

SITARAMAYYA, APPELLANT (SECOND DEFENDANT),

v.

GOPALAKRISHNAMMA AND AN OTHER, RESPONDENTS (PLAINTIFFS).*

1919, April, 28, 29.

Civil Procedure Code (XIV of 1882), sec. 248, clause (a)—Attachment under decree known to judgment-debtor—Application for sale more than a year after previous application—Sale without notice to judgment-debtor, validity of.

A sale of a judgment-debtor's property is not void for want of notice to him of the application for sale made more than a year after a prior application for execution, if the sale is held in pursuance of a subsisting attachment known to the judgment-debtor. *Raghunatha Das* v. *Sundar Das Khetri*, (1915) I.L.R., 42 Cal., 72 (P.C.), and *Shyam Mandal* v. *Satinath Banerjee*, (1917) I.L.R., 44 Calc., 954, distinguished.

APPEAL against the order of remand made by T. S. TYAGARAJA AYYAR, the Subordinate Judge of Cocanada, in Appeal Suit No. 92 of 1917, preferred against the decree of C. RANGANAYAKULU NAYUDU, the District Munsif of Cocanada, in Original Suit No. 106 of 1916.

This was a suit brought in 1916 by the plaintiffs (1) for a declaration that a Court auction concluded in favour of the defendants of certain family lands belonging to the plaintiffs and their deceased father, held in 1899 in execution of a decree of 1893 against the father, was null and void on the ground that no notice of the application for sale as required by section 248, clause (1), Civil Procedure Code of 1882, was served on the plaintiff's father, (2) for redemption of a mortgage executed by the plaintiff's father in favour of the defendants, and (3) for accounts. The first plaintiff attained majority within three years of the suit. The second plaintiff, his brother, was still a minor. The defendants pleaded, *inter alia*, that the proceedings in execution were regular, that the plaintiff's father was aware of the attachment under which the sale was held, that even if the notice under section 248 was not served, it did not vitiate the sale and that the suit was barred by limitation. The District Munsif

* Appeal Against Order No. 319 of 1918.

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dismissed the suit holding that want of notice did not vitiate the sale. On appeal the Subordinate Judge held that, though the plaintiff's father was given notice of the execution application for attachment of his property and was aware of the attachment under which the sale was eventually held, the sale was null and void, as no notice of the last application for sale (which was made more than a year after the previous application for sale) was given to the plaintiff's father. He accordingly reversed the decree of the first Court and remanded the suit for fresh disposal. The defendants appealed.

V. Ramesam and *C. Rama Rao* for appellant.

P. Somasundaram for first respondent.

ABDUR RAHIM, J.

JUDGMENT.—The whole question in this appeal is whether the suit to set aside the sale held on 29th April 1899 is barred by limitation. The suit was instituted about fifteen years from the date of the sale, and at the date of the sale the father of the plaintiff was living. Therefore the suit will be barred unless the case be treated as a case where the sale is to be regarded as null and void. The learned Subordinate Judge held that the sale was void inasmuch as no notice had been issued under section 248 of the old Civil Procedure Code. That section says that the Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or (*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made. The second clause has no application and the question is whether under the circumstances notice had to be issued under clause (*a*) and, if so, whether the non-issue of notice made the entire proceedings null and void. It is somewhat strange that there is no authority bearing directly upon the point which arises in this connexion. Here it appears that attachment was ordered on 1st December 1894 on an application made within one year of the date of the decree. But then this application which apparently asked not merely for attachment but also for sale was dismissed on 18th January 1895 for want of further prosecution. But it cannot be doubted that the dismissal of the application.

did not in any way affect the continuance of the attachment, and we must take it that the attachment subsisted until the date of the sale. After the first petition, exhibit H, several other applications were made—exhibits H series. The next two applications after exhibit H were made within one year of the decree, and admittedly no notice is required to be given of those applications under section 248. But the fourth application, exhibit H-3, was made more than a year after the decree and no notice was issued or served upon the judgment-debtor. It would appear from the finding of the Subordinate Judge that the judgment-debtor had left his village at Samalkot and was living at Vizianagram and as often happens in such cases notice was not properly served. So we may take it that the judgment-debtor did not receive any notice of the application for execution made subsequent to the attachment; but the attachment subsisted and the property was sold under the provisions of section 284 of the old Civil Procedure Code which says that any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. It may be observed that this section does not speak of any notice being given to the judgment-debtor before the property is actually sold. But if an application comes within the purview of section 248 notice has undoubtedly to be given to the judgment-debtor in the terms of that section, that is requiring him to show cause why the decree should not be executed against him. Much reliance has been placed on behalf of the respondent on a ruling of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri*(1), but in that case the property of the judgment-debtor had become vested in the Official Assignee after the attachment but before the sale. Their Lordships found upon the facts that the Official Assignee had not been properly brought before the Court and no order binding on him had been obtained, and it was upon that ground that they held that the Court had no jurisdiction to sell the property so as to bind the Official Assignee. The property having vested in the

(1) (1915) I.L.R., 42 Calc., 72 (P.C.).

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Official Assignee it was necessary that he should be properly brought before the Court, otherwise an order for sale would not bind him so as to affect the rights of other creditors. That comes clearly under clause (*b*) of section 248. Their Lordships do not lay down that the absence of notice in any other case coming under section 248 would make the proceedings in execution null and void, being held without jurisdiction. The ruling of the Calcutta High Court in *Shyam Mandal* v. *Satinath Banerjee*(1), by MUKERJEE and CUMING, JJ., has also been relied on before us. The learned Judges however do not appear to have noticed that in the Privy Council case the Official Assignee in whom the insolvent judgment-debtor's property had vested was not properly before the Court, while in the case they had to deal with the proper parties were apparently represented in the proceedings. Further it was not a case where there was a subsisting attachment. It has been repeatedly pointed out that there is a distinction in law between an application for execution and an application for taking a step in aid of execution ; vide *Venkataramanamma* v. *Purushotham*(2) and *Subbachariar* v. *Muthuveeran Pillai*(3). Here the object of the application made after the attachment was to take a step in furtherance of an execution already initiated, and even if we assume that such an application should comply with the provision of section 235 of the old Civil Procedure Code the further question remains whether failure to give notice of an application made in order to bring the property to sale after attachment goes to the root of the jurisdiction of the executing Court or is merely an irregularity making the sale liable to be set aside under section 311 of the old Civil Procedure Code. It seems to us difficult to hold when there is a subsisting attachment that a Court proceeding to sell the property in pursuance of that attachment would be acting without jurisdiction if no notice was given of the application for an order for sale when the property has been attached in accordance with law. It is not contended that the property in dispute was not so attached in this case. It may be presumed that the judgment-debtor knew of the attachment, and as he was properly before the Court in the execution proceedings the absence of

(1) (1917) I.L.R., 44 Calc., 954. (2) (1901) I.L.R., 24 Mad., 188.
(3) (1913) I.L.R., 36 Mad., 553.

notice of any further application can at the worst amount only to an irregularity. It seems to us therefore that the sale in this case cannot be said to be null and void.

Then the learned pleader for the judgment-debtor further argued that this is a case of fraud and therefore the suit would be in time as the plaintiff came within three years of the date, when the fraud came to his knowledge. No such case was really sought to be made in the Court of trial. Issue does not raise any question of fraud and the plaint, so far as we can judge from the summary of it, does not contain any specific allegations of fraud. The Subordinate Judge no doubt in one or two places in his judgment says that the judgment-creditor acted fraudulently in not serving the judgment-debtor with notice. But in this he seems to have gone further than the issues properly raised in the case. As the sale was not void and as there was no case of fraud, the suit is clearly barred as it was instituted 15 years after the date of the sale which, as already mentioned, took place in the lifetime of the plaintiffs' father.

The result is that the appeal must be allowed, the judgment of the Subordinate Judge reversed, and that of the District Munsif restored with costs here and in the lower Appellate Court.

BAKEWELL, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

RAMASAMI NAIKEN AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATASAMI NAIKEN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1919, July, 21.

Civil Procedure Code (V of 1908), sec. 35—Costs—Change in law, effect of, on award of costs.

It is a good cause for depriving the successful respondent of his costs of the appeal that the law has been altered since the filing of the appeal.

* Second Appeal No. 1147 of 1918.