SUBBA GOUNDAN v. KRISHNAMACHARI.

without legal necessity, in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by KRISHNASWAMI AYYAR, J., in *Kandasami Asari* v. *Somaskanda Ella Nidhi, Ltd.*(1), that a sale without necessity is incapable of ratification by the other co-parceners. Following *Ithiryu Nath Chaube* v. *Narsingh Tiwari*(2), we think the claim for mesne profits should be limited to the period from the date of suit as there was no repudiation before the suit. There will be a declaration that the defendants are entitled to the half share of the vendor which they will be at liberty to work out by a suit for partition. The decree of the Subordinate Judge will be modified accordingly.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Venkatasubba Rao.

1921, December 23.

KUPPUSWAMI CHETTIAR (PETITIONER—PLAINTIFF), APPELLANT,

v.

RAJAGOPALA AIYAR (RESPONDENT—DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), article 182 (5)—Judgment-debtor's petition to enter satisfaction of decree—Objection statement of decree-holder, whether step in aid, when no execution application pending—Suspension of limitation.

A statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the

(1) (1912) I.L.R., 35 Mad., 177. (2) (1917) I.L.R., 39 All., 61.

* Appeal Against Appellate Order No. 12 of 1921.

decree is not a step in aid of execution, especially when no application for execution was then pending. *Umesh Chunder Dutta* v. *Soonder Narain Deo* (1889) I.L.R., 16 Calc., 747. *Raghunandun Pershad* v. *Bhugoo Lall* (1890) I.L.R., 17 Calc., 268 and *Raghunandun Misser* v. *Kallydut Misser* (1896) I.L.R., 23 Calc., 690, followed.

An application to be a step in aid of execution should be one made in a pending execution application. RAMESAM, J.'s view in *Sankara Nainar Pillai* v. *Thangamma* (1922) I.L.R., 45 Mad., 202, dissented from.

The time during which the judgment-debtor's application to enter satisfaction of the decree was pending cannot suspend the period of limitation for application for execution of the decree: *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (1916) I.L.R., 43 Calc., 660, distinguished.

APPEAL against the order of B. SUBBA RAO, Subordinate Judge of Tanjore, in Appeal Suit No. 92 of 1920 (Appeal Suit No. 117 of 1920 on the file of the District Court, Tanjore) preferred against the order of S. K. RAMASWAMI SOMAYAJIYAR, Acting District Munsif of Tiruvadi, in Execution Petition No. 368 of 1919 in Original Suit No. 174 of 1916.

The facts are set out in the judgment. The decree-holder whose application for execution was dismissed by both the lower Courts as barred by limitation preferred this appeal to the High Court.

T. M. Krishnaswami Ayyar for appellant.—Exhibit E is a step in aid of execution: *Dharanamma* v. *Subba*(1), *Abdul Kader Rowther* v. *Krishnan Malaval Nair*(2), *Lakhi Chand* v. *Pear Chand*(3), *Masilamani Mudaliar* v. *Sethuswami Ayyar*(4), *Pacharaj Nyahalchand* v. *Babaji Tukaram*(5), *Laxmiram Lallubhai* v. *Balashankar Veniram*(6).

An application to be a step in aid of execution need not be made in a pending execution application: *Sankara*

(1) (1884) I.L.R., 7 Mad., 306
(2) (1915) I.L.R., 38 Mad., 695, 697.
(3) (1917) 39 I.C., 106.
(4) (1918) I.L.R., 41 Mad., 251.
(5) (1914) I.L.R., 38 Bom., 47.
(6) (1915) I.L.R., 39 Bom., 20.

KUPPUSWAMI CHETTIAR v. RAJAGOPALA AIYAR.

Nainar Pillai v. *Thangamma*(1). The time during which Execution Application No. 16 of 1918 was pending suspends limitation: *Hemendra Mohon Khasnobis* v. *Dharaninath Chanda Roy*(2), *Lakhan Chunder Sen* v. *Madhu Sudan Sen* 3), *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(4). *Muthu Korakkai Chetti* v. *Madar Ammal*(5) is distinguishable.

S. Subrahmanya Ayyar for the respondent.—Exhibit E is not a step in aid: *Sreenivasa Chariar* v. *Ponnusawmy Nadar*(6), *Brij Nath Sahai Singh* v. *Hari Charan Ray*(7), *Umesh Chunder Dutta* v. *Soonder Narain Deo*(8), *Raghunandun Pershad* v. *Bhugoo Lall*(9), *Raghunandun Misser* v. *Kallyut Misser*(10). An application to be a step in aid must be made in a pending execution application. There can be no suspension of limitation apart from the Limitation Act: *Muthu Korakkai Chetti* v. *Madar Ammal*(5).

AYLING, J.

AYLING, J.—The sole question for disposal in this appeal is one of limitation. Appellant is the decree-holder in Original Suit No. 174 of 1916 on the file of the District Munsif of Tiruvadi and the Appeal arises out of his Execution Petition No. 368 of 1919 filed on 8th October 1919. The decree is dated 2nd May 1916; and the only prior execution petition presented by appellant was dismissed on 7th September 1916. The present application is admittedly time-barred, unless appellant can claim a new starting point for limitation under Article 182 (5) of the Indian Limitation Act by showing that he applied within three years of the prior

(1) (1922) I.L.R., 45 Mad., 202.
(2) (1920) 25 C.W.N., 374, 378.
(3) (1908) I.L.R., 35 Calc., 204, 218.
(4) (1916) I.L.R., 43 Calc., 660 (P.C.), 663.
(5) (1920) I.L.R., 43 Mad., 185 (F.B.)
(6) (1905) I.L.R., 28 Mad., 40.
(7) (1918) 48 I.C., 187.
(8) (1889) I.L.R., 16 Calc., 747.
(9) (1890) I.L.R., 17 Calc., 268.
(10) (1896) I.L.R., 23 Calc., 890.

execution petition "to take some step in aid of execution." There are two petitions [Exhibits E and F and a plaint in another suit (Exhibit C) which, as appellant contends, should be regarded as such applications]. I shall deal with them in order beginning with Exhibit E.

On 3rd January 1918 the judgment-debtor (respondent) filed a petition, Execution Application No. 16 of 1918, for entering satisfaction of the decree, which he claimed to have discharged. On this appellant filed a "counter-statement," Exhibit E, dated 1st February 1918, denying receipt of the decree amount, and asking that the petition should be dismissed. (It was eventually dismissed on 16th August 1918 owing to respondent's default).

It is argued that the entry of satisfaction asked for by respondent would have effectively prevented the execution of the decree and that for this reason the counter-statement, Exhibit E, should be treated as an application to take a step in aid of execution of the decree.

The argument really amounts to this: that any application which, if successful, would facilitate execution or prevent an obstacle being raised to the execution of a decree, whether an application for execution is pending or not, should be treated as coming within the words quoted. Such a construction seems to me altogether unwarranted and to fail to give effect to the words of the article. The article classes together an application for execution and an application to take some step in aid of execution: and the latter words appear to be intended to cover an application which is not an initial application for execution, but is an application to take some step to advance an execution proceeding, which is already pending, e.g., application to bring to sale properties already under attachment.

KUPPUSWAMI CHETTIAR v. RAJAGOPALA AIYAR.

AYLING, J.

The petition, Exhibit E, may tend to prevent the Court placing an obstacle in the way of future execution of the decree : but it does not ask the Court to take any step in aid of execution. Supposing it to be successful, execution of the decree is not further advanced than it was before the petition was presented.

This is the view which has been consistently taken by the Calcutta High Court [vide *Umesh Chunder Dutta* v. *Soonder Narain Deo*(1), *Raghunandun Pershad* v. *Bhugoo Lall*(2) and *Raghunandun Misser* v. *Kallgdut Misser*(3)] and it is one in which I respectfully concur, as based on the only natural interpretation of the article.

We have been referred by the learned Vakils on both sides to numerous other cases in which the interpretation of this article has been in question. Some of these call for consideration; but I propose to at once eliminate the class which deals with applications made in the course of a pending execution petition, of which *Abdul Kader Rowther* v. *Krishnan Malaval Nair*(4) is a fair example, dealing with an application by the decree-holder for adjournment of execution proceedings in order to enable him to produce further evidence. Which of such applications should be treated as falling within the article has become a very difficult question to decide, if effect is to be given to all the views expressed in the different judgments. It seems to me, if I may say so with respect, that in some cases the Courts in their anxiety to prevent decree-holders being deprived of the fruits of their decrees by the " technical " plea of limitation have stretched the article to such a point that it has become difficult for the most experienced lawyer (to say nothing of layman) to say when many decrees will become time-barred. In a matter like limitation

(1) (1889) I.L.R., 16 Calc., 747.
(2) (1890) I.L.R., 17 Calc., 268.
(3) (1896) I.L.R., 23 Calc., 690.
(4) (1915) I.L.R., 38 Mad., 695, 697.

certainty is the first desideratum : it matters comparatively little whether a decree-holder is allowed 3 years or 10 to execute his decree as long as he knows for certain when the time allowed him will come to an end.

But whatever case may be made out for an application made in connexion with a pending execution petition as one for taking a step in aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing. A man cannot be said to take some step in aid of a petition which has not been initiated.

The main case relied on by appellant is *Laxmiram Lallubhai* v. *Palashankar Veniram* (1), in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step in aid of execution. As a matter of fact in that case an execution petition filed by the objector apparently was pending at any rate at the time the insolvency petition was filed : but apart from this it seems to me, with all respect, that the reasoning of the learned Judges does not justify such an extension of the article, and I observe that they expressly say they do not seek to lay down any general principle, and desire to confine their judgment to the unusual facts before them.

In the other case, *Sankara Nainar Pillai* v. *Thangamma* (2), RAMESAM, J., certainly says there is no warrant for the view that an application to take a step is aid of execution should be made "in execution," meaning apparently while an execution is pending. But he gives no reasons and does not discuss the point : and, with all respect, I feel compelled to dissent.

I must therefore hold that the counter-petition, Exhibit E, is not an application to take a step in aid of execution.

(1) (1915) I.L.R., 39 Bom., 20. (2) (1922) I.L.R., 45 Mad., 202.

KUPPUSWAMI CHETTIAR v. RAJAGOPALA AIYAR.

AYLING, J.

Exhibits F and C may be more briefly disposed of. Exhibit F is merely a petition by both parties to hear Execution Application No. 16 of 1918 along with another suit between the parties (Original Suit No. 452 of 1917) : and it is conceded that if Exhibit E cannot be relied on to save limitation, Exhibit F stands in no better position.

Nor does Exhibit C. This is the plaint filed by appellant in the last-mentioned suit seeking to set aside a settlement deed executed by respondent in respect of certain immovable properties as void under section 53 of the Transfer of Property Act. The present execution petition is for attachment and sale of moveable property, to which that suit had no application. I cannot see how by any stretch of reasoning the presentation of this plaint could be treated as an application to take a step in aid of execution of the decree in Original Suit No. 174 of 1916.

An alternative contention put forward by appellant is that he is entitled to ask that the time during which Execution Application No. 16 of 1918 was pending should not be counted against him. This plea does not profess to be based on anything in the Limitation Act, but reliance is placed on the decision of a Bench of three Judges of the Calcutta High Court: *Lakhan Chunder Sen* v. *Madhu Sudan Sen*(1), approved on appeal to the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(2), in which it appears to have been held that the relaxations of the ordinary law of limitation provided in the Limitation Act are not exhaustive and that in the case then under consideration the plaintiffs were entitled to count in their favour the period during which they were precluded from bringing their suit by reason of the existence of a decree in a previous suit which

(1) (1908) I.L.R., 35 Calc., 209, 218. (2) (1916) I.L.R., 43 Calc., 660 (P.C.), 663.

covered the same matter. The authority on the first point may be allowed: but in considering whether any concession should be allowed to the appellant before us, the difference in the facts of the two cases deprives the decision of all force. In that case stress was laid on the fact that the prior decree

> "so long as it stood undischarged was susceptible of execution at the hands of the present appellants (plaintiffs) and whilst that decree existed it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit."

For this reason, because the plaintiff's right to bring the action was absolutely suspended as long as the prior decree remained in force, this period was not allowed to count against him for purposes of limitation.

In the present case no such consideration arises. The pendency of Execution Application No. 16 of 1918 was no bar to the institution of execution proceedings by appellant. He may have deemed it good policy not to start fresh proceedings until Execution Application No. 16 of 1918 was disposed of (which happened on 16th August 1918) but that is a very different matter. If relief against limitation is to be allowed in cases not provided for in the Limitation Act, surely this should only be done in cases where justice and equity clearly require it. It is not so here.

Our attention was also drawn to *Muthu Korakkai Chetty* v. *Madar Ammal*(1). The decision in that case turned on a construction of article 180, Limitation Act, with which we have no concern: but the principle of "suspension" and the question of whether the Privy Council intended to lay down any rule as to the exhaustiveness of the exemptions contained in the

(1) (1920) I.L.R., 43 Mad., 185. (F.B.)

KUPPUSWAMI CHETTIAR v. RANGOPALA AIYAR.

AYLING, J.

Limitation Act were no doubt discussed and were in fact the points raised in the reference. It is sufficient to say that the judgments of all the learned Judges except SADASIVA AYYAR, J., tend against appellant's contention : and that none of them militate against the view I have expressed above, viz., that even if it is open to us to allow a suspension of time not provided for in the Limitation Act, there is no justification for doing so here.

I would dismiss the Appeal with costs.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J :—I agree.

N.R.