APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924, February 22.

KALEPALLI RAJITAGIRIPATHY (FIRST RESPONDENT), APPELLANT,

v.

KALEPALLI BHAVANI SANKARAM (PETITIONER),

AND

KALEPALLI KUMARASAMY (SECOND RESPONDENT), RESPONDENTS.*

Decree—Execution—Limitation—Limitation Act (IX of 1908), s. 15 and art. 182—Transfer of decree—Application by transferee for execution—Application stayed by attachment of decree by plaintiff in another suit—Attachment before judgment—Subsequent application by attaching decree-holder for transmission of decree to another Court—Notice to judgment-debtor—Order for transfer passed—Plea of limitation not taken in that application—Subsequent application for execution—Plea of limitation, whether res judicata*—Application by assignee of decree, whether a step in aid of execution—Stay of execution of decree by attachment before judgment, whether a stay under section 15, Limitation Act—Deduction of time.*

A decree was passed on 27th March 1918; an application was made by certain transferees of the decree on 26th July 1919 for recognition of their transfer, and for execution; their petition was dismissed in consequence of an order of attachment passed on the same date and obtained before judgment in another suit filed by the first respondent against the original decree-holders; on 4th April 1922, the first respondent, who had obtained his decree on 22nd December 1921, applied for the transmission of the former decree from the Sub-Court which had passed it to the District Court for execution, and an order for transfer of the same was made after notice to the judgment-debtors who did not object to the transfer on the ground that execution of the decree was then barred by limitation; on 26th April 1922, the first respondent applied for

* Civil Miscellaneous Appeal No. 60 of 1923.

RAJITAGIRI-PATHY v. BHAVANI SANKARAM.

execution of the decree in the latter Court; on the judgment-debtors pleading the bar of limitation,

Held, that, even in an application for transfer of the decree to another Court for execution, it is open to the judgment-debtor to plead limitation in bar of execution, and in fact he ought to do so; and if he omits to raise the plea and the order for transfer is made, he cannot raise the bar of limitation in a subsequent application for execution filed within three years of the previous application for transfer of the decree.

Mungul Pershad Dichit v. *Grija Kant Lahiri* (1882) I.L.R., 8 Calc., 51 (P.C.); and *Raja of Ramnad* v. *Velusami Thevar*, (1921) 40 M.L.J., 197 (P.C.), applied;

that the application by the transferee-decree-holders for recognition of their transfer and for execution was a step in aid of execution of the decree, even though the right of the transferees had been negatived in subsequent proceedings; *Sreepada Brahmayya Pantulu* v. *Parasuramayya*, (1902) 12 M.L.J., 348, followed; that in the case of an attachment before judgment, of a decree, unlike the case of an attachment of a decree by a decree-holder or of a book-debt, the order of attachment absolutely prohibits the execution by anybody of the decree attached and amounts to an injunction within the terms of section 15 of the Limitation Act, and the decree-holder is entitled under that section to a deduction of the period during which the injunction was in force; and that consequently the present application for execution was not barred by limitation.

APPEAL against the order of P. C. LOBO, the District Judge of Kistna, in Execution Petition No. 60 of 1922 in Original Suit No. 66 of 1913 on the file of the Court of the Subordinate Judge of Masulipatam.

In Original Suit No. 66 of 1913 on the file of the Sub-Court, Masulipatam, a decree was passed for payment of money and other reliefs in favour of the plaintiff and fourteenth defendant therein, and the decree was affirmed on appeal on the 27th March 1918. The decree-holders therein transferred their decrees in favour of their wives, and the latter applied on 26th July 1919 to the Sub-Court for recognition of their transfer and for execution of the decree. On the same

date, at the instance of one Bavani Sankaram, the present first respondent, who had filed a suit (Original Suit No. 372 of 1919 on the file of District Munsif's Court, Masulipatam) against the original decree-holders, the District Munsif issued a prohibitory order to the Sub-Court for attachment of its decree; and the attachment was made on 28th July 1919 before judgment in the suit in the Munsif's Court; in consequence of this attachment, the application of the transferee-decree-holders filed in the Sub-Court was dismissed without inquiry into the merits of the transfer and without issuing notices to the judgment-debtors and original decree-holders. The District Munsif passed a decree on 22nd December 1921 in favour of the plaintiff in Original Suit No. 372 of 1919 against the original decree-holders in the Sub-Court suit. The first respon dent, who had obtained his decree in Original Suit No. 372 of 1919 and had attached the decree in Original Suit No. 66 of 1913 before judgment as already stated, applied in Original Suit No. 66 of 1913 on 4th April 1922, for transfer of the Sub-Court decree to the District Court for purposes of execution of the said decree; and the decree was transmitted to the District Court after notice under Order XXI, rule 22, had been issued to the judgment-debtors, who are the present appellant and second respondent in the High Court. The judgment-debtors did not take, in answer to the petition for transfer of the decree, the plea that an application for the execution of the decree was barred by limitation and the Court passed the order for transfer of the decree, without considering the question of limitation. After the order had been passed by the Sub-Court the attaching decree-holder (first respondent) made the present application to the District Court for execution of the decree on the 26th April 1922. The judgment-debtor pleaded

RAJITAGIRI-PATHY v. BHAVANI SANKARAM.

the bar of limitation. The District Judge held that the application was not barred by limitation on two grounds, viz., (1) that the question whether the execution application was not barred was *res judicata* by reason of the order of the Sub-Court on the previous application for transmission of the decree to the District Court, and (2) that the previous application by the transferees of the decree for recognition of their transfer and for execution, was a valid application in accordance with law and was a step in aid of execution of the decree. He overruled the other grounds relied on by the decree-holder, viz., that the time during which the decree was stayed by reason of the attachment should be deducted under section 15 of the Limitation Act, as well as the ground that a notice was issued on a previous application for execution filed by the first respondent before he obtained his decree in Original Suit No. 372 of 1919. The first defendant preferred this appeal.

T. Ramachandra Rao for Appellant.—The question of limitation is not *res judicata* by reason of the order on the application for transmission of the decree. All that is necessary to be inquired into in such an application is whether the decree is not satisfied and such like matters. The question of limitation and executability of the decree need not be gone into at that stage. Though the judgment-debtor might have raised the question of limitation, he is not bound to raise it at that stage. Explanation 4 to section 11, Civil Procedure Code, which is a rule of constructive *res judicata*, is not applicable to execution proceedings. The decision in *Sreepati Charan Chowdhury* v. *Shamaldhone Dutt*(1) shows that it is not permissible to the judgment-debtor to raise in such an application the plea of limitation in bar of execution. An application for transmission of decree

(1) (1912) 15 C.L.J., 123.

is not an application for execution. See also *Chutterpat Singh* v. *Rai Bahadur Saita Soomarimull*(1). This case is approved in *Pierce Leslie* v. *Perumal*(2). Notice under Order XXI, rule 22, should be issued by the executing Court, and not by the Court transmitting the decree. Assuming the transmitting Court is competent to decide, it is not bound to decide the question of limitation. Constructive *res judicata* is not applicable to execution proceedings. See *Kalyan Singh* v. *Jagan Prasad*(3) and *Ramchandra* v. *Shriniwas*(4). The decision of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(5) is distinguishable as there both the petitions were petitions for execution. *2nd point.* The application of the assignee-decree-holders is not a step in aid of execution, because there was no pending application for execution. See *Kuppuswami Chettiar* v. *Rajagopala Aiyar*(6).

P. Somasundaram for respondent.—The application for execution of the assignee-decree-holder operates as a step in aid of execution. The application of assignees on 26th July 1919 is a step in aid of execution. See *Ramanuja Jeer Swami* v. *Secretary of State*(7). Section 15, Limitation Act, applies. The decree-holder is entitled to deduction of time from 28th July 1919 (the date of attachment of decree) to 22nd December 1921, (date of decree obtained by the first respondent in Original Suit No. 372 of 1919). Under Order XXXVII, rule 7, the attachment before judgment operates as a stay of execution. See Order XXI, rule 53, and Form 223, Appendix C, Civil Procedure Code.

The case in *Rangaswami Chetti* v. *Thangavelu Chetti*(8) is distinguishable, as it is a case of attachment

(1) (1916) 20 C.W.N., 889 (F.B.).
(2) (1917) I.L.R., 40 Mad., 1069 (F.B.)
(3) (1915) I.L.R., 37 All., 589.
(4) (1922) I.L.R., 46 Bom., 467.
(5) (1882) I.L.R., 8 Calc., 51 (P.C.).
(6) (1922) I.L.R., 45 Mad., 466.
(7) (1910) 7 M.L.T., 241.
(8) (1919) I.L.R., 42 Mad., 637.

RAJITAGIRI-PATHY v. BHAVANI SANKARAM.

of a simple debt. Attachment in such a case does not prevent a suit. There is a distinction between attachment of a debt and of a decree. *Shib Singh* v. *Sita Ram* (1) and *Beti Maharani* v. *The Collector of Etawah*(2) are cases of attachment of debts. *Unni Koya* v. *Umma*(3).

T. Ramachandra Rao in reply.—The decisions of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(4) and in *Raja of Ramnad* v. *Velusami Tevar*(5) are not applicable to the present case, as they were cases in which the previous application was one for execution, but not so in the present case.

The application by assignees of the decree is not valid as a step in aid of execution, because the assignment was held to be invalid in execution proceedings and in suit. Benamidar cannot execute the decree. See *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(6) [*Somasundaram* for appellant referred to *Vaitheswara Aiyer* v. *Srinivasa Raghava Iyengar*(7) and to *Gur Narayan* v. *Sheo Lal Singh*(8) as laying down that a benamidar is competent to execute a decree].

JUDGMENT.

This appeal relates to the execution of a decree dated 27th March 1918. On 26th July 1919 the transferee-decree-holders applied for recognition of their transfer and for execution. However in consequence of an attachment of the decree, this petition was dismissed. The next petition was put in on 4th April 1922 asking for the transmission of the decree to the District Court for execution, and on 26th April 1922 the present execution petition was filed. It was contended that the present petition was barred by limitation, but four grounds were

(1) (1891) I.L.R., 13 All., 76.
(2) (1895) I.L.R., 17 All., 198 (P.C.).
(3) (1912) I.L.R., 35 Mad., 622.
(4) (1882) I.L.R., 8 Calc., 51 (P.C.).
(5) (1921) 40 M.L.J., 197 (P.C.).
(6) (1889) I.L.R., 16 Calc., 364.
(7) (1919) I.L.R., 42 Mad., 348 (F.B).
(8) (1918) 46 I.A., 1.

urged by the decree-holder for allowing execution. The District Judge has held that two of these grounds were valid and has ordered execution to proceed. Now, this appeal is filed by the first defendant, the judgment-debtor.

The first ground taken is that the plea of limitation is *res judicata* by reason of the order on the application of 4th April 1922 directing the transmission of the decree to the District Court. It has been held in the Calcutta Court in *Sreepati Charan Chowdhury* v. *Shamaldhone Dutt*(1) and in *Chutterpat Singh* v. *Rai Bahadur Saita Soomarimull*(2), that, when an order for transmission of the decree is made, no question of limitation is decided and therefore such an order does not amount to *res judicata* on the question of limitation. In fact, in the former case, MUKERJEE, J., held that the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation; but, apparently no notice was issued to the judgment-debtor under section 248 of the Code of Civil Procedure: the Court held further that, even though notice under section 248 is issued, it is not competent for a judgment-debtor at that stage to contend that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous as being barred by limitation. In the judgment no authority is given for this proposition of law and possibly it is based upon the rules of the Calcutta High Court, which do not require the issue of a notice to the judgment-debtor in an application for transmission of the decree. On the other hand, in Madras, under rule 161 (3) of the Civil Rules of Practice, a notice should be issued and a notice was accordingly issued in this case. It is now urged for the respondent that the judgment-

(1) (1912) 15 C.L.J., 123. (2) (1916) 20 C.W.N., 889 (F.B.).

RAJITAGIRI-PATHY v. BHAVANI SANKARAM.

debtor had an opportunity of appearing and pleading that the application was barred by limitation, and it would seem that, when there was that opportunity, section 11 explanation (iv), would be applicable and that the question would be *res judicata* because it was one which might and ought to have been put forward to show that the decree was not one that could be executed. In fact in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(1), it was held that, where an execution petition was barred by limitation but execution had been ordered to proceed, it was not open to the judgment-debtor in a subsequent application to plead that the former application was barred by limitation. Similarly in *Raja of Ramnad* v. *Velusami Tevar*(2) the Privy Council held that, when an assignee of a decree applied to be brought on the record and to have the decree executed, execution was allowed although the judgment-debtor had raised the plea that execution was barred by limitation. In the order allowing execution the plea of limitation was not dealt with specifically, but it was held that in a subsequent application the plea of limitation could not be urged, for it must be deemed to have been decided in the order on the former application. In that case the plea was raised in the first proceedings, but their Lordships remark in the judgment (at page 200), "It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it. No appeal was brought from the order then made and therefore it was not competent for the Subordinate Judge to admit the plea on the subsequent proceedings." It would appear from this that, even in an application for transfer of a de it is open to the judgment-debtor to plead limitation and

(1) (1882) I.L.R., 8 Calc., 51 (P.C.). (2) (1921) 40 M.L.J., 197 (P.C.).

in fact he ought to do so. If the decree is barred by limitation, the transfer of it to another Court is a mere infructuous proceeding which ought not to be taken and, therefore, if a valid plea of limitation is available, it should be urged in order to prevent multiplicity of proceedings. In this view we think that the District Judge's order in the present case was correct.

The second ground on which the District Judge allowed execution is that the petition put in on 26th July 1919 was a step in aid of execution, and, being less than three years before the present application, the latter is not barred. The application of 26th July 1919 was one put in by the transferee-decree-holders to recognize the transfer and to execute the decree in certain methods specified in the petition. The petition was dismissed because execution of the decree had been stayed and it appears that in subsequent proceedings the right of those transferee-decree-holders has been negatived. At the time the application was made they were transferee-decree-holders by assignment from the original decree-holders and as such the proper persons to execute the decree; it was held in *Sreepada Brahmayya Pantulu* v. *Parasuramayya*(1) that such an application as this would have the effect of saving the bar of limitation. The transfer in that case was effected by a decree of Court, whereas in the present case the transfer is effected by an assignment by the parties, but this cannot affect the question whether the application was one made in accordance with law. Until the assignment had been held to be invalid, the transferees were the persons who had title to execute the decree. On this ground also we think the District Judge was right.

(1) (1902) 12 M.L.J., 348.

RAJITAGIRI-PATHY v. BHAVANI SANKARAM.

The District Judge has rejected the third ground, namely, that limitation is saved under section 15 of the Limitation Act and he has based his decision on *Ranga-swami Chetti* v. *Thangavelu Chetti*(1). In that case, however, the attachment was of a book-debt and it is clear that an attachment of a book-debt does not operate as an injunction within the meaning of section 15 of the Limitation Act. When a decree is attached the form of attachment is given in Appendix E, forms Nos. 22 and 23, and, in accordance with those forms, there would not really be any injunction against execution, for the attaching decree-holder can execute the decree himself; but, in the present case the attachment was not by a decree-holder, but it was an attachment before judgment, and consequently the order issued by the Court attaching the decree absolutely prohibited the execution of the decree by anybody, as will be seen by a reference to the attachment order. This order clearly amounts to an injunction and it is not denied that, if the period during which that injunction was in force be deducted, the present application would be within time.

For all these reasons we think that the present petition is not barred by limitation and therefore dismiss this appeal with costs.

K.R.

(1) (1919) I.L.R., 42 Mad., 637.