APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1924, October 1.

RAMASAMI *alias* PALUNNA NATHAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

M. P. M. MUTHAYYA CHETTY (RECEIVER, PLAINTIFF), RESPONDENT.

Suit on judgment, maintainability of—Suit maintainable, when judgment is not enforceable in execution, but not when judgment is executable—Civil Procedure Code (V of 1908), sec. 47—Limitation Act (IX of 1908), art. 122—Suit for dissolution of partnership—Decree creating new right—Enforceable by suit—Limitation—Cause of action.

In India it is settled law that no action lies on an *executable* judgment, the only remedy being execution, and this principle is embodied in section 47, Civil Procedure Code, but where a judgment creates a new obligation without providing for its execution but indicating a suit as the only method of enforcing it, a suit on the judgment to enforce the obligation is maintainable.

The period of limitation applicable to such a suit is article 122 of the Limitation Act (IX of 1908).

APPEAL against the decree of T. M. FRENCH, Subordinate Judge of Ramnad, in Original Suit No. 13 of 1920.

The plaintiff sued to recover a sum of money from the defendant under the judgment and decree in a previous suit (Original Suit No. 143 of 1909), instituted for the dissolution of a partnership. The preliminary decree in that suit was passed on 27th October 1909, declaring the partnership dissolved from the date of the plaint (4th January 1909) and appointing a Commissioner to take accounts. The Commissioner reported that a sum of Rs. 2,611-6-3 was due to the partnership from the first defendant. The final decree was passed on the 25th

* Appeal No. 136 of 1922.

November 1910. Paragraph 6 of the final decree was as follows :—

"It is, therefore, ordered that the above-referred report of the Commissioner be confirmed, that the first defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that in default of such payment, the fifth plaintiff is appointed Receiver to realize and collect the said amount with power to bring and defend suits in his own name, to grant receipts, and generally to act as the owner thereof might act, that the amount so realized and collected be paid into Court, and that out of the said amount the cost referred to in paragraph 5 of the order be paid out of Court, and the balance be distributed amongst partners in the proportion of shares held by them as set out in the preliminary decree."

This decree was confirmed on appeal and on second appeal on 5th February 1917. On an application for execution, filed in 1914 (E.P. No. 309 of 1914), the Subordinate Judge held that the decree was not enforceable in execution. He observed as follows :—

"As the decree stands it appears to me that the Receiver (fifth plaintiff) has to sue the first defendant for the money due by him to the partnership, and that he cannot recover the amount in execution as there is nothing in the decree to the effect that the first defendant is to pay the sum to the petitioner (fifth plaintiff)."

The fifth plaintiff (Receiver) instituted the present suit on 4th February 1920 to recover the said amount with interest declared in the previous decree to be due from the first defendant therein. The Subordinate Judge decreed the suit. The defendants appealed.

A. Krishnaswami Ayyar and *M. Patanjali Sastri* for appellants.

K. Bhashyam Ayyangar for respondents.

JUDGMENT.

The facts of this appeal may be briefly stated. The plaintiff, the first defendant's father, and two others carried on a partnership business at Zanzibar.

RAMAS AMI v. MUTHAYYA CHETTY.

Original Suit No. 143 of 1909 was filed in the Subordinate Court of Madura (East) for its dissolution. In that suit, the present plaintiff was the fifth plaintiff and the father of the present first defendant was the first defendant. A preliminary decree was passed on 27th October 1909 and a Commissioner was appointed. The Temporary Subordinate Court of Ramnad, to whose file the suit was then transferred, confirmed the report of the Commissioner. Paragraph 6 of the order confirming the report runs as follows:—"It is, therefore, ordered that the first defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that in default in such payment, the fifth plaintiff is appointed Receiver to realize and collect the said amount with power to bring and defend suits in his own name," etc. (see Exhibit D). The final decree (Exhibit E) of the Subordinate Court was passed on 14th October 1911. It says "that out of the amount collected by the fifth plaintiff as Receiver in realizing the only item of assets of Rs. 2,611-6-3 due from the first defendant, he (the fifth plaintiff) do take, etc." There was an appeal to the District Court and the High Court, and the Subordinate Court's decree was finally confirmed by High Court on 5th February 1917. Meanwhile, there was an attempt to execute the decree of the Subordinate Court in E.P. No. 309 of 1914. The Subordinate Court of Ramnad held that the decree was unexecutable and that it contemplated that the fifth plaintiff as Receiver should sue the first defendant to recover the amounts (Exhibit G, dated 26th October 1914). There was no appeal against this order and the order is now binding on all the parties. The result is that the decree must be construed, in the light of that order, to be a decree declaring or creating rights which are unenforceable in execution and can be enforced only by suit.

The plaint in the present suit was presented on 4th February 1920 for recovering the said amount. The plaintiff obtained a decree and defendant appeals.

He contends that the suit is not maintainable and is barred by limitation. It is true, as he points out, that a claim to recover a sum of money due from one of the partners must form part of the inquiry in the action for winding-up the partnership and no separate suit will lie after suit for an account is barred by limitation, *Gopala Chetty* v. *Vijayaraghavachariar*(1). But the respondent contends that the judgment, as construed by the order of 26th October 1914 (Exhibit G) creates fresh rights in the place of the older rights and this suit is an action on the judgment. This is obvious and, provided there is no obstacle in India to a suit on a judgment, when there is no other remedy to enforce the right, the contention ought to prevail.

At common law, actions on judgment lie whether the remedy by execution is available or not [see *Williams* v. *Jones*(2), *Hutchison* v. *Gillespie*(3), *Marbella Iron Ore Co.* v. *Allen*(4) and Black on Judgment, Vol. II, section 958]. This is admitted by the appellant. In India it is settled that no action lies on an executable judgment, the only remedy being execution, the principle being embodied in section 47, Civil Procedure Code (section 244 of the Code of 1882). An exception was at one time recognized by which suits were permitted to be brought in the High Court on judgments of a Court of Small Causes in order to obtain execution against immovable property, *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(5). On the ground that "where an action on the judgment will give a higher or better remedy," the case is different (see

(1) (1923) I.L.R., 45 Mad., 378 (P.C.).
(2) (1845) 13 M. & W., 628.
(3) (1856) 11 Exch., 798.
(4) (1878) 47 L.J., C.P. (N.S.), 601.
(5) (1882) I.L.R., 6 Bom., 292.

RAMASAMI v. MUTHAYYA CHETTY.

Maneharam Kalliandas v. *Bakshe Saheb*(1). The exception is now obsolete (section 94 of Act XV of 1882). But COUCH, C.J., also says in the case last cited "There are cases in which an action may be the only mode of enforcing a judgment or decree." The present case is such a case. In *Mahommed Ghouse Coorooshee* v. *Mustan Ally*(2), SCOTLAND, C.J., and BITTLESTON, J., recognized that such a suit would lie and proceeded to discuss the question of limitation. The further remarks in *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(3) were intended to apply only to executable judgments. The decision in *Merwanji Nowroji* v. *Ashanabi*(4) is also based on the policy of the Civil Procedure Code and applies only to judgments capable of execution. So also are the remarks in *Periasami Mudaliar* v. *Seetharama Chettiar*(5):

> "As against the judgment-debtor himself or against his legal representatives it has long been held that under the Indian Processual Law the remedy is only by way of execution of the decree and that no suit could be brought upon the judgment."

The decision in *Annoda Prasad Banerjee* v. *Nobo Kissore Roy*(6) shows a suit is maintainable on a judgment where no mode of execution (other than proceedings in contempt) is available. SALE, J., says that that was the practice of the Court, referring to *Attermony Dossee* v. *Hurry Doss Dutt*(7). The case in *Kali Charan Nath* v. *Sukhoda Sundari Debi*(8) and those cited in it [*Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal*(9) and *Ashi Phusan Dasi* v. *Peleram Mandal*(10)] are not strictly relevant as they are cases where execution against the judgment-debtor on record was useless and it was

(1) (1869) 6 Bom. H.C.R., 231.
(2) (1869) 4 Mad. Jurist, 127.
(3) (1882) I.L.R., 6 Bom., 292.
(4) (1884) I.L.R., 8 Bom., 1.
(5) (1904) I.L.R., 27 Mad., 243 (F.B.).
(6) (1905) 9 C.W.N., 952.
(7) (1881) I.L.R., 7 Calc., 74.
(8) (1915) 20 C.W.N., 58.
(9) (1879) I.L.R., 4 Calc., 342.
(10) (1913) 18 C.L.J., 362.

sought to obtain a judgment against another person for substantially the same relief. The remarks in *Ramanand* v. *Jai Ram*(1) apply only where there is another mode of enforcing the judgment.

In our opinion, there is nothing in all the Indian authorities cited before us against the maintainability of the suit. Such a case can occur only very rarely. Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in this case, the suit is maintainable.

We accordingly hold that the suit is maintainable. If so, the only period of limitation that is applicable to it is article 122. There was no old cause of action, on which such a suit could be maintained, nor does it subsist, if it ever existed. The judgments created a new obligation in lieu of the old. The suit, therefore, is within time.

The appeal fails and is dismissed with costs.

K.R.

(1) (1921) I.L.R., 43 All., 170.