APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Reilly.

1926, November 25.

THE SOUTH INDIAN INDUSTRIALS, LIMITED (PLAINTIFFS), APPELLANTS,

v.

MOTHEY NARASIMHA RAO (THIRD DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), sec. 22—Civil Procedure Code (Act V of 1908), O. I, r. 10 (5)—Application by plaintiff to add party as defendant—Order granting application—Review—Application dismissed—Revision—Order by High Court adding party—Date from which suit deemed to have been instituted against the added party.

Where an application made by the plaintiff in the original Court to add a person as a defendant in a pending suit was originally granted but subsequently on review dismissed by that Court, and, on a revision petition filed against the last order, the High Court ordered that the party be added as a defendant to the suit without prejudice to any defence of limitation being raised by him in the trial of the suit,

Held, that the order of the High Court adding the party as a defendant, should, for purposes of limitation, be deemed to have taken effect, not merely on the date when it should have been made by the lower Court if it had taken a correct view of the position, but on the date when the plaintiff's application was presented to the trial Court; and that the suit was not barred.

Ramakrishna Moreshwar v. *Bamabai*, (1893) I.L.R., 17 Bom., 29, followed. *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*, (1926) M.W.N., 592 (P.C.), distinguished.

APPEAL against the decree of T. SUNDARAM AYYAR, Additional Subordinate Judge of Vizagapatam, in Original Suit No. 52 of 1922.

* Appeal No. 1 of 1926.

The suit was instituted on 3rd November 1922 against defendants 1 and 2, who were members of a firm and were partners, for damages for breach of contract entered into with the plaintiffs for the purchase of certain bales of gunnies, which were to be taken in four instalments, the last being on 1st April 1921. The first defendant was dead when the suit was instituted but the plaintiff was not then aware of it. The plaintiff filed a petition (I.A. No. 130 of 1923) on the 27th January 1923, to add his son as a party to the suit, not as a legal representative of the first defendant but as a necessary party to the suit to get the appropriate relief. The Subordinate Judge passed an order on 23rd February 1923, adding the respondent as the third defendant to the suit. A review petition was filed by the third defendant, and the same Subordinate Judge passed an order on 10th October 1923, setting aside the previous order and directing the re-hearing of the original petition (I.A. No. 130 of 1923); and on 26th April 1924, he passed his final order refusing to grant the petition and dismissing the application. Against this order a civil revision petition was filed in the High Court, and KUMARASWAMI SASTRI, J., who heard the petition, held that the respondent should be added as a party to the suit without prejudice to any defence being raised by him in the suit. The suit came on for trial on the question of limitation before the lower Court on 29th October 1925, and the then Subordinate Judge held that the suit was barred against the third defendant, holding that the suit could not be deemed to have been instituted against the third defendant, as summons in the suit was not even then served on him as required by Order I, rule 10 (5), Civil Procedure Code; he accordingly dismissed the suit against the respondent. The plaintiffs preferred this appeal.

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K. P. Raman Menon for appellants.—The suit as against the added party is not barred. Section 22, Limitation Act, governs this case. Order I, rule 10 (5), Civil Procedure Code, itself says that it is subject to the Limitation Act. The order adding the respondent as a defendant takes effect from the date of the application: see *Ramakrishna Moreshwar* v. *Bamabai*(1), *Subbaraya Iyer* v. *Vaithinatha Iyer*(2).

T. R. Ramachandra Ayyar and *T. Ramachandra Rao* for respondent.—The date on which the defendant is made a party to the suit is the date on which the order is made. Section 22 of the Limitation Act says that the suit shall be deemed to have been instituted "*when he was made a party.*" It is not the date of the application but the date of the order. The first order of the Subordinate Judge had been set aside on review.

The decision of the Privy Council in *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*(3), governs this case and is conclusive on the question. See also *Ammayya Pillai* v. *Narayana Chetti*(4).

K. P. Raman Menon in reply.—In the Privy Council case, there was neither revision application nor order of a superior Court; the order striking out the original defendants was final.

JUDGMENT.

REILLY, J.

REILLY, J.—The question is whether the suit was in time as against defendant 3, assuming, what has not yet been decided, that time ran from 1st April 1921. The plaint was presented against defendants 1 and 2 on 3rd November 1922. The plaintiffs presented their application I.A. No. 130 of 1923 to bring defendant 3 on record on 27th January 1923, and an order to that effect was made by the Subordinate Judge on 23rd February 1923. But on 10th October 1923 the Subordinate Judge granted a review, set his order of 23rd February 1923 aside and directed that the plaintiffs' application, I.A. No. 130 of 1923, should be re-heard. On 26th April 1924 he

(1) (1893) I.L.R., 17 Bom., 29.
(2) (1910) I.L.R., 33 Mad., 115.
(3) (1926) M.W.N., 592 (P.C.).
(4) (1925) 21 L.W., 125.

dismissed that application. Against that dismissal the plaintiffs preferred C.R.P. No. 752 of 1924 to this Court, and on 12th March 1925 my learned brother found that the Subordinate Judge's dismissal of the plaintiffs' application was wrong and ordered that defendant 3 be added as a party to the suit. When the suit came on again for hearing before the Subordinate Judge on 29th October 1925 he found that, though defendant 3 had been added as a party by my learned brother, no summons had been served on him as a defendant in the suit and therefore under rule 10 (5) of Order I, Civil Procedure Code, proceedings in the suit had not yet begun against him. If that was the correct view, then the suit was already barred as against defendant 3, even assuming that time began to run not earlier than 1st April 1921. The Subordinate Judge, therefore, dismissed the suit as against defendant 3, and the present appeal is against that order.

2. It has not been seriously disputed before us that the reason given by the Subordinate Judge for his order now under appeal is untenable. It is clear that he has overlooked the opening words of rule 10 (5) of Order I, viz., "subject to the provisions of the Indian Limitation Act, 1877, section 22." Under that section the suit must be deemed to have been instituted against defendant 3 when he was made a party. Admittedly he was made a party to the suit by my learned brother's order of 12th March 1925. But it is contended for the plaintiffs that, though the order was made on that day, the effect of that order is that defendant 3 must be deemed to have been made a party at a much earlier date. It is clear in my opinion that the order of my learned brother on 12th March 1925 must be regarded as the order which the Subordinate Judge should have made when he finally disposed of the plaintiff's application,

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I.A. No. 130 of 1923, on 26th April 1924 and must be taken to have had effect at least from that date. But the plaintiffs go further and contend that the order relates back to a still earlier date, viz., the date of their application, I.A. No. 130 of 1923, that is 27th January 1923. Undoubtedly the effect of the Subordinate Judge's order granting a review was to make that application remain pending on his file from the date of its presentation to its final disposal on 26th April 1924. It was decided in *Ramakrishna Moreshwar* v. *Bamabai*(1) that, when a party is added on application, the addition must be deemed to have effect from the date of the application; and that principle appears to have been recognized *obiter* in *Subbaraya Iyer* v. *Vaithinatha Iyer*(2). It is true that in *Ammayya Pillai* v. *Narayana Chetti*(3) DEVADOSS, J., refused to adopt that principle in interpreting section 22 of the Limitation Act. In his judgment he mentioned 17 Bom., 29, but said that it had no application to the case with which he was dealing. Why it had no application is not clear from the report. If he meant that the principle of 17 Bom., 29, was wrong, then with the greatest respect I am unable to follow him. It appears to me to be obviously the right principle to adopt in the matter, as otherwise, though an application might be made in time, as in this case, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court, which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred, and it would be unreasonable to leave the party who had applied in good time at the mercy of such chances. It is contrary to one of the clear principles of the Law of

(1) (1893) I.L.R., 17 Bom., 29. (2) (1910) I.L.R., 33 Mad., 115.
(3) (1925) 21 L.W., 125.

Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. The heavy penalty for exceeding the arbitrary periods of limitation is to be counter-balanced by the assurance of safety when within them. The order made by my learned brother on 12th March 1925 must, I think, be deemed to have taken effect not merely on the date when it should have been made by the Subordinate Judge, if he had taken a correct view of the position, viz., 26th April 1921, but on the date when the Plaintiff's application was presented to him, viz., 27th January 1923.

3. But Mr. Ramachandra Ayyar for defendant 3 has referred us to a recent decision of the Privy Council, *Haveli Shah* v. *Khan Sahib Shaikh Painda Khan*(1), which he contends upsets all those calculations. That, as their Lordships found, was a suit for compensation due to the plaintiff on account of one Sundar Dass deceased having induced certain third parties to break a contract with the plaintiff and fell within article 27 of the Limitation Act. It was instituted in the Court of the District Judge of Quetta on 23rd November 1922 against Sundar Dass' two minor sons with their mother as guardian. Their Lordships found that the suit was time-barred as the breach of contract complained of had occurred more than a year before 23rd November 1922. But their Lordships went on in their judgment to find that there was another defect in the suit which was fatal to it, even if it fell under article 49 or article 115 of the Limitation Act and the period of limitation was therefore three years from the date of the cause of action,

(1) (1926) M.W.N., 592 (P.C.).

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which was in October 1920. On 12th June 1923 the Judicial Commissioner in Baluchistan ordered the names of the minor sons to be struck out as defendants and those of the administrators of Sundar Dass' estate to be added; and the plaint was amended in accordance with that order on 10th July 1923. There was some dispute whether the mother of the sons was the administratrix of the estate. On 21st June 1924, in the words of their Lordships,

> "As the result of consideration, the Judicial Commissioner at Quetta came to the conclusion that his own order of 12th June 1923 had been wrong and that the two sons should be restored to the record as defendants through their mother and guardian."

Their Lordships point out that the suit as against the sons was brought to an end by the Judicial Commissioner's order of 12th June 1923 and find that, when after the lapse of a year the names of the sons were restored as defendants on 21st June 1924, that was in effect the institution of a new suit against them, which by that date was unquestionably time-barred. Mr. Ramachandra Ayyar contends that following that decision of the Privy Council we must treat the present suit as having been dismissed against defendant 3 when the Subordinate Judge on 26th April 1924 finally refused to make him a party to it. But the present case may clearly be distinguished from the case before their Lordships. In the present case the order of the Subordinate Judge made on 26th April 1924 has lost its entire effect and became null, as it was wiped out by the order of my learned brother on revision substituting for it the order which the Subordinate Judge himself should have made. The order made on 12th June 1923 by the Judicial Commissioner on the other hand was never wiped out by any superior authority and in their Lordship's view stands good to the present day. Towards

the end of their judgment their Lordships remark that "on 21st June 1924 the Judicial Commissioner reviewed this order and altered it." But it does not appear probable that they are there using the word "reviewed" in the technical sense of a review under the Code of Civil Procedure. It is clear that they regard the Judicial Commissioner's order of 21st June 1924 as something different from an order legally made on review under the Code. It is probable that there was no application for review, and none is mentioned. If there had been such an application it would almost certainly have been mentioned as by 21st June 1924 the time for a review had long passed, and it may be noticed that their Lordships say that the second order was made "only after the lapse of a year." And earlier in their judgment their Lordships, when they first refer to the order of 21st June 1924, instead of saying, as would be natural if that order was made in consequence of some application by the plaintiff under Order XLVII, Civil Procedure Code, that the Judicial Commissioner made the order on an application for review being granted, merely say that the Judicial Commissioner acted "as the result of consideration." It does not appear to me that this judgment of the Privy Council is of any help or guidance to us in the present case, in which an application to implead defendant 3 was made in ample time and remained pending until the Subordinate Judge made his incorrect order of 26th April 1924, for which the correct order was substituted by my learned brother on 12th March 1925.

4. In my opinion, assuming time to run in this suit from 1st April 1921 or any date not earlier than 27th January 1920—a question which has still to be determined—defendant 3 has been made a party in time. This appeal should therefore be allowed and the suit as

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against defendant 3 should proceed. The costs of this appeal and the costs already ordered in the lower Court will abide and be provided for in the Subordinate Judge's decree, the result of which they will follow. The Court fee on this appeal will be refunded to the plaintiffs.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

1926, November 17.

PERIA KOIL KELVI APPAN GOVINDA RAMANUJA PEDDA JEEYANGARLAVARU (RESPONDENT IN C.M.P. No. 3375 OF 1926 ON THE FILE OF THE HIGH COURT), APPELLANT,

v.

KADAMBI DARMAPURI TIRUVENGADA KRISHNAMACHARLU AND 8 OTHERS (PETITIONERS IN C.M.P. No. 3375 OF 1926 ON THE FILE OF THE HIGH COURT), RESPONDENTS.*

Madras High Court Letters Patent, cl. (15)—*Order of single Judge, staying execution of lower Court's decree, whether a "judgment" within cl.* (15)—*Appealability of*—*Party guilty of contempt by disobedience to decree, whether entitled to stay of execution.*

An order of a single Judge of the Madras High Court staying execution of a decree or order of a lower Court, by suspending an injunction, pending an appeal to the High Court, is a "judgment" within clause (15) of the Letters Patent, and is hence appealable. The long series of decisions of the High

* Letters Patent Appeal No. 328 of 1926.