

clear that it is really unnecessary to look further. Rule 10 of the same order has, however, been invoked. There has been some difference of judicial opinion [see *Sitaramaswami v. Lakshmi Narasimha*(1) and *Muthiah Chettiar v. Govinddoss Krishnadoss*(2)] as to whether this rule can be applied to a transfer or devolution of interest after decree; but we need not enter into that question because the words with which the rule opens, "In other cases of an assignment, creation or devolution of any interest" seem expressly intended to exclude the case of devolution by death, which, as we have already observed, is specifically dealt with in rules 3 and 4.

We accordingly allow the appeal and set aside the learned Judge's order. Respondent will pay the appellants' costs of appeal. Money deposited in Court to be refunded to the appellant.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

SWAMINATHA ODAYAR (APPELLANT), APPELLANT,

v.

THIAGARAJASWAMI ODAYAR (RESPONDENT),
RESPONDENT.*

1925,
October 6.

Civil Procedure Code (Act V of 1908), sec. 48—Combined decree against mortgaged property and the person of the mortgagor—Application for execution, filed more than twelve years from the date of the decree but less than twelve years from the date of sale of hypotheca—Bar—Limitation.

Where a combined decree against the mortgaged property and the person of the mortgagor was passed under the Transfer of

(1) (1913) I.L.R., 41 Mad., 510.

(2) (1921) I.L.R., 44 Mad., 919 at 929.

* Letters Patent Appeal No. 114 of 1924.

SWAMINATHA
ODAYAR
v.
THIAGARAJA-
SWAMI
ODAYAR.

Property Act, an application for execution of the decree against the person of the mortgagor, made more than twelve years from the date of the decree but within twelve years from the date of the mortgagee's failing to get relief by the sale of the mortgaged property, is barred under section 48 of the Civil Procedure Code.

Khulna Loan Company v. Jnanendra Nath Bose, (1917) 22 C.W.N., 145 (P.C.), relied on.

LETTERS PATENT APPEAL against the order of ODGERS, J., in Appeal against Appellate Order No. 103 of 1922 against the decree of the Subordinate Judge of Kumbakōnam in A.S. No. 25 of 1922 preferred against the order of the District Munsif of Valangiman in E.P. No. 516 of 1921 in Original Suit No. 7 of 1903.

A combined decree for sale of the mortgaged property and against the person of the mortgagor was passed in 1903 in O.S. No. 7 of 1903. Under the decree the mortgaged properties were first to be sold and the balance, if any, were to be realized from the person and other properties of the mortgagor. The mortgaged properties were sold on the 26th January 1911, and the proceeds were insufficient to discharge the decree amount. An application for execution against the person and the other properties of the mortgagor was filed in 1918 in E.P. No. 386 of 1918, and the executing Court passed an order *ex parte* for execution, holding that the application was not barred by limitation. A second application for execution of the decree against the person and other properties of the mortgagor was filed on 6th August 1921. The judgment-debtor thereupon applied to set aside the previous *ex parte* order, and the District Munsif did so, and dismissed the execution petition as time-barred. The lower Appellate Court confirmed the latter order. The decree-holder preferred a civil miscellaneous second appeal to the High Court and also applied for revision of the order of the

District Munsif setting aside the *ex parte* order. ODGERS, J., dismissed both. This Letters Patent Appeal was preferred against the order on the civil miscellaneous second appeal.

SWAMINATHA
ODAYAR
v.
THIAGARAJA-
SWAMI
ODAYAR.

R. Kuppuswami Ayyar for appellant.

The question of limitation is *res judicata* by reason of the order on E.P. No. 386 of 1918.

The decree against the person and other properties of the mortgagor comes into force only after the hypotheca is sold. Under the Transfer of Property Act, such a decree can properly be passed under section 90 only after the hypotheca has been sold; but, though irregular, such a decree can be passed in the first decree itself but it takes effect only from a later date; an order is still necessary for execution of the latter portion of the decree. It is a conditional decree. Reference was made to the following cases :—

Rameshvar Singh v. Homeshvar Singh(1), *Jeuna Bahu v. Parmeshwar Narayan Mahtha*(2).

The decision in *Khulna Loan Company v. Jnanendra Nath Bose*(3) is not applicable to this case.

No one appeared for respondent.

JUDGMENT.

This is an appeal from the order of our learned brother ODGERS, J. The first point urged for the appellant is that the order on Execution Application No. 386 of 1918 operated as *res judicata* in favour of the appellant and that the District Munsif was wrong in dismissing the execution application which was filed on the 6th August 1921. The District Munsif decided in E.P. No. 386 of 1918 that the application of the appellant was not barred by limitation. The District Munsif

(1) (1921) 40 M.L.J., 2 (P.C.). (2) (1920) I.L.R., 47 Calc., 370 (P.C.).
(3) (1917) 22 C.W.N., 145 (P.C.).

SWANINATHA
ODAYAR
v.
THIAGARAJA-
SWAMI
ODAYAR.

who dealt with the present application set aside the *ex parte* order on No. 386 of 1918 on the ground that the District Munsif who first disposed of the petition had not before him the decision of the Privy Council in *Khulna Loan Company v. Jnanendra Nath Bose*(1). It is pointed out by Mr. Kuppuswami Ayyar, and very rightly too, that the District Munsif was not justified in setting aside the *ex parte* order on E.P. No. 386 of 1918 as the application to set aside the *ex parte* order was made more than 30 days after the judgment-debtor became aware of the *ex parte* order against him. Against this order, a revision petition was filed by the appellant, and ODGERS, J., has dismissed the revision petition. The order on E.P. No. 386 of 1918 passed by the former District Munsif has ceased to be in force. Therefore, there is no order now upon which the appellant can rely for his contention that the plea of limitation is barred by reason of the order on No. 386 of 1918. Therefore, we disallow this contention.

The next contention of Mr. Kuppuswami Ayyar is that the application is not barred by reason of section 48 of the Civil Procedure Code. The decree in this case is a combined decree both against the property and the person of the mortgagor under the old Code and it has been distinctly held by the Privy Council in *Khulna Loan Company v. Jnanendra Nath Bose*(1) that a decree against the person becomes unexecutable after the lapse of 12 years from the date of the decree, in other words, where a combined decree gives relief against the property as well as the person of the mortgagor, the time for execution against the person would be calculated from the date of the decree and not from the date of the mortgagee failing to get relief by sale of the property. In this case,

(1) (1917) 22 C.W.N., 145 (P.C.).

the properties were sold on the 26th January 1911, and the mortgagee obtained only part satisfaction of the decree. But in view of the decision of their Lordships of the Privy Council in *Khulna Loan Company v. Jnanendra Nath Bose*(1) we are unable to accept the contention of Mr. Kuppaswami Ayyar that the application for the execution of the decree against the person of the mortgagor should be considered to be in time, for the reason that he could not have executed the decree before the sale of the property was found insufficient to satisfy his decree. * If an order was passed after the property had been sold that, for the balance, other properties of the mortgagors should be proceeded against, the present application would be in time, but no such order was passed and therefore the application is barred by section 48 of the Civil Procedure Code.

The appeal fails and is dismissed. We make no order as to costs, as the respondent does not appear.

K.B.

(1) (1917) 22 C.W.N., 145 (P.C.).
