APPELLATE CIVIL.

Before Mr. Justice Pakenham Walsh.

ACHAMBAT ABDURAHIMAN, MINOR, BY HIS MOTHER THITHACHUMMA AND ANOTHER (PETITIONERS), APPELLANTS, 1932, February 25.

v.

K. P. K. IMBICHUNNY, DEAD, AND ANOTHER (COUNTER-PETITIONER AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLVII—Review —Order granting—Effect of, on original decree or order— Appeal filed against original decree or order before filing of application for review of same—Competency of.

Where, after filing an appeal against a decree or order, an application is filed in the Court below for a review of the same and that Court, after issuing a notice to the other side to show cause why the review should not be granted and after hearing its objections, passes an order rejecting the review application, the result is that the parties are relegated to the old decree or order and this is so even in a case where the hearing of the review application may involve to some extent an investigation into the merits of the case. In such a case the competency of the appeal previously filed against the old decree or order is not affected. The result will, however, be different in a case in which the review application is granted and the case is reheard on the merits and the old decree or order is either repeated or varied as a result of the rehearing. In such a case, the whole matter having been reopened, there is a fresh decree and the appeal previously filed against the old decree or order is not competent.

APPEAL against the order of the Court of the Subordinate Judge of Ottapalam in Appeal Suit No. 26 of 1929 (Appeal Suit No. 55 of 1929, District Court, Calicut) preferred against the order of the Court of the District Munsif of Parapanangadi in Execution Application No. 166 of 1928 in Original Suit No. 782 of 1916.

* Appeal against Appellate Order No. 107 of 1930.

ABDU-RAHIMAN v. IMBICHUNNY.

N. R. Sesha Ayyar for appellants.

K. Kuttikrishna Menon for respondents.

Cur. adv. vult.

JUDGMENT.

This appeal arises in the following way. In execution of the decree in Original Suit No. 782 of 1916 on the file of the District Munsif's Court of Parapanangadi the suit properties were attached. A petition against such attachment was put in, Execution Application No. 166 of 1928, and the Court found that the petitioners had no right to the property and passed an order dismissing the petition on 10th December 1928. Against that order an appeal was filed in the District Court, which was transferred to the Subordinate Judge's Court of Ottapalam. After the passing of the order against which the appeal was filed, the appellants filed Execution Application No. 1670 of 1928 in the District Munsif's Court of Parapanangadi for a review of the order; and on that review application notice was issued to the respondent to appear by pleader and file objections, and the Court passed its order on 18th January 1929 rejecting the petition. When the appeal against the order in Execution Application No. 166 of 1928 came on for hearing, a preliminary objection was raised that the appeal was not competent and the Subordinate Judge, holding that it was not competent, dismissed it. Against this order the present appeal has been filed.

The matter is one of considerable difficulty. The learned Subordinate Judge held that, though the effect of the order, dated 18th January 1929, on the review application was to repeat the former decree, nevertheless on the authority of *Vadilal* v. *Fulchand*(1), the whole matter having been re-opened, there was a fresh decree

(1) (1905) I.L.R. 30 Bom. 56, 58.

and therefore the appeal against the order of 10th December 1928 was not competent. The decisions in *Vadilal* v. *Fulchand*(1) and *Gour* v. *Nilmadhab*(2) lay down clearly the procedure which should be followed in regard to an application for review. As stated in the latter case, a review proceeding commences ordinarily with an *ex parte* application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged, and the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one aspect, the result is the same whether the rule is discharged or on the rehearing the original decree be repeated, in law there is a material difference; for, in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. The real difficulty in the present case is to determine whether the order was passed in the second or third stage. It seems to me clear that the Court which passed it did not realize that there were three stages and we have therefore to gather from what has happened at what stage the final order was passed. It is stated at page 487 in *Gour* v. *Nilmadhab*(2) quoted above that

> "the failure to recognise the distinction between the second and third stages has, as appears from the cases in the books, led to the embarrassment of litigants in many instances."

(1) (1905) I.L.R. 30 Bom. 56, 58. (2) (1922) 36 C.L.J. 484.

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In that case also it was stated that the various stages through which an application for review may pass were not clearly appreciated by the lower appellate Court. In that case, however, the decree was reviewed, so that the present difficulty did not really arise. The appellants rely strongly on this sentence in the order: "The petition is rejected." The other side relies on the order to show that the whole matter was gone into and reliance is specially placed on the words:—

"The mistakes pointed out by the petitioners are quite unimportant and cannot in any way modify the conclusion I have arrived at in that order."

It seems to me that the facts in this case are closely similar to those in *Vadilal* v. *Fulchand*(1). But though the lower appellate Court has relied on this case for its decision, I am inclined to think that it supports the appellants. It is stated there at page 57:

"A *rule nisi* was issued requiring Vadilal (counter-petitioner in that case) to show cause why the application should not be granted and he resisted the application on the ground that it was time-barred . . . The Subordinate Judge overruled the said plea, and dismissed the application (on 14th September 1903) on the following ground:—'As to the merits I do not think that the applicant can succeed. Mr. Karpurram has thrown all costs on the applicant Fulchand and Vadilal's darkhast was due to Fulchand's default. He raised frivolous objections in Vadilal's application for execution and I consider the order made is a good one. The application for review is rejected with costs.'"

On appeal against this order the appellate judge amended the order granting review to a certain extent. It was held that no appeal lay from the order of 14th September 1903 and the proper procedure was to file an appeal from the order of 20th December 1902. So far as I gather from this case, the Court which refused review in the first instance did not issue anything

(1) (1905) I.L.R. 30 Bom. 56, 57.

which it called a *rule nisi*, because we find no reference to a discharge of any such rule in its final order. On the procedure which the Bombay High Court laid down in that case, the High Court must have held that, in spite of the failure to say anything in the order about the discharge of the rule, the rule was in fact discharged in that order and the third stage had not been reached. I gather therefore that by the statement at page 57 that a *rule nisi* was issued what was meant was the issue of a notice to the counter-petitioner to show cause why the application should not be granted. Now, applying this view, it seems to be on all fours with the present case. It is quite clear that the mere fact that the merits were considered will not prevent the order being one in the second stage. The Subordinate Judge in that case, as already stated, apparently did not realise that there are three stages and his order appears to be exactly similar to the one in the present case. He says: "The application for review is rejected with costs." I may note that in the text of the judgment quoted above it is said that the application was "dismissed". If there is any distinction between "dismissal" and "rejection", I think it strengthens the argument for the appellants. In that case the word used by the Court itself was "rejected" as in this. But the High Court seems to have considered that even if the application had been dismissed, the result would have been the same and the proceedings would not have passed the second stage. On full consideration, therefore, I consider that the facts in *Vadilal* v. *Fulchand*(1) appear to be precisely the same as those in the present case and that this case really supports the contention of the appellants rather than that of the respondents

(1) (1905) I.L.R. 30 Bom. 56.

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seeing that it was there held that the order was passed at the end of the second stage. I therefore allow this appeal, and the original appeal will be remanded for decision on the other points.

Costs of this appeal will abide the result of that appeal.

K.N.G.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Krishnan Pandalai.

1932, March 16.

MARUKKOLANDAYAMMAL (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF SALEM AND ANOTHER (FIRST DEFENDANT AND LEGAL REPRESENTATIVE OF SECOND DEFENDANT), RESPONDENTS.*

Madras Revenue Recovery Act (II of 1864), ss. 8 and 25—Defaulter in the register—Death of—Sale proceedings under the Act conducted after, and without prescribed notices being given to any living person as defaulter—Sale in case of—Void—Irregularity in publishing and conducting sale—Omission of preliminary steps necessary to give jurisdiction to revenue authorities to conduct sale—Distinction—Sec. 59 of Act—Limitation plea based upon—Available in former class of cases but not in latter.

The fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale under the Madras Revenue Recovery Act (II of 1864) is that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears.

Held, accordingly, that a sale of land for arrears of revenue under Madras Act II of 1864, all the proceedings in which were conducted after the death of the defaulter in the register

* Second Appeal No. 1203 of 1926.