APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1932, January 29.

KARUPPAYEE AMMAL, BY AGENT S. N. SANKARALINGA SWAMI NAICKER (SECOND PLAINTIFF—FIRST RESPONDENT), APPELLANT,

v.

KATTARI NAGAYYAKAMARAJANDRA RAMASWAMI PANDIYA NAYAKKAR AVARGAL AND ANOTHER (DEFENDANTS THREE AND SIX—PETITIONER AND SECOND RESPONDENT), RESPONDENTS.*

Hindu Law—Inheritance—Illegitimate son of Sudra—Widow of last male owner—Moiety devolving upon, on death of last male owner—Illegitimate son of last male owner who had succeeded to other moiety—Right of, on death of widow, to moiety which had vested in her, as against daughter's son of last male owner—"Reverter"—Hindu Law doctrine of—Applicability of—Code of Civil Procedure (Act V of 1908), O. XLV, r. 15—Transmission of order of Privy Council—Order for, made at instance of one of parties—Right of another party to avail himself of—Limitation Act (IX of 1908), art. 182—"Enforce"—Meaning of.

Under the Hindu Law the illegitimate son of a Sudra is entitled only to a moiety of his father's estate, so long as the widow, daughter or daughter's son of the father exists, and the widow, daughter and daughter's son are entitled to take the other moiety one after the other.

On the death of a Sudra, the last male owner of an estate, his widow succeeded to a moiety thereof and his illegitimate son to the other moiety. The widow then died leaving behind her a son of the daughter of the last male owner and the illegitimate son above mentioned.

Held that the daughter's son was entitled to the moiety which had vested in the widow and that the illegitimate son was not entitled to any portion thereof.

* Appeal against Order No. 147 of 1928.

The Hindu Law doctrine of "reverter", that, on the death of a female, who holds only a "woman's estate" in the property inherited by her from the last male owner, the then heir of the last male owner succeeds to his property, is inapplicable to a case where his property vested on his death not in a female heir only but in a male heir also.

Under rule 15 of Order XLV of the Code of Civil Procedure it is not necessary that each party interested in the execution of an order of His Majesty in Council should obtain a separate transmission of the order. An order for transmission made by the High Court at the instance of one of the parties may be taken advantage of by another party.

Balusami Iyer v. *Venkatasami Naicken*, (1923) 32 M.L.T. 249, followed.

Maharaja Sir Ravaneshwar Prasad Singh v. *Rai Baijnath Goenka Bahadur*, (1917) 2 P.L.J. 496, referred to.

Quaere—Whether the word "enforce" in article 183 of the Limitation Act (IX of 1908) means the same as "execute", or whether its connotation is wider than the connotation of the word "execute".

In re Barlow v. *Orde*, (1872) 18 W.R. (P.C.) 175, referred to.

APPEAL against the order of the Court of the Subordinate Judge of Dindigul, dated 29th February 1928, and made in Execution Petition No. 72 of 1927 in Original Suit No. 31 of 1902, Sub-Court, Madura.

B. Sitarama Rao and *P. N. Appuswami Ayyar* for appellant.

K. V. Krishnaswami Ayyar, *C. A. Seshagiri Sastri*, *K. Rajah Ayyar* and *V. Ramaswami Ayyar* for respondents.

Cur. adv. vult.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—Visvanathaswami Naicker, an illegitimate son of the late Zamindar of Bodinaickanoor by the fourth defendant, filed Original Suit No. 31 of 1902 on the file of the Sub-Court of Madura West for a declaration that he is entitled to

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inherit the Zamin of Bodinaickanoor and for possession of the Zamindari with all its appurtenances and for other reliefs. Though his suit was dismissed by the Sub-Court, Madura West, on appeal that decision was reversed and the suit remanded for fresh disposal. On 25th April 1913, the Sub-Court, Madura (which was the name given to the old Sub-Court, Madura West) passed a decree in plaintiff's favour for partition of the separate properties of the late Zamindar and delivery of a one-third share thereof to him. On appeal, the High Court modified that decree and upheld the plaintiff's right to a half-share in the said separate properties. The High Court also held that the plaintiff was not bound by the release deed—Exhibit II—executed to the first defendant, the widow of the late Zamindar, by the fourth defendant, the mother of the plaintiff, for herself and on behalf of her son, the plaintiff, who was then a minor, nor debarred from claiming the said partition, but directed that the plaintiff should deliver possession to the first defendant of items 1 to 3 in schedule 1 of Exhibit II, as they were held to be pannai lands and therefore impartible. The High Court also directed that "the plaintiff and the first defendant do each take a half of item 4 of schedule 1 attached to Exhibit II". The first defendant preferred an appeal to the Privy Council against the decision of the High Court, and, on the 20th of December 1922, the Privy Council dismissed the appeal and confirmed the judgment of the High Court; see *Kamulammal* v. *Visvanathaswami Naicker*(1).

It must be mentioned that the third defendant is the daughter's son of the first defendant, the fourth defendant is the mother of the plaintiff, and the sixth defendant a gnati of the late Zamindar; the second

(1) (1922) I.L.R. 46 Mad. 167 (P.C.).

defendant—the daughter of the first defendant—and the fifth defendant—elder brother of the sixth defendant—both died pending suit, and we are not concerned with them further.

Pending the appeal to the Privy Council, the first defendant—the widow of the late Zamindar—died on 13th January 1921, and the third defendant was brought on record as the legal representative of the deceased first defendant in the appeal to the Privy Council.

The third defendant—the daughter's son of the late Zamindar—applied in the Court of the Subordinate Judge of Dindigul by Execution Petition No. 72 of 1927 for delivery of possession of items 1 to 3 and of a moiety of item 4 mentioned in schedule I of Exhibit II, since the plaintiff was in possession of the same. The plaintiff having died, the fourth defendant—his mother and legal representative—who had been made the second plaintiff—was added as a respondent to the execution petition, to which the sixth defendant was also made a party-respondent. The Subordinate Judge of Dindigul allowed the third defendant's prayer with reference to a moiety of item 4, but dismissed the petition in other respects. The fourth defendant—the second plaintiff—has preferred the present civil miscellaneous appeal The third defendant has preferred a memorandum of objections in respect of item 1—the third defendant not having pressed his claim in respect of items 2 and 3 in the lower Court.

At the hearing of this appeal, Mr. B. Sitarama Rao, the learned Advocate for the appellant, raised a preliminary objection that the Subordinate Judge's Court of Dindigul had no jurisdiction to entertain Execution Petition No. 72 of 1927 put in by the third defendant. His contention was that the decree was passed by the Subordinate Judge's Court of

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Madura; and, though the decree was transferred for execution to the Subordinate Judge's Court of Dindigul so far as the rights conferred under the decree on the second plaintiff and sixth defendant were concerned, the same was not transferred so far as the rights conferred by the decree on the first defendant or her legal representative—the third defendant—were concerned, and that the transfer of such a decree at the instance of some of the parties only for execution to another Court does not give that other Court jurisdiction to entertain an execution petition at the instance of the party at whose instance the decree was not so transferred, and that the circumstance that the Sub-Court of Dindigul had local jurisdiction, on the date of Execution Petition No. 72 of 1927, over the items of immovable property in question did not confer jurisdiction on that Court to entertain that execution petition. He relied on some decisions in support of his contention, and on the recent Full Bench decision of this Court in *Ramier* v. *Muthukrishna Ayyar*(1) in support of his second contention. He also contended that the application was, in any event, barred by limitation, because, though Execution Petition No. 72 of 1927 was filed on 2nd September 1927, and though that was within 12 years from the date of the Privy Council decision (20th December 1922), yet the proper article applicable to the present case is article 181 of the Limitation Act and not article 183. He argued that article 183 applied only to the *execution* of a decree or order, though the word used in the article is "enforce" and not "execute". Since the Privy Council confirmed only the preliminary decree for partition made by the High Court and did not pass a final partition

(1) (1932) I.L.R. 55 Mad. 801 (F.B.).

decree, he contended that, in such circumstances, the proper course for the plaintiff was to file an application for the passing of a final decree within the period of three years from the date of the Privy Council decision.

On behalf of the third defendant—first respondent—it was argued that, having regard to the terms of the decree in question, the transfer of the decree at the instance of the second plaintiff from the Madura Sub-Court to the Dindigul Court gave the Dindigul Court jurisdiction to entertain the execution petition filed by the third defendant in the circumstances, and that, in any event, having regard to the order passed by the High Court in Civil Miscellaneous Petition No. 1398 of 1924 and Civil Miscellaneous Petition No. 3939 of 1925 on 12th November 1925 transmitting the decree to the Subordinate Judge's Court, Dindigul, for execution, it was not open to the second plaintiff (the appellant before us, who was a party to the said order) to raise any objections to the execution of the decree by the Dindigul Sub-Court. On the question of limitation, he argued that the present execution petition filed in 1927 could not be said to be barred by limitation having regard to the date of the order passed by the High Court, viz., 12th November 1925.

After consideration of the question, we are inclined to agree with the contention raised by the learned Advocate for the third defendant—first respondent.

It must be here mentioned that, in pursuance of the preliminary decree for partition passed by the High Court on 26th October 1915, a final decree was passed by the Sub-Court, Madura, on 26th July 1918. The second plaintiff applied to the Sub-Court, Madura, for the transfer of the decree for execution to the Sub-Court, Dindigul, and the transmission was ordered on 10th April 1922. Subsequently, Execution Petition

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No. 74 of 1924, was filed in the Sub-Court, Dindigul, by the sixth defendant for execution of the decree relating to the immovable properties. Similarly, the third defendant filed Execution Petition No. 120 of 1924 in the Sub-Court, Dindigul, for execution of the decree as regards the immovable properties. It was in these circumstances that the order was passed by the High Court on 12th January 1925 directing that the order of His Majesty in Council be sent to the Sub-Court of Dindigul for execution. If any party wanted to rely on the circumstances that no final decree had been passed after the decision of the Privy Council and that there was no executable decree at that time, though a final decree had been passed by the Sub-Court, Madura, on 26th July 1918 in pursuance of the decision of the High Court (which was confirmed by the Privy Council), he ought to have urged the objections then. But, having regard to the circumstances mentioned already, nobody thought it worth while to raise any objection; the appellant before us, the second plaintiff, was a party to the High Court's order and did not object. Seeing that the second plaintiff, the third defendant and the sixth defendant had, each of them, applied to the Sub-Court of Dindigul to execute the decree, it is not surprising that the parties were agreeable, and anxious, to have the decree executed by the Sub-Court, Dindigul. The High Court had ample jurisdiction to transfer the proceedings from the Sub-Court, Madura, to the Sub-Court, Dindigul; and, having regard to that order, we are inclined to think that the objection as to jurisdiction now raised before us in this appeal for the first time is unsustainable. We may mention that this objection relating to jurisdiction was not raised before the lower Court (Sub-Court, Dindigul) in the present proceedings; nor

was it raised in the grounds of appeal to this Court; and the learned Advocate for the appellant mentioned to us that it would not have been taken at all even in the argument of the appeal but for the recent decision of the Full Bench in *Ramier* v. *Muthukrishna Ayyar*(1). However, having regard to the consideration mentioned above, in our view, it is not open to the parties at this stage to raise any such objection.

We must here notice one further argument advanced by the learned Advocate for the appellant on the question of jurisdiction. He argued that, under Order XLV, rule 15, Civil Procedure Code, any party who desired to obtain execution of any order of His Majesty in Council should apply by petition to the High Court to transmit His Majesty's order to the lower Court for execution, and that it is not open to a party to take advantage of an order for such transmission passed by the High Court at the instance of another party; and, in support of this argument, he relied on the decision of the Patna High Court in *Maharaja Sir Ravaneshwar Prasad Singh* v. *Rai Baijnath Goenka Bahadur*(2). In answer to that contention, we may say that, having regard to the wording of the partition decree in the present case, the transfer of the order for execution, though passed at the instance of the person entitled to a moiety of the property, would necessarily enure to the benefit also of the other party entitled to the other moiety in this case. In such a case, even according to the decision in *Maharaja Sir Ravaneshwar Prasad Singh* v. *Rai Baijnath Goenka Bahadur*(2), a separate application under Order XLV, rule 15, Civil Procedure Code, would not be necessary. Further, there is a decision of this Court, reported

(1) (1932) I.L.R. 55 Mad. 801 (F.B.). (2) (1917) 2 P.L.J. 496.

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as *Balusami Iyer* v. *Venkatasami Naicken*(1), where the learned Judges held that it was not necessary that each person interested in the execution of a particular order should obtain a separate transmission of the order of His Majesty in Council when that order had already been transmitted to the lower Court at the instance of one of the successful parties. They observed as follows :—

"The lower Court's order is objected to, first, on the ground that the respondents before us, petitioners before it, were not entitled to apply for restitution when they had not, under Order XLV, rule 15, obtained transmission of the order of His Majesty in Council to the lower Court, the order being the basis of their claim. Order XLV, rule 15, no doubt, does make it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But in the present case transmission has already been obtained by the 27th defendant, the successful appellant in the Privy Council. It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted. This ground of appeal is not sustainable."

In that case, a decree for possession of land was passed against the landlord and the rival lessees, and for mesne profits against the rival lessees only. The landlord alone appealed to the Privy Council, making the plaintiff the only party-respondent to the Privy Council appeal. The Privy Council reversed the lower appellate Court's decree and dismissed the plaintiff's suit. The rival lessees—defendants—applied for restitution of the amount of mesne profits realized from them by the plaintiff before the lower appellate Court's decree was reversed by the Privy Council. The learned Judges held that the order of His Majesty in Council though passed at the instance of the landlord—the

(1) (1923) 32 M.L.T. 249.

twenty-seventh defendant—enured for the benefit of the lessees-defendants also and that the lessees-defendants were entitled to apply for restitution, and further that the transfer of His Majesty's order by the High Court under Order XLV, rule 15, at the instance of the twenty-seventh defendant (landlord) enured to their (lessees-defendants') benefit also. In a matter of practice like this, we should be loath to dissent from the opinion expressed by the learned Judges of this Court in *Balusami Iyer* v. *Venkatasami Naicken*(1) unless we see very strong reasons to do so.

In the above view, it is admitted that no question of limitation arises; and it is not necessary for us to consider whether the word "enforce" in article 183 of the Limitation Act means the same as "execute", or whether its connotation is wider than the connotation of the word "execute"—in deciding which question the observations of the Privy Council in *In re Barlow* v. *Orde*(2) would be useful.

On the merits, it was argued for the appellant that, on the death of the first defendant, the moiety of item 4 decreed to her would go to the persons who would be the heirs of the last male-holder at the time of the widow's death, and therefore that moiety should go to the plaintiff and the third defendant on the death of the first defendant, and that the lower Court was in error in directing that the third defendant should recover the whole of that moiety from the plaintiff. The learned Advocate for the appellant based his argument on the theory of "reverter"; and he argued that, when a Hindu widow succeeds to the estate of her husband, on her death, the next heir of the last male-holder would be entitled to the estate. It is on this principle that, on

(1) (1923) 32 M.L.T. 249.

(2) (1872) 18 W.R. (P.C.) 175.

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the widow's death, the daughter succeeds to the estate of the last male-holder, and, on the death of the daughter, the daughter's son succeeds to the last male-holder's estate. He therefore argued that, on the first defendant's death, the moiety of item 4 decreed to her should go to those persons who would be heirs to the last male-holder, if he died, on the date of the widow's death, and, as the illegitimate son would be one of such heirs, it was argued that he would be entitled to a moiety of the moiety decreed to the widow. Thus, the argument advanced on behalf of the appellant comes to this:—If a Sudra dies leaving property, his illegitimate son and his (last male-holder's) widow would each be entitled to a moiety of the estate; that, on the widow's death, the illegitimate son would be entitled to a further one-fourth of the last male-holder's estate, and the last male-holder's daughter to the other one-fourth; and that, on the daughter's death, her son would be entitled to one-eighth and the illegitimate son to the other one-eighth of the last male-holder's estate. Thus, in such circumstances, the illegitimate son would get half plus one-fourth plus one-eighth (that is, seven-eighths) of the last male-holder's properties, if he should be alive when the succession opened to the daughter's son of the last male-holder, and survived both the widow and the daughter. A further question would arise whether, if the illegitimate son should die before the widow, his sons would be entitled to claim such rights against the daughter and the daughter's sons.

On behalf of the respondents it was argued that the doctrine of reverter referred to by the appellant applies only to the ordinary cases arising under the Hindu Law, that the illegitimate son's case does not come within the ordinary rule, and that his case is specially provided for by special Hindu Law texts; and that the

illegitimate son is entitled only to a moiety of his father's estate in such circumstances, so long as the widow, daughter or daughter's son exists. No decisions on the point have been quoted to us, and the case seems to be one of first impression. The position of an illegitimate son is peculiar under the Hindu Law. The illegitimate sons of the three regenerate classes are only entitled to maintenance, and it is only the illegitimate son of a Sudra that would be entitled to a share in his father's separate property in particular circumstances. He does not acquire right by birth. He cannot compel his father to give him a share, for it is only by the father's choice that he would be entitled to a share. His share is not the same as that of a legitimate son. He does not succeed to his father's collaterals. It is not necessary to mention the other incidents of the peculiar position occupied by the illegitimate son under the Hindu Law. It is under section 12 of Chapter I of the Mitakshara that the illegitimate son claims his share. There his rights are mentioned as follows :—

"Even a son begotten by a Sudra on a female slave may take a share by the father's choice; but if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons."

The passage has been understood as follows :—

"Should there be no sons of a wedded wife, the illegitimate son takes the whole estate provided there be no widow, nor daughters nor daughters' sons."

It has been further explained thus :—

"If any, even in the series of heirs down to daughter's son, exist, the son by the female slave does not take the whole estate, but, on the contrary, shares equally with such heir." *Dattaka Chandrika*, v. 31.

Under that text—if read in the ordinary way—the illegitimate son would be entitled to a moiety only of

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his father's estate, when there is the widow, daughter or daughter's son of the last male-holder. In this case the third defendant is the daughter's son, and consequently the illegitimate son would be entitled only to a moiety of his father's estate, which he has already got, and the daughter's son—the third defendant —would seem to be entitled to the other moiety.

Under the doctrine of reverter referred to, on the widow's death the whole of the estate that the widow inherited would (subject to alienations made by her and binding on the estate) vest in the daughter if then alive, and the daughter's son, on the death of the daughter. If the contention of the appellant be upheld that would not be so ; only a portion of the estate that vested in the widow would vest in the daughter, and only a portion of the estate that vested in the daughter would vest in the daughter's son. Again, the illegitimate son would, according to the appellant's contention, succeed to his father's estate on three such occasions. There is no other instance mentioned to us where a male, who is heir to a last male-holder, succeeds to the last male-holder's estate on different occasions. The principle underlying the doctrine of reverter referred to is that the last male-holder's estate is inherited by females who have no free right of alienation and who hold a peculiar kind of estate called "woman's estate" and on whose death the then heir of the last male-holder succeeds to the last male-holder's estate. From its very nature, the doctrine could not apply legitimately to a case where the last male-holder's estate vested on his death not in a female heir but in a male heir also. In such a case, the doctrine as such would not strictly apply, nor has it been, so far as we are aware, applied to such a case. We are not now concerned with the question as to what

would become of the property if the last of the daughters died without leaving a daughter's son, in such circumstances. Here, we have the third defendant, who is the daughter's son, and, according to the text under which the illegitimate son claims, he would be entitled to a moiety of his father's estate when there is the widow, the daughter, or the daughter's son. The third defendant being the daughter's son would take one moiety, the illegitimate son having taken the other moiety. In *Chinnammal* v. *Varadarajulu*(1) the following observations occur:—

"The authorities as to the respective rights of a widow and an illegitimate son are somewhat conflicting. But the following appears to be the general result so far as they are agreed."

Now see *Kamulammal* v. *Visvanathaswami Naicker*(2).

"If there be a widow and daughters or daughters' sons and an illegitimate son, the latter takes half of the estate, leaving the other half to be enjoyed as woman's estate by the widow and daughters or by daughter's sons in succession."

The present question was not before the learned Judges in *Chinnammal* v. *Varadarajulu*(1), but the observation would seem to support the respondents' contention, if the learned Judges meant by the use of the expression "in succession" nothing more than that they would take one after the other.

In the circumstances, we are not prepared to say that the lower Court's decision was wrong on this point.

We need not go into the question whether it would be open to the first plaintiff to raise this question in execution when the decree directs that he should deliver a moiety of item 4 to the first defendant, where by reason of the first defendant's death after the

(1) (1892) I.L.R. 15 Mad. 307, 313. (2) (1922) I.L.R. 46 Mad. 167, 187 (P.C.)

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decree it is claimed that the plaintiff has become a co-heir with the third defendant as regards the moiety decreed to the first defendant. Assuming that the contention is open to the plaintiff in these execution proceedings [*Khatija Bi* v. *Babu Sahib*(1)], we have held against him on the merits of his contention. The second plaintiff's rights are the same as the first plaintiff's in such circumstances.

The appeal is accordingly dismissed with costs of the third defendant—first respondent.

A memorandum of objections has been preferred by the third defendant claiming item 1 disallowed to him by the lower Court. In the judgment of the High Court passed on appeal, item 1 was mentioned as pannai land, and, as such, impartible; the sixth defendant is the present Zamindar, and he disputes the third defendant's rights to the same in the circumstances. The third defendant's claim to item 1 was disallowed by the executing Court on a former occasion. It was mentioned to us that in a suit between the third defendant and the sixth defendant, the third defendant's claim to item 1 has been disallowed, though it was also said that an appeal against that decision is pending. We see therefore no sufficient reason to interfere with the lower Court's order disallowing the third defendant's claim to item 1. The memorandum of objections is also dismissed, with costs (one set) of the second plaintiff and the sixth defendant, each sharing a moiety thereof.

REILLY J.—I agree.

A.S.V.

(1) (1912) 14 I.C. 544.