APPELLATE CIVIL.

1934, March 5.

Before Mr. Justice Jackson and Mr. Justice Butler.

THANDAVAN CHETTIAR AND ANOTHER (PLAINTIFFS 2 AND 1), APPELLANTS,

v.

U. K. UNNALACHAN (LEGAL REPRESENTATIVE OF DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, rr. 58, 63, and sec. 47—Party to suit and a person not a party to suit —Claim by—Order rejecting—Remedies of respective claimants against.

If two persons one of whom is a party to the suit and one not a party prefer a claim under Order XXI, rule 58, of the Code of Civil Procedure, the party to the suit must proceed by way of appeal by virtue of section 47 of the Code and the non-party by way of suit by virtue of Order XXI, rule 63, of the Code.

U Kala v. *Ma Hnin U and one*, (1927) I.L.R. 5 Rang. 110, distinguished.

APPEAL under Clause 15 of the Letters Patent against the judgment and decree of PAKENHAM WALSH J., dated 12th day of December 1932 and passed in Second Appeal No. 1667 of 1928, preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Palghat and made in Appeal Suit No. 20 of 1927 (Original Suit No. 369 of 1924 on the file of the Court of the Additional District Munsif of Palghat).

T. A. Anantha Ayyar for appellants.

K. Kuttikrishna Menon for respondent.

* Letters Patent Appeal No. 42 of 1933.

The JUDGMENT of the Court was delivered by JACKSON J.—We are not prepared to hold that PAKENHAM WALSH J. has erred.

If two persons one of whom is a party to the suit and one not a party prefer a claim under Order XXI, rule 58, of the Code of Civil Procedure, the party to the suit must proceed by way of appeal by virtue of section 47 and the non-party by way of suit by virtue of Order XXI, rule 63.

In the *obiter dictum* at the end of *U Kala* v. *Ma Hnin U and one*(1) it is assumed that the claim was not made in execution, (*see* bottom of page 114) which distinguishes it from our case, though why this assumption is made we do not understand. *Goba Nathu* v. *Sakharam Tepi Patil*(2) proceeds on the rights of the auction purchaser.

We see no absurdity in one party proceeding by way of suit and another by way of appeal—the two proceedings could ordinarily be linked; while if it is a District or Subordinate Court that is executing the decree against a party to the suit, its jurisdiction should not be taken away at the party's own instance by coupling himself with a non-party.

The importance of giving due scope to section 47 is noted by the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(3).

This Letters Patent appeal is dismissed with costs.

A.S.V.

(1) (1927) I.L.R. 5 Rang. 110. (2) (1920) I.L.R. 44 Bom. 977.
(3) (1892) I.L.R. 19 Calc. 683 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Lakshmana Rao.

1934, March 1.

NARAPPA NAICKEN (COUNTER-PETITIONER, DECREE-HOLDER), APPELLANT,

v.

GOVINDARAJA NAICKEN, MINOR RESPONDENT BY GUARDIAN MUTHAMMAL (LEGAL REPRESENTATIVE OF THE PETITIONER), RESPONDENT.*

Foreign Court—Jurisdiction of—Submission to, before judgment if must be—Submission afterwards—Effect of—Inference of submission before judgment from—When not proper.

To give jurisdiction and therefore validity to the decree of a foreign Court against a resident of British India there must be submission before judgment is pronounced. Submission afterwards except as supporting an inference that there was submission before is only effective as creating a sort of estoppel. A mere order made by the foreign Court that the original decree stand can add nothing to its validity or in any way extend the jurisdiction of the Court with regard to it.

An *ex parte* decree of a Court of Travancore against the respondent, a resident of British India, was sought to be executed in British India. In the Court of execution the respondent did not repudiate the decree, but took time to have it set aside, as being *ex parte*, in the Travancore Court (with the result that the decree was affirmed). The lower appellate Court and a single Judge of the High Court inferred that he did not submit to the jurisdiction of the foreign Court at the beginning and that his subsequent action was due to ignorance of his rights.

Held that that inference of fact could not be said to be wrong.

APPEAL under Clause 15 of the Letters Patent against the judgment and order of CURGENVEN J., dated the 23rd day of November 1932 and passed in Appeal against Appellate Order No. 132 of 1928

* Letters Patent Appeal No. 20 of 1933.

preferred to the High Court against the order of the District Court of Coimbatore, dated the 6th day of March 1928 and made in Appeal Suit No. 214 of 1927 (Execution Appeal No. 280 of 1927 in Execution Petition Register No. 89 of 1927 on the file of the Court of the District Munsif of Tiruppur in Original Suit No. 929 of 1098 M.E. on the file of the Court of the District Munsif of Quilon).

T. M. Krishnaswami Ayyar for appellant.

K. Bhashyam Ayyangar and *V. C. Veeraraghavachari* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by JACKSON J.—The appellant is seeking to execute in British India against a resident of British India a decree obtained in a Court of Travancore. In these circumstances it is admitted that the decree is only executable if the respondent submitted to the Travancore jurisdiction. It is a question of fact. The respondent never appeared at the trial of the suit in Travancore but it is argued that his submission may be inferred from the fact that in the Court of execution he did not repudiate the decree, but took time to have it set aside, as being *ex parte*, in the Travancore Court (with the result that the decree was affirmed). If, it is said, he submitted to the jurisdiction at the end of the transaction how can it be said he did not submit to it at the beginning? The lower appellate Court and this Court have preferred to infer that he did not submit at the beginning, and his subsequent action was due to ignorance of his rights and we are not prepared to say at this stage that this inference of fact is

JACKSON J.

NARAPPA NAICKEN v. GOVINDARAJA NAICKEN.

JACKSON J.

wrong. This disposes of the appeal but as so often happens the argument has been more substantial than its matter and much case-law has been cited. The law is correctly stated in *Sheo Tahal Ram* v. *Binaik Shukul*(1) and Dicey as quoted fully in this case seems to be correctly understood at page 753, only we should excise "probably" (two lines from bottom). To give jurisdiction and therefore validity to the decree there must be submission before judgment is pronounced. Submission afterwards unless, as in our case, supporting an inference that there was submission before, is only effective as creating a sort of estoppel such as that in *Malhar Narayan Prabhu* v. *Vishnu Sonu Ganada*(2). There the judgment-debtor took no objection to the execution, and allowed it to proceed to sale, and the Court held that to allow him subsequently to protest would seem very strange either in law or in equity. But in our case the respondent has all along opposed the execution. It is not very clear what the learned Chief Justice means at the bottom of page 750 in *Sheo Tahal Ram* v. *Binaik Shukul*(1). By adverse order he may be thinking of an appellate decree such as there is in *Guiard* v. *De Clermont & Donner*(3). A mere order, as in our case, made by the foreign Court that the original decree stand can add nothing to its validity or in any way extend the jurisdiction of the Court with regard to it. But an appellate decree which is the decree in the suit is quite another matter. *Hari Singh* v. *Muhammad Said*(4) in terms follows *Guiard* v. *De Clermont & Donner*(3)

(1) (1931) I.L.R. 53 All. 747.
(2) (1924) 80 I.C. 754.
(3) [1914] 3 K.B. 145.
(4) (1926) I.L.R. 8 Lah. 54.

(*see* page 92). It may be questionable whether the facts of these two cases run altogether on all fours ; but that is not a question which we need discuss. And, of course, an order after judgment has been passed is not the same as an order before the suit. In *Boissiere* v. *Brockner*(1) it was held that an appearance in the foreign Court before the suit in order to protest against its jurisdiction involves the defendant in the necessity of submitting to its jurisdiction if the plea to the jurisdiction should be disallowed. But appearance after the suit is decreed need not involve any such necessity. It is not as though after refusing to set aside the *ex parte* decree the Court proceeded to pass a fresh decree.

The appeal is dismissed with costs.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell.

THE PUBLIC PROSECUTOR, APPELLANT,

1934, February 28.

v.

T. P. SHANMUGA NADAR AND ANOTHER (ACCUSED), RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 192 (1)—Transfer—Magistrate empowered to—Can do so at any stage of case.

A Sub-Divisional Magistrate to whom a private complaint of offences under sections 485 and 486, Indian Penal Code, was made, after hearing the prosecution evidence found that a *prima facie* case was made out only of an offence under section 482,

(1) (1889) 6 T.L.R. 85.

* Criminal Appeal No. 598 of 1933.