APPELLATE CIVIL.

1939, April 28.

Before Mr. Justice Burn and Mr. Justice Stodart.

T. S. P. L. P. CHIDAMBARAM CHETTIAR (PETITIONER), APPELLANT,

v.

MURUGESAM PILLAI (MINOR) AND TWO OTHERS (RESPONDENTS 2 TO 4), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Final Order —Meaning of—Order returning execution petition for amendment—"Final order", if—Execution petition not re-presented—Limitation, if saved by.

The expression "final order" in article 182 (5) of Schedule I of the Indian Limitation Act of 1908 means an order putting an end to the application in respect of which it is made and not merely the last order in point of time made on the application. An order requiring the petitioner to do something more in order that the Court may proceed with his execution petition does not contemplate the end of that execution petition at all and, therefore, is not a "final order" within the meaning of article 182 (5). An execution petition which is returned for amendment and which is not re-presented within the proper time cannot save limitation.

Per BURN J.—A decree-holder who takes no further action on an execution petition returned to him for amendment should be treated as if he had never put in his petition at all.

Per STODART J.—A direction of the Court that an application made to it in execution should be amended is not even an order at all.

Article 182 (5) does not provide for the case where an order is passed by the Court on a defective application. An application which does not conform to the requirements of Order XXI, rules 11 to 14, of the Civil Procedure Code, and which for that reason has to be kept in abeyance—if the Judge so wishes—to permit the defect to be remedied, is not an

* Appeal Against Order No. 157 of 1938.

application made in accordance with law within the meaning of article 182 (5). Even therefore if the direction allowing time for the remedy of the defect is regarded as an "order" of the Court, it would not be an order passed on an application made in accordance with law and would therefore fall altogether outside the provisions of article 182 (5).

Kesavuloo v. *Official Receiver, West Tanjore*(1) and *Rama Reddi* v. *Motilal Daga*(2) followed.

Municipal Council, Tanjore v. *Sundaresan*(3) approved.

Mottayya Padayachi v. *Rajagopalan* (4), *Shanmuga Pathar* v. *Swaminatha Pathar*(5), *per* PANDRANG ROW J. in *Chidambara Nadar* v. *Rama Nadar*(6) (when the case was before the Division Bench after the expression of opinion by the Full Bench), and Appeal Against Appellate Order No. 138 of 1937 disapproved.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 11th October 1937, and made in Execution Petition No. 216 of 1936 in Original Suit No. 157 of 1924.

S. T. Srinivasagopalachari for *K. R. Rangaswami Ayyangar, T. R. Srinivasa Ayyangar* and *E. A. Viswanathan* for appellant.

K. G. Srinivasa Ayyar for third respondent.

Respondents 1 and 2 were not represented.

Cur. adv. vult.

JUDGMENT.

BURN J.

BURN J.—The only point in this appeal is one of limitation. The appellant's father got a decree in Original Suit No. 157 of 1924 on the file of the Subordinate Judge of Trichinopoly on 29th June 1925. The appellant is his adopted son. He presented his petition in execution (Execution Petition No. 216 of 1936) on 27th June 1936 and the learned Subordinate

(1) I.L.R. [1937] Mad. 112. (2) I.L.R. [1938] Mad. 326.
(3) 1939 M.W.N. 426. (4) 1936 M.W.N. 547.
(5) 1936 M.W.N. 547 (6) I.L.R. [1937] Mad. 616 (F.B.), 633.

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Judge has held that it was barred by limitation on the ground that it was not presented within three years after the final order passed on a previous application made in accordance with law to the proper Court for execution or to take some step in aid of execution; article 182 (5) of the Limitation Act.

The execution petition presented on 27th June 1936 is the fifth of the execution petitions presented by this decree-holder. The first was filed on 3rd November 1927 praying for arrest of the defendant; it was dismissed on 7th January 1928 as the judgment-debtor was not found for arrest. The second execution petition was presented on 3rd November 1930. This was returned on 4th November 1930 with an endorsement requesting the petitioner to show how he was entitled to attach a sum of money in deposit in Original Suit No. 6 of 1925. After two extensions of time had been given, the learned Counsel for the petitioner re-presented this petition on 24th November 1930 with an explanation. The petition was then returned on 26th November 1930 with an endorsement that the permission of the Court must be obtained to proceed against the properties in the hands of the receiver appointed by the Court. Two weeks' time was allowed for this. This endorsement was not complied with. The next application was "filed" on 3rd March 1931 and the second execution petition was "filed" along with it with the remark:

"On 3rd November 1930, petition was put in, but it was returned. It was not re-presented, it is filed herewith."

On this petition, on the 5th of March, the lower Court again required the petitioner to obtain the permission of the Court to proceed against the properties in the hands of the receiver appointed by the Court in Original Suit No. 6 of 1925 and allowed two weeks'

time for complying with this. After two extensions, this was re-presented on the 6th of April with an application for permission to proceed against the receiver. It was again returned by the lower Court on the 7th of April with a requisition that the description of the property sought to be attached should be amplified and that the extent and survey numbers should be given. One week's time was allowed for this. On the 15th of April, the petitioner's pleader prayed for fifteen days time to obtain the necessary extracts from the survey registers. On the 25th of June, fifteen days further time was prayed for and granted by the Subordinate Judge in his order, dated 30th June 1931. The requisition was however not complied with and this petition did not come back to the Court until 30th June 1934, when the fourth execution petition was filed. In that, as in the third, the petitioner stated that he had put in previous execution petitions on 3rd November 1930 and 3rd March 1931 but they had been returned to him and therefore, he said, they were presented along with the fourth. This was returned on 3rd July 1934 with an endorsement requiring the petitioner : firstly, to file an affidavit with regard to the legal representatives of the decree-holder (this petition was presented by the present appellant, the adopted son of the original decree-holder) ; secondly, to obtain the consent of the Vakil who had appeared in the prior execution proceedings ; thirdly, to put in a guardian petition for the minor legal representatives of the judgment-debtor ; and fourthly, to produce the revenue extracts which had already been called for on the previous two execution petitions. The petitioner did not comply with these requisitions but appears to have applied for further time, for, on 18th July 1934, the

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lower Court has endorsed: "Time granted till 9th August 1934." The petitioner having taken the petition back, nothing more was heard of it until 27th June 1936, when he presented Execution Petition No. 216 of 1936. He then produced the second, third and fourth petitions with an endorsement on each of them in these words: "As a fresh petition is filed herewith, this petition may be dismissed." Now, the learned Subordinate Judge has held that none of the orders passed on the second, third and fourth execution petitions can be considered to be a "final" order within the meaning of article 182 (5) of the Limitation Act. The last final order on an execution petition is dated 7th January 1928 and the execution petition presented on 27th June 1936 is long out of time.

Hence this appeal by the decree-holder. His contention is that his Execution Petition No. 216 of 1936 is not barred by limitation because it was presented within three years from 30th June 1934 when the fourth execution petition was finally returned to him; the fourth execution petition was presented within three years of 30th June 1931 when the third execution petition was returned to him, and the third execution petition was presented within three years of 26th November 1930 when the second execution petition was finally returned to him. The second execution petition was presented on 3rd November 1930 within three years of 7th January 1928 on which date the first execution petition had been dismissed.

The question is: what is the meaning of the words "final order" in article 182 (5) of the Limitation Act? Learned Counsel for the appellant contends that it means simply the last order in point of time. He relies on the decision of PANDRANG ROW J. in

Mottayya Padayachi v. *Rajagopalan*(1) and the decision of STODART J. in *Shanmuga Pathar* v. *Swaminatha Pathar*(2). On the other hand, learned Counsel for the appellant recognises that there are two decisions of Division Benches of this Court subsequent to these decisions of single Judges in which it has been held that "final" does not mean merely last in point of time. These are the cases of *Kesavuloo* v. *Official Receiver, West Tanjore*(3) and *Rama Reddi* v. *Motilal Daga*(4). There is also a decision of my own sitting singly, reported as *Municipal Council, Tanjore* v. *Sundaresan*(5). In the case of *Kesavuloo* v. *Official Receiver, West Tanjore*(3) VENKATASUBBA RAO and CORNISH JJ. have shown that "final" in article 182 (5) cannot be taken as meaning merely last in point of time. VENKATASUBBA RAO J. points out that the word "final" occurs not only in clause 5 of article 182 but also in clauses 2 and 6 and the meaning of the word "final" in clause 2 has been considered by their Lordships of the Privy Council in *Batuk Nath* v. *Munni Dei*(6) and *Abdul Majid* v. *Jawahir Lal*(7). The latter case, in my opinion, is very much in point. Article 182 (2) provides that the three years period of limitation for execution of a decree shall run, when there has been an appeal, from "the date of the final decree or order of the appellate Court . . . ". In the first of the cases before the Privy Council, an appeal was preferred to the Privy Council and it was dismissed for want of prosecution under Rule 5 of the Order in Council of 1853. It was contended on behalf of the assignee-decree-holder that the date on which the appeal had

(1) 1936 M.W.N. 547.
(2) 1936 M.W.N. 547.
(3) I.L.R. [1937] Mad. 112.
(4) I.L.R. [1938] Mad. 326.
(5) 1939 M.W.N. 426.
(6) (1914) I.L.R. 36 All. 284 (P.C.).
(7) (1914) I.L.R. 36 All. 350 (P.C.).

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been dismissed by the Privy Council was the date of the final decree or order of the appellate Court, and that the decree could be executed within three years from that date. This contention was disallowed by their Lordships. They held that, in such a case, there was no final order of the Privy Council within the meaning of article 179 (2) as it was then, corresponding now to article 182 (2). In the latter case again it was contended that the date of the dismissal by the Privy Council was the date of the final order or decree. Lord MOULTON observed :

"The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all."

In my opinion, this is the test to be applied in cases like the present. If an execution petition is returned to the decree-holder for some amendment, it is his duty to re-present it within the time allowed, or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can be properly described as a final order upon it. If, having received back his execution petition, he takes no further action upon it, then he should be treated in my opinion as if he had never put in his petition at all. This is what I said in my judgment in *Municipal Council, Tanjore* v. *Sundaresan*(1). It is not, in my opinion, permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned

(1) 1939 M.W.N. 426.

for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all. In the present case, the first execution petition, as I have already said, was dismissed on 7th January 1928, the second execution petition was filed on 3rd November 1930 and was last returned to the petitioner on 26th November 1930 requiring him to get the Court's permission to proceed against the properties in the hands of the receiver and giving him two weeks' time to do so. Now he did not bring this back until 3rd March 1931 and, when he brought it back, he did not comply with the requisitions; he did not pray for excusing the delay in complying with the requisitions; he did not ask that anything whatever should be done with the second execution petition; he merely filed it with the third execution petition presented on 3rd March 1931. Now, on 3rd March 1931, execution was barred because that was already more than three years after 7th January 1928 when the first execution petition had been dismissed. As I have already said, the third execution petition was dealt with in the same way as the second and therefore no judicial determination of it has been made but it is quite conceivable that if the third execution petition had been re-presented in proper time, it would have been dismissed as barred by limitation. Certainly it would have been necessary to dismiss the second execution petition as barred by limitation when it was re-presented on 3rd March 1931, unless the petitioner had been able to persuade the Court to excuse the delay in re-presentation. If the delay were not excused, then this petition would have had to be treated as if it had been presented for the first time on 3rd March 1931, and that was beyond the period of limitation. Learned Counsel has suggested

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that we should refer this matter to a Full Bench because PANDRANG ROW J. in spite of the decision of a Bench of this Court in *Kesavuloo* v. *Official Receiver, West Tanjore*(1) in 1936, still adhered in 1937 to his former opinion—vide *Chidambara Nadar* v. *Rama Nadar*(2)—and again in *A. K. Narasimha Aiyar* v. *Veerappa Chettiar**. I regret I do not consider that this is a sufficient reason for referring this matter to a Full Bench. As I have already said, there are two Benches which have already expressed the view that "final" in article 182 (5) cannot be interpreted as being merely last in point of time. With respect, I think those decisions are correct. "Final" is a word which has many meanings but all of them I think involve the notion of putting an "end" to something. It is not possible to call an order a "final order" unless it puts an end to something or other. Now, in my opinion, it is impossible to say of any of these orders of return on the second, third and fourth execution petitions that they put an end to anything. They were expressly orders requiring the petitioner to do something more in order that the Court might proceed with his execution petition. They did not contemplate the end of that execution petition at all. Learned Counsel for the appellant wishes us to say that such orders as these ought to be construed as if they contained further clauses. He says that when an execution petition is returned for amendment within fifteen days it ought to be read as if it contained a statement that in default of re-presentation within fifteen days, it should stand dismissed. I am not able to accept this contention. Article 182 (5) refers

(1) I.L.R. [1937] Mad. 112. (2) I.L.R. [1937] Mad. 616 (F.B.), 663.

* Appeal Against Appellate Order No. 138 of 1937.

expressly to "the date of the final order". It is not possible for this purpose to bring in some fictitious date of an order which has not been passed. Learned Counsel for the appellant has relied strongly upon the case of *Pitambar Jana* v. *Damodar Guchait*(1). But that case was before the amendment of the Act in 1927 as the ruling shows. It is therefore not applicable to this case. Learned Counsel has also referred to the decision of MADHAVAN NAIR J. in *Muhammad Abu Bakkar* v. *Ramakrishna Chettiar*(2). What is stated in that decision is that so long as the Court does not dismiss a petition, it must be deemed to be still pending. With respect I do not think that that principle can be applied to execution petitions of this kind where there is a period of limitation prescribed. If that view is taken, it is possible, as I have pointed out elsewhere, for a decree-holder to extend the period of limitation at his will by presenting a defective execution petition, and on its return to him by refraining from re-presenting it. This course could be taken before the amendment of article 182 in 1927. In 1927 it was the date of an execution petition that gave the start for the period of limitation of three years. Any execution petition presented within three years of the date of the presentation of a former execution petition was in time. It was therefore possible to present an execution petition with no intention of proceeding with it, and to take no further steps upon it for two years and three hundred and sixty-four days and then to come in with another execution petition. PANDRANG ROW J. in *Mottayya Padayachi* v. *Rajagopalan*(3) has expressed some views about the policy of the amending Act passed in 1927. With respect

(1) (1926) I.L.R. 53 Cal. 664. (2) A.I.R. 1933 Mad. 540.
(3) 1936 M.W.N. 547.

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it is not quite self-evident to me that the policy underlying the amendment was to give the decree-holder more time. I would prefer to follow the views on this subject expressed by VENKATASUBBA RAO J. in *Kesavuloo* v. *Official Receiver, West Tanjore*(1). I do not think, therefore, that there is any sufficient reason for putting this matter before a Full Bench. I am quite satisfied that the execution petitions which were returned for amendment and which were not re-presented within the proper time cannot save limitation.

The judgment of the learned Subordinate Judge is, therefore, in my opinion, correct, and this appeal should be dismissed with costs.

STODART J.

STODART J.—I agree with my learned brother. I think that my decision in *Shanmuga Pathar* v. *Swaminatha Pathar*(2) was wrong. In that decision I held that the expression "final order" in article 182 (5) of the First Schedule of the Limitation Act might be construed as the "last order" and that a direction of the Court that an application made to it in execution should be amended was, if the amendment was never made, the "last order" on that application. On further consideration I think that such a direction is not final in the sense in which that word should be construed, namely, as putting an end to the application; and I would go further and hold that such a direction is not an order at all. It is simply an intimation to the applicant that his petition cannot be admitted and acted upon unless he supplies the Court with further particulars or observes some formality which he has omitted to observe. There are in my opinion only three ways of dealing with an application for the execution of a decree, and these are unambiguously

(1) I.L.R. [1937] Mad. 112. (2) 1936 M.W.N. 547.

defined in Order XXI, rule 17, of the Civil Procedure Code. If the application conforms to the requirements of rules 11 to 14, it must be admitted which means that it receives a serial number in the execution petition register and comes on in the usual course in open Court for the orders of the Judge. In such a case there will be a final order which will effectively dispose of the matters raised in the application. Secondly, if the application does not comply with the requirements of rules 11 to 14, it may be forthwith rejected. Thirdly, and this is the case now under consideration, if the application does not comply with the provisions of rules 11 to 14, the Judge, instead of rejecting it forthwith, may allow the defect to be remedied and if necessary may grant time to enable the applicant to do this. The practice universally followed by the Courts is to embody a direction to this effect on the application itself and to return it to the party. If, within the time allowed, the application is not re-presented nothing more is heard of it. In my opinion the direction of the Court stating that the application is defective, that the Court allows the defect to be remedied and that the Court grants time for that purpose—generally a certain number of days—is not an order at all, much less a final order. It sometimes happens that a decree-holder makes an application for the execution of a decree not with any idea of realising anything towards his decree, but in order to extend the time during which it is lawful for him to execute his decree. Such an application may be perfectly *bona fide*. He may know at the time that the judgment-debtor is not able to pay anything, or he may wish to give the judgment-debtor further time to pay, either at the request of the judgment-debtor himself or for a variety of other

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reasons. Nevertheless, in his own interests, it is necessary to present an application for the execution of the decree to the proper Court lest he should lose his remedy altogether. Since the amendment of the Limitation Act in 1927 (Act IX of 1927), the mere presentation of an execution application to the proper Court is not sufficient to extend the period of limitation. Surely enough time has now elapsed for decree-holders to realise that the law has been changed and that they must not only present an application but must see that it conforms to the requirements of rules 11 to 14 of Order XXI and that it is admitted and finally disposed of by an order of the Court. It may occasionally happen that an application does conform to the requirements of rules 11 to 14 but is nevertheless not admitted but is held in abeyance pending the furnishing of some further information which the Court requires but which should not properly be called for till a later stage is reached. In that case the attention of the Court may be drawn to the fact that the application is one which should be, under the provisions of rule 17, admitted and disposed of in the ordinary course. Lastly, I would like to say that in my opinion article 182 (5) of the First Schedule to the Limitation Act does not seem to provide for the case where an order is passed by the Court on a defective application. The relevant words are " the date of the final order, passed on an application made in accordance with law to the proper Court ". But an application which does not conform to the requirements of Order XXI, rules 11 to 14, and which for that reason has to be kept in abeyance—if the Judge so wishes—to permit the defect to be remedied, is not in my opinion an application made in accordance with law. Even therefore if the direction allowing time for the remedy of the defect is regarded as an " order " of the Court,

it would in my view not be an order passed on an application made in accordance with law. If the application, on the other hand, were not defective, it would necessarily be admitted and a final order would be passed on it in due course. When it is defective and no order can be passed on it except an order—if order it can be called—that the defect can be remedied in a certain time, it seems to me that it falls altogether outside the provisions of article 182 (5).

I agree that this appeal must be dismissed with COSTS.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

VELLAYA KONAR (DIED) AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

1939, April 3.

v.

RAMASWAMI KONAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7 (iv-A) as amended by the Madras Act (V of 1922) and art. 17-A (i) of schedule II of the Act—Suit by creditor under sec. 53 of the Transfer of Property Act (IV of 1882) for a declaration that an alienation by a debtor is void against creditors—Proper prayer—Article applicable in such a case.

A suit brought by a creditor under section 53 of the Transfer of Property Act for a declaration that an alienation by the debtor is void against the creditors is not a suit for cancellation of a document securing money or property falling under section 7 (iv-A) of the Court Fees Act as amended in Madras,

* Second Appeal No. 959 of 1935.