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and, without expressly refusing to accept that decision as correct, I am not at present prepared to follow it, the more so that so far as regards this aspect of the appeal the hearing has been *ex parte*.

The present situation therefore is that the attestation by Anamale Chettyar must be taken to be good and that there is as yet no evidence as to the attestation by Ma Taik.

[The appeal was dismissed against the 1st respondent for reasons not material for the purposes of this report, and the case was remanded for the trial of the issue as to whether the mortgage deed was duly attested by Ma Taik.]

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.

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Aug. 3.

NACHIAMMA ACHI
v.
S.N. SUBRAMONIAN CHETTY.*

Order for transmission of decree for execution, a ministerial act—Allowing execution against legal representative of deceased judgment-debtor without notice whether valid—Question whether decree is barred when a question for executing Court and not the transmitting Court to decide—Letters Patent, Cause 13 *—Civil Procedure Code (Act V of* 1908), *ss.* 48, 50*—Limitation Act (IX of* 1908), *Sched. I, Art.* 181.

A decree of the Chief Court of Lower Burma passed in June 1910 was transmitted in July 1910 to the District Court of Ramnad for execution. It remained there till February 1922 when it was returned with a certificate of non-satisfaction and a letter stating that the decree was returned so as to enable the decree-holder to bring in the legal representatives of a deceased defendant on the record. The Ramnad Court had stated in one of its orders also that the request of the decree-holder to keep the execution petition on the file need not be granted. In April 1923 the decree-holder applied to the High Court to have the appellant brought on the record as the legal representative, and the order was made *ex parte* in July 1923. In January 1926 appellant got the *ex parte* order set aside, and in December 1926, she was ordered by the Original

* Civil First Appeal No. 32 of 1927 arising out of Civil Execution Case No. 301 of 1923 of the Original Side.

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Side Judge to be brought on the record and the decree ordered to be transmitted to Ramnad. Appellant appealed against the order, contending that the decree and the application to bring her on the record were both time-barred.

Held, that the order was appealable as it finally determined the question of the right of the appellant to have the decision of this court on the contentions raised by her.

Held, also, that an order permitting execution against legal representatives of a deceased judgment-debtor by transmission of the decree to another Court can rightly be made *ex parte*. A Court transmitting a decree acts ministerially and it is open to the legal representatives to raise objections on the score of limitation before the executing Court. Having regard also to the fact that it was uncertain whether the original execution proceedings in the District Court of Ramnad were open or closed, and owing to doubt as to the exact effect of its orders, it was preferable that the Ramnad Court should decide the question of limitation.

Banku Behary Chatterji v. *Narairdas Dutt*, 31 C.W.N. 589 (P.C.)—*followed*.

N. M. Cowasjee and *B. K. B. Naidu*—for Appellant.

Paget—for Respondent.

RUTLEDGE, C.J., AND CARR, J.—In Suit No. 308 of 1909 of the Chief Court of Lower Burma the respondent, Subramonian Chetty, obtained a simple money decree against five defendants, of whom the 5th was K.M.P.R.S. Palaniappa Chetty of Karakuddi in the Madras Presidency. The decree was passed on the 3rd of June, 1910, and in July of that year it was transmitted to the District Court of Ramnad in Madras, for execution. There it remained until the 25th February, 1922, when the Ramnad Court returned it to this Court with a letter stating that it was returned " so as to enable the decree-holder to bring in the legal representatives of the deceased defendants on record " and that no satisfaction had been obtained by execution in that Court.

Nothing was done in this Court until on the 20th April, 1923, the decree-holder (respondent) applied to have the appellant, Nachiamma Achi, brought on the record as the heir and legal representative of K.M.P.R.S. Palaniappa Chettyar, deceased. On this petition notice was issued to the appellant. This

was held to have been duly served and as the appellant did not appear an *ex parte* order was passed directing that the appellant be brought on the record as the legal representative of the 5th defendant. This was done by adding her name as legal representative in the plaint and the decree in the suit. The formal propriety of this procedure is at least questionable, since the Civil Procedure Code does not provide for it on the lines of the provisions of Order 22 in respect of suits. The only actual provision in the Code is section 50, which says that the decree-holder may apply to the Court which passed the decree to execute it against the legal representatives. The point, however, is not now of material importance.

This order was passed on the 4th July, 1923, and on the 9th of August the respondent applied for re-transmission of the decree to the Ramnad Court for execution. This was granted and the amended decree was so transmitted.

On the 24th of November, 1923, the appellant applied to have these two *ex parte* orders vacated. Notice was issued to the respondent, who contested the application. After much delay it was decided on the 19th of January, 1926, when the learned Judge on the Original Side allowed it and set aside the *ex parte* orders. His order came before this Bench in Civil Miscellaneous Appeal No. 43 of 1926, which appeal we dismissed on the ground that the order was not a judgment within the meaning of Clause 13 of the Letters Patent of this Court and was therefore not appealable.

The matter then went before another Judge on the Original Side, whose order on it is now appealed from.

The contention of the appellant was that the decree was no longer executable, being time-barred under section 48 of the Civil Procedure Code, and that the

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application to bring her on the record, or to execute the decree against her, was also time-barred under Article 181 of the Schedule to the Limitation Act. The respondent contends that there is no bar in either case because of the various proceedings in execution in the Ramnad Court.

The learned Judge has refused to decide between these two contentions. The view he has taken is that the questions raised are questions which ordinarily should be decided by this Court, but that in the peculiar circumstances of this case they ought to be decided by the District Court of Ramnad, because the decision will involve the construction of the previous orders in execution of that Court.

The appellant urges before us that she is entitled to have these questions decided by this Court. The respondent supports the order under appeal and contends further that there is no right of appeal against that order.

On this last question we are of opinion that an appeal does lie because the order finally determines so far as this Court is concerned the question of the right of the appellant to have the decision of this Court on the contentions raised by her. In this respect it differs from the order in question in Civil Miscellaneous Appeal No. 43 of 1926, which merely set aside certain *ex parte* orders and left the questions raised for decision on contest.

As regards the first contention this case is strikingly similar to *Banku Behary Chatterji* v. *Naraindas Dutt* (1), which was decided by the Privy Council. The facts of that case are somewhat more fully stated in the judgment of the Calcutta High Court (2). From the last-mentioned report it appears that more

(1) (1927) 54 I.A. 129 ; 31 C.W.N. 589.
(2) 78 I.C. 1001.

than twelve years after the passing of a mortgage decree by the Calcutta High Court the decree-holder "applied to the High Court, praying that the (deceased) mortgagor's widow and his two sons . . . . be substituted on the record in his place ; . . . . and that . . . . the decree be transmitted to the Hoogly Court for execution." This was done without notice to the widow and sons. The Hoogly Court issued notice to them under Order XXI, Rule 22 of the Civil Procedure Code and they then filed objections, not in the Hoogly Court but in the High Court itself. The principal objections were that the widow was not a legal representative of the mortgagor, and that execution was barred by the law of limitation. These objections were heard by a Judge of the High Court and a consent order was passed. Of this order Mr. Justice Richardson says in his judgment : "as it seems to me, its only appreciable effect was to amend . . . . the order for the transmission of the decree by striking out the name of the mortgagor's widow." Later he says :— "As I regard the matter, the parties or their legal advisers recognized, when they came before Pearson, J., that what I may call the substantial objections of the appellants to the execution of the decree fell to be decided not by the learned Judge but by the Hoogly Court to which the decree had been transmitted. The agreement arrived at related merely to the form of the order for the tranmission of the decree and not to its substance. When the original order, made without notice to the appellants, gave liberty to the respondent to execute the decree against them, such liberty was merely a liberty to the respondent to proceed in execution subject to all just objections on the part of the appellants and it would, perhaps, have obviated misunderstanding if some such words had been introduced."

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Again he says :—" Under the scheme of the Code, the Court transmitting a decree is not the Court to decide objections on the part of the judgment-debtor that the decree is incapable of execution or that execution is barred by limitation. Such objections should be taken before and heard and determined by the Court to which the decree is transmitted as the Court of Execution."

This judgment was passed on an appeal from the Hoogly Court before which the legal representatives had urged the objections that execution of the decree was time-barred under Article 183 of the Limitation Act. The Hoogly Court held that the original *ex parte* order of the High Court, coupled with the subsequent consent order, and as amended thereby, constituted a revivor of the decree. In the appeal the High Court held that it did not and that execution of the decree was in fact time-barred.

The decree-holder appealed to the Privy Council, which upheld the judgment of the High Court. The judgment of their Lordships was delivered only on the 22nd February in this year, that is, after the order now under appeal had been passed. They say expressly that the order of transmission would be rightly made *ex parte* and as a ministerial act. And although they do not expressly say so it follows by necessary implication from their judgment, in view of the facts before them, that the order permitting execution against the legal representatives would also rightly be made *ex parte*. On this point we ourselves expressed a contrary opinion in our judgment in Civil Miscellaneous Appeal No. 43 of 1926,* but in the face of this judgment of their Lordships we can no longer sustain that opinion.

There are, of course, differences of detail between the cases now before us and that dealt with by their

* Subramonian Chetty v. Nachiamma Achi.

Lordships, but as far as at present concerns us the essential features of the two are the same. The effect of the judgment is to show that this Court could rightly have allowed execution against the legal representative, and have transferred the decree to the Ramnad Court for execution, without giving any notice to the appellant and leaving her to raise her objections on the score of limitation in that Court. We do not think that the fact that notice has been given to her and that she has raised the objections in this Court can affect the power of the Court to act in the same way, which is what the learned Judge has done in the order under appeal.

We think also that in the circumstances of the case he was right in adopting that course, although we regret that one result must necessarily be to prolong further this already protracted litigation. The materials on the record are not in our opinion sufficient for a satisfactory decision of the question. They appear to be far from complete. On the other hand the whole of the previous proceedings in execution have been taken in the Ramnad Court and all necessary materials for a decision are therefore available to that Court.

We therefore dismiss this appeal with costs, ten gold mohurs. A copy of this judgment will be sent to the Ramnad Court.