1928

MA NGWE MYUN v. MA THWE.

MYA BU AND DARWOOD, JJ.

We therefore allow these appeals and set aside the orders passed by the District Court in Civil Miscellaneous Proceedings Nos. 105 and 111 of 1927.

The District Court will now proceed with the enquiry and dispose of the applications according to law.

We make no order as to the costs of these appeals.

APPELLATE CIVIL.

Before Mr. Justice Pratt, Officiating Chief Justice, and Mr. Justice Cunliffe.

1928

May 28.

ALIBHAI MOHAMED, A FIRM
v.
MAHOMED NOORMAHOMED.*

Limitation Act (IX of 1908), Sch. I, Arts. 182, 183—Burma Courts Act (XI of 1922), s. 26—Decree of Chief Court governed by Art. 182 and is not a decree of High Court for purposes of limitation—Infructuous application for execution which is time-barred gives no fresh period for limitation.

Held, that Art. 182 and not Art. 183 of the Limitation Act applied as regards execution of a decree of the late Chief Court of Lower Burma, although an application for execution is made in the High Court. The object of s. 26 of the Burma Courts Act was simply to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It is not intended to metamorphose a decree of the Chief Court into a High Court decree so as to apply the longer period of limitation attaching to a High Court decree.

Held, also, that where an application for execution is made, which is time-barred, and an order for arrest is made, but no warrant is issued and no process-fees are paid, the application becomes wholly infructuous and cannot give the decree-holder a fresh period of limitation under the provisions of Art. 182 (6) of the Limitation Act. Consequently a second application for execution is also time-barred, although presented within three years from the date of the infructuous application.

Bhagwan Jethiram v. *Dhondi*, 22 Bom. 83; *Bissessur Mullick* v. *Maharajah Mahatab Chunder*, 10 Suth. W.R., F.B.R. 8—*referred to.*

Mungul Pershad v. *Grija*, 8 I.A. 123—*distinguished.*

Jeejeebhoy for the appellants.

Rafi for the respondent.

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* Civil First Appeal No. 303 of 1927 from the order of the Original Side in Civil Execution No. 302 of 1927.

1928

ALIBHAI MOHAMED, A FIRM v. MAHOMED NOOR-MAHOMED.

PRATT, C.J.—This is an appeal from a decision of the Judge on the Original Side that an application for execution was time-barred. The decree, which it was sought to execute, was passed by the Chief Court on November 30, 1920.

An application for execution was made on the 6th July 1926, notice was issued and declared, duly served, and the Deputy Registrar ordered a warrant of arrest to issue. Costs were not deposited and the proceedings were closed without issue of warrant, so that the application was wholly infructuous.

If the application fell under Art. 182 of the First Schedule to the Limitation Act then it was barred.

The Original Side Judge has held that the *ex parte* order of the Deputy Registrar of the 6th of July 1926, in which he observed that the application appeared to fall under Art. 183, cannot operate as *res judicata*.

Of this there can be no doubt. It is obvious there has been no decision which can operate as *res judicata*.

The learned Judge further held that Art. 182 and not Art. 183 applied and that the application was therefore barred.

As regards the applicability of Art. 183 it is obvious that clause 44 of the Letters Patent is not relevant. It has, however, been argued with great plausibility that under section 26 of the Burma Courts Acts all decrees passed by the Chief Court of Lower Burma before the commencement of the Act shall be deemed to have been passed by the High Court.

I agree with the learned Original Side Judge that the object of the section was simply and solely to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It was not intended that a decree of the Chief Court should come under a different law of limitation simply because

1928

ALIBHAI MOHAMED, A FIRM v. MAHOMED NOOR-MAHOMED.

PRATT, C.J.

it was executed by the High Court. The wording of the section is quite definite :—"shall be deemed for the purposes of execution to have been passed by the High Court". It does not say that the decree shall be deemed the decree of the High Court for all purposes.

It is to my mind clear that the decree in question is not a decree of a Court established by Royal Charter within the meaning of Art. 183.

On the assumption that Art. 182 applies it is, however, argued that under Art. 182 (6) appellant obtained a fresh starting point for limitation from the date of the application for execution in Execution Case No. 318 of 1926, *viz.* 26th June 1926. Reliance is placed on the ruling of their Lordships of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhury* (1). Their Lordships undoubtedly held that assuming that a decree is barred at the date of some order made for its execution, such order, although erroneously made, is nevertheless valid unless reversed upon appeal. Their Lordships, however, also held that under the then Limitation Law the decree was not barred.

The facts of *Mungul Pershad Dichit's* case (1) are not, however, on all fours with the present, since in that case the property was actually attached and no appeal was preferred. In the present instance no warrant was issued so the application was wholly infructuous.

Their Lordships of the Privy Council were careful to distinguish the facts from those in *Bissessur Mullick* v. *Maharajah Mahatab Chunder Bahadoor* (2), where there was merely notice on the judgment-debtor after the decree was barred, but no order was made.

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(1) (1881) ; 8 I.A. 123 ; 8 Cal. 51. (2) 10 Suth. W.R., F.B.R. 8.

In the later case of *Bhagwan Jethiram* v. *Dhondi* (1), a Bench of the Bombay High Court held after reference to the case in *Mungul* v. *Grija* (2), that where a second application, which was time-barred, was allowed or subsequently struck off for some fault of the applicant, a third application was barred though presented within three years of the second.

In that case it was pointed out that there had been no adjudication in the time-barred application, which was allowed and subsequently struck off, which differentiated it from *Mungul* v. *Grija* (2).

The facts in the present appeal are similar. It cannot be said that there was any adjudication in Execution Case No. 318 of 1926. The judgment-debtor never appeared and the warrant of arrest ordered *ex parte* never issued. On the facts on record it is by no means clear the judgment-debtor was aware of the application for execution.

There was not in my opinion sufficient ground for holding service effected. The action of the decree-holder in not paying the process fees distinctly suggests that his real object was to get an application recorded for the purpose of saving limitation, but that as a matter of fact he did not desire that the judgment-debtor should be cognisant of the application. I do not consider that an application made under such circumstances, which was time-barred, should give appellant a fresh period for limitation. I would hold that as the previous application was barred, the present application is also barred, and that the mere fact that an order was passed for issue of a warrant *ex parte*, though the warrant never issued, cannot validate the application and prevent the operation of the Law of Limitation.

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(1) (1896) 22 Bom. 83. (2) (1881) 8 I.A. 123 ; 8 Cal. 51.

1928

ALIBHAI MOHAMED, A FIRM v. MAHOMED NOOR-MAHOMED.

I would dismiss the appeal with costs. Advocate's fees five gold mohurs.

CUNLIFFE, J.—I agree. This is a novel point which in all probability will never arise again. I was at first much attracted by the argument put forward on behalf of the appellant, based on the provisions of section 26 of the Burma Courts Act. The material portion of this section is as follows :—

"All decrees passed and orders made in the exercise of any jurisdiction other than criminal jurisdiction and all sentences and orders passed in the exercise of criminal jurisdiction before the commencement of this Act—

(*a*) by the Chief Court of Lower Burma, or the Judicial Commissioner, Upper Burma, or the Court of the Judicial Commissioner of Upper Burma—

shall be deemed for the purposes of execution to have been passed or made by the High Court."

It was argued that the full meaning of the above must be that any decree of the old Chief Court was completely metamorphosed into a High Court decree from every standpoint and especially on the question of limitation the longer period attaching to a High Court decree must accrue. I have come to the conclusion that this was never the intention of the Legislature.

The enactment merely attempts to smooth away any difficulties from an execution point of view, so that litigation may be continued to its logical conclusion.