APPELLATE CIVIL.

Before Mr. Justice Brown.

1929

Jan. 30.

S. S. SOMASUNDARAM CHETTYAR
v.
MA SHWE THIT AND OTHERS.*

Civil Procedure Code (Act V of 1908), O. 21, rr. 58 to 63—Court's scope of inquiry—Attaching creditor's right to execute decree or that it is time-barred cannot be questioned by claimants who are not parties to the decree —Opening of execution proceedings—Making of application in execution—Step in aid of execution—Limitation Act (IX of 1908), Sch. I, Art. 182—Court's failure to adjudicate on claim whether property is attachable—Court's failure to consider the law that is applicable on point of limitation— Grounds for revision.

In investigating claims for removal of attachment under O. 21, rr. 58 to 61 of the Civil Procedure Code, it is not within the scope of the enquiry for a Court to decide whether the attaching creditor has the right to execute his decree. Objectors who are not parties to the decree cannot ordinarily contend that the application of the executing creditor was time-barred.

The opening of execution proceedings is not the same thing as the making of an application in execution or the taking of some step in aid of execution, but all of them come within the purview of Art. 182 of the Limitation Act. Even where there is no actual application for execution on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose.

A. Pille v. *Adiappa*, 10 L.B.R. 34—*referred to.*

The remedy of a party against whom an order is passed under O. 21, rr. 59 to 62 of the Code, is to file a declaratory suit. But where the Court has refused to adjudicate on the claim as to whether the property was attachable under O. 21, rr. 58 to 62, and the Court has not really considered the law that is applicable on the point of limitation, it has erroneously refused to exercise a jurisdiction vested in it by law, and the High Court can interfere on revision.

Venketram for the applicant.

Khin Maung Gyee (2) for the respondents.

BROWN, J.—The petitioner obtained a decree, and in execution of that decree attached certain property.

* Civil Revision No. 211 of 1928 from the order of the Subdivisional Court of Magwe in Civil Miscellaneous No. 7 of 1928.

The respondents, who were not parties to the decree, filed an application for removal of attachment, and one of the grounds taken by them was that the application for attachment was barred by limitation.

The trial Court, without coming to any decision on the merits, held that this contention was correct and removed the attachment. The attaching creditor has now come to this Court in revision.

Two main objections have been taken to the order passed by the trial Court. The first is that the respondents not being parties to the original decree were not entitled to question the right of the Chettyar Firm to attach under that decree, and the second objection is that the finding on the point of limitation is wrong.

The procedure to be followed when applications for removal of attachment are made is laid down in Rule 58 and the following Rules of Order XXI of the Code of Civil Procedure.

Under Rule 59 "The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached", and under Rule 61 "Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim."

It does not come within the scope of the enquiry to decide whether the attaching creditor had the right to execute the decree, and there is considerable force in the contention that the respondents should not have been refused the order they asked for merely because the application in execution was

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time-barred. But apart from this, it seems to me clear, on the face of the record, that the application in execution was not time-barred at all. The trial Judge found that it was time-barred because the first application in execution was made on the 25th of January, 1923, and, according to him, the second application was not made until the 18th of September, 1926. He seems, however, entirely to have overlooked the fact that, although execution proceedings were opened on the 25th of January, 1923, and no fresh proceedings were opened until September, 1926, there were several applications made in the course of the earlier proceedings. The first attempt in those proceedings appears to have been infructuous.

On the 21st of July a fresh application was made for arrest of the judgment-debtor. This arrest does not seem to have been effected, and on the 26th of November, 1923, the diary of the proceedings shows that the decree-holder's advocate was heard as to whether the judgment-debtor should be arrested. On the 3rd of December, 1923, the diary shows that the decree-holder again applied for arrest of the judgment-debtor and for attachment of certain property. The Judge refused to arrest the first judgment-debtor but issued a warrant of attachment against the property of the 2nd judgment-debtor.

On the 26th of January, 1924, a sale proclamation was issued but the sale did not take place, as an application was made for removal of attachment.

Under the provisions of Article 182 (5) of the Limitation Act, the period of three years runs, "where the application next hereinafter mentioned has been made, from the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree

or order." This Article does not prescribe that the application must of necessity be in writing.

On the 3rd of December, 1923, the decree-holder applied for the arrest of the 1st defendant and for attachment of the house of the 2nd defendant. The application was considered on its merits and was actually granted as regards the second prayer. It seems to me that this is a sufficient application within the meaning of the Article.

In the case of *A. A. Adimuthu Pille* v. *Adiappa and one* (1), it was held "that, even where there is no actual application on the record, such an application may be presumed in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose."

In this case the record shows clearly that an application was made, and I am of opinion that limitation was thereby saved.

It is only in rare cases that this Court will interfere in revision with orders passed on applications made for removal of attachment. The applicant is ordinarily referred to the remedy provided for him by Rule 63 of Order XXI of the Code of Civil Procedure. But there are special circumstances here which justify a departure from the ordinary rule. The Court has refused to adjudicate on the claim as to whether the property was attachable under the provisions of Order XXI, Rule 58 and the following Rules, and in coming to its decision on the point of limitation, the Court has not really considered the law that is applicable. It has entirely overlooked that the opening of execution proceedings is not the same thing as the making of an application in execution, or the taking of some step in aid of

(1) (1918) 10 L.B.R. 34.

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execution, and has erroneously refused to exercise a jurisdiction vested in it by law. The petitioner will in the circumstances be put to quite unjustifiable hardship if he is compelled to resort to a regular suit. He is, in fact, being denied his right to have the matter adjudicated on by the Executing Court.

I, therefore, set aside the orders passed by the trial Court and direct that the application for removal of attachment be dealt with on its merits.

The respondents will pay the costs of the petitioner in this Court.

APPELLATE CIVIL.

Before Mr. Justice Brown.

1929

Jan. 30.

GUNNU MEAH
v.
A. RAHMAN.*

Arbitration—Application to file an award and suit to enforce an award, distinction between—Second appeal to High Court—Signature by party to an award, when estops him from disputing the award—Suit not based on acceptance of award.

There is a distinction between an application to file an award and a suit to enforce an award. In the latter case, but not in the former, a second appeal lies to the High Court.

Nga Hla Gyaw. v. *Mi Ya Po,* (1914-16) U.B.R. Vol. 2, 26—*referred to.*

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the award, and this is especially so when the plaintiff's case is not based on any acceptance of the award by the defendant in virtue of his signature.

U Gunawa v. *U Pyinnyadipa,* 1 Ran. 15—*distinguished.*

N. N. Sen for the appellant.
Bhattacharyya for the respondent.

BROWN, J.—The appellant, Gunnu Meah, filed a suit in the Township Court of Insein for the enforcement

* Civil Second Appeal No. 434 of 1928 from the judgment of the District Court of Insein in Civil Appeal No. 22 of 1928.