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them and at their expense of the bund newly erected by them in their land to the south of the boundary bund C—D.

A decree will be passed accordingly. As both sides have been partially successful in this appeal there will be no order as to the costs of the appeal or of the cross-objection. The order of the District Court regarding the costs of the first appeal and of the original suit will be maintained.

APPELLATE CIVIL.

Before Mr. Justice Dunkley.

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Mar. 31.

ARJUNDAS *v.* U KA YA AND ANOTHER.*

Limitation—Execution—Limitation Act (IX of 1908), article 182 (5)—Application for execution made to Court which passed the decree—Certified copy of decree filed—Prayer for attachment of property situate outside jurisdiction—Amendment of application—Dismissal of application—Fresh starting point of limitation—Subsequent application for transfer of decree—Jurisdiction of transferee Court to decide points of limitation—Civil Procedure Code (Act V of 1908), s. 38, O. 21, r. 26.

To attract the provisions of clause (5) of article 182 of the Limitation Act three conditions must be fulfilled: (1) an application must be made for the execution of the decree: or to take some step in aid of execution: (2) it must be made in accordance with law: and (3) it must be made to the proper Court.

Where a decree-holder makes an application for execution accompanied by a certified copy of the decree to the Court which passed the decree and asks the Court to attach and sell the debtor's land which is situate outside its jurisdiction, the Court ought not to dismiss the application without giving the decree-holder opportunity to amend it by praying for the transfer of the decree for execution to the Court in whose jurisdiction the property is situate. In any case the application satisfies the requirements of clause (5) of article 182 as having been made in accordance with law to the proper Court, for in order to attach property outside the jurisdiction of the Court which passed the decree an application must in the first instance be made to that Court. Consequently a subsequent application of the decree-holder for transfer of the decree made within three years from the date of the dismissal of his previous application is within time. The Court to which the decree is transferred can decide whether an application for execution made to itself is in time or not, but it has no juris-

* Civil Second Appeal No. 362 of 1935 from the order of the District Court of Thayetmyo in Civil Miscellaneous No. 47 of 1935.

diction to decide whether the application for transfer was within time or not. That question can only be decided by the Court which passed the decree.

Sreenath v. *Priyanath*, I.L.R. 58 Cal. 832—*followed.*

Nachiamma v. *Subramonian Chetty*, I.L.R. 5 Ran. 775—*referred to.*

Alibhai v. *Noormahomed*, I.L.R. 6 Ran. 566; *Kayastha Co., Ltd.* v. *Sitaram*, I.L.R. 52 All. 11—*distinguished.*

K. C. Sanyal for the appellant.

Leong for the 1st respondent.

DUNKLEY, J.—This appeal raises a somewhat unusual point regarding the limitation of applications for execution of decrees. The provision of the Limitation Act which governs the matter in issue between the parties is clause 5 of article 182 of the First Schedule, which is in the following terms :

"5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order."

Hence, in order to attract the provisions of this clause three conditions must be fulfilled, namely : (1) an application must be made for the execution of the decree ; or to take some step in aid of execution ; (2) it must be made in accordance with law ; and, (3) it must be made to the proper Court. The period of limitation is, of course, three years from the date of the final order passed on the application.

The appellant, who is the decree-holder, obtained a decree against the respondents in the Township Court of Thayetmyo in Civil Regular Suit No. 61 of 1926. He made certain infructuous applications to execute his decree, and the particular application which is of importance in the present proceedings is Execution No. 33 of 1932 of the Township Court of Thayetmyo. This application was presented to the Court on the 12th March, 1932. The prayer was for the attachment and

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sale of a house and site at Minhla and, therefore, outside the jurisdiction of the Township Court of Thayetmyo. Process-fees were paid by the appellant, and notice was issued to the judgment-debtors, and the case was fixed for the 29th March. As the notice was not returned on the 29th, further adjournment was made to the 31st March. On the 31st March the notice still had not been returned, and then the learned Township Judge recorded the following order :

"I find the land sought to be attached situate in Minhla Township. This Court cannot execute the decree in the manner applied for. The application is dismissed."

A copy of the decree had been filed with the application, and by a mere amendment of the prayer, regarding the manner in which the decree-holder desired the Court to act, the application could have been converted into an application for the transfer of the decree for execution ; but, nevertheless, the learned Township Judge did not ask the decree-holder whether he desired to have his decree transferred for execution to the Township Court of Minhla, but dismissed the application *in limine.*

No further action was taken by the decree-holder until 1st February, 1935, when, in Execution No. 9 of 1935 of the Township Court of Thayetmyo, he applied for a transfer of his decree for execution to the Township Court of Minhla. This application was allowed on the 5th February, 1935, and the decree was transferred to the Township Court of Minhla. Subsequently on the 11th May, 1935, in Execution No. 8 of 1935 of the Township Court of Minhla, the decree-holder-appellant took out execution and notice was issued to the judgment-debtors-respondents. They appeared on the 20th May, and contended that the application for execution was barred by limitation, and the learned Township

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Judge, after hearing argument, decided that it was so barred and dismissed the application. An appeal was filed in the District Court of Thayetmyo against this order, but was dismissed ; hence this second appeal.

The grounds on which the learned Township Judge proceeded in his order were based on the case of *Alibhai Mohamed* v. *Mahomed Noormahomed* (1), but that case is not applicable to the present matter as there the earlier application had been barred by limitation. It has now been contended on behalf of the appellant that the Court to which the decree was transferred for execution had no jurisdiction to consider the question of limitation, but it has been held by a Bench of this Court in the case of *Nachiamma Achi* v. *S. N. Subramonian Chetty* (2) that the executing Court, to which a decree has been transferred for execution, has jurisdiction to decide whether the application for execution subsequently made to it is barred by limitation or not. I do, however, agree with the further contention that in considering the question of limitation the executing Court cannot look further back than the order transferring the decree of the Court which passed the decree, for an order transferring a decree is a step in aid of execution, and, consequently, provides a starting point for a fresh period of limitation. Hence, so far as the Township Court of Minhla was concerned, the application for execution to that Court was plainly within time as it was made within a period of a little over three months after the order transferring the decree to it for execution. It was not open to the Township Court of Minhla to go behind that order and decide whether the application for transfer was within time or not, as that question had been implicitly decided by the order transferring the decree. If the respondents desired to

(1) (1928) I.L.R. 6 Ran. 566. (2) (1927) I.L.R. 5 Ran. 775.

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question that order, then their proper course was to apply to the Township Court of Minhla, under Rule 26 of Order XXI of the Code of Civil Procedure, for a stay of execution to enable them to make the necessary objection in the Township Court of Thayetmyo. However, the learned Township Judge has erroneously considered the question on the basis that the order transferring the decree to his Court was not a step in aid of execution, although probably this point was not present in his mind, and, consequently, the question of limitation is now at large and must be considered.

Learned counsel for the respondents does not contend that an application for transfer of a decree is not a step in aid of execution, but the learned District Judge on first appeal rightly pointed out that the real question at issue, in deciding whether execution of this decree is barred by time or not, is whether the application made in Civil Execution No. 33 of 1932 of the Township Court of Thayetmyo was effective to constitute a fresh starting point for the running of time. He decided that it was not so effective, on the ground that when an application to attach property is made in the wrong Court the application is not in accordance with law and, therefore, cannot be considered for the purpose of saving limitation. He cited as authorities for this proposition the cases of *Sheo Prasad* v. *Naraini Bai* (1) and *Kayastha Company, Limited* v. *Sitaram Dube* (2). He, however, apparently overlooked the fact that the decision in the former case, regarding the necessity of *bonâ fides* in the application, was overruled by the judgments of the Full Bench in the latter case. There is, no doubt, in the judgment of Sulaiman J. in the latter case (2), a statement that

(1) (1925) I.L.R. 48 All. 468. (2) (1929) I.L.R. 52 All. 11.

"When it was shown that the relief asked for in the previous application, *viz.*, to attach and sell property not situated within the jurisdiction of the Munsif, was such as the court could not grant, the application was not in accordance with law and the case could have been disposed of on that point alone."

but, with all due respect, this remark was *obiter* and was not necessary for the decision of the reference before the Court.

A distinction must be drawn, in such a case as this, between an application to the Court which passed the decree and an application to a Court to which the decree has been transferred for execution. Section 38 of the Code of Civil Procedure lays down that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Consequently, an application for execution either to the Court which passed the decree or to the Court to which the decree has been transferred must be held to be an application to the proper Court. If an application be made to a transferee Court for the attachment and sale of land outside the jurisdiction of that Court it would perhaps have to be held that the application was not made in accordance with law, for the Court could not proceed against property outside its jurisdiction; but the matter is on a different footing when the application is made to the Court which passed the decree, as in order to proceed against property outside the jurisdiction of that Court application must first be made to that Court, and it cannot, therefore, be said that an application for execution to that Court is not made in accordance with law, merely because, instead of asking for a transfer of the decree to the Court within whose jurisdiction the property is situated, the application asks for the issue of a warrant of attachment. In the case of *Sreenath Chakravarti* v.

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Priyanath Bandopadhyay (1), where the prior application was made to the Court which passed the decree, it was held that the decree-holders were entitled to call in their aid their prior application for execution though that Court was not competent to execute the decree as against immovable property situate outside its territorial jurisdiction. It was further held that the question is not whether the Court has jurisdiction to execute the decree, but whether it has jurisdiction to entertain the application, in other words, whether an application for execution made in that Court in such circumstances will count as an application for execution for the purpose of limitation ; and even if an application is made to a Court, which passed a decree, to execute it in respect of property outside its territorial limits and that Court will not have jurisdiction to carry on such execution, the application should be regarded as made to a proper Court.

Consequently, the decision of the Township Court of Minhla, dated the 20th May, 1935, and the judgment of the District Court of Thayetmyo, dated the 3rd September, 1935, on appeal therefrom, were incorrect. This appeal is, therefore, allowed, and the application for execution in Execution No. 8 of 1935 of the Township Court of Minhla is restored to the file and returned to that Court for disposal in accordance with law. The appellant is entitled to obtain from the respondents his costs of this appeal and of the appeal in the District Court ; advocate's fee in this Court two gold mohurs.

(1) (1930) I.L.R. 58 Cal. 832.