

Burma); both are entirely outside the scope of the Act. [*M.T.T.K.M.M.S.M.A.R. Somasundaram Chettyar v. Commissioner of Income-tax, Madras* (1), and *The Provident Investment Co., Ltd. v. The Commissioner of Income-tax, Bombay* (2).] It would never, I imagine, be contended that, where a business in Burma had a branch abroad, the profits of which branch were not assessable, the expenses of running the foreign branch could be deducted under section 10 (2) (ix).

The question referred must therefore be answered in the negative. The Commissioner of Income Tax is entitled to his costs of this reference, advocate's fee 20 gold mohurs.

ROBERTS, C.J.—I agree.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

K.K.K.M. CHETTYAR *v.* SELLAMI ACHI.*

Execution—Decree of a British Indian Court transferred to Burma for execution prior to 1st April 1937—A pplication for execution after 1st April 1937—Jurisdiction—Foreign Court—No reciprocal arrangement—Application to bring legal representative of deceased judgment-debtor on record—Application to executing Court—Irregularity—Civil Procedure Code, ss. 2 (5) and (6), 44A; O. 21, rr. 10, 11—Adaptation of Laws Order, para. 10.

Where the decree of a Court in British India has been transferred to a Court in Burma for execution prior to 1st April 1937, but no application for execution has been made in the Court in Burma until after 1st April 1937, the Court in Burma has no jurisdiction to execute the decree. The receipt of the decree on transfer is a mere ministerial act, and it is the application for execution which initiates the proceedings in execution. Since 1st April 1937 the decree of the British Indian Court has become a foreign decree and cannot be executed in Burma on an application without reciprocal arrangement to that effect.

Paragraph 10 of the Adaptation of Laws Order deals with substantive rights and not matters of procedure.

R.M.K.A.R. Chettyar v. R.M.K.A.R.V. Chettyar [1938] Ran. 176, referred to.

(1) 2 I.T.C. 505.

(2) 6 I.T.C. 21.

* Civil First Appeal No. 163 of 1937 from the order of the District Court of Henzada in Civil Execution No. 8 of 1937.

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In re
THE COMMISSIONER OF
INCOME-TAX,
BURMA
v.
N.S.A.R.
CONCERN.

DUNKLEY, J.

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If an application to bring the legal representative of a deceased judgment debtor is made to the Court to which the decree is transferred for execution and not to the Court which passed the decree, it is a mere irregularity in procedure and can be waived.

Jang Bahadur v. Bank of Upper India, 55 I.A. 227, followed.

K. C. Bose for the appellant.

Hay for the respondent.

MOSELY, J.—This is an appeal from an order of the Additional District Judge of Henzada dismissing an application for execution of a decree passed by the Court of the Subordinate Judge, Devakotta, Madras, which had transferred the decree to the Henzada Court for execution.

The ground on which the learned Additional District Judge dismissed the application was this, that the judgment-debtor had died in the interim between the date of receipt of the application for execution on transfer and the date of the application for execution, and no application had been made to the Devakotta Court for the addition of legal representatives. In the order of the District Court it was also mentioned that a (more vital) objection was made, namely, that the decree was one of a foreign Court and incapable of execution in Burma in any event, the application for execution having been made after separation. This aspect of the case was merely mentioned at the opening of the judgment of the learned Additional District Judge: it was not afterwards alluded to. It is, however, relied on in great part by the learned advocate for the respondent judgment-debtors in this appeal.

The date of the order of transfer was the 17th October 1936 and the date of receipt 29th October 1936. Under Order 21 rule 10 where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree, or if the decree has been sent under the provisions of section 39 to the Court to which

it has been sent. It is clear from this section that it is the application for execution which initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act. Order 21 rule 10 (a) provides that if no application is made by the decree-holder within six months of the date of receipt of the papers the Court shall return them to the Court which passed the decree with a certificate of the circumstances. This period of six months had expired on the 29th of April 1937, and as the District Court itself remarked, the copy of the decree should have been returned before this application was actually made.

The application for execution was only made on the 19th May 1937. Separation took effect from the 1st of April 1937. The decree of the Devakotta Court had by then become the decree of a foreign Court and the judgment a foreign judgment within the definition of sections 2 (5) and 2 (6) of the Code of Civil Procedure. Under section 44A which came into force on the 1st of November 1937, *vide* Judicial Department Notification No. 203, dated the 6th November 1937, it is only where the foreign Court which passed the decree belongs to a territory which has reciprocated in this respect with Burma that a copy of its decree may be filed in the District Court in Burma so as to become executable here as if it had been passed by the District Court.

The application for execution in question was filed before the date of that Notification; but that is immaterial as at the date that it had been filed the District Court had no jurisdiction to execute decrees of a foreign Court, while even if the application had been made after the 1st of November no reciprocation has yet been made with Burma by India or any part of it.

Mr. Bose for the appellant has quoted sections 10 and 11 of the Government of Burma Adaptation of

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Laws Order of 1937. I do not think that section 11 is relevant. Section 10 says that nothing in this order shall affect any right, privilege, obligation or liability already acquired under any Burman Law : but this refers clearly to substantive rights acquired and not to mere matters of procedure in which rights cannot be acquired.

As regards the point dealt with by the learned Additional District Judge, there was a conflict of authorities on the point as to whether application to add legal representatives of a deceased judgment-debtor must be made, *vide* section 50, sub-section (2) of the Code of Civil Procedure, to the Court which passed the decree or could be made to the Court executing the decree also. This controversy was set at rest in *Jang Bahadur v. Bank of Upper India* (1), where their Lordships of the Privy Council held that the matter was one of procedure and not of jurisdiction. The jurisdiction, it was said, of the executing Court over the subject matter continued as before, but a certain procedure was prescribed for the exercise of such jurisdiction. If there was non-compliance with such procedure the defect might be waived. I might note here that the learned Judge should not have fallen into the common and slipshod error of quoting an author's Commentary on the Civil Procedure Code instead of quoting the judgments of the Courts of India to be found on the subject after very little search there or in any annotated Code. The Commentary cited, it may be added, is not usually considered one of any particular weight.

For these reasons this appeal fails and will be dismissed with costs, advocate's fee three gold mohurs.

(1) (1928) 55 I.A. 227.

BAGULEY, J.—I agree but would put the matter shortly in this way. In my opinion execution proceedings can only start with an application for execution, *vide* Order 21, rules 10 and 11. In this case the application was not filed until after the Court had ceased to have jurisdiction to deal with it. Before the 1st of April 1937 the execution proceedings could have been initiated in Henzada and had they been initiated, it is possible, though I have not considered the matter, that the result would have been different. In this case they were not initiated until the Court ceased to have jurisdiction to deal with them : as I cannot agree that the receipt of a copy of the decree gives the receiving Court a jurisdiction to do anything before an application was made for it.

Whether the plaintiff executes his decree in one Court or another is a matter of procedure. In a recent Full Bench case of this Court, *R.M.K.A.R. Arunachallam Chettyar v. R.M.K.A.R.V. Valliappa Chettyar* (1), a case of a similar nature to the one before us, it was pointed out, relying upon the cases of *Republic of Costa Rica v. Erlanger* (2) and *Wright v. Hale* (3), that no litigant can have a vested right in a matter of procedure. For this reason Rule 10 of the Adaptation of Laws Order cannot apply. The substantive right of the appellant to get his money from the respondent is not touched : he can execute his decree in any Indian Court or he can file a suit in the Henzada Court or any other Court in Burma, using the judgment which he has obtained as a foreign judgment on which to sue for a decree : no substantive right is taken away by refusing to allow him the right of procedure of executing his decree in the Henzada Court.

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(1) [1938] Ran. 176.

(2) (1876) 3 Ch.D. 62.

(3) 30 L.J. Ex. 40.