APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

P.L.S.P. SUBRAMANIAN CHETTIAR

v.

L.N. CHETTYAR FIRM AND ANOTHER.*

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May 16.

Execution, Application for—Plea of limitation—Jurisdiction to entertain plea—Court which passed the decree—Court to which decree is transferred for execution—Burma Courts Act, 1922, ss. 6, 7, 24, 26—Establishment of District Courts—Burma Courts (Amendment) Act, 1932, s. 2 (1) (4)—Establishment of Assistant District Courts—Decree of District Court of value less than Rs. 15,000—Decree executable by District Court and not by Assistant District Court—Civil Procedure Code, ss. 37 (b), 150; O. 21, r. 28.

Objections as to execution of a decree on the ground of limitation can be raised either in the Court which passed the decree or in the Court to which the decree is sent for execution. The Court which passed the decree is the Court which has and retains control of the proceedings, and it is a matter of convenience or priority of application as to which Court should determine the question.

Banku Behari v. *Naraindas*, 54 I.A. 129; *Nachiamma* v. *Subramonian Chetty*, I.L.R. 5 Ran. 775; *Srihary Mundul* v. *Chowdhury*, I.L.R. 13 Cal. 257, referred to.

Where a decree has been passed by a District Court either for a sum not exceeding Rs. 15,000 or in a suit of a value less than Rs. 15,000, whether prior to or since the establishment of Assistant District Courts by Burma Act IV of 1932, the Court in which an application to execute the decree must be filed is the District Court and not the Assistant District Court of the locality. By establishment of the Assistant District Court the District Court has not ceased to exist or to exercise jurisdiction in respect of decrees to the value of Rs. 15,000 or under passed by it. Neither s. 37 (*b*) nor s. 150 of the Civil Procedure Code has any application in such a case.

Aminuddin v. *Atahmani Dasi*, I.L.R. 47 Cal. 1100, dissented from.

Hay for the appellant. The present application for execution is barred by limitation. The District Court had no jurisdiction to " condone " the delay. Section 5 of the Limitation Act which was invoked does not

* Civil First Appeal No. 170 of 1939 from the order of the District Court of Maubin in Civil Execution No. 5 of 1936.

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apply to execution proceedings, and s. 14 is of no help to the respondent as the application still remains out of time after excluding the prescribed period.

The decree was passed by the District Court and it alone had jurisdiction to entertain an application to transfer the decree to another Court for execution.

The Assistant District Court is a Court subordinate to the District Court and the prior execution application to the Assistant District Court was not one made to a " proper Court." The District Court which passed the decree is still functioning and its jurisdiction to entertain applications for execution of its own decrees of the value of Rs. 15,000 or under has not been lost by the creation of Assistant District Courts. There is no provision to warrant such a conclusion either in the Civil Procedure Code, or the Burma Courts Act or the Burma Courts (Amendment) Act.

P. K. Basu for the 1st respondent. After a decree has been transferred objections to execution can and should be raised only in the transferee Court. See the judgment of Richardson J. in *Narain Das Dutt* v. *Banku Behari* (1), confirmed on appeal by the Privy Council (2). No execution application can be entertained by the Court which passed the decree after it has transferred it to another Court for execution. *The Maharaja of Bobbili* v. *Sree Raja Narasaraju* (3) —confirmed by the Privy Council (4) ; *Nachiamma Achi* v. *Subramonian Chetty* (5). Hence the District Court cannot decide the question of limitation. Moreover the order of transfer, passed *ex parte*, was one of a ministerial nature and was not an order in execution so as to be open to appeal.

(1) A.I.R (1925) Cal. 213, 216.
(2) 54 I.A. 129.
(3) I.L.R. 37 Mad. 231.
(4) 43 I.A. 238.
(5) I.L.R. 5 Ran. 775.

It is conceded that s. 5 of the Limitation Act has no application to execution proceedings. S. 14 (2) of the Act would apply but the time taken up by the execution case was only two months, and so it does not help.

The main point is whether on the constitution of the Assistant District Court it was the proper Court to execute the decree, within the meaning of art. 182 (5) of the Limitation Act. The words "original proceedings" as used in s. 7 of the Burma Courts Act of 1922 are used in contradistinction to appellate proceedings mentioned in s. 9, and "proceedings" obviously include execution proceedings. Burma Act IV of 1932 established an Assistant District Court with jurisdiction to hear and determine all suits and original proceedings of the value up to Rs. 15,000. Hence an application for execution of a decree of not more than Rs. 15,000 can be filed in the Assistant District Court of the locality.

Act IV of 1932 is only an amending Act, and therefore the provisions of s. 24 (2) of Act XI of 1922, the main Act, would become applicable to the newly constituted Court. Under ss. 37 and 150 of the Civil Procedure Code, when a special jurisdiction is created in one Court, the jurisdiction of the other Court automatically comes to an end and all proceedings are automatically transferred to the new Court. *Aminuddin Mullick* v. *Atahamani Dasi* (1).

Pecuniary and territorial jurisdictions stand on the same footing. (S. 21, Civil Procedure Code and s. 8, Suits Valuation Act.) When territorial jurisdiction is taken away from one Court and vested in another, execution applications can be filed in the new Court. *Latchman Pande* v. *Madan Mohun Shye* (2);

(1) I.L.R. 47 Cal. 1100. (2) I.L.R. 6 Cal. 513.

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Jaher v. *Kamini Debi* (1) ; *Udit Narain Chaudhuri* v. *Mathura Prasad* (2).

Under s. 37 (*b*) of the Code, the proper Court to execute the decree would be the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for execution of the decree, would have jurisdiction to try the suit.

The amendment effected by Act IV of 1932 relates to procedure and therefore will have retrospective effect. *R.M.K.A.R. Chettyar* v. *R.M.K.A.R.V. Chettyar* (3). Consequently the Assistant District Court is the Court competent to entertain the execution application.

MOSELY, J.—This is an appeal from an order in execution passed by the District Judge of Maubin. The facts of the case are as follows :—A decree was passed in favour of the first respondent, L.N. Chettyar Firm, in the District Court, Maubin, in Suit No. 2 of 1928 for some Rs. 8,000 odd rupees against the appellant P.L.S.P. Subramanian Chettiar and his partner, the second respondent, Karuppan Chettyar, who has not entered appearance in this appeal and is only a *pro forma* party. Execution of this decree was taken out in Civil Execution case No. 2 of 1929 and in Civil Execution case No. 18 of 1931 of the District Court of Maubin, which was closed on the 5th December 1931, and again in a third execution proceedings, No. 8 of 1934 of the Assistant District Court of Maubin. Assistant District Courts were not constituted by the Burma Courts Act XI of 1922, but were only established under a further Act to amend that Act, Burma Act IV of 1932, which came into force in that year—1932. This execution proceeding was

(1) I.L.R. 28 Cal. 238. (2) I.L.R. 35 Cal. 974.
(3) [1938] Ran. 176.

instituted on the 9th November 1934, but was not proceeded with, and was closed on the 21st January 1935. Then a fourth execution proceeding, the one with which the present appeal is concerned, Execution case No. 5 of 1936, was instituted on the 5th August 1936 for execution for a sum of Rs. 4,800 odd. This was an application that the decree be sent for execution to the Subordinate Court of Sivaganga in the Madras Presidency. The decree was sent (as usual without notice to the judgment-debtors) with the necessary certificate on that date.

Execution was proceeded with in the Sivaganga Court, but nothing further was done in Execution case 5 of 1936 of the District Court of Maubin until the 21st October 1938, when the appellant applied that the decree be recalled and the certificate of non-satisfaction corrected by the showing of a sum of some Rs. 2,000 as having already been satisfied by a payment in 1931. On the 31st October this application was followed by a further application by the appellant pleading that execution of the decree was time-barred. The first respondent, the decree-holder, then filed a written objection, and later, in April 1939, an application was made to condone the delay. The present order now under appeal was passed on this application and on the application by the judgment-debtors to say that the appeal was time-barred.

The learned District Judge found in the first place that Execution case No. 8 of 1934 had not been transferred to the Assistant District Court nor had it been presented to the proper Court as defined in Article 182 read with explanation II to that Article. In the explanation it is said "proper Court" means the Court whose duty it is to execute the decree or order. The learned Judge, however, went on to quote section 5 of the Limitation Act and to say that the Court had power

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to condone delay if it was satisfied that the decree-holder had sufficient cause for not making his application within the period of limitation. Section 5, however, does not apply to applications in execution at all. The learned Judge proceeded to hold that the mistake was a *bona fide* one and that the delay should and could be condoned under section 14 (2) of the Limitation Act, forgetting that section 14 (2) could only operate to exclude from limitation the actual time during which this application in execution to the Assistant District Court was pending. Admittedly that period would not be sufficient to make the present application within time.

This appeal is on the ground that sections 5 and 14 of the Limitation Act have no application and that the proceedings in execution in question are on the face of them time-barred.

A preliminary objection is made by the respondent that any objection on the score of limitation should have been made to the Sivaganga Court in which proceedings in execution were being conducted and not to the Maubin Court.

This question was discussed, but not decided, in an appeal to a bench of this Court [*Nachiamma Achi* v. *S.N. Subramonian Chetty* (1)]. This was a case where a decree of the Chief Court of Lower Burma was sent for execution to the District Court of Ramnad in Madras and was returned with a certificate of non-satisfaction for the purpose of enabling the decree-holder to bring the legal representatives of the deceased defendant on the record. This was done and it was then ordered that the decree be re-sent to the Ramnad Court. In appeal it was contended that the decree and the application to bring the legal representatives on the record were both time-barred.

(1) (1927) I.L.R. 5 Ran. 775.

The learned Judge on the Original Side of the Chief Court had taken the view that both questions were questions which should ordinarily be decided by the Chief Court, but that in the circumstances of the case they ought to be decided by the District Court of Ramnad as the whole of the previous proceedings in execution had been taken in that Court and all necessary materials for a decision were therefore available there.

It was contended in appeal that the appellant was entitled to have these questions decided by this Court. *Banku Behari Chatterji* v. *Naraindas Dutt* (1), a decision of their Lordships of the Privy Council was quoted, where it was expressly said that an order of transmission would be rightly made *ex parte* and as a ministerial act, and it followed by necessary implication that an order permitting execution against the legal representatives could also rightly be made *ex parte*.

That case affirmed the decree of the Calcutta High Court in *Narain Das Dutt and another* v. *Banku Behari Chattopadhaya and others* (2), where the other question had arisen as to which was the proper Court to decide an objection on the part of the judgment-debtor that execution was time-barred.

In that case Richardson J. had briefly said that under the scheme of the Code the Court transmitting a decree was not the Court to decide such an objection, and that such objection should be taken and determined by the Court to which the decree is transmitted.

All that was said in *Nachiamma Achi*'s case (1) was that this Court could have rightly left both questions, in the circumstances of that case, to the Ramnad Court.

Another ruling quoted [*Maharaja of Bobbili* v. *Sree Raja Narasaraju Garu and another* (3)] is to the

(1) (1927) 54 I.A. 129. (2) A.I.R. (1925) Cal. 213.
(3) (1912) I.L.R. 37 Mad. 231.

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effect that after a decree is sent for execution, the Court which passed the decree has no jurisdiction to entertain another application *in execution* unless concurrent execution had been ordered or the proceedings in the Court to which the decree was sent had been stayed. But the present application is not one to execute but that the decree be declared incapable of execution and, it may be remarked, execution has been stayed in the Sivaganga Court for the purpose of allowing this question of limitation to be decided by the District Court of Maubin.

I myself can find nothing in the Act to show that it is intended that objections as to limitation which go to the root of execution can only be taken in the Court to which a decree is transmitted. No doubt that is often the most convenient course, and is usually the most convenient course when the executing Court lies in the same province as the Court which passed the decree and can easily obtain full materials and information. But the Court which passed the decree is the Court which has and retains control of the proceedings, *vide* Order XXI, rule 28, which says that

> "Any order of the Court by which the decree was passed . . . in relation to the execution of such decree shall be binding upon the Court to which the decree was sent for execution."

Of course applications that the decree has been wholly satisfied in Burma after its transmission to Madras would naturally and normally be made to the Court in Burma which passed the decree, and there is, in my opinion, nothing in the Act or in the scope or intention of the Act to prevent similar applications in regard to matters concerning limitation which go to the root of execution. It is merely the question of convenience or of priority of application which determines the Court which shall decide such questions.

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If this preliminary objection had been well founded and the District Court had had no power to decide the question of limitation, the District Court would have had no power to transmit the decree to the Sivaganga Court.

Another objection that this plea of limitation is *res judicata* because it was not raised in the Sivaganga Court may be dismissed on the short ground that it could be raised at any time in the Sivaganga Court and cannot therefore be *res judicata* here. See a case decided on these lines [*Srihary Mundul* v. *Murari Chowdhury and another* (1)].

As to the main grounds of appeal we must first refer to the Burma Courts Act of 1922 and to the amending Act of 1932 by which the Assistant District Court was constituted. By section 6 of Act XI of 1922 it was enacted that the Local Government shall establish District Courts, Subdivisional Courts and Township Courts. Section 7 defined the original jurisdiction of those Courts, and sub-clause (*c*) said that the District Court shall have jurisdiction to hear and determine any suit or original proceeding without restriction as regards the value.

It appears to me that the words "original proceeding" are not used in contradistinction to "proceeding in appeal", and can only mean proceedings which initiate something, such as, for example, pauper applications (the same words are used with reference to the jurisdiction of Subdivisional and Township Courts). These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them.

Section 24 is the first section of Chapter IV, which is headed "Provision for Pending and Past Proceedings",

(1) (1886) I.L.R. 13 Cal. 257.

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and section 24, sub-section (2) says that every proceeding pending in any other civil Court in Burma [*i.e.*, other than the High Court, mentioned in section 24 (1)] *at the commencement of this Act* shall be deemed to be transferred to the Court exercising the jurisdiction under this Act, which corresponds to the jurisdiction of the Court in which the proceeding was instituted, and the Court to which any such proceeding is transferred shall proceed to try, hear and determine the matter as if it had been instituted in such Court.

Section 26 refers to execution of past decrees and orders, and says that all decrees and orders passed by the Divisional Court shall be deemed to have been passed or made by the District Court which would have had jurisdiction if this Act had been in force at the time the decrees or orders were passed or made.

The amending Act (Burma Act IV of 1932), by sub-section 2 (1) established a new grade of Court in Burma in addition to the already established Courts, namely the Assistant District Court, and by sub-section 4 of that Act it was laid down that the Assistant District Court shall have jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rs. 15,000. It would appear clear on a plain reading of this last provision, read with section 24 (2) of the Act of 1922, that the Assistant District Court had only jurisdiction to try suits or original proceedings within its pecuniary jurisdiction which were instituted after Act IV of 1932 came into force, or, it may be added, which were transferred to it under section 24 of the Civil Procedure Code by the District Court. Section 26 of Act XI of 1922 was not amended so as to make it deemed that decrees of the District Court had been passed by the Assistant District Court.

It cannot be said that the Court which passed the decree (section 38 of the Code) had ceased to exist or

to have jurisdiction to execute its decrees. If that were the case, of course, the Assistant District Court would be the Court to which applications in execution of the proceedings of the District Court within the pecuniary jurisdiction of the Assistant District Court would lie under the provisions of section 37 (*b*) of the Code. But the District Court has not ceased to exist, and in practice District Courts have been executing decrees passed in suits of a value less than Rs. 15,000 passed prior to 1932 ever since then, and applications for execution of such decrees have not been filed in the Assistant District Courts. The proper procedure was pointed out by a circular of this Court in 1933. I do not see that section 150 of the Code can help the respondents here. That section enacts :

> " Save as otherwise provided, where the business of any Court is transferred to any other Court (*i.e.*, the business of any Court is, in whole or part, transferred to any other Court), the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

I do not wish to allude to cases which have been quoted where a Court has ceased to exist or had ceased to exercise territorial jurisdiction. This argument pre-supposes that the District Court had ceased to exist or had ceased to exercise jurisdiction in respect of decrees to the value of under Rs. 15,000 passed by it. I will only refer to one case cited by the respondents [*Aminuddin Mullick* v. *Atahmani Dasi* (1)].

In that case a Munsif who was empowered to try suits up to Rs. 2,000 had passed a preliminary decree but was then transferred, and the final decree in the

(1) (1920) I.L.R. 47 Cal. 1100.

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case was passed by the Subordinate Judge. Application for execution of the decree was subsequently made to a successor of the Munsif, who was also empowered to try suits up to Rs. 2,000. It was said in the judgment in that case (page 113 *ibid*) that since the second Munsif's Court was vested with the powers to try suits up to Rs. 2,000 in value the business in the Subordinate Judge's Court so far as it related to suits up to the value of Rs. 2,000 must be taken to have been transferred to the Munsif's Court, and that that Court therefore would have the same powers and would perform the same duties as those conferred and imposed by the Code upon the Court of the Subordinate Judge from which the business was transferred. The decision purported to be one under the provisions of section 150 of the Code, but I cannot see myself that that section had any application in that case. Section 150 starts "Save as otherwise provided", and it certainly could not have been said in that case, in the words of section 37, that the Court of the Subordinate Judge had ceased to exist.

For these reasons I think that the trial Court was right in coming to its conclusion that Execution case No. 8 of 1934 had not been instituted in the proper Court. This being so, it must be held that execution in the present case now under appeal is time-barred. This appeal will be successful and there will be a finding to this effect. The first respondent is to pay the costs of this appeal *ad valorem*. The proceedings in execution will be recalled from the Court of Sivaganga.

MYA BU, J.—I agree with my learned brother. As regards the respondents' objection to the jurisdiction of the District Court of Maubin, the principle underlying the rule in Order XXI, rule 28, and the decision

in *Srihary Mundul* v. *Murari Chowdhury and another* (1) make me incline to the view that the Court which passed the decree possesses jurisdiction to determine the question whether the execution of the decree is time-barred or not, although it has sent the decree to another Court for execution ; but for the purpose of this case I am content to adopt the view that the authorities relied on in support of the contention do not lay down that the Court which passed the decree is deprived of jurisdiction to determine the question after it has sent the decree to another Court for execution, and I am in entire agreement with my learned brother that both the Court which passed the decree and that to which the decree is sent for execution have jurisdiction to determine this question, and which is the more suitable of the two depends upon the question of convenience and priority.

Coming to the main question for determination, namely, whether the application for execution in Civil Execution No. 8 of 1934 of the Assistant District Court of Maubin was an application made to the proper Court, the arguments addressed in support of the affirmative view seem to have proceeded upon the supposition that by the creation of the Assistant District Court by the Burma Courts (Amendment) Act, 1932, the jurisdiction of the District Court to execute its own decrees under section 38 of the Civil Procedure Code was extinguished, where the amount does not exceed the pecuniary limit of the jurisdiction of the Assistant District Court. The authorities relied on by the learned advocate for the respondents (other than the one already quoted by my learned brother) are cases where the Court which had jurisdiction to pass the decree had ceased to exist and another Court had

(1) (1886) I.L.R. 13 Cal. 257.

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come into being to exercise that jurisdiction. The fallacy of the argument can, however, be illustrated by simple illustrations, such as, for example, in a suit for Rs. 20,000 filed in the District Court in which the District Court passes a decree for Rs. 500 only, it is still the District Court which has jurisdiction to execute the decree for Rs. 500, although the decretal amount happens to be within the jurisdiction of the Township Court which, of course, will have jurisdiction to execute the decree only if it be transferred to it. This illustration, in my opinion, is sufficient to show that, just because an inferior Court has been constituted for the same local area after the passing of the decree with jurisdiction to hear and determine suits or original proceedings of a certain value, the Court of a higher pecuniary jurisdiction which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's jurisdiction but is the proper Court which should execute the decree.

For these reasons I agree in the order proposed by my learned brother.