

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

JEEWANDAS DHANJI, APPELLANT AND DEFENDANT, v. RANCHODDAS
CHATURBHUI, RESPONDENT AND PLAINTIFF.*

1910.
August 5.

Execution proceedings—Decree in Baroda Court—Transmission to Bombay High Court for execution—Application to execute—Limitation—Civil Procedure Code (Act V of 1908), section 48, and Schedule I, Order XXI.

On 17th July 1893 the plaintiff obtained a decree in the Amreli Court, in the territory of H. H. the Gáekwár of Baroda. On 12th May 1894 an application for execution was made. On 10th July 1905 a second application was made, the prayer being for the attachment of the moveable properties of the defendant "in whatsoever villages and at whatsoever places in Okhamandal." Okhamandal being within the jurisdiction of the Amreli Court, the order for attachment was made.

On 5th July 1909 the decree was transmitted on the plaintiff's application to the Bombay High Court for execution; and on 15th October 1909 an application for execution by attachment of property in Bombay was made.

Held, that the application was a substantive application with regard to the property in Bombay which was not the subject of any previous application, and being made more than 12 years after the date of the decree, was barred by the provisions of section 48 of the Civil Procedure Code (Act V of 1908).

An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution.

Husein Ahmad Kaka v. Saju Mahamad Sahid⁽¹⁾ distinguished.

PROCEEDINGS in execution.

On 17th July 1893 the plaintiff abovenamed obtained a decree for Rs. 6,727 and costs against Jeewandas Dhanji and another in the Amreli Court, in the territory of H. H. the Gáekwár of Baroda. On 12th May 1894, the first application to execute the decree was made. This application was finally disposed of on 12th August 1898. Subsequently the plaintiff heard that the defendants were coming on business to Okhamandal

* Appeal No. 46 of 1909, Original Suit No. 562 of 1889-90 in District Court at Amreli (Baroda).

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(within the jurisdiction of the Amreli Court) and he, therefore, on 10th July 1905, made a second application for execution, a rough translation of the material part of the prayer being as follows :—

“As to whatever moveable properties I may point out for taking under attachment in whatsoever villages and at whatsoever places in Okhamandal the same may be attached and sold by auction, and the moneys derived therefrom may be paid to me.”

He further asked for the arrest and detention of the defendants. On 25th July 1905 an order was made for the attachment of the moveable properties as prayed, and a notice was issued against the defendants to show cause why they should not be arrested. This notice was ultimately discharged on 30th July 1908.

On 29th September 1908 the plaintiff applied to the Amreli Court for transmission of the decree for execution to the Bombay High Court, under Government Notification No. 2634, dated 3rd July 1908.⁽¹⁾

The Amreli Court rejected the application, but the rejection was set aside by the Appeal Court of Baroda, and on 17th June 1909 the District Judge of Amreli made the following order :—

“At the request of the applicant a formal certificate to issue *re* the execution of the decree (of this Court) by the High Court of Bombay according to section 218 of the Civil Code. Whether the *Darhast* to be proceeded with here or not will be duly considered hereafter and decided accordingly.”

In compliance with the above order, the District Judge on 5th July 1909 forwarded to the High Court at Bombay a copy of the decree, and a certificate setting forth what part of the decree remained to be executed. On 14th September he forwarded in addition copies of the order of 25th July 1905 (granting the application for the execution of the decree), and the order of 17th June 1909.

(1) “In exercise of the powers conferred by section 229-B of the Code of Civil Procedure (Act XIV of 1882) the Governor General in Council is pleased to declare that the decrees of the Civil Courts situate in the territories of His Highness the Gāekwār of Baroda, which have not been established or continued by the authority of the Governor General in Council, may be executed in British India as if they had been made by the Courts of British India.”

The plaintiff accordingly on 15th October 1909 applied to the Prothonotary for execution of his decree "by attachment and sale of the moveable property of the said Jeewandas Dhanji consisting of the stock in trade and goods, lying in the shop of the said Jeewandas Dhanji situate in Chikal gally in the Mulji Jetha Cloth Market and bearing No. 92."

The goods were attached, whereupon Jeewandas took out a summons against the plaintiff to show cause why the execution proceedings should not be quashed.

On the applicant's depositing Rs. 8,600 with the Prothonotary as security, the attachment on the goods was removed.

Macleod, J., however, discharged the summons with costs, holding (1) that the order for transmission was an order on a previous application for execution, and therefore no notice was necessary to be issued under Order XXI, rule 2, and (2) that the plaintiff's application to the Bombay High Court for the attachment of the goods was not a fresh application and was therefore not barred under section 48 of the Civil Procedure Code (Act V of 1908).

The defendant appealed.

Jayakar, with *Mulla*, for the appellant.

Jinnah, with *Jardine* (acting Advocate-General) and *Desai*, for the respondent.

SCOTT, C. J.—This is an appeal from an order of Macleod, J., made in Chambers, dismissing an application by the second defendant to quash certain execution proceedings which had been taken against him in the Bombay High Court.

The plaintiff had obtained a decree in the Amreli Court in the Baroda State on the 17th July 1893. He had presented certain applications for execution to the Amreli Court, of which the second was presented on the 10th July 1905, within twelve years of the passing of the decree. In that application he prayed as follows:—

"I pray for recovery of the amount of Rs. 7,637-4-10 from the defendants in accordance with the claim as shown in the application for execution. The same is as follow:—(1) On account of some urgent cause and occasion the defendants are now going to come specially to Okhamandal. Therefore, at that time as to whatever moveable properties I may point out for taking

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under attachment in whatsoever villages and at whatsoever places in Okhamandal the same may be attached and sold by auction and the moneys derived therefrom may be paid to me. (2) If the defendants' moveable property be insufficient to satisfy the moneys then you would be pleased to cause the moneys to be recovered and given to me by enforcing for that purpose an order for imprisonment against the defendants. The defendants are absconding to a foreign territory. They have now no property at all within the jurisdiction of this Court. Therefore simultaneously with enforcing execution as against moveable property you will also compel them to appear before this Honourable Nyayadhishi Court."

On the 25th of July 1905 an order was made by the Amreli Court to the effect that—

"The Darkhast (application for execution) after having been registered in the register book an order for execution should be issued for attaching the defendants' moveable property. The other prayer is for arrest and imprisonment of the defendants. As to that matter along with the order dealing with the case of non-satisfaction of moneys from moveable property a notice should be issued against the defendants calling upon them to show cause why an order should not be issued for their arrest and imprisonment."

Upon that notice a subsequent order was made on the 30th July 1908 declining to issue execution against the defendants personally.

The plaintiff then applied to the Amreli Court for an order transmitting the decree for execution to the High Court of Bombay. That application was refused on the 17th October 1908.

An appeal was preferred to the appellate Court sitting in Baroda, upon which an order was made setting aside the order of refusal of the Amreli Court.

The judgment of the Baroda Court is important. The Judges say :—

"We hold that when the decree was such as could be executed, the lower Court should not have objected to granting the appellant's application. Had the Darkhast of the appellant been presented on the 15th July 1906 instead of on the 15th July 1905 after the date of the decree, then it could have been held that the decree was no longer such as could be executed. Such is not, however, the case in the present proceedings. Hence the appellant's decree was not time-barred but was within time. We, therefore, decide that the application made by the appellant for a certificate for the execution of the

decree in the Bombay High Court deserves to be granted. When the decree is sent to the Bombay High Court for execution, that Court will see whether the decree can be executed according to their law of limitation. But that point has not been considered here. It seems that the question is a difficult one. But according to our law the decree is such as can be executed."

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In an earlier part of the judgment upon the question whether the lower Court was right in deciding that the application having been made after twelve years the decree became time-barred and could no longer be executed, the learned Judges hold that:—

" Properly speaking the application was not a Darkhast but an application. What particulars there ought to be in a Darkhast for execution of a decree is stated in the Civil Procedure Code, section 228. As the said particulars are not stated in this application, the same does not become a Darkhast. But it is an application made according to Civil Procedure Code, section 217. Such an application for the transfer of a decree is a step in aid of the execution of the decree within the meaning of clause 4, Article 179, Schedule II of Act XV of 1877. The British High Courts have held as above."

Mr. Justice Macleod having an incorrect translation of the plaintiff's application for execution, dated the 10th July 1905, was under the impression that the application was for attachment of "whatever moveable property the defendants might have at Okhamandal or any other place whatever." That, however, was not the application. The words were: "in whatsoever villages and at whatsoever places in Okhamandal the same may be attached." Okhamandal being within the jurisdiction of the Amreli Court, the application for execution was in order in so far as it related to moveable property in Okhamandal. Mr. Justice Macleod being of opinion that there was an order for execution based upon an application for execution of moveable property of the defendants wherever situate, held that he was bound by the order of the Amreli Court for execution against the moveable property mentioned in the application of the 10th July 1905 and that therefore the attachment against the property of the defendant in the Mulji Jetha Market in Bombay, which was more particularly specified in an application to the Prothonotary after the decree had been transmitted from Baroda to Bombay for execution, was a good attachment.

In coming to that conclusion he felt himself to be bound by the decision of this Court in *Husein Ahmad Kaka v. Saju Mahomed*

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Sahid⁽¹⁾. That was a case in which after a decree had been obtained against a judgment-debtor in the Court of Small Causes at Rangoon in 1883 and after the judgment-debtor who had been arrested in execution had died in gaol in December 1883, an application was made to the Rangoon Court in November 1886, under section 248 of the Civil Procedure Code, for the execution of the decree against the judgment-debtor's legal representative. The Rangoon Court in February 1887 ordered that the decree should be executed and it was thereafter transferred for execution to the Court of the First Class Subordinate Judge at Surat, and a Darkhast for execution was presented in that Court on the 22nd April 1887 against property in Surat. It was objected by the defendants on the record that the decree was barred by limitation. The Subordinate Judge overruled the objection and ordered execution to issue, being of opinion that the plea of limitation could not then be raised. The District Judge, on the other hand, considered himself competent to enquire into the propriety of the order for execution made by the Rangoon Court in February 1887. It was, however, held by this Court on appeal that the District Judge had no power to determine whether the execution was barred in February 1887 or not, for an order for execution, though it may be erroneously made, is nevertheless valid unless reversed in appeal.

In our opinion, the case of *Husein Ahmad Kaka v. Saju Mahamad Sahid*⁽¹⁾ has no application here. The order for transmission by the Baroda Court is not an order for execution, nor is the application for transmission by the Baroda Court to the Bombay Court an application for execution; and we are of opinion that the objection taken on behalf of the judgment-debtor is good, namely, that the present application against the property of the judgment-debtor in the Mulji Jetha Market in Bombay is barred by the provisions of section 48 of the Civil Procedure Code. That section provides that where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the

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decree sought to be executed. Here, we have an application made to the Prothonotary of this Court in Bombay after the transmission by the Baroda Court of the decree and that application is a substantive application with regard to the property in Bombay which was not the subject of any previous application. It is an application made in accordance with the provisions of Order XXI, rule 11.

There is ample authority for the proposition that an order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution: *Nilmony Singh Deo v. Biressur Bannerjee*⁽¹⁾; *Suja Hossein v. Monohur Das*⁽²⁾. The whole of the argument on behalf of the plaintiff upon this point has been devoted to the attempt to satisfy this Court that the order for transmission is an order for execution. It is, however, clear from the records of the Baroda Court itself that the application for transmission was treated as an application for transmission and nothing more, and that the order which was made for transmission was not treated as an order for execution but as an order for transmission *re* the execution of the plaintiff's decree.

Here, therefore, we are concerned with a fresh application made more than twelve years after the date of the decree, and it is clear from the provisions of section 48 of the Civil Procedure Code that it cannot be entertained.

We, therefore, reverse the decision of the lower Court, and make the defendant's summons absolute with costs throughout.

The amount withdrawn must be refunded.

The order for costs will include poundage expenses.

Decree reversed.

Attorneys for the appellant: Messrs. *Malvi, Hirabai, Mody and Ranchoddas.*

Attorneys for the respondent: Messrs. *Dikshit, Dhanjisha and Soonderdas.*

K. M. I. K.

(1) (1889) 16 Cal. 744.

(2) (1895) 22 Cal. 921.