APPELLATE CIVIL.

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

1914. *October 5.*

BALARAM VITHALCHAND GUJAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MARUTI BIN DEVJI DUBAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 48—Civil Procedure Code (Act XIV of 1882), section 230—Limitation Act (IX of 1908), Article 182—Decree upon a compromise—Payment by instalments—Default—Execution—Minority of the legal representatives of the judgment-creditor—Step in aid of execution—Execution barred by the lapse of twelve years.

An instalment decree upon a compromise provided that upon default the judgment-creditor was entitled to possession of certain property. The decree was dated the 29th July 1884 and default in the payment of instalment was made in 1892. Thereupon the judgment-creditor applied for the execution of the decree. He died in 1898 and the execution proceedings were continued by his brother as his representative. In March 1902 the brother also died leaving minor sons. On the 27th June 1902 the guardian or the next friend of the minors applied to have the minors brought on the record as representing their father for continuing the execution proceedings. This application was rejected in September 1902 and the original application for execution which was presented by the judgment-creditor on default was also struck off. On the 1st September 1909 a fresh application to execute the original decree was presented by the minor sons of the judgment-creditor's said brother, one of the minors having in the meanwhile attained majority.

The application was met by the objection that as it was made after the expiration of twelve years from the date of the default mentioned in the consent decree sought to be executed, it was barred by section 48 of the Civil Procedure Code (Act V of 1908).

Held, that the fresh application was time-barred as being made twelve years after the date of the default. Article 182 of the Limitation Act (IX of 1908) showed that the fresh periods which could be obtained under the provisions of that article did not escape the provisions of section 48 of the Civil Procedure Code (Act V of 1908).

Section 48 of the Civil Procedure Code (Act V of 1908) is more extensive in its application than section 230 of the Code of 1882 and it is wide enough to cover the compromise decree of which execution was sought.

* Second Appeal No. 50 of 1913.

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BALARAM VITHAL CHAND v. MARUTI.

SECOND appeal against the decision of W. T. W. Baker, Acting District Judge of Satara, reversing the order of R. G. Gogte, Subordinate Judge of Karad, in an execution proceeding.

On the 29th July 1884, one Naro bin Bhagavandas Gujar obtained a compromise decree which provided that the defendants should pay to Naro the sum of Rs. 600 by annual instalments of Rs. 50 each and in default of any instalment, the plaintiff should wait for four months and if the defendants failed to pay within that period of grace, the plaintiff was entitled to the possession of the property. Default in the payment of instalment having been made in the year 1892, Naro applied to execute the decree and to recover possession of the property. While the execution proceedings were pending Naro died in the year 1898 and the execution proceedings were continued by his brother Nihalchand as his representative. In March 1902, Nihalchand also died and his minor sons, Balaram and others, applied on the 27th June 1902 through their guardian for the substitution of their names in the record in lieu of their deceased father. This application was rejected in September 1902 and the original darkhast filed by Naro for the execution of the decree in the year 1892 was also struck off. Subsequently Balaram having attained majority, he and his brothers filed a fresh application for the execution of the decree on the 1st September 1909.

The first Court granted the application and directed that papers be sent to the Collector for the execution of the decree.

On appeal by the defendants the District Judge reversed the order and dismissed the application as time-barred. His reasons were as follows :—

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As to the respondents being minors they cannot claim the benefit of section 6 of the Limitation Act because time had begun to run against their father before his death in 1902.

This is a case not of initial disability but of subsequent disability : *cf. Jivaraja* v. *Babaji*, VI Bombay L. R., p. 639.

The minors only became entitled to apply on the death of their father against whom time had already begun to run. Though the plea of minority has been raised in the application i is not mentioned in his order by the learned Subordinate Judge, presumably because he thought there was nothing in it.

The application for execution is time-barred. Their father died in 1902. The present application is 7 years from that date.

The applicants, representatives of the original plaintiff, preferred a second appeal.

Coyaji, with *P. D. Bhide*, for the appellants (representatives of the original plaintiff) :—Our fresh application for execution was in time. The decision in *Jivraj* v. *Babaji*[1] does not apply but that in *Lolit Mohun Misser* v. *Janoky Nath Roy*[2] applies. Our disability to apply for execution on account of minority arose before the time had begun to run. The minors' father had made an application to execute the decree and pending that application he died. Then an application was made on behalf of the minors to bring them on the record and that application was rejected. Thus time had not begun to run at the time of the father's death. Moreover, the proceedings in execution were stayed till the decision of the Suit No. 333 of 1899, under section 335 of the Civil Procedure Code and the appeal in that suit was decided in 1909. Thus the Judge was not right in applying *Jivraj* v. *Babaji*[1]. See *Lolit Mohun Misser* v. *Janoky Nath Roy*[2] and *Mon Mohun Buksee* v. *Gunga Soondery Dabee*[3].

[1] (1904) 29 Bom. 68. [2] (1893) 20 Cal. 714.
[3] (1882) 9 Cal. 181.

The mere fact that the previous application to execute was made by the guardian of the minors would not disentitle them from taking advantage of their minority under the Limitation Act: *Mon Mohun Buksee* v. *Gunga Soondery Dabee*[1], *Anantharama Ayyan* v. *Karuppanan Kalingarayen*[2], *Zamir Hasan* v. *Sundar*[3], *Norendra Nath Pahari* v. *Bhupendra Narain Roy*[4].

Section 230 of the Code of Civil Procedure, 1882, or section 48 of the Code of 1908, are not applicable to the case of minors: *Moro Sadashiv* v. *Visaji Raghunath*[5].

Jayakar, with *S. R. Bakhle*, for the respondents (defendants):—The present application is a fresh application for execution of a decree which is more than twelve years old, it is, therefore, barred under section 48 of the Civil Procedure Code of 1908. That section is wider in scope than section 230 of the old Code of 1882. It covers the case of a mortgage decree and all other decrees except a decree for injunction. Thus the application being beyond twelve years is clearly time-barred. Article 182 of the Limitation Act clearly refers to section 48 of the Civil Procedure Code which is exhaustive and it mentions the only limitation contemplated in the section itself. Minority is not so excepted.

Coyaji, in reply:—The Ruling in *Moro Sadashiv* v. *Visaji Raghunath*[5] shows that minority is a good defence even under section 230 of the Code of 1882. All the intervening applications were steps in aid and were continuous proceedings. The previous consent decree became merged in the decree passed under section 335 of the Civil Procedure Code.

(1) (1882) 9 Cal. 181.
(2) (1881) 4 Mad. 119.
(3) (1899) 22 All. 199.
(4) (1895) 23 Cal. 374.
(5) (1891) 16 Bom. 536.

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SCOTT, C. J. :—On the 29th of July 1884, a decree was passed in favour of one Naro upon a compromise, and according to its terms, certain instalments were payable, and upon default, as provided in the decree, the judgment-creditor was entitled to claim possession of a share or shares in certain property. Default having been made in 1892, the judgment-creditor became entitled to apply for possession and he, therefore, made an application for execution of the decree. In 1898 he died, and the execution proceedings were carried on thereafter by his brother as his representative. In March 1902, that brother died leaving the present appellants, his minor sons. On the 27th of June 1902, by their guardian or next friend, they applied to be brought on the record as representing their father for the purpose of continuing the execution proceedings, and in September 1902, their application was rejected, and the original application for execution which had been instituted by Naro was struck off. On the 1st of September 1909, a fresh application to execute the original decree was presented on behalf of the appellants, one of them having attained majority.

The objection is taken on behalf of the respondents that the application being a fresh application for execution, made after the expiration of twelve years from the date of the default mentioned in the consent decree, in respect of which the applicants sought execution, was barred by section 48 of the Code of Civil Procedure.

It is contended by the appellants that their case should succeed if they show that there was a fresh step in aid of execution made under the Indian Limitation Act of 1877, Article 179, or the present Indian Limitation Act, Article 182, which gave a fresh starting point to limitation, and that from that starting point time would not run against them until after they attained majority.

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Unfortunately, however, for that argument, Article 182 of the Indian Limitation Act, which was in force at the time of the last application to execute the decree, shows that the fresh periods which could be obtained under the provisions of that Article do not escape the provisions of section 48 of the Civil Procedure Code, the words of Article 182 being "For the execution of a decree...of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908." Section 48 of the present Code is more extensive in its application than the previous section 230 of the Code of 1882, and it is wide enough to cover the compromise decree of which execution is sought in the present case. The fresh application, therefore, with which we are concerned being made more than twelve years from the date of the default, the appeal must fail. We affirm the decision of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

PRIVY COUNCIL.*

[On appeal from the High Court of Judicature at Bombay.]

P. C.*
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October 20.
21.
November 18

KARMALI ABDULLA ALLARAKIA, PLAINTIFF *v.* VORA KARIMJI JIWANJI AND OTHERS, DEFENDANTS.

Partnership—Agreement for joint venture in business—Contract Act (IX of 1872), sections 239, illustration (a), 249, 251, 253—Liability of co-adventurers against whom there is no document of debt binding on its face—Operations of buying and selling natural to a partnership, and for the partnership—Liability of both defendants on hundis drawn separately by each for payment of his own share of goods—Criterion as to transaction being or not being a partnership transaction.

* *Present* :—Lord Dunedin, Lord Shaw, Sir John Edge, and Mr. Ameer Ali.