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the property of Nagapa be equally partitioned between the defendant No. 2 and defendant No. 1 and that the property sold to plaintiff be assigned to the share of defendant No. 2 as far as possible and handed over to the plaintiff.

Each party to bear his own costs throughout. The partition of lands liable to pay assessment to be effected by the Collector as provided by the Code of Civil Procedure.

MACLEOD, C. J. :—I have nothing to add. I entirely agree with the conclusions arrived at in the judgment which has just been read.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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April 13.

RANGASWAMI SHETTI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS
v. SHESHAPPA MANJAPPA SHIMPI (ORIGINAL DEFENDANT). RES-
PONDENT³.

*Indian Limitation Act (IX of 1908), Schedule I, Article 182 (5)—Step-in-aid
of execution—Transfer of decree—Proper Court, meaning of.*

In 1910 the plaintiffs obtained a decree in the Court at Salem in Madras Presidency. After ineffective attempts at execution, in 1914 the decree-holder applied for transfer of the decree for execution to the Court at Sirsi in the Bombay Presidency. The decree was accordingly transferred but the Sirsi Court returned it unexecuted to the Salem Court in November 1918. In the meantime on the 4th August 1916, the decree-holder had applied to the Salem Court praying for transfer of the decree to the District Munsiff of Sagaram in the Mysore State. The application was returned to the decree-holder as the decree had not been returned by the Sirsi Court. In 1919 the

* Second Appeal No. 429 of 1921.

Salem Court again transferred the decree to the Sirsi Court and a Darkhast was filed in the latter Court on the 9th June 1919,

Held, that the Darkhast of 1919 was barred, as the application of 4th August 1916, made to the Salem Court was one to a Court which had ceased to be a proper Court within the meaning of Article 182 (5) of the Limitation Act, 1908, after it had sent the decree for execution to Sirsi Court.

Maharajah of Bobbili v. Narasaraju Peda Srinulu⁽¹⁾, relied on.

SECOND appeal against the decision of F. W. Allison, District Judge of Kanara, reversing the decree passed by V. R. Guttikar, Subordinate Judge at Sirsi.

Proceedings in execution.

The plaintiffs obtained a decree against the defendants in Suit No. 409 of 1909 in the Salem Court of the Madras Presidency on the 26th July 1910.

In October 1912 and in March 1913 the plaintiffs applied for execution of the decree but these applications were dismissed. On the 3rd July 1914, a third application No. 473 of 1914 was made praying that the decree may be sent to the Sirsi Court (Bombay Presidency) to enable the plaintiffs to obtain execution within the jurisdiction of that Court. The decree was accordingly transmitted to the Sirsi Court and was received there on the 18th August 1914, but the plaintiffs took no action to execute the decree which was ultimately returned unexecuted to Salem Court on the 21st November 1918.

In the meantime on the 11th August 1916, the plaintiffs had applied to the Salem Court to send the decree to Sagar Court in the Mysore State to obtain execution there. That application was returned to the plaintiffs on the 15th August 1916 on the ground that the copy of the decree and other papers were not received back from Sirsi Court.

⁽¹⁾ (1916) L. R. 43 I. A. 238.

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The plaintiffs made the present application No. 71 of 1919 to the Salem Court on the 31st January 1919, praying that the heirs of the deceased plaintiffs might be recognised and the decree transmitted to the Sirsi Court for execution. The decree was received in that Court on the 7th April 1919 and the plaintiffs took out execution on the 9th June 1919 (in Darkhast No. 251 of 1919 of Sirsi Court).

The Subordinate Judge held that the application of the 9th June 1919 (Darkhast No. 251 of 1919) to the Sirsi Court was in time from the last application, dated the 4th August 1916, made to the Salem Court which was the proper Court to receive the application and the same was a step-in-aid of execution. He, therefore, allowed execution to proceed.

On appeal the District Judge was of opinion that the application of the 4th August 1916 did not save limitation as the Salem Court to which it was presented was not the proper Court within the meaning of Article 182 (5) of the Limitation Act 1908. He, therefore dismissed the Darkhast of 1919 as time-barred.

The plaintiffs appealed to the High Court.

P. B. Shingne, for the appellants :—By section 38 of the Civil Procedure Code, a decree can be executed by the Court which passed it, or by the Court to which the work of execution is transferred. By Order XXI, rule 6, the Court sending a decree for execution has to send, among other things, a copy of the decree. The decree in the original is not to be sent. The Court, which passed it, retains it in its record. The Court to which execution is transferred has to certify to the Court, which passed the decree, the fact of execution, or where there is a failure to execute the decree, the circumstances attending such failure (section 41).

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Section 42 of the Code vests the Court, to which a decree is transferred for execution, with powers to execute the decree, but does not divest the Court, which passed the decree of its powers. The Court to which a decree is transferred has no power to transfer it to another Court. The power of transferring a decree for execution is vested in the Court which passed the decree (section 39). Hence, the application, dated the 4th August 1916, was rightly made to the Court, which passed the decree and was a step-in-aid of execution. It was open to the Court to keep it on its record and ask the Court to which execution was transferred to return the record. The Privy Council case of *Maharajah of Bobbili v. Narasaraju Peda Srinulu*⁽¹⁾ is distinguishable. In that case the application was to execute the decree, execution whereof was transferred to another Court and the point to be decided in this case had not arisen in that case.

G. P. Murdeshwar, for the respondents :—The Dar-khast is obviously out of time, unless it is held that the application of 4th August 1916 made to the Salem Court was one to a proper Court to take some step-in-aid of execution. I submit that after the decree was transferred to the Sirsi Court, the Court at Salem ceased to have jurisdiction to execute the decree until it was sent back to itself (Salem) by the Sirsi Court. Order XXI, rule 10, provides that when a decree is transferred to another Court, all applications for execution must be made to such Court.

[SHAH, J. :—But it is contended that the application of 1916 was not for executing the decree but for a transfer of the decree to a third Court, to which Rule 10 is not applicable.]

(1) (1916) L. R. 43 I. A. 238.

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The contention, however, is that it is an application to take a step-in-aid in execution (as otherwise Article 182 would not apply). I submit it is in substance an application for execution and therefore Rule 10 applies.

[SHAH, J.:—Do you say that the application should have been made to the Sirsi Court only and that the Salem Court has no jurisdiction to entertain it?]

Such a proposition would seem to follow from the provisions of sections 41 and 42 and Order XXI, Rule 10 of the Civil Procedure Code, 1908. That was expressly laid down by the Madras High Court in the case of *Maharajah of Bobbili v. Sree Raja Narasaraju Peda Balier Simhulu Bahadur*⁽¹⁾. This case had been decided in 1912 and the decree-holder who belonged to the Madras Presidency could have no misapprehension as to the proper Court when he applied in 1916 to the Court at Salem (in Madras Presidency). It is not however necessary for our present purposes to go to the length of saying that the Salem Court had no jurisdiction. I submit that the plaintiff here ought to have applied to the Sirsi Court to send the decree back to Salem to enable him to apply for a fresh transfer. Such an application could have saved limitation.

[SHAH, J.:—Is that course prescribed by the Code?]

That is not prescribed in so many words. But when the Sirsi Court retained its jurisdiction to execute the decree, the decree-holder's application to the Salem Court without reference to the Sirsi Court was not competent. The Salem Court too seems to have viewed the question from the same stand point. It returned the application, because the decree had not been returned by the Sirsi Court. The decree-holder ought

⁽¹⁾ (1912) 37 Mad. 231 at p. 232.

to have immediately applied to the Sirsi Court for the return of the decree to Salem. Such an application could be made well within time and could have also saved limitation. Assuming that the application of 1916 to the Salem Court was in order, it was no use to the decree-holder for the purpose of limitation. For it is not all applications for execution that save limitation but only such as are set out in Article 182 (5). The application must be made to a "proper Court," that is, according to Explanation II "to a Court whose duty it is to execute the decree." Here it must be admitted that after the decree was transferred to the Sirsi Court it was the duty of that Court to execute it. Therefore the application of 1916 was not one to a proper Court within the meaning of Article 182 (5) and cannot therefore save limitation.

Shingnè, in reply :—Explanation II to Article 182 (5) is to be read subject to the provisions in the Civil Procedure Code. Otherwise, by means of case law a position may be created which was not contemplated by the Legislature and which will tend to deprive the Court, which passed the decree, of a power, which is inherent in the Court and which has not been taken away from it or vested in the Court to which the work of execution is transferred.

MACLEOD, C. J.:—The plaintiffs obtained a decree in the Court of the Principal District Munsiff of Salem of the Madras Presidency in 1910. After ineffective attempts at execution the decree-holder applied that the decree should be transferred to the Court of the Subordinate Judge of Sirsi in the Bombay Presidency for execution. The decree was transferred in July 1914. No steps were taken in the Sirsi Court to execute the decree and the Sirsi Court returned the decree unexecuted to the Salem Court in November 1918. In 1919, the Salem Court again transferred the decree to

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the Sirsi Court and the present Darkhast was filed on 9th June 1919. The judgment-debtor opposed on the ground that execution was barred. The question was whether an application which had been made on the 4th August 1916 to the Salem Court praying that the decree might be sent to the District Munsiff of Sagaram in the Mysore State for execution was a step-in-aid of execution made to the proper Court. The District Judge following the decision in *Maharajah of Bobbili v. Narasaraju Peda Srinulu*^ω came to the conclusion that the Salem Court was not the proper Court in which to apply to take a step-in-aid when the decree had been transferred to the Sirsi Court. Under Schedule I, Article 182 (5) of the Indian Limitation Act the period of limitation applicable is three years from the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree, and the "proper Court" by Explanation II means the Court whose duty it is to execute the decree or order. Under Order XXI, Rule 10 "where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof." In *Maharajah of Bobbili v. Narasaraju Peda Srinulu*^ω a decree was passed by the District Court and was sent to the Court of a Munsiff for execution, and it was held that when the decree of a District Court had been sent, under the Code of Civil Procedure, 1882, section 223, to the Court of a Munsiff for execution and had not been returned to the District Court, the "proper Court" within the meaning of the Indian Limitation Act, 1908, Schedule I, Article 185 (5), in which to apply "for execution, or to take some step-in-aid of execution,"

of the decree was the Court of the Munsiff, with the result that an application to the District Court would not prevent the time for enforcing the decree from running (under Article 182) from the date upon which it was made.

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In that case the application to the District Judge was for execution of the decree by sale of immoveable properties whereas in this case there was an application to the Court of Salem for the transfer of the decree to another Court. It seems to me to make little difference whether there is an application for execution or only an application to take a step-in-aid of execution. For it clearly seems to have been their Lordships' opinion that when the Court which has passed a decree sends it for execution to another Court, then the first Court ceases to be the proper Court within the meaning of Schedule I, Article 182 (5) of the Indian Limitation Act. Therefore the decision of the District Judge was right and the appeal must be dismissed with costs.

SHAH, J.:—I have felt some difficulty in this case. Though it is clear from the provisions of section 42, that when the decree is once transferred to another Court, that Court has the same powers in executing such decree as if it had been passed by itself, I do not find any express provision in the Code as to what procedure a party is to adopt when he wants to get the decree transferred again to another Court. There is no provision as to whether in such a case the application should be made by him in the first instance to the Court to which the decree has been transferred or to the Court which originally passed the decree, and which made the order transferring the decree for execution on the first occasion. The difficulty arises from the absence of any express provision in the Code on the point. It is possible, however, to read section 42

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of the Code in a comprehensive manner, and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred ; and the observations in *Maharajah of Bobbili v. Narasaraju Peda Srinulu*⁽¹⁾ show that all the applications after the decree is once transferred for execution to another Court, in connection with its execution, must be made to that Court. No doubt the application in that case was for the execution of the decree, and as it was made to the Court which had already transferred the decree, it was held that the application was not made to the proper Court. The application in the present case is not exactly of that kind, and I should have been glad to see my way, if possible, to hold that another application for a transfer to a third Court might be made to the Court which had originally passed the decree. At any rate it may be said in favour of that view that there is no express provision prohibiting such a procedure. At the same time there is much to be said in favour of the view accepted by the lower appellate Court, and by my Lord the Chief Justice. On the whole I think, though not without hesitation, that the application in this case to the Salem Court, which had already transferred the decree for execution to the Sirsi Court, for a transfer of the decree to another Court, cannot be treated as having been made to the proper Court and therefore cannot be held to be a step-in-aid of execution.

Decree confirmed.

J. G. R.

⁽¹⁾ (1916) L. R. 43 I. A. 238.