APPELLATE CIVIL.

Before Mr. Justice Macklin and Mr. Justice Sen.

HASAN VALI BACAS AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* ISAP BAPUJI PATEL, ASSIGNEE OF THE FIRM OF MESSRS. BRUEL & Co. (ORIGINAL PLAINTIFF), RESPONDENT.* 1938 *June* 20

Indian Limitation Act (IX of 1908), Art. 183, Proviso—Decree—Assignment—Application by assignee—Order by Court—Application for execution filed more than twelve years after decree—Revivor—Execution barred.

On January 31, 1922, a decree for money was obtained on the Original Side of the High Court. On January 6, 1934, the decree-holder assigned his rights under the decree to the respondent. On January 8, 1934, the assignee applied to the High Court for the recognition of his assignment. On February 5, 1934, the Court made an order allowing execution against all the four heirs of the judgment-debtor without prejudice to their contention as to the execution of the decree being barred by the law of limitation. The decree was later on transferred to the Court of the First Class Subordinate Judge, Broach, for execution. On April 4, 1934, the assignee filed a *darkhast* to execute the decree when a question arose as to whether the execution of the decree was barred by limitation :—

Held, (1) that the order of February 5, 1934, could not operate as a revivor and that the assignee was not entitled to execute the said order ;

Raja of Ramnad v. *Velusami Tevar*,[1] distinguished ;

Kamini Debi v. *Aghore Nath Mukherji*,[2] relied on ;

(2) that the execution of the decree was barred against all the judgment-debtors.

SECOND APPEALS from the decision of M. C. Kaveesbwar, Assistant Judge, Broach, setting aside an order made by C. D. Pandya, First Class Subordinate Judge, Broach.

Proceedings in execution.

On January 31, 1922, Messrs. Bruel & Co. obtained on the Original Side of the High Court a decree for Rs. 4,283-7-6 with costs and future interest against Vali Bagas, the father of appellant Nos. 1 and 2 and the husband of appellant

* Cross Appeals Nos. 301 and 302 of 1937.

[1] (1920) L. R. 48 I. A. 45, s. c. 23 Bom. L. R. 701.
[2] (1909) 11 Cal. L. J. 91.

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No. 3 in Second Appeal No. 301 and of the respondent in Second Appeal No. 302. On August 14, 1922, costs were taxed.

On January 6, 1934, Messrs. Bruel & Co. assigned the decree to Isap Bapu Patel (respondent in Second Appeal No. 301 and appellant in Second Appeal No. 302).

On January 8, 1934, the assignee applied to the High Court for the execution of the decree and on notices being issued under O. XXI, r. 16 of the Civil Procedure Code, the rule was made absolute against the assignor.

On January 26, 1934, notice was made absolute against the four heirs and legal representatives of the deceased judgment-debtor, the order being that the assignee should execute the decree against the appellants in Second Appeal No. 301. On January 29, 1934, the order of January 26 was vacated and on January 30, an amendment was made.

On February 5, 1934, notice was made absolute against all the opponents and a final order was made stating "that the assignee do execute the said decree against the respondents Nos. 2, 3, 4 and 5" with a proviso that the order was without prejudice to the contention of the respondents that the execution of the decree was barred by the law of limitation.

Thereafter the decree was transmitted to the Court of the First Class Subordinate Judge, Broach, for execution and on April 4, 1934, the assignee filed *darkhast* No. 179 of 1934 for the execution of the decree.

The executing Court raised several issues of which issue No. 1 was as follows :—

"Whether the execution of the decree is time-barred against the defendants Nos. 2, 3, 4 and 5 ?"

The learned Subordinate Judge held that the *darkhast* was not time-barred, observing as follows :—

"It is common ground that the point is covered by Art. 183 of the Indian Limitation Act. That Art. 183 fixes the period of limitation as 12 years from (1) the date of the decree or (2) from the date on which it is revived. The present darkhast is admittedly filed more than 12 years after the date of the decree.

"It is urged, however, that there was a revivor. The Assignee had applied to the High Court of Bombay on January 8, 1934, to have his name brought in as the judgment-creditor and to be allowed to proceed with execution as the assignee. The High Court granted his application on January 26, 1934, and recognised the assignment in his favour and allowed him to proceed with the decree. (See certified copy, exhibit 2.) Then again it vacated the order on January 29, 1934, and finally reaffirmed it on February 5, 1934. It is urged that this operates as a revivor.

Now, the latest case on the point cited before me is I. L. R. 52 Mad. 590. The relevant remarks are at p. 600 :—'The matter is concluded . . . by the pronouncement of the Privy Council in 48 I. A. 45 which appears to me to be a direct authority for the proposition that when a Court has recognised the assignment of a decree and passed an order allowing the assignee to execute it, that gives a fresh starting point of limitation and that it is not open to the judgment-debtor to contend that it did not act as a revivor'. It would, therefore, appear that the order of the High Court recognizing the assignment in favour of the Assignee would operate as a revivor and give a fresh starting point of limitation to the Assignee.

I, therefore, hold on issue No. 1 that the darkhast is in time."

On appeal, the learned Assistant Judge held that the execution of the decree was barred by limitation against the respondent in Second Appeal No. 302 and he accordingly made an order stating that the execution of the decree was barred against her, but he held that it was in time against the other three persons (appellants in Second Appeal No. 301). In the course of the judgment the learned Judge observed as follows :—

"The respondent seems to be on a stronger ground in respect of the order of 26th January 1934. This order is however passed against appellants Nos. 1, 2 and 4 and not against No. 3. An order against one cannot operate against all, *vide* A. I. R. 1916 Mad. 1038. For Article 183, the order would operate only against those against whom it is passed. I therefore hold that the execution is barred against the present appellant No. 3. Notices were served on all before the date of this order. There is no reservation of any point in this order. It is an absolute order. No defect or flaw has been shown by the appellants in respect of this order.

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Decree was in time on the date of this order. An assignee has to be recognised by the Court which passed the decree. This order so recognised the Assignee.

9. This order was however vacated by the Judge passing the same, 3 days after, *i.e.*, on 29th January 1934. The appellants contend that the parties will be presumed to be relegated to their former position and will have to refund or return the advantage gained, on the vacating of the order. It is true that if this new order of 29th January 1934 is valid and with jurisdiction, the right accrued thereby to the respondent, viz., the revival of the decree or the fresh start for limitation would go away. Now, a valid judicial order can be vacated by a properly constituted Appellate Court under the Civil Procedure Code, or by the same Court if it is found to be bad on the ground of fraud, misrepresentation or the like. It is not apparent from the order, exhibit 2, that the order of 25th January 1934 was vacated because of fraud or the like. It does not appear to have been vacated on those grounds which give the Court jurisdiction to do so. On the contrary, exhibit 2 states that the notice was called on for argument on 29th January 1934 against the present appellant No. 3, that the appellants Nos. 1, 2 and 4 had objected to some defect in the application for recognising the assignment, that leave was granted to the Assignee to amend his application and that the order of 25th January 1934 was vacated for the purpose of passing an order against all the present appellants after the amendment of the Assignee's application. Amendment was made on 30th January 1934 and the order was passed against all the present appellants on the next fixed date, *i.e.*, on 5th February 1934. The procedure in the case of fraud, etc., would have been otherwise or quite different. The order of 29th January 1934 thus appears to be redundant, invalid and without jurisdiction. It cannot therefore affect the revivor and the fresh start of limitation."

Hasan, Asmal and Bai Huri filed Second Appeal No. 301.
Isap Bapuji filed Second Appeal No. 302.

Second Appeal No. 301 of 1937.

O'Gorman, with *J. G. Mody*, for the appellants.
H. C. Coyajee, with *P. A. Dhruva*, for the respondent.

Second Appeal No. 302 of 1937.

H. C. Coyajee, with *P. A. Dhruva*, for the appellant.
O'Gorman, with *J. G. Mody*, for the respondent.

SEN J. These appeals arise out of proceedings in the execution of a decree in suit No. 4696 of 1921 in the High Court in its original jurisdiction, the plaintiff having obtained

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a decree for over Rs. 4,000 against one Vali Bagas. The decree-holder assigned this decree on January 6, 1934, to one Isap Bapuji Patel, the respondent in Second Appeal No. 301 of 1937 and the appellant in the other second appeal. On January 8, 1934, the assignee applied to the High Court for recognition of his assignment. Notices were issued to the decree-holder as well as to the four heirs and legal representatives of the original judgment-debtor, who had died in the meanwhile. On January 19, 1934, three out of the four judgment-debtors asked for an adjournment of the proceedings and the order of the Court was that the notice was made absolute as against the plaintiff (the assignor). On January 26, 1934, the Court passed an order that the assignee should execute the decree against three out of the four judgment-debtors, (Nos. 1, 2 and 4), these three being the appellants in Second Appeal No. 301. Thereafter, apparently on an application by the assignee, he was allowed to amend his application and on January 29, 1934, the Court passed an order vacating its own order dated January 26, 1934. On February 5, 1934, the Court made its notice of January 8, 1934, absolute against all the four heirs of the original judgment-debtor. The date of this order was more than twelve years after the date of the decree. The decree was then transferred to the Court of the First Class Subordinate Judge, Broach, and on April 4, 1934, a darkhast was filed by the assignee of the decree for execution. The Court, following *Palaniappa Chettiar* v. *Valliammai Achi*,[1] treated the recognition by the High Court of the assignment as a revivor within the meaning of art. 183 of the first schedule to the Indian Limitation Act and held that the darkhast was in time. All the four judgment-debtors appealed against this order to the District Court and contended that the execution was barred by limitation. The Assistant Judge who heard the appeal held that the order of February 5, 1934, did not constitute a valid revivor as the question of

[1] (1928) 52 Mad. 590.

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limitation had not been decided by that order. He further held that the order of January 29, 1934, was invalid and without jurisdiction, as the Court, in his opinion, had no right to vacate its own order, there having been no fraud or misrepresentation or any other such ground affecting the order of January 26. He, therefore, treated the order of January 26, 1934, as operative and allowed the darkhast to proceed against only judgment-debtors Nos. 1, 2 and 4. Against this order Second Appeal No. 301 of 1937 has been filed on the plea that execution is barred by limitation against all the judgment-debtors and Second Appeal No. 302 has been filed on the plea that execution is not barred even against judgment-debtor No. 3.

There is no dispute that the case is governed by art. 183 of the first schedule to the Indian Limitation Act. The darkhast was admittedly filed more than twelve years after the date of the decree, and therefore the main question that arises is whether it was saved by the proviso to the said article as to revivor. In the order of February 5, 1934, which gives the history of the proceedings, we find that after January 25, 1934, the assignee wanted to amend his application and that the Court, after hearing the advocates on both sides, allowed the amendment and vacated its own order of January 26. Its object, apparently, was that there should be an order against all the four judgment-debtors. On behalf of the judgment-debtors it has been argued that it was perfectly competent for the Court to vacate its own order as the provisions of s. 151 of the Civil Procedure Code are wide enough to allow this being done, and reliance has also been placed on *Yusuf* v. *Abdullabhoy Lalji*.[1] In that case it was held that an interlocutory order which was made in chambers could be reviewed by the Court, under s. 151 of the

[1] (1929) 55 Bom. 368.

Civil Procedure Code, if the ends of justice required it, even though the application for such a purpose did not expressly fall within the language of O. XLVII of the Code. It seems to us that the Court felt that it was necessary in the interest of justice to vacate the order it had passed on January 26, 1934, in view of the fact that its previous order did not enable the assignee of the decree to proceed against all the judgment-debtors. The final order passed on February 5, 1934, now stands, there having been no appeal against either the order of January 29, 1934, or that of February 5, 1934, and the further fact to be noticed is that this order was passed at the instance of the assignee himself. We are, therefore, not satisfied that the order of February 5 was an improper order and, in our opinion, the learned Assistant Judge was wrong in regarding the order of January 29 as "redundant, invalid and without jurisdiction" and in holding that the assignee could rely on the order of January 26.

Mr. Coyajee on behalf of the assignee has contended that in any case the order of February 5, 1934, operates as a revivor and that the assignee is entitled to execute the said order. He relies on *Raja of Ramnad* v. *Velusami Tevar*[1] and *Palaniappa Chettiar* v. *Valliammai Achi*.[2] In the first of these cases the Court recognised an assignment of a decree and allowed the assignee to execute it. Their Lordships of the Privy Council observed in that case that that order was a positive order that the assignee should be allowed to execute the decree and that as no reference to limitation was made therein there was a revivor, irrespective of whether a plea of limitation would have succeeded in that case. On this latter point, however, the present case cannot be said to be analogous to that case, as the Court, after it had decided that the notice of January 8 should be made absolute against all the four judgment-debtors, added

[1] (1920) L. R. 48 I. A. 45, s.c. 23 Bom. L. R. 701.
[2] (1928) 52 Mad. 590.

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further, "I do further order that this order is without prejudice to the contentions of respondents Nos. 2, 3, 4 and 5 (i.e., the four judgment-debtors), that the execution of the decree is barred by the law of limitation." The Court, therefore, did not determine the question whether execution was barred by limitation, and its order cannot be said to be a positive order that the assignee should be allowed to execute the decree. The case of *Palaniappa Chettiar* v. *Valliammai Achi*[1] follows *Raja of Ramnad* v. *Velusami Tevar*[2] and carries the matter no further.

Mr. O'Gorman on behalf of the judgment-debtors has relied on *Chutterput Singh* v. *Sait Sumari Mull*[3] for the view taken by the learned Assistant Judge that the order of the Court being qualified in the manner described above it could not operate as a revivor. At p. 920 of this case Sanderson C. J. referred to an earlier case, *Kamini Debi* v. *Aghore Nath Mukherji*,[4] in which the test of what constitutes a revivor within the meaning of art. 183 had been laid down by Mookerjee J. in the following words (p. 93) :—

> "The essence of the matter is that to constitute a revivor of the decree, there must be, expressly or by implication, a determination that the decree is still capable of execution, and the decree-holder is entitled to enforce it."

We think that this view must be accepted and that in view of the qualification as to limitation of the order of February 5, 1934, the learned Assistant Judge was right in holding that the order of February 5, 1934, could not operate as a revivor.

It is further contended by Mr. Coyajee that if not the order of February 5, 1934, the order passed on January 19, 1934 must be taken to operate as a revivor. That order merely made the notice of January 8 absolute against the assignor. We do not think that this can be interpreted as meaning that

(1) (1928) 52 Mad. 590.
(2) (1920) L. R. 48 I. A. 45, s. c. 23 Bom. L. R. 701.
(3) (1916) 43 Cal. 903, F. B.
(4) (1909) 11 Cal. L. J. 91.

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the decree was determined to be capable of execution against the judgment-debtors. All that this order means is that the original decree-holder was no longer entitled to execute the decree. The question of limitation certainly became important after January 31, 1934, i.e., twelve years after the date of the decree, and it cannot be said that it was possible after that date to determine that the decree still remained executable without going into the question of limitation.

The third point sought to be made by Mr. Coyajee was that the order of February 5, 1934, must be held to relate back to the date of the application. We do not think that this question is now of any consequence in view of our conclusion that the final order of February 5, 1934, does not operate as a revivor. In support of the proposition in question, besides, Mr. Coyajee can only rely upon *Venkapaiya* v. *Nazerally Tyabally*,[1] which, in our opinion, is not applicable to the facts of this case.

Finally, it has been urged on behalf of the assignee that on the Court's making its notice absolute against three of the judgment-debtors on January 26, 1934, limitation must be held to have commenced to run immediately, and that even if that order was vacated later on, the running of limitation could not be stopped; and that it can thus be held that the revivor created on January 26 remained operative at the date of the Darkhast. We do not, however, think that there is any substance in this line of argument, as we must hold that the vacating of the order of January 26 put an end to the running of limitation which owed its commencement to such order. To hold otherwise would obviously lead to anomalous results.

In the result, therefore, the appellants in Second Appeal No. 301 of 1937 and the respondent in Second Appeal No. 302 of 1937 must succeed. The first of these appeals will, therefore, be allowed with costs throughout, orders of both the

[1] (1923) 47 Bom. 764.

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Courts below being set aside. Second Appeal No. 302 of 1937 will be dismissed with costs. The execution of the decree will, therefore, be barred against all the judgment-debtors. First Appeal No. 245 of 1935, which was filed to meet the contingency that might arise in case Appeal No. 32 of 1935 filed in the District Court was thrown out on the ground of pecuniary jurisdiction, must be dismissed without any orders as to costs.

Second Appeal 301 allowed;
Second Appeal 302 dismissed.

Y. V. D.

PRIVY COUNCIL.

J. C.*
1938
July 27

PESTONJI BHICAJEE, APPELLANT *v.* P. H. ANDERSON, RESPONDENT.

[On Appeal from the Court of the Judicial Commissioner of Sind]

Civil Procedure Code (Act V of 1908), s. 60 (1), prov. (m)—Contingent interest under a will, whether attachable.

A testator by his will directed that the income from three-sixteenths of his property "shall as long as C. S. Anderson and Winifred his wife are both alive be divided, two-thirds to the wife and one-third to the husband. If one of them dies his or her share of the income shall belong to their four children or the survivors of them in equal proportions and when the remaining parent dies the capital and income shall belong to the children then living in equal proportions".

Held, that the interest of a child under the will was, during the joint lives of his father and mother, a contingent interest both as to income and as to corpus and was, under prov. (*m*) to s. 60 (*1*) of the Code of Civil Procedure, not liable to attachment.

APPEAL (No. 18 of 1938) from a judgment of the Court of the Judicial Commissioner in its Appellate Jurisdiction (February 28, 1936) which affirmed a judgment of the same Court in its Original Civil Jurisdiction.

* *Present :* Lord Romer, Sir Shadi Lal and Sir George Rankin.