

## Appellate Jurisdiction (a)

*Civil Miscellaneous Regular Appeal No. 25 of 1869.*

B. BROOKS, ESQUIRE, Official Assignee, and  
as such the Assignee of the estate and  
effects of VURDALOCA CHARY..... } *Petitioner.*

PATTAM MARI NUNJAPPA NAICK... *Counter Petitioner.*

An attachment of property in execution of a decree operates *de die in diem* as process of execution upon a decree.

The late Sudder Court, by an order dated the 25th July 1855, directed that the judgment-debtor should be allowed to remain in the enjoyment of the property then under attachment, that an order for the sale of the property should be stayed, but that the attachment should continue in force until the further order of the Court.

On the 10th of May 1868 the High Court made an order setting aside the order of the Sudr Court dated the 25th July 1855 and stating that the assignee of the judgment-creditor should be left at liberty to apply for execution of the decree.

Upon application to the Civil Court of the district in which the property was situated the Court decided that the application to obtain execution was barred by Act XIV of 1859.

*Held* by the High Court, that the right to enforce payment of the amount payable under the decree was not barred.

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**T**HIS was an appeal against an order of C. F. Chamier the Civil Judge of Salem, dated the 21st December 1868:

In this case the petitioner sought, as the assignee of one Vurdaloca Charry, who had become an Insolvent, to obtain execution of a decree of the late Sadr Court in Appeal Suit No. 9 of 1843. The petition stated that the plaintiff in the suit was Predavagherry Josayee and the defendant Peddaputta Narainsawmi Naidu, Poligar of Bagalore, and that a decree was obtained against the defendant. On the 12th of October 1846, the interest of Predavagherry Josayee was assigned to Jagadavagherry Josayee who undertook to collect the amount payable under the decree and to pay it to Predavagherry Josayee after making certain deductions ; but nothing was recovered by Jagadavagherry Josayee.

Predavagherry Josayee died in 1849 leaving his adopted son, Davagherry Josayee, his legal personal representative him surviving. Davagherry Josayee died on the 11th August 1856 leaving Gungagherry Josayee his legal representative him surviving.

(a) Present : Scotland, C. J., and Collett, J.

Davagherry and Gungagherry Josayee, by two instruments in writing, dated respectively the 15th of September 1855 and the 26th January 1858, assigned their interest in the decree to Vardaloca Charry.

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Jagadavagherry Josayee, the assignee, died in February 1854 leaving his adoptive father Jolingherry Josayee him surviving.

On the 19th August 1854 a razinamah was presented to the late Sadr Court signed by Jalingherry Josayee and the judgment-debtor whereby the judgment-debtor agreed to pay the amount of the decree by instalments.

On the 12th October 1854 Davagherry Josayee, the son of the plaintiff, presented a petition to the Sadr Court stating that the consideration agreed upon between Predavagherry and Jagadavagherry Josayee for the assignment of the decree had not been paid, and praying that the assignment might be set aside. The Sadr Court, by an order dated the 8th January 1855, rejected the petition, and referred the petitioner to a regular suit in respect of any claim which he had against the holder of the decree.

On the 18th July 1855 another razinamah signed by Petambara Row, the agent of the decree-holder, Jalingherry Josayee, and the judgment-debtor, was filed in the Sadr Court whereby it was agreed that the judgment-debtor should pay the amount of the decree by instalments, but that the judgment-debtor should remain in possession of the Polliem subject to the then attachment of the Court.

On the 25th July 1855 the Sadr Court made an order directing the Civil Judge of Salem not to sell the Polliem but to place it under the charge of the judgment-debtor and to hold it under attachment until further order.

On the 9th November 1854 Petambara Row, who was the gumastah of Jalingherry Josayee and acted under a written authority authorising him to collect the amount of the decree and to take all necessary proceedings in the matter, entered into an agreement with Davagherry Josayee, the son of the plaintiff, in which he undertook to pay to the latter the amount due to him under the decree.

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On the 16th July 1859, a bill was filed on the Equity Side of the late Supreme Court by Vurdaloca Charry against Petambara Row and others.

The bill prayed for an account of what was due upon the decree and of the moneys received by Petambara Row on account thereof. The bill stated the various agreements between the parties and the proceedings taken to enforce the decree. Petambara Row in his answer admitted the receipt of rupees 8,010-5-4 under the decree, but denied his liability to account to the plaintiff. By the decree of the Supreme Court dated the 12th September 1862 it was referred to the Master to take an account of what was due upon the decree and of the amount received by Petambara Row on account thereof.

Vurdaloca Charry and Petambara Row having become insolvent and died, the suit was revived by the Official Assignee. By the final decree of the High Court of Madras dated the 11th July 1866, it was declared that the plaintiff by revivor, the official assignee and as such the assignee of Vurdaloca Charry, was entitled to all the rights of Davagherry Josayee under the decree of the Court of Sadr Adalut in the Appeal Suit No. 9 of 1843, and that Petambara Row was indebted to the estate of the plaintiff by original bill in the sum of rupees 6,010-5-4, being the balance upon the amount received by him under the decree of the Court of Sadr Adalut.

On the 26th April 1867 an application was made by the petitioner to the Civil Judge of Salem to proceed with the execution of the decree. The application was refused on the ground that, so long as the order of the Sadr Court of the 25th July 1855 remained in force, the Civil Judge could not take any further step in the execution of the decree.

On the 10th May 1868, the High Court on its Appellate Side, made an order that the order of the Sadr Court dated the 25th July 1855 be set aside and that the petitioner as official assignee and as such entitled to all the rights of Vurdalocharry deceased be left at liberty to apply to the Civil Court of Salem to enforce payment of the amount payable under the decree.

An application was accordingly made to the Civil Court, which was refused by the Civil Judge upon the ground that the right claimed was barred by the Act of Limitation.

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The petitioner appealed to the High Court.

*O'Sullivan* for the Petitioner.

*Vencatapathy Row*, for the counter Petitioner.

The Court delivered the following

**JUDGMENT:**—The question which the Court is called upon to determine in this case is whether process of execution to enforce the decree in Regular Appeal No. 9 of 1843 is barred by Section 20 of the Act of Limitation. That decree was passed in 1844 and was transferred in 1846, and the transferee took proceedings to enforce it, which were continued after his death by his heir. Those proceedings resulted in a razinamah and an order of the Sadr Court thereupon, dated the 25th July 1855, sanctioning payment of the amount decreed by instalments and directing that the judgment-debtor should be allowed to remain in the enjoyment of the property then under attachment, and that an order for the sale of it should be stayed, but that the attachment should continue in force until the further order of the Court. That order remained unaltered until the passing of the recent order of this Court, and by force of it the attachment has been operating *de die in diem* as process of execution upon the decree, and at any time further process for the sale of the property might have issued upon the attachment by leave of the Sadr Court or this Court on the application of the party entitled to the judgment-debt.

Clearly therefore there was a continuing proceeding in execution of the decree down to the date of the present application for execution, and consequently the application was not barred by Section 20 of the Act of Limitations. We do not think that it makes any difference on this point that the order of the Sadr Court was made at the instance of Jalingherry, whose claim at the time was resisted by the heir of the original decree holder from whom the insolvent claimed by assignment. The official assignee

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claims to have vested in him the complete right to all that remains due of the judgment-debt, and, assuming that he can substantiate his claim by proof, he is the transferee now entitled to the benefit of the attachment in execution of the decree.

The order appealed from must be set aside, and the appellant left at liberty to renew his application for process of execution. Upon such application the Civil Court will hear and determine the claim upon its merits. The appellant's costs of this appeal must be paid by the respondent. The costs in the Civil Court will abide the determination of the Court in the renewed application and be paid by the party who fails. If the application should not be renewed within one month from the re-opening of the Court after the adjournment each party will bear his own costs.

Miscellaneous Petition No. 79 of 1869 put in by Mr. Mayne on behalf of Vencataramangeri Josayee, but which was not argued in consequence of our intimating the opinion we had formed, will be simply dismissed.

### Appellate Jurisdiction. (a)

*Special Appeal No. 612 of 1868.*

THESIKAM IYENGAR and another...*Special Appellants.*

GANAPATHY IYER and 3 others.....*Special Respondents.*

By an agreement entered into between the predecessors of the plaintiffs, Durmakartas of a Temple, and the defendants it was provided that the defendants should have a permanent right of cultivating certain lands belonging to the Temple upon payment of the circar tirva and a swamibogam mentioned in the agreement. Subsequently to the agreement the Government notified that the melvarum payable to the Government would be thenceforth permanent and not according to the nerick ascertained by reference to the market prices in certain towns, and the Government stated that any advantage arising from the change of system should go to the ryots themselves.

The plaintiffs sued the defendants to recover the balance of the market value of the produce of the land cultivated by the defendants after deducting the amount of circar kist paid by them.

*Held,*—(reversing the decree of the Lower Courts) that the defendants were only liable to pay the amount of swamibogam mentioned in the agreement and that no right was acquired by the plaintiffs by virtue of the subsequent arrangement made by the Government.

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**T**HIS was a Special Appeal against the decision of A. D. Srinivasas, the Principal Sadr Amin of Tinnevely, in Regular Appeal No. 424 of 1866, confirming the decree of

(a) Present : Scotland, C J, and Carmichael, J.