Privy Council Appeal No. 42 *of* 1920.

Raja Rajeswara Sethupati Avergal, Raja of Ramnad - - *Appellant*

v.

Velusami Tevar and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH DECEMBER, 1920.

Present at the Hearing:

LORD DUNEDIN.
LORD MOULTON.
MR. AMEER ALI.

[*Delivered by* LORD MOULTON.]

In this appeal the appellant is the assignee of a decree against the defendants (some of whom are minors and are represented by their guardian) which was passed on the 26th September, 1907. The amount of the decree was Rs. 35,063 and interest. The decree was in favour of the plaintiffs in the suit and went on to order that the plaintiffs should at once draw out the money in Court which was a sum of about Rs. 3,000, and that the first and second defendants should repay the balance within three months with interest and costs, and in default of such payment that the plaintiffs should recover the same by the sale of the entire cowle right possessed by them including the interest if any of the third defendant also, and if the sale proceeds were not sufficient for the purpose the plaintiff should recover the deficiency from the first and second defendants.

The judgment debtors made no payment and accordingly in January, 1909, the decree holder put in his application for execution by sale and realized Rs. 27,000, and in December, 1909, the sale was confirmed and possession delivered. An appeal was brought by the judgment debtors to the High Court, but this was dismissed on the 8th April, 1911.

By the actual sale of the village, the further amount recoverable from the first and second defendants under the decree became definitely ascertained, and on the 9th March, 1914, the then plaintiffs proceeded with the execution of the decree.

While these proceedings were in progress, the present appellant purchased the decree from the then plaintiffs, and on the 20th November, 1914, made his application to be brought on to the record as assignee of the decree, and to have the decree executed. This was resisted by the present respondents or their predecessors in title on several grounds. They put the present appellant to the proof of his assignment, they alleged that the right to execute the decree was barred by limitation, and they raised questions as to the liability of certain of the properties to attachment.

The matter came on for hearing before the Subordinate Judge, who delivered judgment thereon on the 13th December, 1915. The material portion of his judgment reads as follows :—

> " The transfer of the decree in favour of the petitioner is recognized and petitioner allowed to execute the decree . . . petitioner may file a fresh application for attachment."

One of the defendants applied for a review of this decision on the ground that the application was barred by limitation. On the 24th August, 1916, judgment was given dismissing this petition. The actual ground of dismissal was that it was out of time, but the order made by the Court is of importance in that the learned Judge points out that the order of the 13th December, 1915, above referred to, does not reserve any question of limitation for future determination. It is clear, therefore, not only that the issue of the execution of the decree being barred by limitation was in fact before the Court (as is shown also by the pleadings) on that occasion, but that the Judge at the time was aware of it, and that his decision included (as legally must have been the case) the rejection of this plea.

The present appellant proceeded to obtain the attachment of such properties of the respondents as were available to him in execution, and during the year 1916 various claims to the property were put forward by him and adjudicated upon by the Subordinate Judge, and finally the matter came before the Subordinate Judge and he dealt with it by an order on the 31st March, 1917.

In these final proceedings he permitted the defendants to raise again the plea that the above order of December, 1915, did not preclude the defendants from raising the plea that the defendants were barred by limitation. Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of the 13th December, 1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation if pleaded, would according to the respondents' case have been a complete answer, and therefore it must be taken that a decision was given against

the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon. No appeal was brought from the order then made, and therefore it was not competent for the Subordinate Judge to admit the plea on subsequent proceedings, or to consider it in his order of the 31st March, 1917, and the same remark applies to the judgment of the High Court on the 17th March, 1918, from which this appeal is brought.

Their Lordships are therefore of opinion that the order of the Subordinate Judge of the 31st March, 1917, and of the High Court of the 7th March, 1918, should be set aside, and that the prayer of the appellant for the recovery of the decree amount by attachment and sale of the defendants' immoveable properties referred to in the application should be granted, and that the appellant should receive from the respondents his costs in the Court below and of this appeal, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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RAJA OF RAMNAD,

v.

VELUSAMI TEVAR AND OTHERS.

DELIVERED BY LORD MOULTON.

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