

Having regard to the clear terms of Article 117, the period of limitation for a suit on such a foreign judgment is six years. I have already discussed previously the reasons why this Court should not consider the question whether the execution of this decree is barred by the law of limitation in Junagadh. Having heard counsel again I adhere to the view which I have previously expressed in the interlocutory judgment. In 43 I A 108¹¹ the plaintiff had brought the suit for specific performance of an agreement to sell a mortgage decree and which decree was to be duly transferred to the defendant. Before assignment the decree however became time barred, and the defendant refused to take it. Their Lordships of the Privy Council came to the conclusion, as a question of fact, that the plaintiff had agreed to assign to the defendant a decree which was capable of execution, and that until assignment there was an obligation on the plaintiff as vendor to keep the decree alive. Therefore, when execution of the decree became barred by limitation, the plaintiff was asking for specific performance by the defendant of an agreement which he was himself unable to perform and no such relief could be granted. In considering the effect of an observation in a decision it is always necessary to bear in mind the facts in connexion with which the judgment was delivered. Having regard to the facts of that case it is clear that their Lordships were not considering at all the question whether a time-barred decree could form a cause of action in a foreign Court. Giving all the weight which the observation is entitled to, in my opinion, it only means that in the particular case the defendant had agreed to buy an article which was alive, i. e. was capable of giving him money when it was transferred to him. In the interval by reason of the plaintiff's omission it had ceased to retain that character and therefore the relief of specific performance could not be granted. I am unable to read the sentence quoted above as meaning anything beyond what I have just summarized. In my opinion that observation in the judgment does not affect the considerations which made me hold that the Court is not concerned with the question whether the execution of the decree in Junagadh is time-barred. Issue 1 will be found in the negative and issue 2 in the affirmative. There will therefore be a decree for the plaintiff against defendant 1 as prayed.

D.S./R.K.

Suit decreed.

A. I. R. 1939 Bombay 526

LOKUR J.

Mahadeo Sunder Mehta

v.

Khanderao Sitaram Tipnis.

First Appeal No. 139 of 1937, Decided on 20th June 1939.

(a) Civil P. C. (1908), S. 68—Date on which status of judgment-debtor is to be considered is date when order for sale is passed.

Section 68 and the rules made thereunder require that when an order for sale is passed and the judgment-debtor is an agriculturist, the proceedings should be transferred to the Collector for execution of that order; in other words, the date at which the status of the judgment debtor is to be considered is the date when the order for sale is passed: *A I R 1934 Bom 383 Rel. on.* [P 527 C 2]

(b) Civil P. C. (1908), O. 21, R. 64—Order under O. 21, R. 64 may be modified if judgment-debtors appear under O. 21, R. 66 and prove that they are agriculturists.

When an order for sale is passed under O. 21, R. 64 it is really a preliminary order, which may be subsequently modified if any of the judgment-debtors appear in reply to the notices under O. 21, R. 66 and prove that they are agriculturists. In that case the proceedings would have to be transferred to the Collector: *A I R 1934 Bom 383 Rel. on.* [P 528 C 1]

(c) Civil P. C. (1908), S. 47 and O. 21, R. 66—Administrative directions relating to proclamation of sale do not fall under S. 47—But order as to whether sale is to be held by Court itself or by Collector falls under S. 47.

It is true that administrative directions relating to proclamation and other matters necessary for the carrying out of the sale cannot be regarded as orders falling under S. 47; but an order as to whether the sale is to be held by the Court itself or by the Collector is a judicial order relating to the execution of the decree, and, as such, it falls under S. 47. It has to be passed after a consideration of the question whether any of the judgment-debtors was agriculturist at the date of the order of sale, and when a notice is given to the judgment-debtor under O. 21, R. 66 for the settlement of the terms of the proclamation, it is his duty to put forward his contention that he was an agriculturist on the date of the order of sale and, therefore, instead of issuing a proclamation, the Court should transfer the proceedings to the Collector. If he fails to raise such a contention at that time, and the Court passes an order that the sale should be held by itself, then that order is a judicial order which is binding on the judgment-debtor. If the judgment-debtor appears and contends that he was an agriculturist at the date of the order for sale and the Court holds that he was not and proceeds to hold the sale itself, then it would be open to the judgment-debtor to appeal from that order. The same result would follow if he does not appear in reply to the notice issued to him and allows an ex parte order to be passed against him. [P 528 C 1, 2]

K. N. Dharap — *for Appellants.*Dr. B. R. Ambedkar and V. B. Virkar —
for Respondents.

Judgment.—This is an appeal against an order passed in execution proceedings by the First Class Subordinate Judge of Thana.

The appellants obtained a money decree against the respondents, and presented darkhast No. 73 of 1931 to recover the decretal amount by attachment and sale of the respondents' property. The darkhast was presented on 12th February 1931, and when the notices were served on them, respondent 1 put in his written statement (Ex. 13) on 8th September 1931, alleging *inter alia* that he was an agriculturist. Subsequently, on 19th December 1931, the plaintiffs put in a purshis (Ex. 16) stating that under a compromise they had agreed to grant six months time to the judgment-debtors to pay off the decretal amount, and that the judgment-debtors had agreed to waive their contention raised by respondent 1 in Ex. 13. The respondents' pleader, however, stated on 12th January 1932, that he had no instructions regarding the alleged compromise. The property was attached on 8th March 1932, and then an order for its sale was passed under O. 21, R. 64, Civil P. C., on 28th July 1933. Notices were issued to the judgment-debtors under O. 21, R. 66, and on 10th October 1933 the following order was passed: "Ordered sale. Issue proclamation."

Thereafter some proceedings as regards the addition of parties went on and the execution was stayed by the High Court. Ultimately the papers were received back on 21st December 1936 and on 12th January 1937 the judgment-debtor Khanderao made an application (Ex. 80) stating that his contention in the written statement (Ex. 13) that he was an agriculturist had not been considered, and requesting that as he was an agriculturist, the proceedings should be transferred to the Collector for the sale of the property attached. The lower Court then recorded evidence regarding the status of the judgment-debtor Khanderao and held that he was an agriculturist. The darkhast was, therefore, ordered to be transferred to the Collector of Kolaba for execution. It is against that order that the present appeal is filed by the decree-holders.

One of the contentions on behalf of the decree-holders, which was urged before the lower Courts, was that by reason of the alleged compromise mentioned in the purshis (Ex. 16) it was not open to the judgment-debtor, respondent 1, to put forward the plea that he was an agriculturist. The alleged compromise was not admitted on behalf of the judgment-debtors; nor has it been proved. Moreover, even if Khanderao

had then agreed to give up his contention regarding his status, still he cannot be regarded as having waived his right to claim the transfer of the proceedings to the Collector after the order for sale was passed, if he could prove that on the date of the order he was an agriculturist. S. 68, Civil P. C., and the rules made thereunder require that when an order for sale is passed and the judgment-debtor is an agriculturist, the proceedings should be transferred to the Collector for execution of that order; in other words, the date at which the status of the judgment-debtor is to be considered is the date when the order for sale is passed. That is also clear from the ruling in 36 Bom L R 804.¹ It was therefore open to the judgment-debtors to contend that the proceedings should be transferred to the Collector after the order for sale was passed, and the Court was bound to transfer those proceedings if it found that at the date of the order for sale the judgment-debtors or any one of them was an agriculturist.

The lower Court has found on the evidence that one of the judgment-debtors Khanderao is an agriculturist, but it is urged that there was no issue regarding his status on the date of the order for sale. But when his application (Ex. 80) is read with the evidence adduced on his behalf, it is evident that he wanted the contention raised by him in his written statement (Ex. 13) to be considered, and that related to his status in the year 1931, and the evidence is led that all along he has been an agriculturist. When the witnesses were examined there was no suggestion that Khanderao had changed his status at any time. Hence, it must be deemed that the lower Court held Khanderao to be an agriculturist on the material date, namely the date on which the order for sale was passed. No evidence was adduced by the decree-holders to rebut the evidence adduced on behalf of Khanderao, and the finding of fact recorded by the lower Court practically stands unchallenged.

But the most important objection against the order of the lower Court is that judgment-debtor 1 did not put forward his contention regarding his status at the proper time. The contention which was taken in the written statement (Ex. 13) was not then pressed, and no finding regarding the status of Khanderao was recorded before the order for sale was passed on 28th August

1. *Sopana v. Dattatraya*, (1934) 21 A I R Bom 883=162 I C 589=36 Bom L R 804.

1933. After that order notices under O. 21, R. 66 were issued for the settlement of the terms of the proclamation. It was at that stage that the judgment-debtors should have come forward to ask for the transfer of the proceedings to the Collector for execution of the order for sale. As observed by Broomfield J. in 36 Bom L R 804,¹ when an order for sale is passed under O. 21, R. 64 it is really a preliminary order, which may be subsequently modified if any of the judgment-debtors appear in reply to the notices under O. 21, R. 66 and prove that they are agriculturists. In that case the proceedings would have to be transferred to the Collector. But this opportunity given to Khanderao was not availed of by him, and he remained absent on the date fixed in the notice issued to him under O. 21, R. 66. The Court then made an order for sale and issue of proclamation. Such an order would not have been passed if any of the judgment-debtors had appeared and urged that the proceedings should be transferred to the Collector by reason of their being agriculturists. It is therefore urged on behalf of the appellants that by implication the Court then found that it had jurisdiction to proceed with the sale, and it was not necessary to send the proceedings to the Collector. When once such an order is passed, it is binding on the judgment-debtors unless they appeal from that order and get it set aside.

On the other hand, it is pointed out that such an order is not a judicial order but merely an administrative order from which no appeal lies. In support of this view reference may be made to 27 Mad 259² and 52 Bom 444.³ In both these cases it was held that the proceedings of a Court under O. 21, R. 66, Civil P. C., and the rules made thereunder in relation to the proclamation of sale, are not orders within the meaning of S. 47, and are not appealable. It is true that administrative directions relating to proclamation and other matters necessary for the carrying out of the sale cannot be regarded as orders falling under S. 47, Civil P. C., but an order as to whether the sale is to be held by the Court itself or by the Collector is a judicial order relating to the execution of the decree, and as such, it falls under S. 47, Civil P. C. It has to be passed

after a consideration of the question whether any of the judgment-debtors was an agriculturist at the date of the order of sale, and when a notice is given to the judgment-debtor under O. 21, R. 66, for the settlement of the terms of the proclamation, it is his duty to put forward his contention that he was an agriculturist on the date of the order of sale and, therefore, instead of issuing a proclamation, the Court should transfer the proceedings to the Collector. If he fails to raise such a contention at that time, and the Court passes an order that the sale should be held by itself, then that order is a judicial order which is binding on the judgment-debtor. If the judgment-debtor appears and contends that he was an agriculturist at the date of the order for sale and the Court holds that he was not and proceeds to hold the sale itself, then it would be open to the judgment-debtor to appeal from that order. The same result would follow if he does not appear in reply to the notice issued to him and allows an ex parte order to be passed against him.

In the present case not only did the judgment-debtors fail to appear on receiving the notices issued to them under O. 21, R. 66, but even after the terms of the proclamation were settled they made an application (Ex. 29) on 22nd December 1933, asking for a fresh panchanama and a fresh valuation of the property. That application was granted and a fresh proclamation was issued on 11th January 1934. Thus, even though they accepted the order passed by the executing Court and allowed the proceedings of sale to go on in the Court itself, it was nearly three years thereafter, when the proceedings were received back from the High Court, that Khanderao came forward with his application (Ex. 80). But since already an order had been passed that the Court itself should proceed with the sale, it was not open to him subsequently to put forward a contention which he ought to have put forward when the notice under O. 21, R. 66 was issued. I, therefore, hold that the lower Court should not have gone into the question of the status of the judgment-debtor No. 1 at that stage. I set aside the order of the lower Court and direct that it should proceed with the proceedings for sale, instead of sending them to the Collector. The respondents shall pay the costs of the appellants and bear their own.

D.S./R.K.

Order set aside.

2. Sivagami Achi v. Subrahmanya Ayyar, (1904) 27 Mad 259=14 M L J 57 (F B).

3. Krishnarao Ambadas v. Krishnarao Raghunath, (1928) 15 A I R Bom 245=111 I O 892=52 Bom 444=30 Bom L R 679.