1927

BHODAI SHAIK v. LAKSHMI-NARAYAN DUTT.

RANKIN C.J.

Relief Act and, therefore, he has come before the Court not merely on the basis of his own possession which is gone, but on the merits of the claim which, makes all the difference. That makes applicable the two cases to which I have referred.

In this case the Munsif's order giving the plaintiff the costs of the trial must be varied and the order for costs before the Munsif will be that each party will bear his own costs. But the plaintiff must pay the costs of the two appeals and those costs will be added to the sum due on the mortgage. So that the plaintiff would have to pay those as a condition of redeeming. If the plaintiff, however, in the end fails to redeem, then he must pay the costs in all the Courts.

S. M. *Decree varied.*

APPELLATE CIVIL.

Before Page and Graham JJ.

1927

July 25.

JUGAL KISORI DEBI

v.

BAIDYA NATH ROY.*

Execution of Decree—Applications for execution not made in accordance with law and in proper Court, whether will save limitation—Joint decree—Discharge given by an adult without the concurrence of minors, whether will be sufficient—Limitation Act (IX of 1908), Art. 182 (5), ss. 6, 7—Civil Procedure Code (Act V of 1908), ss. 37, 38, 39, O. XXI, r. 6.

On December 6, 1920 a decree on appeal was passed by the High Court of Patna in a suit which was decided by the Subordinate Judge of Purnlia. Two applications on April 15, 1921, and on January 11, 1924, respectively, were made without success in the Court of the Subordinate Judge of Dhanbad to execute the decree. Subsequently the appellants applied on March 23, 1925 to the Court of the Subordinate Judge of

*Appeal from Original Order No. 361 of 1925, against the order of J. K. Mukherjee, Subordinate Judge, Asansol, dated Aug. 7, 1925.

Asansol in Bengal to execute the decree as the property lay within the jurisdiction of that Court :—

Held, (*i*) that as the two previous applications to the Dhanbad Court were not made in accordance with law and to the proper Court under sections 37, 38, 39, and O. XXI, r. 6 of the Code of Civil Procedure, and no other steps in aid of execution within Article 182 (5) of the Limitation Act were taken, the application for execution to the Court of Asansol was barred by limitation ;

(*ii*) that on a proper construction the decree passed by the High Court of Patna was a joint decree which the appellants were jointly entitled to execute within section 6 of the Limitation Act ;

Ahinsa Bibi v. *Abdul Kader Saheb* (1) followed.

(*iii*) that in the absence of any evidence that the appellants were members of a joint undivided Hindu family, or whether they were living under the Mitakshara or Dayabhaga School of Hindu Law, or whether one of them being major was acting as the *karta* of a joint Hindu family of which the appellants were members, and as the major decree-holder was acting as next friend of one of the minors, a discharge could not be given by him to the respondents "without the concurrence of" the minors within section 7 of the Limitation Act.

Nobin Chandra Barua v. *Chandra Madhab Barua* (2) and other cases referred to.

MISCELLANEOUS APPEAL by Sm. Jugal Kisori Debi, the judgment-debtor.

This miscellaneous appeal arose out of an order passed by the Subordinate Judge of Asansol dismissing an objection by the judgment-debtor to the execution of a decree passed by the High Court of Patna on December 6, 1920. The decree-holders respondents Bireswar, Batakrishna and Bholanath are three brothers. Batakrishna and Bholanath are minors and Bireswar is an adult. They instituted a suit in the Court of Subordinate Judge of Purulia for an account. The suit was decreed, and an appeal was preferred by them to the High Court of Patna through inadequacy of the sum awarded by the lower Court,

(1) (1901) I. L. R. 25 Mad. 26. (2) (1916) I. L. R. 44 Calc. 1.

1927

JUGAL KISORI DEBI v. BAIDYA NATH ROY.

PAGE J.

and the decree was varied. Subsequently the decree-holders instituted the present execution proceedings.

Mr. Ram Chandra Majumdar, *Babu Narendra Krishna Bose* and *Babu Gopendra Nath Das*, for the appellant.

Mr. Girija Prasanna Sanyal and *Babu Indu Bhusan Roy*, for the respondent No. 1.

Babu Braja Lal Chakravarti and *Babu Nripendra Chandra Das*, for the respondents Nos. 2 and 3.

PAGE J. This is an appeal from an order of the learned Subordinate Judge of Asansol of the 7th August 1925 dismissing an objection by the judgment-debtor to the execution of a decree passed by the High Court of Patna on the 6th December 1920. The present execution proceedings were commenced on the 23rd March 1925, and, therefore, *primâ facie* were time-barred. The decree-holders contended that the present application for execution was not barred by limitation because (*i*) on two previous occasions 15th of April, 1921 and the 11th of January, 1924 applications had been made "in accordance with law" to execute the said decree in "the proper Court", namely, the Court of the Subordinate Judge of Dhanbad, and, therefore, under Article 182 (*5*) of the Statute of Limitation (Act IX of 1908) the present application was presented within the time limited by the Statute, (*ii*) on the 6th of December, 1920, when the decree which it is now sought to execute was passed, two of the three decree-holders were and still are minors, and the three decree-holders being jointly entitled to make an application for execution of the decree, and the adult decree-holder not being able to give a discharge to the judgment-debtors without the concurrence of the minor

decree-holders, the present application was saved from the bar of limitation by the provisions of sections 6 and 7 of the Limitation Act. The first contention raised by the decree-holders cannot be supported, for it has not been proved that either of the two previous applications was made (*a*) in accordance with law, (*b*) to the proper Court. Under section 37 of the Code of Civil Procedure "the Court which passed the decree" of the 6th of December, 1920 is deemed to be the Court of the Subordinate Judge of Purulia, and that Court did not send the decree to the Court of the Subordinate Judge of Dhanbad for execution as required by sections 38 and 39 and Order XXI, rule 6 of the Code of Civil Procedure. As the decree-holders have failed also to prove that the Court of the Subordinate Judge of Purulia had "ceased to exist "or to have jurisdiction to execute the decree", the two previous applications to the Dhanbad Court for execution were not made "in accordance with law" or to "the proper Court", and are not to be regarded as steps in aid of execution within Article 182 (*5*) of the Limitation Act. It was established, however, that the decree was duly sent to the Court of the Subordinate Judge at Asansol for execution by the Court at Purulia, and that the present application for execution was presented in compliance with the provisions of the Code of Civil Procedure.

With respect to the second contention that has been raised before us by the decree-holders it is necessary to refer to certain material facts that are not in dispute, in order that the nature of the proceedings may be appreciated. It is to be observed that the judgment-debtor's objection to the execution of this decree is utterly devoid of merit, and is based solely upon technical grounds. It appears that the defendants in the suit were officials employed in the

1927

JUGAL KISORI DEBI v. BAIDYA NATH ROY.

PAGE J.

management of the estate of one Prosanna Kumar Roy, a trader of Keshalpur, and that after the death of Prosanna the present suit No. 198 of 1911 was brought in the Court of the Subordinate Judge of Purulia, *inter alia*, to compel the defendants to render an account of the moneys that they had received in the course of their stewardship. The plaintiffs were two of the sons of Prosanna—(1) Bireswar Roy, an adult, (2) Butto Kristo Roy, then a minor, by his next friend and brother Bireswar. The third son of Prosanna, Bhola Nath Roy, also a minor, was made defendant No. 7, and appeared through his mother Sarojini Debya as next friend and guardian-ad-litem. The suit was decreed on the 16th September, 1916 in favour of the plaintiffs and defendant No. 7 against the judgment-debtors or their predecessors-in-title. The decree-holders, regarding the sum decreed as inadequate, appealed to the High Court at Patna. Meanwhile, Butto Kristo had attained his majority, and Bireswar had died; and on the 6th of December 1920 when the decree of the High Court was passed the appellants were (1) Baidya Nath Roy, a minor son of Bireswar Roy by his mother Satyabala Debya as his next friend and guardian-ad-litem, (2) Butto Kristo Roy and (3) Bhola Nath Roy, the other minor son, by his mother Sarojini Debya as his next friend and guardian-ad-litem. The decree provided *inter alia*—

"Accordingly it is ordered and decreed that the appellants do realise "from—

			Rs.	A.	P.
"Respondent No. 1	...	...	18,328	10	9
"and costs	...	...	1,448	3	9
"Respondents Nos. 2 to 5	...	...	592	12	6
"and costs	...	...	46	13	4
"Respondent No. 6	...	...	278	3	0
"and costs	...	...	22	0	0

	Rs.	A.	P.
" Respondent No. 7	1,777	14	6
" and costs	140	8	0
" Respondent No. 8	27,678	12	9
" and costs	2,187	0	9
" Respondents No. 2, 3, 4, 5 and 8 ...	1,977	0	0
" and costs	166	3	6

" and the respondents do bear their own costs in the lower Courts : and it " is further ordered and decreed that the respondents do pay to the appel- " lants the sum of rupees four hundred and sixty-five, annas eleven and " pies ten only, as per details at foot being the amount of proportionate " costs incurred by the latter in this Court."

It is not, I think, open to doubt or controversy that this decree *quoad* the principal defendants was a joint decree which the decree-holders were jointly entitled to execute. In *Ahinsa Bibi* v. *Abdul Kader Saheb* (1), which was a suit brought by the heirs of a deceased partner for an account, and to recover from the other partners their father's share of the profits in the partnership, Bhashyam Ayyangar J. observed :

" The claim which was possessed by one individual is now possessed " jointly by a number of individuals who are his legal representatives, and " all must, therefore, join in a suit to enforce that claim. If one or more " of such joint claimants do not join as plaintiffs the course to be pursued " in India, according to a long-established course of decisions, is for the " claimants bringing the suit to join as party-defendants those who do not " join as plaintiffs. The cause of action for taking an account was one " and indivisible as against the surviving partners, and it necessarily " follows that the suit cannot be barred in respect of some of his heirs " and not barred in respect of the others. It must be either wholly " barred or not barred at all. This is the principle underlying sections 7 " and 8 of the Indian Limitation Act ",

now sections 6 and 7 of the present Act. I respectfully agree with those observations, and hold that the decree in the present suit was one that the three heirs of Prosanna Kumar Roy were jointly entitled to execute within section 6 of the Limitation

(1) (1901) I. L. R. 25 Mad. 26.

1927

JUGAL KISORI DEBI v. BAIDYA NATH ROY.

PAGE J.

Act. See *Ahinsa Bibi* v. *Abdul Kader Saheb* (1), *Kandhiyalal* v. *Chandar* (2), *Sitaram Apaji Kode* v. *Shridhar Anant Prabhu* (3), *Ramchode Doss* v. *Rukmany Bhoy* (4), *Surja Kumar Dutt* v. *Arun Chunder Roy* (5) and *Periasami* v. *Krishna Ayyan* (6), *per* Bhashyam Ayyangar J. A further question still remains to be considered, namely, whether Butto Kristo was able to give a discharge to the judgment-debtors "without the concurrence of" the minor decree-holders. I have examined a number of cases upon this subject. It is not easy to disentangle them; to reconcile them is impossible. But on the facts of this case I am clearly of opinion that Butto Kristo Roy was not able to give such a discharge to the judgment-debtors within section 7 of the Limitation Act. It is not proved that the decree-holders were members of a joint undivided Hindu family, nor whether they were living under the Mitakshara or Dayabhaga School of Hindu Law, nor whether Butto Kristo was acting as the *karta* of a joint Hindu family of which the decree-holders were members. On the contrary, it is apparent that in these proceedings he did not act, or purport to act, as the manager of the family or on behalf of the decree-holders as a whole; much less has he acted in these proceedings on behalf of Bhola Nath. In my opinion he has acted in his own interest. Butto Kristo was not a party to the execution case No. 35 of 1924 which was brought by Bhola Nath through his mother as his next friend; and in this suit he did not join Bhola Nath as a co-plaintiff, but impleaded him as defendant No. 7. Moreover, after the decree of the High Court of Patna had been passed on the 6th December 1920, Butto

(1) (1901) I. L. R. 25 Mad. 26.
(2) (1884) I. L. R. 7 All. 313.
(3) (1903) I. L. R. 27 Bom. 292.
(4) (1905) I. L. R. 28 Mad. 487.
(5) (1901) I. L. R. 28 Calc. 465.
(6) (1901) I. L. R. 25 Mad. 431.

Kristo Roy appears to have been substituted in the place of Satyabala Debi as the guardian and next friend of the minor Baidya Nath Roy, and in that capacity he filed execution Case No. 191 of 1921. It is also in that capacity, as well as on his own behalf, that Butto Kristo is a party to the present application for execution. On the other hand, throughout the suit and the proceedings incidental thereto in execution of the decree Bhola Nath has appeared through his mother as his guardian and next friend. I am of opinion, according to law now clearly established, that under such circumstances Butto Kristo cannot be held to have been capable of giving a discharge to the judgment-debtors without the concurrence of the minors within section 7 of the Limitation Act. See *Nobin Chandra Barua* v. *Chandra Madhab Barua* (1), *Ganesha Row* v. *Tuljaram Row* (2), *Letchmana Chetty* v. *Subbiah Chetty* (3), *Ganga Dayal* v. *Maniram* (4) and *Jawahir Singh* v. *Udai Parkash* (5).

For these reasons I am of opinion that the appeal fails, and must be dismissed with costs, the hearing-fee being assessed at ten gold mohurs.

GRAHAM J. I agree.

B. M. S. *Appeal dismissed.*

(1) (1916) I. L. R. 44 Calc. 1.
(2) (1913) I. L. R. 36 Mad. 295.
(3) (1924) I. L. R. 47 Mad. 920.
(4) (1908) I. L. R. 31 All. 156.
(5) (1925) I. L. R. 48 All. 152.