APPELLATE CIVIL.

Before Nasim Ali and Henderson JJ.

1935

June 6.

ABED HOSAIN MIYA

v.

ABDUR RAHMAN SHAHA CHAUDHURI.*

Limitation—Certificated guardian—Power to give discharge of minor's dues—Substantive law—Processual law—Indian Limitation Act (IX of 1908), s. 7—Code of Civil Procedure (Act V of 1908), O. XXXII, r. 7.

Section 7 of the Limitation Act contemplates discharge by a person, who by virtue of his own legal capacity under the substantive law is able to give a discharge.

It does not contemplate a legal capacity, which only empowers a person to realise a debt on behalf of another by the process of execution with the permission of the court.

The legal capacity, therefore, of a certificated guardian to realise moneys payable to a minor decree-holder under a decree of the court is not independent of the rights of the minor decree-holder as in the case of partners and *karta* of a joint Hindu family.

Ganesha Row v. *Tuljatam Row* (1) referred to.

APPEAL FROM APPELLATE ORDER by the decree-holder.

The facts of the case and the arguments in the appeal appear fully in the judgment.

Nareshchandra Sen Gupta and *Jogeshchandra Singha* for the appellants.

Beereshwar Bagchi and *Beereshwar Chatterji* for the respondents.

NASIM ALI J. This is a decree-holders' appeal in an execution case. They are five in number, one of whom—Abdul Rauf Chaudhuri—is a minor and is represented by a co-decree-holder, who is his certificated guardian. The appellants obtained a decree

*Appeal from Appellate Order, No. 349 of 1933, against the order of E. S. Simpson, District Judge of Rajshahi, dated Mar. 27, 1933, affirming the order of Abdul Ahsan, Munsif of Naogaon, dated Nov. 25, 1932.

(1) (1913) I. L. R. 36 Mad. 295; L. R. 40 I. A. 132.

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against the respondents on the 21st June, 1928. The execution proceedings, out of which this appeal arises, were started by them admittedly after three years had expired from the date of the decree. The judgment-debtors objected to the execution on the ground that it was barred by limitation. The executing court accepted the objection of the judgment-debtors and ordered the execution case to be dismissed. On appeal by the judgment-debtors to the lower appellate court the learned judge has affirmed that order.

Hence the present appeal by the decree-holders.

The contention of the learned advocate for the appellants is that the courts below are wrong in holding that the execution is barred by limitation. It is argued that one of the decree-holders is still a minor and, consequently, under the second part of section 7 of the Indian Limitation Act, the execution is not barred. Now section 7 of the Limitation Act is in these terms :—

> Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Section 6 of the Indian Limitation Act contemplates cases, where there is only one minor decree-holder or where all the decree-holders are minors. The second part of section 7 extends the period of limitation in some cases, where there is a joint decree in favour of persons some of whom are minors. *Prima facie*, therefore, under the second part of section 7, the application for execution is not barred by limitation. It is, however, contended by the learned advocate for the judgment-debtors that the provisions of the second part of section 7 are not attracted to the facts of the present case. He puts forward two grounds:—(*i*) that the decree is not at all a joint decree, and (*ii*) that the certificated guardian of the minor decree-holder had the legal capacity to give a

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discharge without the concurrence of the minor. As regards the first ground, it appears from the decree itself that it does not specify the shares of the different decree-holders. The learned advocate for the judgment-debtors, however, contends that, as the decree-holders obtained the decree as heirs of a certain Mahomedan lady, they are tenants-in-common and consequently the decree cannot be a joint decree. The obvious answer to this contention is that the materials on the record of the present case do not support such an argument. In support of the second ground it is argued by the learned advocate for the respondents that under the powers conferred on the certificated guardian by the Guardians and Wards Act he had power to collect the moneys of the minor and consequently he had the legal capacity to give a discharge for the decretal debt without the concurrence of the minor. I am unable to accept the contention. Whatever may be the power of the certificated guardian to collect other moneys of the minor, his power to receive money payable to a minor under a decree is subject to the permission of the court [See Order XXXII, rule 7 of the Civil Procedure Code and the case of *Ganesha Row* v. *Tuljatam Row* (1)]. He cannot receive the decretal money amicably and out of court and give a discharge. The discharge given by a certificated guardian, who is appointed next friend of the minor with the permission of the court, is really a discharge by the order of the court.

Again section 7 contemplates a legal capacity to give discharge *without the concurrence* of the person under disability. The section requires that the co-decree-holder in addition to his capacity as a co-decree-holder must have such a legal capacity as would empower him alone to realize the decretal debt and give a discharge without putting the decree into execution, even if his minor co-decree-holder had been under no disability and had the capacity to give his assent. In other words, the legal capacity must enable him alone to give a discharge, the consent of

(1) (1913) I. L. R. 36 Mad. 295 ; L. R. 40 I. A. 132.

the other decree-holders not being necessary at all in the exercise of that legal capacity. The law must clothe him with rights to give a discharge for the whole debt irrespective of the consent of the other decree-holders. Familiar instances of such legal capacities are those of a partner and the *kartâ* of a joint Hindu family. Their legal capacity to give a discharge is derived from the substantive law. They have the power to realise the whole decretal debt amicably and are not required by law to take the consent of the other joint decree-holders, or the permission of the court under the processual law before giving discharge. The legal capacity of a certificated guardian to realize moneys payable to a minor decree-holder under a decree of the court does not fulfil the test, which I have indicated above. It is not independent of the rights of the minor decree-holder. Section 7 contemplates discharge by a person, who by virtue of his own legal capacity under the substantive law is able to give a discharge. It does not contemplate a legal capacity, which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the court. Much reliance, however, was placed by the learned advocate for the respondents upon certain observation in the case of *Asutosh Ghose* v. *Sashi Mohan Roy* (1). In that case, however, the adult decree-holder was the *kartâ* of a joint Hindu family. He had his powers under the Hindu law to give a discharge for the whole debt. He alone could have received the decretal money out of court and given a discharge, even if the other decree-holders had not been under any disability. It is true that in that case there is an observation that in his capacity as a certificated guardian the adult decree-holder was also entitled to give a discharge. But, in view of the fact that he was also the *kartâ* of the joint family, that observation was not necessary for the decision of that case. As pointed out before in view of the principle underlying the decision of the Judicial Committee cited above and the provisions of

(1) (1928) 48 C. L. J. 555.

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Order XXXII, rule 7 of the Civil Procedure Code, it is difficult to maintain that after a certificated guardian has been appointed next friend of the minor he can give a discharge of the decretal debt without the permission of the court. Such a discharge, therefore, cannot be a discharge by the guardian—far less a discharge without the concurrence of the minor within the meaning of section 7. In this view of the matter it is not necessary to refer to the cases, which were decided under sections 7 and 8 of the Limitation Act of 1877. After the amendment of the Limitation Act in 1908, section 7, as it now stands, in my judgment contemplates discharge by an adult decree-holder by virtue of some legal capacity conferred on him by the substantive law apart from and without reference to his capacity to give a discharge with the permission of the court under the processual law. For the reasons stated above, I am of opinion that the judgment-debtors have failed in the present case to show that the adult decree-holder, who represents the minor decree-holder, was in a position to give a discharge. My conclusion, therefore, is that the application for execution is not barred by limitation.

In the result the appeal is allowed, the orders of the courts below dismissing the appellants' application for execution are set aside and I order the execution to proceed.

The appellants decree-holders will get their costs from the respondent judgment-debtors; hearing fee is assessed at 5 gold mohurs.

HENDERSON J. I agree. The point, which arises for our consideration in this appeal is a short one and is concerned with the interpretation of section 7 of the Limitation Act. We were invited by Mr. Bagchi to construe that section by a strict interpretation of the words used therein. If we do this, it seems reasonably plain that the section seeks to draw a distinction between cases, in which one of several persons entitled to a joint debt can give a discharge

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for the whole debt without the concurrence of the other persons so entitled and cases in which such a discharge cannot be given. In the former case, time will run against a person suffering under disability: in the latter case it will not.

The learned District Judge took a different view and held that, inasmuch as there was a person, who was in a position to collect debts due to the minor and give a valid discharge, time would run against the minor as well as the major decree-holders. We have been asked on behalf of the respondents to say that this is the proper meaning of the words used and that in this case a discharge can be given without the concurrence of such persons. As I have already indicated, in my judgment that would not be the natural interpretation of the words used and I do not think that the matter can be better expressed than in the words of Suhrawardy J. in the case of *Bilwar Bibi* v. *Mahamed Habibar Rahaman* (1). In dealing with the point the learned Judge says this:—

> Section 7 of the Limitation Act contemplates a case where a decree-holder holds such a legal character as to be able in law to give a discharge on behalf of his co-decree-holders. One of the tests may be that, had the judgment-debtor paid the debt to one of the decree-holders amicably and out of court, could he have successfully pleaded payment to all the decree-holders as full satisfaction of the decree ?

With those observations I respectfully agree.

It is, therefore, necessary to consider whether in the present case a discharge could have been given without the concurrence of the minor. It is to be noted that one of the major decree-holders is the certificated guardian of the minor and on that ground we have been asked to say that the application was barred by limitation on the authority of the case of *Asutosh Ghose* v. *Sashi Mohan Roy* (2). As my learned brother has pointed out, inasmuch as one of the plaintiffs in that case was able to give a discharge as the *kartâ* of the family, it has not really decided the point at all.

(1) (1924) I. L. R. 51 Calc. 566, 572-3. (2) (1928) 48 C. L. J. 555.

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In the second place, the facts are quite different. In that case there were two plaintiffs one of whom was a major and the other a minor. The major was the certificated guardian of the minor. The position, therefore, was that the major was able to give a discharge both on his own behalf and on behalf of the minor. In such a case it might be necessary to consider whether this peculiar position of one of the plaintiffs would prevent the minor from getting the benefit of section 7. But in the present case the facts are quite different. Here there are four majors and one minor. One of the majors is the certificated guardian of the minor. It is quite clear that, if the debt was paid out of court to the major, who is the certificated guardian of the minor, he would not be in a position to give a discharge, which would bind the other co-decree-holders.

The only other point, on which I need say anything is the contention made on behalf of the respondents to the effect that this decree is not a joint decree, because the heirs are Mahomedans and are not joint. It may be that the court, which passed the decree, ought not to have passed a joint decree. But the fact remains that it did pass a joint decree and it is not the duty of the executing court to consider whether that decree was right or wrong. This point was not really taken in the petition of objection under section 47. The objection that was taken was to the effect that the application was entirely barred and should be dismissed. The objection as now being placed before us is quite different and is to the effect that, although the minor decree-holder is entitled to take out execution for his individual share, the application of the major decree-holders is barred. It is quite obvious that such an objection could not be determined without going into the facts, because we do not even know the share of the minor decree-holder.

Appeal allowed.

G. S.