NILAKANTA v. KRISHNASAMI.

no good reason why the debtor should lose the benefit of the section because he disputes some part of the debt or puts the transferee to proof of the assignment. And the unreasonableness of the other construction of the clause becomes greater in the case of actionable claims other than money claims, to which the section seems to extend, for in such cases the person against whom the claim is made need have no notice of the transfer, and the suit may be the first intimation he has of it. In my opinion the construction put upon the section by the Allahabad Court in the case of *Jani Begam* v. *Jahangir Khan*(1) is the correct one, though I do not agree with all the reasoning of that judgment. I would answer the question referred that the plaintiff is entitled to be paid only the sum decreed which I understand to be the price actually paid by him with interest and incidental expenses.

[The second appeal having come on for final hearing before a bench of two Judges, the Court delivered judgment as follows :—

JUDGMENT.—On the decision of the Full Bench, the second appeal fails and must be dismissed with costs.]

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1889. April 9, 10.

SESHAN AND ANOTHER (PETITIONERS), APPELLANTS IN A.A.O. No. 100 OF 1886,

v.

RAJAGOPALA (COUNTER-PETITIONER), RESPONDENT.*

RAJAGOPALA (PETITIONER), APPELLANT IN A.A.O. No. 103 OF 1886,

v.

RAMANADA AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, ss. 231, 258—*Limitation Act—Act XV of* 1877, *ss.* 7, 8, *sched. II, art.* 179—*Minority—Execution of decree.*

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession

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(1) I.L.R., 9 All., 476. * Appeal against Orders Nos. 100 and 103 of 1886.

of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favor of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:

Held, that the order of the District Judge was wrong, as neither s. 7 nor s. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.

APPEALS against the orders of J. W. Reid, District Judge of Coimbatore, made on execution petition No. 13 of 1884 and civil miscellaneous petition No. 216 of 1885.

Execution petition No. 13 of 1884, presented in April 1884, was a petition by one of three plaintiffs who had in 1875 obtained a decree for the partition of family property, for the execution of the decree. The applicant was a minor at the date of the decree, but had attained his majority in June 1881. The plea of limitation was raised in civil miscellaneous petition No. 216 of 1885, which was a counter-petition preferred by certain of the judgment-debtors, but the District Judge who referred in his judgment to *Mon Mohun Buksee* v. *Gunga Soondery Dabee* (1), *Jagjivan Amirchand* v. *Hasan Abraham*(2), *Surju Prasad Singh* v. *Khwahish Ali*(3) overruled this plea and granted the application for execution in respect of the applicant's one quarter share in the property, the subject of the suit.

The persons against whom execution was permitted to issue preferred appeal No. 100; and the decree-holder preferred appeal No. 103.

Bhashyam Ayyangar and *Ramachandra Ayyar* for appellants in appeal No. 100 of 1886.

Subramanya Ayyar for respondent.

Subramanya Ayyar and *Sundara Ayyar* for appellant in appeal No. 103 of 1886.

Balaji Rau, *Bhashyam Ayyangar*, *Anandacharlu*, *Sankaran Nayar*, *Mahadeva Ayyar* and *Ramachandra Ayyar* for respondents.

The further facts of this case appear sufficiently for the purposes of this report from the judgment.

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(1) I.L.R., 9 Cal., 181. (2) I.L.R., 7 Bom., 179. (3) I.L.R., 4 All., 512.

SESHAN v. RAJAGOPALA.

JUDGMENT :—These are appeals from orders passed in execution of the decree in original suit No. 16 of 1873 on the file of the District Court of Coimbatore. The suit was one brought for partition by the appellants, Rajagopala Misrayer and his two brothers, against their father and 81 others, who were in possession of portions of the family property under alienations made in their favor by the father. Of the three plaintiffs, the first plaintiff alone was of age when the suit was brought, and he instituted it in his own name and as the next friend of his two minor brothers, the second and third plaintiffs, who were described to be under his protection. The decree which was passed against the 45th and 46th defendants, who are the appellants in civil miscellaneous appeal No. 100, had reference to three items of immovable property Nos. 79, 80 and 81, and it declared that the plaintiffs were entitled to one half of the jenm right in item No. 80 and to redeem the mortgage of items Nos. 79, 80 and 81 on payment to the 45th defendant of Rs. 11,340, the amount for which the plaintiffs and the first defendant, their father, were jointly liable under exhibit 44, that the plaintiffs' share of the mortgaged property declared to be redeemable by them and of the mortgage debt was three-fourths. The decree was passed on the 30th August 1875, and no application for its execution was filed either by the first plaintiff or the second plaintiff within the period prescribed by Act XV of 1877.

The third plaintiff, however, who was a minor when the suit was brought, attained his majority on the 4th June 1881 and applied for execution of the decree on the 7th April 1884. The 45th and 46th defendants opposed the application on the grounds, first, that the decree sought to be executed was merely declaratory; secondly, that the third plaintiff was bound to deposit the entire mortgage debt, amounting to Rs. 17,973-12-9, in Court; and, thirdly, that the application was barred by limitation. The Judge granted the application to the extent of the third plaintiff's quarter share and left the amount payable in redemption of the mortgage to be determined by the District Court in South Malabar, to which the plaintiff prayed that the decree might be transferred for execution. From this order the third plaintiff appeals on the ground that he is entitled to execute the whole decree, and defendants Nos. 45 and 46 appeal for the reason that the execution is wholly barred by limitation. The third plaintiff's appeal

No. 103 relates also to portions of the order in which the other respondents are concerned. His pleader, however, does not support the appeal, so far as it relates to those portions, and states that he has had no instructions from his client. We, therefore, dismiss appeal No. 103 so far as it concerns respondents other than respondents Nos. 20 and 21 or defendants Nos. 45 and 46 with costs (separate sets) of such of them as have appeared by pleader in this Court.

As to the contest between the third plaintiff and the 45th and 46th defendants, we attach no weight either to the contention that the decree is, so far as it affects the latter, merely declaratory, or to the fact that the third plaintiff did not offer in his application for execution to pay the mortgage debt. Reading the decree together with the judgment, we see no reason to doubt that, though the former is not drawn up with precision, it was intended to be mandatory. The prayer in the plaint and the very nature of the suit support the construction suggested by the Judge. Though the application did not in terms offer to deposit the mortgage debt, yet there is no sufficient warrant for the suggestion that the third plaintiff sought to recover possession before paying the mortgage debt. The application prayed for transmission of the decree for execution to the District Court in South Malabar, and in his order the Judge left the amount to be paid to be determined by that Court. The substantial question, therefore, for determination is whether the application for execution is barred by limitation. Though the suit in which the decree was made was one for partition, and though in such suit the share of each of the co-parceners might be ascertained and awarded, yet, having regard to the actual direction embodied in the decree, we agree with the pleader for defendants Nos. 45 and 46 that it is not "a decree passed severally in favor of more persons than one, distinguishing portions of the subject matter as payable or deliverable to each," and that article 179 would apply if the appellant's application is not protected by section 7 of the Limitation Act. It was suggested that section 8 of the Limitation Act was applicable to the case before us, but we are not prepared to adopt this suggestion. Section 8 does not appear to include execution-creditors, and the classes of persons contemplated by it are joint-creditors or joint-claimants, one of whom is under some disability, whilst there are others who can give a valid discharge

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in regard to his interest without his concurrence. But the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. Having regard to sections 258 and 231, we are of opinion that it is not the act of the joint decree-holder, but the act of the Court executing the decree that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge. Again, section 231 suggests that the liability of the adult joint decree-holder to the minor decree-holder in respect of his interests in the decree is not considered to be of itself an adequate protection, but that the duty of protecting the minor's interest is cast upon the Court. We consider that section 8 applies only to those cases in which the act of the adult joint owner is *per se* a valid discharge.

It is next contended that section 7 does not apply to the case before us, and we are of opinion that this contention is well founded. It applies to cases in which there is either one decree-holder and he is a minor, or in which all the joint decree-holders are minors or labor under some other disability. It does not seem to be intended to apply to cases in which the minor's interest can be protected by joint decree-holders, who are also interested in the subject matter of the decree. Section 7 is in these terms:—"If a "person entitled to institute a suit or make an application be, at "the time from which the period of limitation is to be reckoned, a "minor, or insane, or an idiot, he may institute the suit or make the "application within the same period after the disability has ceased, "as would otherwise have been allowed from the time prescribed "therefor in the third column of the second schedule hereto "annexed." The language of this section is substantially the same as that of the proviso in the statute of James I and of 3 and 4 Will. IV, cap. 42, s. 4. Referring to the former statute Lord Kenyon observed as follows in *Perry* v. *Jackson*(1):—"the proviso "was introduced into the statute in order to protect the interests of "those persons only which there was no one of competent age, of "competent understanding, or competent in point of residence in

(1) 4 T. R., 519.

"this country, to protect . . . Now the words of this clause, gram-
"matically speaking, do not apply to the present case; they only
"extend to cases where the person individually a single plaintiff, or
"persons in the plural, when there are several plaintiffs, are not in
"a situation to protect their interests. Neither does this case come
"within the policy of the law which provides that, if parties neglect
"their interests, they shall lose the benefit of suing to enforce their
"demands." We are, therefore, of opinion that the construction that ought to be placed on section 7 is the same as that placed on the corresponding provision of the English statute. It was held under it that the disability of one of two co-heirs cannot operate to save the statute in favor of the other who was capable of instituting a suit. Having regard to the language of section 231 of the Code of Civil Procedure, we must hold, if any other construction were adopted, that the third plaintiff could not only execute the decree in regard to his own share, but also in regard to the shares of those who are precluded by the Limitation Act from applying for execution. There can be no doubt that the first and second plaintiffs are barred by article 179 of the Limitation Act, and, if so, what the Act would forbid them from doing directly could not be done for them by the third plaintiff, which would be the case if any other construction were to prevail. The conclusion we come to is that the application of the third plaintiff is barred by limitation as against defendants Nos. 45 and 46.

We set aside the order of the District Judge so far as it relates to them and dismiss the application with costs both in this Court and in the Court below.