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All these difficulties are now avoided by the enactment of Order XXXIV in the Code of Civil Procedure.

For these reasons we hold that as the application for an order absolute was made within twelve years of the passing of the preliminary decree and as the decree has been kept alive by the steps taken under article 179, this application is not barred by limitation.

We dismiss the appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1915. March 17, 18 and 28.

MOOL CHAND AND ANOTHER (DEFENDANTS NOS. 3 AND 4), APPELLANTS,

v.

P. ALWAR CHETTY (PLAINTIFF), RESPONDENT.*

Joint judgment-debtors—Release of some—Liability of others—English law—Indian Contract Act (IX of 1872), sec. 44—Justice, equity and good conscience, rule of—Rule of English law, applicability of.

A release by a decree-holder of some of the joint judgment-debtors from liability under the decree, does not operate as a release of the other judgment-debtors from their liability.

The rule of English law should not be applied in India, as it is based on the substantive rule applicable to contractual joint-debtors, which is different under section 44 of the Indian Contract Act, and is not in consonance with justice, equity and good conscience.

Quære: whether the English law should be applied in cases arising within the original jurisdiction of the High Courts though contrary to the rule of justice, equity and good conscience.

Chinnamannar and Gurusami v. *Sadasiva* (1882) I.L.R., 5 Mad., 387, referred to.

APPEAL from the judgment of KUMARASWAMI SASTRIYAR, J., in Execution Application in Civil Suit No. 176 of 1909.

The material facts appear from the judgment of NAPIER, J.

G. Annaji Rao, for the appellants.

C. P. Ramaswami Ayyar, for the respondent.

* Original Side Appeal No. 65 of 1914.

NAPIER, J.—This appeal is from an order passed in execution by Mr. Justice KUMARASWAMI SASTRIYAR. It was on the application by the plaintiff in execution of the decree in Original Suit No. 176 of 1909. The decree is as follows: "That Kasturchand, Nattoji Mulchand and Amed Mull, the defendants herein, do pay to the plaintiff the said sum of rupees twenty-three thousand," etc.; subsequently to the decree a petition was put in under Order XXI, rule 2 of the Civil Procedure Code, by the first and second defendants and not opposed by the decree-holder for a certificate by the Court of the adjustment of the decree as against them, and an order was passed "that the plaintiff herein do enter up satisfaction of the decree herein in full as against the first and second defendants herein as agreed to by him by the said agreement." Later when the execution application above referred to as against the other defendants was put in, objection was taken that the decree had been fully satisfied by the adjustment referred to on the ground that the discharge of one of several joint promisors discharges the others as well. Mr. Justice KUMARASWAMI SASTRIYAR overruled the objection and ordered execution to issue.

It is contended before us that the learned Judge was wrong on two grounds, (1) that satisfaction having been entered up nothing remains and (2) that the release of one judgment-debtor operates in favour of all.

On the first point it is only necessary to observe that the term "satisfaction" although used in the order is not one contemplated by the Civil Procedure Code. The words of Order XXI, rule 2, are "The decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." Admittedly the decree has been adjusted by payment so far as the first and second defendants are concerned, but there has been no satisfaction, although that word appears in the order.

The second point is one of more substance. It is argued that although section 44 of the Indian Contract Act provides that a release of one or more joint promisors does not discharge the other joint promisor or joint promisors, that has reference only to obligations arising out of contract and does not apply to judgment debts; that under the English law a release of one promisor of a contractual joint debt, or of one judgment-debtor in respect

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of a judgment joint debt does discharge the co-obligor, that in the original civil jurisdiction of the High Court the law as administered in England prevails and that therefore there being no statutory provision as to a judgment-debt the English law of discharge still obtains. In my opinion this argument is fallacious. Admitting that according to the English law, the fact that a debt is a judgment-debt makes no difference and that a release in favour of one joint judgment-debtor operates in favour of the others it is only necessary to see the basis on which this doctrine is founded to establish the fallacy in the argument. In *In re E.W.A*; *A debtor*(1) (in the Court of appeal) it was contended that where the foundation of the obligation was a judgment the doctrine of release did not apply. Lord Justice COLLINS overrules this contention in the following words: "I cannot see any foundation in principle for the distinction; for under any judgment or other obligation creating a joint liability, there is only one debt, and that being so, the rule that the release of one of the joint debtors gets rid of the debt applies equally whether the obligation arises on a judgment or on any other security. It is too late now to question the law that where the obligation is joint and several the release of one of two joint debtors has the effect of releasing the others." The view of the Court is clear, namely, that where a right to a release arises on the original contractual liability, the fact that a liability under a judgment has been substituted for that original liability cannot increase the burden or deprive the debtor of the right given to him by the substantive law. It necessarily follows that where the substantive law has been altered, as has been done by the Indian Contract Act, and the benefit of the doctrine of release has been taken away from a joint debtor, the basis of the rule disappears. I do not think it necessary to discuss the soundness of the decision of this Court in *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2) that in an appeal from the original side the English law has to be administered but I must not be taken to accept the correctness of that conclusion. On principle I am clear that just as the debtor cannot in England be deprived of this right which attaches to his contract by reason of the fact that the contract debt has merged in a judgment debt, so in India the creditor cannot be

(1) (1901) 2 K.B., 642.

(2) (1882) I.L.R., 5 Mad., 37.

deprived of his statutory right to proceed against a joint debtor in spite of a release by reason of the fact that the contractual debt has merged in a judgment debt. It is noticeable that the English Law was not accepted by the Courts in India in dealing with cases from the mufassal even prior to the Contract Act. For in two cases *Sheo Churn Lall* v. *Ram Surun Sahoo*(1) and *Nunkoo Lall* v. *Musst Dhunesh Kooer*(2), respectively, it was held that a judgment-creditor is entitled to realize his debt from any one of the debtors and that by proceeding against one he does not relieve the other debtors from their joint liability to him. In *Ramratan Kapali* v. *Asurni Kumar Dutt*(3) and *Bhavani Koer* v. *Darsan Singh*(4), the point was considered at great length by MOOKERJEE, J. He relies on the two Calcutta cases above referred to as establishing the law outside the provisions of the Contract Act and bases the variance from the English Law on the obvious grounds of justice, equity and good conscience; and he points out that in England there has been a tendency to restrict the operation of the Common Law by a refined distinction between a release and a covenant not to sue. That this distinction exists is clear from the language of ROMER, L.J., in *In re E.W.A; A debtor*(5), the case above referred to. For in that case the learned Lord Justice expresses a doubt whether, "having regard to the form of the document and the surrounding circumstances there was not a discharge of the debt but only a discharge of the particular debtor from the liability as against himself personally, in other words an *agreement by the Bank not to sue him.*" It is clear, therefore, that even in England the Courts will favour the construction of a document in a manner beneficial to the creditor. Sir Frederick Pollock in dealing with the result of section 43 of the Indian Contract Act says: "We think it the better opinion that the enactment should be carried out to its natural consequences, and that notwithstanding the English authorities founded on a different substantive rule a judgment against one of several joint promisors remaining unsatisfied cannot in British India be held to be a bar to a subsequent action against the other promisor or promisors." This view was adopted by this Court in *Ramanjulu Naidu* v.

(1) (1871) 16 W.R., 49.
(2) (1872) 17 W.R., 496.
(3) (1910) I.L.R., 37 Calc., 559.
(4) (1911) 14 C.L.J., 354.
(5) (1901) 2 K.B., 642.

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Aravamudu Aiyangur(1), where it was argued that the omission in a previous suit against one of several joint promisors of a part of the cause of action was a bar under section 43 (of the Civil Procedure Code) to a subsequent suit against a joint promisor for the balance so omitted. KRISHNASWAMI AYYAR, J., in an elaborate judgment after considering all the authorities declined to limit the logical result of the operation of section 43 of the Contract Act by the language of section 43 of the Civil Procedure Code. I adopt the reasoning of the very eminent jurist referred to and of the learned Judge in that case, which in my opinion applies with equal force to section 44, namely that you must look to the substantive law and must give full effect to it, and in that view it seems to me clear that a release of a judgment-debtor can give his co-judgment-debtor no higher rights than he would have had prior to the judgment, and that full effect must be given to the substantive law laid down in section 44.

That being so there is no force in the last contention for the appellant, that the release enures for the proportionate amount of the debt. Reliance is placed on the language to be found in the judgment of MOOKERJEE, J., in *Bhavani Koer* v. *Darsan Singh*(2), and I agree that where the consideration for the release is not the payment of a definite portion of the debt but an adjustment otherwise than by payment within the meaning of order XXI, rule 2, difficulties may arise in ascertaining the amount of the balance remaining due, and that therefore it may be necessary to hold that the adjustment operated to the extent of the proportionate liability of the released judgment-debtor as between him and his co-judgment-debtors. But whereas in this case the amount received by the judgment-creditor was a specific sum, I am clear that as the liability of the other judgment-debtors is for the whole amount of the debt, they can only claim the benefit of the amount actually paid by the judgment-debtor who has been released. In my view, therefore, this appeal fails and must be dismissed.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree. I only wish to add the following remarks:—

If the passage (at page 46) in the judgment of MUTHUSWAMI AYYAR, J., in *Gurusami* v. *Chinna Mannar* and *Gurusami* v.

(1) (1910) I.L.R., 33 Mad., 317. (2) (1911) 14 C.L.J., 354.

Sadasiva(1), was intended to lay down that the High Court on its original side is bound to decide questions like the one in controversy on the basis of English precedents and English Common Law procedure even though the following of such precedents and procedure may be against the "justice and right" or the "justice, equity and good conscience" which are the true guides to be followed according to the Charter Acts, I respectfully differ from the observation in that passage. The doctrine that the release of one joint-debtor releases the others is an artificial doctrine not consonant with "justice and right."

It was decided in *Bhawani Koer* v. *Darsan Singh*(2), that the decree-holder in that case ought to give credit to the proportionate sum due by the released judgment-debtors on the basis that all the judgment-debtors were liable equally as among themselves to pay the decree-amount. That decision is (if I may say so) no doubt justifiable on the facts of that case. But it could not, in my opinion, be extended as a support to the very broad proposition that even if the creditor realized only a definite and lesser proportionate amount from the released joint-debtor or debtors he has not got the right to go against the other debtors for the whole of the remaining balance, but only for what would be found to be the latter's proportionate share if the decree-amount was equally divided between all the debtors including the released debtor or debtors.

K.R.

(1) (1882) I.L.R., 5 Mad., 37. (2) (1911) 14 C.L.J., 354.