APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice King.

1934, October 5.

SADANALA GANGARAJU (APPELLANT), APPELLANT,

v.

INDRAGANTI SUBBAYYA (DIED) AND TWO OTHERS (RESPONDENT AND LEGAL REPRESENTATIVES), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182, cl. 5, and explanation 1 thereto—Surety and principal judgment-debtor —Execution petition filed against latter—Available to save limitation against former if—Applicability of explanation 1 in case of.

Explanation 1 of clause 5 of article 182 of the Indian Limitation Act does not contemplate the case of a judgment-debtor and his surety, and the question whether an execution petition filed against a judgment-debtor will avail to save limitation as against his surety must be decided only with reference to the provision of clause 5 itself. Under that clause an execution petition filed against a judgment-debtor will avail to save limitation as against his surety.

Muhammad Hafiz v. *Muhammad Ibrahim*, (1920) I.L.R. 43 All. 152, and *Badr-ud-din* v. *Muhammad Hafiz*. (1922) I.L.R. 44 All. 743, approved.

Civil Miscellaneous Second Appeal No. 62 of 1913 dissented from.

APPEAL against the appellate order of the Court of the Subordinate Judge of Rajahmundry, dated 22nd April 1929 and made in Appeal No. 32 of 1929 (Appeal Suit No. 122 of 1928, District Court, East Gōdāvari) preferred against the order of the Court of the District Munsif of Ramachandrapur

* Appeal against Appellate Order No. 25 of 1930.

in Original Suit No. 283 of 1916 on the file of the Additional District Munsif's Court, Rajahmundry.

Ch. Raghava Rao and *S. Rajaram* for appellant.

A. Satyanarayana for respondents.

Cur. adv. vult.

KING J.

The JUDGMENT of the Court was delivered by KING J.—The appellant in this appeal is the decree-holder in Original Suit No. 283 of 1916 on the file of the Additional District Munsif of Rajahmundry. The respondent is a surety for the satisfaction of the decree by the judgment-debtor. The decree in question was confirmed in appeal on 23rd February 1922. In 1922 and again in 1924 execution was taken out by the appellant against the legal representatives of the judgment-debtor. Some of the assets of the judgment-debtor were sold and the decree was satisfied in part. In April 1927 and again in October 1927 execution was taken out against the surety. When his property was about to be sold in March 1928 the surety (respondent) raised the objection that execution as against him was barred, and this objection was upheld both by the executing Court and on appeal by the Sub-Judge of Rajahmundry. Hence the second appeal by the decree-holder to this Court.

The article of the Limitation Act which governs this case is 182, clause 5. This allows three years' time from the date of the final order passed on the last preceding application for execution made in accordance with law. That date is admittedly 4th October 1924 and therefore, if clause 5 alone is looked to, both the execution applications of 1927 are in time. But clause 5 is subject to

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Explanation 1 the second part of which runs as follows :—

"Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them or against his or their representatives shall take effect against them all."

We have been referred to a number of decisions which deal with similar facts to those in the present case and with the application of this explanation to the case of a surety, but they are by no means uniform. The earliest is *Narayan* v. *Timmaya*(1), where it is laid down that a principal judgment-debtor and a surety are not joint judgment-debtors and therefore an execution petition taken out for the first time against a surety more than three years from the date of the decree is not saved from the bar of limitation by the fact that previous execution petitions had been taken out against the principal judgment-debtor. This ruling has been followed by the High Courts of Rangoon in *Mohamed Cassim* v. *Jamila Bee Bee*(2) and Patna in *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh Bahadur*(3). The Allahabad High Court, however, has taken a different view in *Muhammad Hafiz* v. *Muhammad Ibrahim*(4) and *Badr-ud-din* v. *Muhammad Hafiz*(5) holding that a surety is neither a joint judgment-debtor nor a person against whom a decree has been passed severally with any

(1) (1906) I.L.R. 31 Bom. 50.
(2) (1928) I.L.R. 6 Rang. 334.
(3) (1928) I.L.R. 8 Pat. 310.
(4) (1920) I.L.R. 43 All. 152.
(5) (1922) I.L.R. 44 All. 743.

portion of its subject-matter distinguished as payable or deliverable by him. Explanation 1, therefore, does not apply to a case like this at all, and it must be governed only by the simple unqualified words of clause 5 itself. The Lahore High Court also dissents from the view held in Bombay, Rangoon and Patna but for a different reason. It is held in *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand*(1) that a surety and a principal judgment-debtor are joint debtors as each is liable for the whole amount of the decree. In Madras there is no reported case dealing with this point, though we have been referred to a decision of a Bench of two Judges in Civil Miscellaneous Second Appeal No. 62 of 1913 which follows *Narayan* v. *Timmaya*(2) without any discussion of any possible alternative view.

In this conflict of authorities we are of opinion that the method of approach adopted by the Allahabad High Court is the right one. None of the rulings cited from Bombay, Rangoon or Patna lays it down positively that the case of a judgment-debtor and his surety falls within Explanation 1. They all assume without any discussion that, as the judgment-debtor and his surety are not joint judgment-debtors, an execution petition against the former will not avail to save limitation as against the latter. We agree with the Allahabad view that Explanation 1 does not contemplate a case of this kind at all and, therefore, that clause 5 itself is the only provision by which this question of limitation must be determined. And this view, we think, is very clearly in accordance with natural justice and the

(1) (1922) 67 I.C. 301. (2) (1906) I.L.R. 31 Bom. 50.

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real meaning of suretyship. When a surety guarantees the payment of a decree debt, what is ordinarily contemplated is that the decree-holder will proceed first (as he has done here) against the principal judgment-debtor and, if he fails to realise his decree in full from him, he will then proceed against the surety for the balance. The surety may no doubt be technically liable from the date of the decree but in equity his liability arises only upon the failure of the principal judgment-debtor to satisfy the decree, and in practice it will be only on the happening of that contingency that the decree-holder will think of proceeding against him. In these circumstances it seems to us unreasonable to hold that a decree-holder, who may often find that proceedings against the principal judgment-debtor occupy him for more than three years, must file a formal and otherwise futile petition against the surety before the period of three years expires, in order to keep alive against him a remedy which he has not yet thought of using.

For these reasons we hold that the order and judgment of the Courts below are wrong and must be set aside. The appeal is allowed with costs throughout, and the Execution Petition (No. 522 of 1928) ordered to be restored to file and be disposed of according to law.

A.S.V.