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SITA RAM v. BHAGWAN DAS.

OLDFIELD, J.—The question raised is, whether certain property which the decree-holder has attached in execution of a decree against Lachmi Chand, is liable to be attached and sold under the decree; the appellant, who is the representative of the judgment-debtor, having objected that the property was the self acquired property of himself, and not property inherited from the judgment-debtor, and therefore not liable in execution. This is a question which must be decided in the execution department under s. 244, Civil Procedure Code—*Ram Ghulam* v. *Hazaru Koer* (1) may be referred to—and the Court was in error to refuse to entertain and dispose of the objection. This order is set aside, and the case will be remanded for disposal. Costs to be costs in the cause.

MAHMOOD, J.—I concur.

*Cause remanded.*

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1885
*March* 30.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

RAMESHAR SINGH (JUDGMENT-DEBTOR) *v.* BISHESHAR SINGH (DECREE-HOLDER). *

*Abatement of appeal—Application for declaration of insolvency—Appeal from order rejecting application—Death of decree-holder-respondent—No application by appellant for substitution—Act XV of 1877 (Limitation Act), sch. ii, No. 171 B.—Civil Procedure Code, ss. 344-348, 350, 351, 368, 563, 582, 590.*

The decree-holder respondent in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency under s. 344 of the Civil Procedure Code, died, and the judgment debtor appellant took no steps to have the legal representative of the deceased substituted as respondent in his place.

*Held* that art. 171 B, sch. ii, of the Limitation Act (XV of 1877) applied to the case, and that, as no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate.

*Per* MAHMOOD, J., that, whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of a defendant.

*Narain Das* v. *Lajja Ram* (2), distinguished.

THIS was an appeal from an order of the District Judge of Benares, dated the 17th May, 1884, refusing an application under s. 344 of the Civil Procedure Code, for declaration of insolvency.

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* First Appeal No. 87 of 1884, from an order of D. M. Gardener, Esq., District Judge of Benares, dated the 17th May, 1884.

(1) *Ante*, p. 547. (2) *Ante* p. 693.

The respondent having died, the appellant was allowed time to take proper steps in the matter, but he took no steps. The son of the deceased respondent subsequently applied to be substituted, and an order was made substituting him. At the hearing of the appeal it was contended for the respondent that the appeal should abate.

Munshi *Hanuman Prasad*, for the appellant.

Munshi *Kashi Prasad*, for the legal representative of the deceased respondent.

MAHMOOD, J.—In my opinion this appeal must abate. The decree-holder-respondent, Bisheshar Singh, is stated by the learned pleaders for the parties to have died on the 4th September, 1884, and no application for the substitution of his legal representatives has been made by the appellant, nor is there anything stated on his behalf as a sufficient cause for not making the application. Pershid Narain, the son of the deceased respondent, has, however, applied to be substituted as the legal representative of the deceased, and, by an order of the 26th March, 1885, his name has been substituted. The learned pleader who appears for him, however, argues that, the application not having been made within the time provided by art. 171B of sch. ii of the Limitation Act (XV of 1877), we are bound by law to order that the appeal shall abate. For this contention the learned pleader relies on the last part of s. 368 of the Civil Procedure Code (read with ss. 647, 582, and 590), and s. 4 of the Limitation Act. On the other hand, the learned pleader for the appellant, whilst conceding that the period provided by art. 171 B, sch. ii of the Limitation Act, has expired, contends, with reference to the recent Full Bench ruling of this Court in *Narain Das* v. *Lajja Ram* (1) that the appellant should be regarded as a "*defendant*," and that his appeal must therefore be held to be absolutely free from liability to abatement, whether he impleaded any one as representative of the deceased respondent or not, and the only effect of his omission to implead the respondent's heir should be, to allow the appeal, and to set aside the order of which the appellant complains, or, failing this, to dispose of this appeal on the merits.

(1) *Ante*, p. 693.

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I confess that I cannot understand the Full Bench ruling of the majority of the Court to have any other effect ; but the ruling is not, in my opinion, applicable to the present case.

Whatever the position of the parties may have been in the regular suit, the judgment-debtor-appellant in the insolvency proceedings, under Chapter XX of the Civil Procedure Code, occupied a position analogous to that of a plaintiff.

S. 344 of the Civil Procedure Code allows the judgment-debtor, who may, of course, have been either plaintiff or defendant in the regular suit, to make an application for declaration of insolvency ; s. 345 states the contents which must form the application, and, among these, clause (*f*) relates to the creditors who would be affected by such declaration of insolvency ; s. 346 lays down that "the application shall be signed and verified by the applicant in manner hereinbefore prescribed for signing and verifying plaints ;" and ss. 347 and 348 provide that a copy of the application and notice must be served upon creditors, &c., who occupy a position analogous to that of defendants. S. 350 provides for a hearing of the case in the presence of the contending parties, and s. 351 lays down rules for adjudication either in favour of the applicant or the opposing parties.

Reading these provisions of the law together, I am of opinion that the position of an applicant for a declaration of insolvency is sufficiently analogous to that of a plaintiff in a regular suit. I arrive at this conclusion, especially, not only because the applicant is the person who moves the Court and prays the Court to grant him a specific remedy, *viz.*, an adjudication of insolvency, but also because, referring to ss. 344, 345, and 346, and reading them with s. 553 of the Code, the provisions which apply to plaintiffs-appellants also apply to the judgment-debtor-appellant in these proceedings.

Whatever the position of a judgment-debtor may be in the regular suit, in the insolvency proceedings he is the plaintiff. The Court which had jurisdiction to decide the regular suit, had not necessarily jurisdiction to decide the application for insolvency, because s. 349 lays down that such application should be made to the Dis-

trict Court, which is the highest Court having jurisdiction to decide ordinary original civil cases.

It has been argued that the position of the judgment-debtor-appellant is not absolutely analogous to that of the plaintiff in a regular suit; in the first place, because he (the judgment-debtor) would be defendant in the regular suit; and, in the next place, the rules applicable to the plaintiff in the regular suit did not apply to him, because his complaint, petition or prayer did not involve the array of creditors as defendants, nor could the creditors be in any sense regarded as "*defendants*" to such a proceeding.

The argument is plausible, but has no real force.

No doubt, in an insolvency proceeding, the Court has not to deal with the claim of *A* against *B* as specific parties, but has to deal with the petitioner's prayer for declaration of insolvency as against such creditors as may appear to oppose the application as against the whole world. S. 41 of the Evidence Act deals with the effect of such adjudications. Judgments passed by the Court in such proceedings would be judgments *in rem*, binding not only upon the specific defendants, but upon the whole world. So far as the question of array of parties is concerned, the parties arrayed against the petitioner (who claims to be declared insolvent) are the creditors who would appear on the issue of the citation or who are named by the applicant. The position of the appellant being that of a plaintiff, the position of the decree-holder is that of the defendant, and, as a matter of fact, in this case the appellant did implead the decree-holder in his petition. The decree-holder-respondent having died, it was the appellant's duty to have some representative of the respondent substituted for him.

In this view, s. 368 is applicable to the present case, because, though relating to suits, it has been made applicable to miscellaneous proceedings by s. 647, and also to appeals from orders by s. 590 of the Civil Procedure Code. It was the duty of the appellant to apply within the time prescribed by law, under art. 171B, sch. ii of the Limitation Act.

This article is somewhat curiously worded, in that it only mentions the defendant. By the rule of interpretation contained in the second paragraph of s. 3 of the Code, art. 171B of the Limi-

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tation Act must be construed with reference to s. 368 of the present Civil Procedure Code. Reading s. 368 with s. 582 of the Code, it is clear that the word *defendant* in s. 368 includes a *respondent*, and art. 171B of the Limitation Act is applicable to the case of a defendant, and it follows that that article applies to the present case.

No application having been made within the time allowed by art. 171B, the appeal must abate under the last clause of s. 368, read with ss. 582 and 590 of the Civil Procedure Code, with costs.

OLDFIELD, J.—I concur, although with some hesitation, in holding that this appeal must abate, as no one has been brought on the record to represent the deceased respondent within the term of limitation. Dismissed with costs.

*Appeal dismissed.*

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1885
*April* 1.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

RAM PRASAD AND OTHERS (DEFENDANTS) *v.* RAGHUNANDAN PRASAD (PLAINTIFF.)*

*Act I of* 1872 (*Evidence Act*), *ss.* 63 (*c*), 114, *illustration* (*g*)—*Secondary evidence—Copy of a copy—Suit for redemption of mortgage—Burden of proof—Withholding evidence.*

A deed executed in 1812 became the subject of litigation resulting, on the 17th May 1813, in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village, that what was mortgaged was not the lands, but only the right to receive the fixed *jama*, and that the fact that the mortgage money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage deed, and the decree of the 17th May 1813, were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. The plaintiff sought to support his case by putting in a copy on plain paper purporting to have been transcribed from a certified copy of the decree of the 17th May 1813.

*Held*, with reference to the provisions of s. 63 of the Evidence Act (I of 1872), that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in

* First Appeal No. 18 of 1883, from a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 22nd December 1882.