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IN THE MATTER OF A. JOHN & Co.

owned and occupied by the assessee is not liable to assessment at all.

BY THE COURT.—Our answer then to the reference is that as Act No. VII of 1918 now stands the allowance on account of the annual value of business premises owned and occupied by the assessee is not liable to assessment at all. We grant the assessee's counsel Rs. 220 as costs in this and the connected reference the result of which is governed by this decision.

Reference answered.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Gokul Prasad.

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July, 16

MUHAMMAD HAFIZ AND ANOTHER (DECREE-HOLDERS) *v.* MUHAMMAD IBRAHIM (JUDGMENT-DEBTOR).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182, clause 5—Execution of decree—Application to take a step in aid of execution—Application to execute decree against surety available in respect of a subsequent application to execute against judgment-debtor.

An application asking the proper court to execute the entire decree by the arrest of the person of a surety who has made himself liable for the satisfaction of the decree, amounts to asking the execution court to take a step in aid of the execution of the decree as against the principal whose liability the surety has taken upon himself within the meaning of clause (5) of article 182 of the first schedule to the Indian Limitation Act, 1908.

THE facts of the case briefly are these:—Muhammad Hafiz and others obtained a joint decree against Muhammad Ibrahim, Akbar and Shakur on the 2nd of January, 1913, which was confirmed in appeal on the 11th of June, 1913. On second appeal the High Court also affirmed it on the 30th of May, 1914. On the 10th of April, 1913 the decree-holders applied for execution against Muhammad Ibrahim alone. On the 23rd of January, 1914, a warrant of arrest was issued against Muhammad Ibrahim, but Muhammad Husain and Badruddin stood surety for him. They bound themselves to produce him before the court and undertook to pay the sum of money due by him should the decree-holder fail to realize it from him. After various intermediate proceedings, an application was made on the 19th of

* Second Appeal No. 1433 of 1919, from a decree of Gopal Das Mukerji, officiating District Judge of Agra, dated the 10th of July, 1919, reversing a decree of Kanheshwar Nath Rai, Subordinate Judge of Agra, dated the 24th of February, 1919.

March, 1915, for a warrant of arrest against Muhammad Husain. The present application was made against Muhammad Ibrahim on the 6th of March, 1918. The judgment-debtor objected that the application was time-barred. The court of first instance rejected the objection. The lower appellate court accepted it and dismissed the application. The decree-holder appealed.

Munshi *Shiva Prasad Sinha* (for The Hon'ble Munshi *Narain Prasad Ashthana*), for the appellants :—

The application, dated the 19th of March, 1915, was a step in aid of execution and saved time against both the principal and the surety. Having regard to the comprehensive nature of the liability, which was both for producing Muhammad Ibrahim and also for paying off the liability, it was open to the appellants to apply for the arrest of the surety. In fact, after making several infructuous attempts to realize the money from the judgment-debtor the only course open to the appellants was to proceed against the surety. I rely on section 145, clause (*a*), of the Code of Civil Procedure. It is true, I could proceed against Muhammad Husain only when I had exhausted all my remedies against Muhammad Ibrahim, but that is a rule for the convenience of the surety whom the law views with a certain degree of favour and indulgence. The words "distinguishing portions of the subject matter as payable or deliverable to each" in explanation to article 182, schedule I to the Indian Limitation Act support my contention. In a case where the liabilities are defined and fixed there is no connecting link between the different debtors, and if the decree-holder fails to realize his money from one debtor to the extent of his liability he cannot fall back upon the other debtors for that portion of the money. Here if the appellants cannot get the money from the principal judgment-debtor they can realize the whole or a portion from the surety. It is practically a case of joint and several liability. The rule that I can proceed against the surety only when I have no hopes from the judgment-debtor, or that I cannot proceed against them simultaneously, exists for the benefit of the surety and in no way alters the situation. The case reported in I. L. R., 31 Bom., 50, relied on by the court

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below is not applicable to the present case. There the surety accepted the liability before the decree was passed, so there was no question of a step in aid of execution. Besides, that was a case under the old section 253 of Act XIV of 1882. The language of the present section 145 is much wider. There is no case directly in point, but the law and equity both are in appellants' favour.

Mr. *Zahur Ahmad*, for the respondent :—

The present application is time-barred. The application of the 19th of March, 1915, could not save limitation as against the judgment-debtor. The judgment-debtor and the surety are two different persons; both cannot be proceeded against simultaneously. I rely on *Narayan Ganpatbhat Agsal* v. *Timmaya bin Subbaya* (1). In fact it goes a step further. If a surety accepts the liability before the decree and if even then he is not liable, as there was no application within time against him, certainly a surety after the decree does not stand in a worse position. The principle underlying the decision in the case was that " the decree could not be treated as passed jointly as against the judgment-debtor and the surety."

PIGGOTT and GOKUL PRASAD, JJ. :—This is a second appeal by the decree-holder in an execution matter and it raises a question of limitation which, so far as we are aware, is not definitely covered by any published ruling. The decree was passed against three persons jointly and severally; but we are at present concerned only with the question whether that decree is still capable of execution against the first judgment-debtor, Muhammad Ibrahim. We do not know precisely on what grounds the execution court has come to the conclusion that it is not capable of execution against the other two judgment-debtors, but that matter is not before us. The decree was dated the 1st of February, 1913. There was an appeal against it and the appellate decree bears date the 11th of June, 1913. On second appeal the decree was confirmed by this Court under date the 30th of May, 1914. While the first appeal was pending, a proceeding in execution had been taken with which we are not now concerned. In the interval between the decision of the lower appellate court and that of this Court, namely, on

(1) (1906) I. L. R., 31 Bom., 50.

the 23rd of January, 1914, the decree-holders applied for the realization of the entire decree by the arrest of Muhammad Ibrahim. It would seem that he was in fact arrested and brought before the court, although this point is not absolutely material. At any rate he continued to represent to the court that he desired the execution proceedings to be stayed pending the result of the second appeal to this Court. This application was allowed on condition that security was furnished. Two persons, Muhammad Husain and Badar-ud-din, executed a security bond on the 23rd of January, 1914. According to its terms they made themselves jointly and severally liable for two distinct things. They bound themselves in a sum of money equivalent to the amount of the decree as it then stood, to produce Muhammad Ibrahim in court if required to do so. They also bound themselves to satisfy the entire decree, as it might stand after the decision of the second appeal by this Court, in the event of Muhammad Ibrahim failing to do so. Admittedly, no further proceedings in execution were taken against Muhammad Ibrahim personally until the 6th of March, 1918, when the application was made with which we are now concerned. Admittedly also this application is barred under article 182 of the first schedule to the Indian Limitation Act (No. IX of 1908), unless the decree-holders are entitled to the benefit of clause (5) of the said article. According to this clause a fresh period of limitation would begin to run from the date on which any application was made in accordance with law to the proper court to take some step in aid of the execution of the decree. In the months of February and March, 1915, the decree-holders did present certain applications to the court, whereby they sought to realize the full amount of the decree, under the terms of the security-bond, from Muhammmad Husain, the first of the two sureties. We are really concerned with one of these applications only, but its effect cannot be precisely understood unless it be consideredi connection with what had gone just before. We find that on the 16th of February, 1915, the decree-holders presented a formal and regular application for execution of the decree. They mentioned the fact that Muhammad Ibrahim, one of the joint judgment-debtors, had given security for the satisfaction of the

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entire decree, and they asked the court, with reference to the provisions of section 145 of the Code of Civil Procedure, to realize the entire amount of the decree from the first of the two sureties, namely, Muhammad Husain, by the arrest of his person. The execution court rightly or wrongly held that Muhammad Husain was entitled first to an opportunity of producing the judgment-debtor, Muhammad Ibrahim, before the court and passed an order to that effect. On the 19th of March, 1915, the decree-holders presented a further application, not drawn up on any prescribed form but obviously referring back to the application of the 16th of February, 1915. Herein they mentioned the fact that Muhammad Ibrahim had in the meantime got into trouble with the Criminal Courts and been sentenced to a long period of imprisonment. Although the application does not say so in express terms, the decree-holders obviously intended to represent that, in consequence of this fact, it was impossible for the surety, Muhammad Husain, to produce Muhammad Ibrahim before the court; perhaps also by implication they desired to suggest that no purpose would now be served by their attempting to realize the decree by the arrest of Muhammad Ibrahim's person. They, therefore, prayed the court, referring back to the application of the 16th of February, 1915, on which no final order had yet been passed, to direct the arrest of Muhammad Husain. That prayer is in itself an impossible one, except the application be considered as being in continuation of the previous application of the 16th of February, 1915. The prayer in that application had been for the realization of the entire decree by the arrest of Muhammad Husain's person, and obviously it was only by way of execution of the decree that the decree-holders could ask for Muhammad Husain's arrest at all. We are not concerned with the subsequent fate of this application, except that it proved infructuous and was finally dismissed on the 15th of September, 1915. We are now dealing with an application made within three years of the 19th of March, 1915, and the question for determination is whether the application of that date, for the realization of the entire decree by the arrest of one of the two persons who had stood surety for Muhammad Ibrahim's satisfaction of the

entire decree, is or is not to be regarded as an application to the execution court to take a step in aid of execution as against Muhammad Ibrahim. The first court was of opinion that the case was clearly covered by the provisions of clause (5), to which we have referred, and it allowed the application. The lower appellate court remarked in effect, that the question is a difficult one and that no authority had been laid before it, except a decision of the Bombay High Court in the case of *Narayan Ganpatbhat Agsal* v. *Timmayabin Subbaya* (1). To begin with, that was a case decided under section 253 of the former Code of Civil Procedure (Act XIV of 1882) and the proceedings sought to be taken were against a surety who had rendered himself liable before the passing of the decree for the due performance of the same. There had been a number of applications to execute the decree against the judgment debtor, but, more than three years after the passing of the decree, an application was made for the first time to execute the same against the surety. The court held that the decree could not be said to have been passed jointly against the decree-holder and his surety, and that consequently the applications made against the principal judgment-debtor did not save limitation against the surety. It is clear enough that the precise point decided in this case was not the one now before us. The lower appellate court, however, has remarked that, in the absence of any better authority, it felt itself bound to follow the principle which seemed to underlie this decision and, on this view of the case, it has dismissed the application for execution, dated the 6th of March, 1918, as barred by limitation.

In considering this matter we have to look at the provisions of section 145 of the Code of Civil Procedure, before we come to consider those of article 182 of the Indian Limitation Act. The Civil Procedure Code (Act V of 1908) gave for the first time a summary remedy by way of execution against a surety who had bound himself for the due satisfaction of a decree after the decree was passed. The case of such a surety does not seem to be covered by any part of explanation I to article 182 of the first schedule to the Indian Limitation Act. It would be obviously

(1) (1906) I. L. R., 31 Bom., 70.

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absurd to say that the decree in execution now before us distinguished portions of the subject matter as payable respectively by Muhammad Ibrahim and by his surety Muhammad Husain. It is equally incorrect to say that the decree had been passed jointly against Muhammad Ibrahim and Muhammad Husain. The decree itself affects Muhammad Ibrahim, but Muhammad Husain has become liable to be proceeded against in execution by reason of the special provisions of section 145 of the Code of Civil Procedure. In our opinion, therefore, we are dealing with a case not contemplated by explanation I to article 182 of the first schedule to the Indian Limitation Act. We are driven back, therefore, to clause (5), and we can only put to ourselves the plain question:—Does an application, asking the proper court to execute the entire decree by the arrest of the person of a surety who has made himself liable for the satisfaction of the decree, amount to asking the execution court to take a step in aid of the execution of the decree as against the principal whose liability the surety had taken upon himself? In the absence of authority to the contrary, the conclusion we have come to is that this question should be answered in the affirmative and that the decree-holders are in this case entitled to the benefit of clause (5) of the article. The result is that we allow the appeal, set aside the order of the lower appellate court and send the case back to the court of first instance with directions to proceed with the execution in accordance with law and with the decree-holders' application of the 6th of March, 1918. The decree-holders will be entitled to their costs of this proceeding in all three courts.

Appeal allowed.