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the statute which creates the exception. On grounds of ordinary justice there would be great objection to the practice. As my brother has pointed out, the mind of the court, and of the counsel for the prosecution, at the time when such witnesses would be giving their evidence in the box would not be directed to the question of the guilt or otherwise of the absconding person, and many things which ought to be asked might be omitted, and *a fortiori* questions in cross-examination asked by the four persons who are on their trial, with the express purpose of throwing guilt upon the absent party, might extract from such witnesses statements prejudicial to the absent party which could not be permitted if the witnesses were being properly examined under section 512.

We, therefore, hold as a question of law that the evidence of these two witnesses ought to have been excluded from the trial.

Appeal allowed.

APPELLATE CIVIL.

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December,
14.

Before Mr. Justice Dalal and Mr. Justice Boys.

NAND LAL SARAN (OBJECTOR) *v.* DHARAM KIRTI SARAN (DECREE-HOLDER).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 182—*Execution of decree—Limitation—Civil Procedure Code, section* 48(*a*)—*Execution only for incidental costs—Step in aid of execution.*

Where a decree is passed jointly against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of explanation (1) to article 182 of the first schedule to the Indian Limitation Act, 1908, will apply to the decrees passed severally and the second portion to the decree or decrees passed jointly. *Subramanya Chettiar* v. *Alagappa Chettiar* (1), dissented from.

* First Appeal No. 176 of 1925, from a decree of Gaur Nath, First Subordinate Judge of Moradabad, dated the 24th of March, 1925.

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An application for execution of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it. *Appu Rao* v. *Ramakrishna Chettiar* (1), referred to.

THE facts of this case were as follows :—

A decree based on an award made in the course of a suit for the partition of a family business was passed on the 18th of May, 1909. An appeal against this decree was preferred by one of the parties, but was dismissed upon the ground that, the award being legally valid and the decree being in accordance therewith, no appeal lay. Amongst other matters with which the award and the decree based thereon dealt was the partition of a hundi business in Rampur. As to this the arbitrator seemed to think that he could not give a decision which would bind the parties, but nevertheless declared that a sum of Rs. 12,000 odd was due by the Rampur business to two of the parties, viz., Dharam Kirti Saran and Sibta Prasad. Dharam Kirti Saran applied in execution to recover his share of this amount. Objections were raised by the party against whom execution was sought—Nand Lal Saran, but the objections were dismissed on the 11th of October, 1915, upon the ground that the managers of the Rampur business were bound to pay the amount claimed.

The present appeal arose out of an application to execute the decree filed on the 17th of November, 1924. In the lower court the judgement-debtor, Nand Lal Saran, objected to the execution of the decree on the following grounds :—

1. That twelve years had expired since the date of the decree sought to be executed, so the application was barred under the provisions of section 48(*a*) of the Code of Civil Procedure.

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2. That if for any reason there was no such bar, then the application was barred by the period of three years fixed under article 182(2) of the Limitation Act, because no step in aid of execution of this particular decree had been taken within three years of the 17th of November, 1924.

3. That the decree was not capable of execution on the ground that there was no operative order in the decree for the recovery of the sum claimed by the decree-holder.

The lower court held that there was no bar under section 48 because the period of limitation would be calculated not from the date of the decree but from the date of the dismissal of an appeal from that decree on the 18th of November, 1912; that there had been a step taken by the decree-holder against another judgement-debtor for recovery of certain costs by an application in execution which saved limitation as against the present judgement-debtor objector and that though there was no operative order in the decree of the 18th of May, 1909, for the payment of the sum claimed by the decree-holder from the judgement-debtor, this defence was barred to the present judgement-debtor by the rules of *res judicata*. It accordingly allowed the application for execution. Against this order Nand Lal Saran appealed to the High Court.

Dr. *Kailas Nath Katju* (with him Sir *Tej Bahadur Sapru*, Dr. *Surendra Nath Sen* and Munshi *Narain Prasad Asthana*), for the appellant.

Munshi *Durga Prasad* (with him Maulvi *Iqbal Ahmad*), for the respondent.

The judgement of the High Court (DALAL and BOYS, JJ.), after stating the necessary facts and discussing the question whether execution of the decree was barred by reason of section 48 of the Code of Civil Procedure, found that limitation was to be counted

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from the date of the original decree, i.e., the 18th of May, 1909, and therefore execution would be barred.

On the point of the bar by the three years' rule of limitation the judgement was as follows :—

The execution case, which according to the decree-holder respondent saves limitation, is case No. 233 of 1921, in which the application was filed on the 3rd of March, 1922. The present application is filed within three years of the date of that application, which was filed by Dharam Kirti Saran for withdrawal of money deposited by Sahu Param Kirti Saran in court. The amount sought to be recovered and which was deposited consisted of costs, which were awarded to Dharam Kirti Saran against this particular judgement-debtor Param Kirti Saran during execution proceedings in the trial court and in the High Court. Dharam Kirti Saran had applied for execution of a portion of the decree of 1909, in which he was decreed a sum of Rs. 51,000 odd against the deceased father of Param Kirti Saran. Param Kirti Saran objected and his objection was dismissed. The execution court ordered on the 8th of March, 1916, (execution case No. 308 of 1914 and miscellaneous case No. 127 of 1916), that Param Kirti Saran judgement-debtor shall pay Rs. 418-8-0 to the decree-holder Dharam Kirti Saran on account of the costs incurred in the application of objection. Param Kirti Saran appealed from this order. His appeal was dismissed, and he was made liable to pay costs Rs. 262. These were the two items of costs of which recovery was desired by an application of the 30th of August, 1921, in the execution department. The question is whether this step in execution of a decree against one of several judgement-debtors saved limitation as against the present judgement-debtor who was not a party to the previous execution proceeding. If it does not, the application

of the 3rd of March, 1922, for withdrawal of this money from court will not save limitation. Explanation 1 to article 182 of the first schedule of the Limitation Act lays down (second paragraph) :—" 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."

It was argued on behalf of the appellant that the first portion of this rule will apply to the present case. The alleged facts, on which this argument was based, are not correct in our opinion. The appellant's case was that there was no portion of the decree passed against all the defendants jointly in favour of Dharam Kirti Saran, that the decree was passed severally and Nand Lal Saran was not interested in the portion of the decree passed in favour of Dharam Kirti Saran against Sibta Prasad. We find in the award, clause (19), that certain properties were allotted to Dharam Kirti Saran as against all the defendants of this suit. The decree passed on this award decreed this property, which was joint up to the institution of the suit, in favour of Dharam Kirti Saran against all the defendants. It is not the fact, therefore, that no portion of the decree was passed jointly against all the defendants. The case before us does not appear to be specifically provided for in the explanation, where a portion of the decree is jointly passed against all the defendants and there are other portions of the decree passed severally against different defendants. The question

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will be whether such a decree will fall within the first portion of the explanation or the second or whether such a decree will be governed by the first part of the explanation as regards the several decrees and by the second portion of the explanation as regards the joint decrees. The opinion of the Madras High Court is that where any portion of the decree is joint, the case will fall within the second part of the explanation. This was laid down by a Bench of the Madras High Court in *Subramanya Chettiar* v. *Alagappa Chettiar* (1). According to the learned Judges the second part of the paragraph should be read literally, i.e., the words "where the decree or order has been passed jointly against more persons than one." The reasoning does not appear to us to be convincing. If the first portion is read literally—"where the decree or order has been passed severally"—it may be argued with equal reason that such a case must be governed by the first part of the explanation. The principle appears to us to be that when *A*, *B* and *C* are jointly liable and the decree-holder is attempting to recover the decretal amount from one of them, he should not be barred from recovering it from the rest if he fails to recover it from that particular judgement-debtor. He exercises due diligence in recovering the amount decreed to him and it will be no fault of his if he does not find the particular judgement-debtor of sufficient substance to pay up the entire decree. In such a case it will be equitable to direct that steps taken in aid of execution against one of the joint judgement-debtors should save limitation as against the others. It is also obvious that when a joint decree is passed the decree-holder cannot execute it at one and the same time against them all separately for the same amount. The

(1) (1906) I.L.R., 30 Mad., 268.

case is different when certain portions of a decree are jointly passed and others severally passed against more persons than one. While the decree-holder is executing the joint portion of the decree against one of the joint judgement-debtors, there is nothing to prevent him from executing the other portions of the decree against the several judgement-debtors who are liable thereunder. It would be expected of a diligent decree-holder that he should do so. We think, therefore that, where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the explanation should apply to decrees passed severally and the second portion to the decree or decrees passed jointly. We find ourselves unable to agree with the opinion of the Madras High Court. We have not been referred to any rulings on the subject of any other High Court during the arguments. We hold that the application is barred by the three years' limitation.

From another point of view also the application will be so barred. The three years' period is to be counted, in terms of article 182, clause (5), from the date of applying in accordance with law to the proper court for execution or to take some step in aid of execution of the decree. The step in aid of execution which would save limitation is the step taken in execution of that particular decere which is sought to be executed subsequently. In the present case the step taken was to withdraw costs of execution proceedings and those costs were not costs in the suit. Those costs were not of the suit because they were not incurred in execution proceedings but were incurred by a particular objector who objected to a certain execution proceeding. That decree for costs was a separate decree

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against a particular objector. The execution application for recovery of such costs was not an execution application of the original decree. The learned Subordinate Judge has explained away this difficulty by holding that the application in execution by Dharam Kirti Saran for recovery of Rs. 51,000 and odd and the objection of Sahu Param Kirti Saran to the payment of that amount were proceedings in suit between the preliminary decree and the final decree. According to the lower court the order for payment, dated the 8th of March, 1916, was really a final decree for the payment of Rs. 51,000 and odd and the costs incurred in obtaining that decree were costs in the suit. If this view be accepted, the decree of 1908 will be taken to be a preliminary decree and there would be several final decrees on foot thereof. The present judgement-debtor was not a party to the final decree of the 8th of March, 1916, so any steps taken in execution of that decree cannot save limitation against the present judgement-debtor. Our view, that an application for execution of costs incidental to the execution proceedings was not an application for the execution of the original decree or any part of it, is supported by a Bench ruling of the Madras High Court in *Appu Rao* v. *Rama Krishna Chettiar* (1).

In the result we decree the appeal and dismiss the execution application of Dharam Kirti Saran with costs.

Appeal allowed.

(1) (1901) I.L.R., 24 Mad., 672.