APPELLATE CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
January, 30

SURAJ DIN (JUDGMENT-DEBTOR) *v.* NARAIN RAO PARMESHWARI PRASAD (DECREE-HOLDER)*

Limitation Act (IX of 1908), article 182(5)—"Application to take a step in aid of execution"—Application to execute decree against surety saves limitation for subsequent execution against judgment-debtor—"Application made in accordance with law"—Application for execution against surety by sale of the property hypothecated by the security bond—No mortgagee mentioned in the security bond—Mode of enforcement—Execution or separate suit.

Execution of a decree was stayed, pending appeal, upon a surety executing a security bond for the due performance of the decree which might be passed on the appeal. The security bond contained an undertaking to pay and also hypothecated certain properties, but did not mention any one as being the mortgagee or person who might enforce the security. After the appellate decree was passed, the decree-holder applied for execution thereof against the surety by sale of the hypothecated property. Later, the decree-holder applied for execution against the judgment-debtor, and the question was whether the application against the surety availed to save limitation for the application against the judgment-debtor:

Held, that although the case did not come within explanation I to article 182 of the Limitation Act inasmuch as no decree was passed against the surety and therefore the decree was not one passed jointly or severally against the surety and the judgment-debtor, yet the application for execution against the surety was an application "to take some step in aid of execution" of the decree against the judgment-debtor within the meaning of article 182(5) and the former application was available to save limitation for the latter.

Held, also, that no person having been mentioned in the security bond as the mortgagee, no suit could be brought to enforce it and the correct mode for its enforcement was the passing of an order by the execution court for sale of the properties charged. The application for execution by sale of the properties was therefore "an application made in

*First Appeal No. 423 of 1937, from a decree of S. B. Singh, Civil Judge of Allahabad, dated the 28th of September, 1937.

accordance with law to the proper court" within the meaning of article 182(5).

Messrs. *Ram Nama Prasad* and *Kanhaiya Lal*, for the appellant.

Mr. *Gopalji Mehrotra*, for the respondent.

BENNET and VERMA, JJ.:—This is an appeal by the judgment-debtor against an order dismissing his objections to the application for execution of the decree.

The material facts as stated by learned counsel are these. Two persons, Bhajan Lal and Hira Lal, had executed a sale deed in favour of the appellant, Suraj Din, in respect of certain property belonging to them. The respondent before us was one of the creditors of the vendors and had brought a suit for a declaration that this sale was void and ineffectual because it had been executed with the intent to defeat and delay the creditors of the vendors. Suraj Din was the principal defendant to that suit. The suit was decreed and costs were awarded to the plaintiff. Suraj Din filed an appeal in this Court against that decree. During the pendency of the appeal he applied for the stay of the execution of the decree for costs. That application was granted subject to his furnishing security to the extent of Rs.2,000. Thereupon two persons, Hazari and Mata Palat, executed a security bond, each of them undertaking liability to the extent of Rs.1,000 for the due performance of the decree which might ultimately be passed against Suraj Din. It is important to note that in the security bond no person was mentioned as a mortgagee or as a person on whom any right to enforce or realise the security was conferred. It merely contains an undertaking to pay. This fact is admitted by the learned counsel appearing for the appellant. Suraj Din's appeal was ultimately dismissed by this Court on the 30th of November, 1932, and costs of the appeal also were awarded to the respondent against

1939

SURAJ DIN v. NARAIN RAO PARMESHWARI PRASAD

Suraj Din. It is this decree for costs, for the satisfaction of which Hazari and Mata Palat had stood surety, that is now in execution. The first attempt made by the decree-holder respondent for the realisation of the amount due under the decree was in the year 1933. On the 2nd of March in that year the decree-holder filed his first application for execution. It was against the sureties, Hazari and Mata Palat, alone and prayed for the realisation of the money by sale of the property hypothecated under the security bond. Suraj Din was not made a party to that application. It may be mentioned here that the original suit had been brought in the court at Jaunpur, and this application for execution against the sureties was filed in that court. While that application for execution against the sureties was pending, the decree-holder took certain steps against Suraj Din which proved infructuous, and the details of those proceedings are not necessary for our present purpose. Suraj Din, it was found, was residing at Allahabad where he was in service. On the 8th of February, 1936, the decree-holder made an application to the Jaunpur court praying for a transfer of the decree to the court at Allahabad. The Jaunpur court passed an order granting this application and transferring the decree to Allahabad in March, 1936. In July, 1936, the decree-holder made an application for execution, as required by the Code, to the court at Allahabad, to which the decree had been transferred, praying for the arrest of the judgment-debtor, Suraj Din. It is this application which is the subject-matter of this appeal. Suraj Din took a number of objections to the execution. The court below has overruled all those objections and has directed execution to proceed against Suraj Din by his arrest for realisation of Rs.2,000 plus the costs of the execution proceedings.

The only point argued before us on behalf of the appellant is one of limitation and two grounds have

been urged for holding that the application for execution made against the appellant is barred by time:

(1) that the application of 2nd March, 1933, being against the sureties alone, does not save limitation as against Suraj Din who was not a party to that application; and

(2) that, in any event, the application dated 2nd March, 1933, against the sureties was not made in accordance with law within the meaning of article 182(5) of the Indian Limitation Act inasmuch as the decree-holder could proceed against the sureties only by suit on the security bond and not by an application for execution.

Having heard learned counsel, we have come to the conclusion that there is no force in the contentions put forward.

The argument as to the first ground mentioned above is based on explanation I to article 182. It is argued that the sureties were no parties to the decree and therefore there was no decree, joint or several, to which Hazari and Mata Palat were parties along with Suraj Din. It is contended that explanation I not being applicable, clause (5) of the article will not apply and that therefore the application for execution made against Suraj Din must be held to be barred by time. Reliance is placed on the case of *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh* (1). It seems to us, however, that the learned counsel is not correct in contending that inasmuch as explanation I is not applicable clause (5) of the article is ruled out. Clause (5) lays down that the period of three years would run from the date of the final order passed on an application made in accordance with law to the proper court for execution *or to take some step in aid of execution of the decree or order.* In our judgment the application for execution made on the 2nd of March, 1933, against

(1) (1928) I.L.R. 8 Pat. 310.

1939

SURAJ DIN v. NARAIN RAO PARMESHWARI PRASAD

the sureties was an application which sought to take a step in aid of execution of the decree. This is the view that has been taken in this Court in the case of *Muhammad Hafiz* v. *Muhammad Ibrahim* (1). At page 158 of the report the following passage occurs:

"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."

We are in entire agreement with this decision. We hold therefore that the first ground urged by the learned counsel fails.

The argument on the second ground advanced by the learned counsel is that the decree-holder was not entitled in law to file an application for execution against Hazari and Mata Palat and that therefore the application filed on 2nd March, 1933, was not an application made in accordance with law and could not consequently save limitation. Reliance is placed on the decision of the Full Bench in the case of *Khair-un-nissa Bibi* v. *Oudh Commercial Bank* (2). It seems to us, however, that the case before us is not governed by that decision and that the ruling which governs it is the decision of their Lordships of the Privy Council in

(1) (1920) I.L.R. 43 All. 152. (2) (1933) I.L.R. 55 All. 846.

Raj Raghubar Singh v. *Jai Indra Bahadur Singh* (1). In the case before their Lordships a decree had been passed by the court of the Judicial Commissioner of Oudh on 4th March, 1907, i.e., when the Code of 1882 was in force, the result of which was that a lady called Raghubans Kunwar was not entitled to the possession of all the villages claimed by her in the suit but only to a few of them. Raghubans Kunwar had brought a suit against Sheo Singh, who was the brother of her deceased husband, for possession over the entire taluqa of Mahewa. The suit was decreed by the Subordinate Judge. She applied that possession be delivered to her and the Subordinate Judge put her in possession upon her providing security to restore the mesne profits to the extent of one lakh of rupees. The applicants before their Lordships were, or represented, the persons who had given the necessary security. The Judicial Commissioner's court had affirmed the decision of the trial court. On an appeal by Sheo Singh to the Judicial Committee, the decree passed by the courts in India was varied and it was declared that the taluqa with its accretions had passed to the defendant, the brother, and that the plaintiff was entitled only to the private estate of her deceased husband. The case was referred to the court of the Judicial Commissioner to ascertain how much of the property in dispute formed part of the taluqa and how much was the private estate of the deceased taluqdar. The court of the Judicial Commissioner remitted the case for inquiry to the Subordinate Judge and he reported accordingly. Thereupon the court of the Judicial Commissioner passed the ultimate decree, dated the 4th of March, 1907, mentioned above, by which it was decided that out of the villages claimed by the widow, 117 belonged to the taluqa and 31 had formed part of the private estate of the deceased, and the suit of the plaintiff was dismissed in respect of the 117 villages

(1) (1919) I.L.R. 42 All. 158.

1939

SURAJ DIN v. NARAIN RAO PARMESHWARI PRASAD

which belonged to the taluqa. On the 21st of August, 1908, the court of the Judicial Commissioner directed that the order of His Majesty in Council and its own decree of 4th March, 1907, should be sent to the Subordinate Judge and ordered him to ascertain the amount of the mesne profits of the 117 villages during the period that the widow had been in possession of them, but the Subordinate Judge was directed not to make any order of payment until the whole case had been decided. It may be noted here that under the Code of 1882 mesne profits were ascertained in execution proceedings and the provisions now contained in order XX, rule 12 were laid down for the first time when the Code of 1908 was passed. Therefore the proceedings which followed upon the making of the order of 21st August, 1908, by the court of the Judicial Commissioner, mentioned above, were proceedings in execution. On 6th January, 1909, the respondent made an application purporting to be under sections 47 and 144 of the present Code, which had by that time come into force, for fixation of mesne profits. The parties against whom the application was made were the widow and the sureties; and the relief prayed was that they might be declared liable for mesne profits of the 117 villages, the liability of the sureties being limited to one lakh rupees only. Among the objections raised by the sureties to this application was an objection to the effect that it was necessary for the successful defendant, who had become entitled to mesne profits, to bring a separate suit to enforce the charge and that the application filed by him was not maintainable. Their Lordships pointed out that no person having been mentioned in the instrument, and thus there being no mortgagee to whom the security was given, the instrument did not amount to a mortgage, and that therefore no question of a suit on that instrument arose. As we have stated above, the security bond in the case before us is exactly similar to the security bond which

was before their Lordships of the Privy Council. Having held that no separate suit to enforce the charge could be filed on the basis of an instrument of this character, their Lordships remark at page 167 of the report: "It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money." It seems to us that their Lordships clearly held that in a case in which the security bond is of the type that we have before us, an order for sale of the property charged under the security bond could be made by the court to which the execution of the decree had been entrusted. The security bond which the Full Bench had before them in *Khair-un-nissa Bibi* v. *Oudh Commercial Bank* (1) was, on the other hand, of a different character. That bond distinctly conferred the right to realise the security on the Oudh Commercial Bank. It was on this ground that the Full Bench distinguished the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (2) and held that in the case before them there was a mortgage and there was a mortgagee. *Khair-un-nissa Bibi's* case is, therefore, not applicable to the facts of the case before us.

For the reasons given above we dismiss this appeal with costs.

(1) (1933) I.L.R. 55 All. 346. (2) (1919) I.L.R. 42 All. 158.