1882

IN THE MATTER OF THE PETITION OF BADRI PRASAD v. SARAN LAL.

was entitled to order the sale of the 20th April, 1881? We think not. It appears to us that when several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the law contemplates, no matter whether such Courts be of the same or different grades, that *one* Court and *one* Court only shall have the power of deciding objections to the attachment; of determining claims made to the property; of ordering the sale thereof, and receiving the proceeds, and of providing for their distribution under s. 295. Where the Courts are of different grades the one upon which this duty devolves is that of the highest grade; where they are of the same grade, that which first effectuated the attachment. We think that for the most obvious reason of convenience, and as a precaution against confusion in the execution of decrees, this is the proper construction to place on s. 285 of the Procedure Code. Seeing the notoriety that now has to be given to attachments it is in the highest degree improbable that one Court will be unaware of a prior subsequent attachment by another, and in the matter now before us it is admitted that the Munsif was well aware of all that had been done in reference to the three decrees of the Subordinate Judge's Court. In our opinion therefore the sale of the 20th April, 1881, was a bad sale, as being held in pursuance of the order of a Court that had no jurisdiction to direct it, and such order and sale must be, and are hereby, set aside.

This application is accordingly allowed, but we make no order as to costs.

Application allowed.

1882
March 30.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

PIRTHI PAL SINGH AND OTHERS (PLAINTIFFS) *v.* HUSAINI KHAN AND ANOTHER (DEFENDANTS). *

Muhammadan Law—Succession—Debts—Suit against one of the heirs of a deceased person for debt.

The heirs to a deceased Muhammadan divided his estate among themselves according to their shares under the Muhammadan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. *Held* that, inasmuch as such heirs had not, by sharing in the estate, rendered themselves liable for the whole of such debt, Muhammadan law allowing the heirs of a deceased person to divide his

* Reference No. 30 of 1882 under s. 617 of Act X of 1877.

1882

PIRTHI PAL SINGH v. HUSAINI JAN.

estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken.

Hamir Singh v. *Zakir* (1) referred to.

THIS was a reference to the High Court by Mr. R. D. Alexander, Judge of the Court of Small Causes at Allahabad. The facts of the case, and the point on which the Judge entertained doubt, and his opinion on the point, were stated by him as follows:—

"On the 2nd August, 1878, Imam-ud-din Jan, deceased, executed a promissory note in favour of Suraj Bakhsh Singh, deceased, for the sum of Rs. 25, bearing interest at the rate of Rs. 15 per cent. This promissory note matured on the 10th November, 1878. Imam-ud-din died shortly after its execution. On the 9th November, 1881, the day before its limitation expired, the plaintiffs filed the present suit against the widow and son of the deceased, alleging them to be the heirs, and in possession of the estate. On the 16th January, 1882, appearance was made for the defence, and a plea was raised that the two defendants were not the sole heirs, but that there were two daughters of the deceased also heirs; one Banni Jan who was of age and married, and who had taken her share of the deceased's estate, and one Wahid-ul-Jan, a minor, who was still living under the care of her mother the first defendant, and for whose guardianship, as well as for that of the second defendant, defendant No. 1 had taken out a certificate from the District Court under Act XL of 1858. It was admitted by the plaintiffs that these facts were correct, and that the deceased Imam-ud-din had left four heirs, and not two only, and that Banni Jan had taken her share, *viz.*, $\frac{7}{32}$ of the deceased's estate. The shares therefore of the heirs were as follows:—defendant No. 1, widow, $\frac{4}{32}$, defendant No. 2, son, $\frac{12}{32}$, Banni Jan, $\frac{7}{32}$, Wahid-ul-Jan $\frac{7}{32}$.

"Under s. 32, Act X of 1877, Banni Jan and Wahid-ul-Jan were added by the Court as defendants, and summonses were issued and made returnable on the 20th January. On that date they were returned unserved, and the Court declined to issue fresh summonses, because it was clear that, as regarded the added defendants, the suit was barred by limitation under the provisions of s. 22, Act

(1) I. L. R., 1 All. 57.

XV of 1877. They were made parties on the 16th January, 1882, and the period allowed by law for suing on the promissory note terminated on the 10th November, 1881.

"On this the counsel for the plaintiffs contended (*a* that he was entitled to a decree for the whole sum claimed against the two original defendants, who in turn might recover from the others heirs their shares of the debt by a suit for contribution; (*b*) that if he was not entitled to a decree in full, he was at all events entitled to a decree in part, such part being represented by the shares taken by the defendants in the deceased's estate, *i.e.*, nine-sixteenths. He therefore claimed a decree for nine-sixteenths of Rs. 45. The counsel for the defence urged against this (*a*) that it would not be equitable to saddle the original defendants with the whole of the debt, and (*b*) that the plaintiffs, having sued the original defendants as sole heirs and in possession of the whole estate of the deceased, could not now turn round and claim this proportionate relief.

"The questions therefore I would submit for the decision of the Hon'ble Court are—(i) On the facts as stated should a decree be passed against the original defendants for the whole of the debt claimed, or (ii) on the facts as stated should a decree be passed against the original defendants for nine-sixteenths of the debt claimed, their shares in the estate of deceased being nine-sixteenths.

"As to the first question, I do not think it would be equitable to decree the whole debt against the original defendants, because I am doubtful if an action for contribution could be maintained successfully by them against the other heirs for their shares. I assume that all that can be recovered in a suit for contribution is a sum legally payable by the defendant which the plaintiff has paid for him. But as by the other heirs no part of this debt would appear to me to be legally payable, because the claim of the creditor as against them is barred by limitation, the effect therefore of giving a decree against the original defendants, if it were followed by a suit for contribution, would virtually, if the latter claim were decreed, be to revive a claim barred by limitation. It was held in *Tillakchand Hindumal* v. *Jitamal Sudaram* (1) that an executor may pay a debt justly due by his testator, though barred by the

(1) 10 Bom. H. C. R. 206.

1882

PIRTHI PAL SINGH v. HUSAINI JAN.

statute of limitation, and will in equity be allowed credit for such payment. Can it be equally argued that, where some heirs have been obliged to pay a debt due from the whole estate of a deceased, the recovery of such debt as against the other heirs being barred by limitation, the former can recover from the latter in a suit for contribution? If it cannot, then I am of opinion that it would be inequitable to allow the recovery of the whole debt against the two original defendants. Perhaps some guide might be found in considering the provisions of s. 28, Act XV of 1877. If in the case of suits to recover debts the right to the debt is extinguished under that section, as well as the remedy barred, it would appear to me that as far as the added defendants are concerned there would be an end of the liability "*in toto*." But in *Mohesh Lal* v. *Busunt Kumaree* (1) it was held that, as far as regards debts, the Indian Limitation Acts merely bar the remedy, but do not extinguish the right. In *Ram Chander Ghosaul* v. *Juggutmonmohiney Dabee* (2) it was held that s. 28, Act XV of 1877, extended the doctrine of the extinguishment of the right to property other than land, but Garth, C. J. queried whether this principle would apply to debts. In *Abhoy Churn Pal* v. *Kalee Pershad Chatterjee* (3) White, J. said: "A suit for rent is, I think, a suit for the possession of property within the meaning of that section." It might be urged therefore that though *quoad* the creditor the remedy was barred, still the debt was not extinguished, and that a suit for contribution would lie because the right was still in existence.

"There is another matter to be considered, and that is whether according to Muhammadan law a creditor is entitled to recover from one or two out of more heirs, all of whom have taken the estate, more than the share of the debt the share of the estate taken by the heir represents. There is a passage in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (4) quoted from the Hedaya, Bk. XX, chap. 4:—"If an heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to law, each is only obliged to pay his own share." If that is the law, then it would appear clear that the utmost the plaintiffs could recover in this case would be nine-sixteenths

(1) I. L. R., 6 Calc. 340.
(2) I. L. R., 4 Calc. 283.
(3) I. L. R., 5 Calc. 949.
(4) I. L. R., 4 Calc. 142.

of the debt, and that the answer to the first question must be in the negative. And this brings me to the consideration of the second question. In the Calcutta case just quoted the passage from the Hedaya goes on to say: "The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir." It does not appear clear whether this means non-recourse, so as to establish the individual liability of an heir in whose hands there is only a portion of the estate, or the liability of the whole estate as represented by him alone. The passage goes on to explain that the reason of this is that, although one of the heirs may act as plaintiff in a case on behalf of the others, yet he cannot act as defendant on their behalf unless the whole of the effects be in his possession. It would appear to come to this. Must the whole estate be represented by all the heirs in possession in a suit before the creditor is entitled to recover his debt against one heir in possession of part of the estate if he choses, or can he recover proportionately from each heir according to the share he has taken in the estate. In *Hamir Singh* v. *Zakia* (1) the Court quoted the Hedaya, Bk. XXVI:—"While then the heirs might lawfully take possession of an estate not completely involved in debt, the creditors have the right to sue such of the heirs as have taken the estate; 'but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir.'" In the present case the creditor has had recourse for the payment of his debt to two heirs who have not the whole estate, and it is owing to his own laches and carelessness that the whole estate was not properly represented. His suit too against the two heirs was not brought for a considerable time after the death of his debtor. It would appear, however, that, if the plaintiffs are entitled to a proportionate decree, the Court would be justified under s. 28, Act X of 1877, in making a decree against the defendant No. 1 for two-sixteenths and against the defendant No. 2 for seven-sixteenths of the sum claimed, and apart from the consideration whether such liability is recognized by the Muhammadan law, on which question I feel great doubt, I am of opinion that that would be the most equitable way of deciding the case. At the request however of the pleader for the plaintiffs, who maintained that they are legally

(1) I. L. R., 1 All. 57.

1882

PIRTHI PAL SINGH v. HUSAINI JAN.

entitled to a decree for the whole sum claimed, and being doubtful whether under Muhammadan law the defendants are liable at all, I refer the case for the decision of the Hon'ble High Court."

Munshi *Hanuman Prasad*, for the plaintiffs.

Munshi *Kashi Prasad*, for the defendants.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—Under the Muhammadan law the heirs of a deceased person are permitted to divide the estate notwithstanding the circumstance that a small debt is due, and creditors have a right to sue the heirs in possession for recovery of a debt, "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir."—*Hamir Singh* v. *Zakia* (1).

In this case it is admitted by plaintiffs that defendants are not the sole heirs and that they have only divided and obtained their proper share of the estate, and by Muhammadan law under the circumstances of this case they are permitted to do so; and they will not, we think, thereby incur a liability to a creditor, suing them for recovery of a debt, for the whole debt due to him by the deceased, and a creditor could not in a suit brought against them bind the other heirs. In this view of the law we consider that the creditor can recover individually from heirs in the position of defendants the share of the debt for which they are liable.

The answer to the first question will be in the negative, and the second question in the affirmative.

Order accordingly.

1882
March 7.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* KALLU.

Covenanted Magistrate of the third class on tour in Division of a District—Subordination to Magistrate of the Division—Act X of 1872 *(Criminal Procedure Code), ss.* 41, 44, 46, 284.

A Magistrate of a Division of a District made over, under s. 44 of Act X of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction,

(1) I. L. R., 1 All. 57.