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remand of the case of their Lordships of the Privy Council, and evidence on the point was adduced after the remand it cannot be held that the decision of the courts below as to defendant No. 4's status rests on any evidence that was recorded before he was made a party. The learned Judge of the trial court has only referred to the pleadings of the parties as they stood before remand of the case but his decision is based on the evidence recorded after the remand.

Thomas, C.J. and Ziaul, Hasan, J.

The appeal is therefore dismissed and the lower court's decree confirmed. Defendants 1 and 2 being responsible for this litigation we order that they shall pay the plaintiff respondent's costs from the date of the suit up to this date.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice R. L. Yorke, and Mr. Justice Radha Krishna Srivastava

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April, 4

M. MOHAMMAD IHTISHAM ALI (DEFENDANT-APPLICANT) *v.* L. LACHHMAN PRASAD AND ANOTHER (PLAINTIFFS-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), sections 10 and 115—United Provinces Encumbered Estates Act (XXV of 1934), section 9(5)—Promissory note by two persons—One executant applying under Encumbered Estates Act—Suit on promissory note against other executant alone—Civil Court continuing suit in spite of application under Encumbered Estates Act—Revision against order of continuance of suit, if lies—Section 9(5) Encumbered Estates Act, whether applies to joint and several debts.

Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encumbered Estates Act, and it elects nonetheless to proceed with the hearing of the suit, it acts with material irregularity, and it cannot be said that when the court passes such an order it is any less a case decided because

*Section 115 Application No. 83 of 1937, for revision of the order of Mr. Pradyumna Krishna Kaul, Civil Judge of Mohanlalganj, Lucknow, dated the 2nd June, 1937.

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the decision is not with reference to section 10 but with reference to the provisions of the Encumbered Estates Act. A revision therefore lies against an order allowing the trial of such suit to continue. *Sahdeo Singh, Sardar* v. *Chanun Kuer, Sardarni, and another* (1) followed. *Paras Nath* v. *Raj Bahadur and others* (2), *Madan Mohan* v. *Kuar Kamla Narain Dube* (3), *Buddhu Lal* v. *Mewa Ram* (4), and *Durga Das* v. *Gobind Singh* (5), referred to.

Section 9(5) of the United Provinces Encumbered Estates Act applies to joint and several debts also and not only in the case of debts which are strictly joint debts. *Swadeshi Bima Co., Ltd., Agra* v. *Shiv Narain Katiyar and another* (6), relied on.

Messrs. *M. H. Kidwai and Abrar Husain,* for the applicant.

Messrs. *L. S. Misra and Kashi Prasad Srivastava,* for the opposite-party.

YORKE and RADHA KRISHNA, JJ.:—This is an application in revision under section 115 of the Code of Civil Procedure by Mohammad Ihtisham Ali, defendant.

This application has arisen in the following circumstances:

The plaintiffs Lachhman Prasad and Madan Lal held a promissory note for Rs.16,500 executed by two persons Mohammad Ihtisham Ali and Mohammad Azhar Ali on the 4th January, 1934. One of the debtors Azhar Ali made an application under the Encumbered Estates Act. Subsequently the creditors instituted a suit in the Court of the Civil Judge, Mohanlalganj, Lucknow, to recover Rs.21,697-8 on foot of the pro-note. In their plaint the plaintiffs mentioned that Azhar Ali had already made an application under the Encumbered Estates Act. They sought relief in the first instance only against Ihtisham Ali, but they made a second prayer that in case the defendant No. 2, Azhar Ali should get his application under the Encumbered Estates Act dismissed, a decree should be given by the

(1) (1928) I.L.R., 3 Luck., 650, F.B. (2) (1935) I.L.R., 11 Luck., 529, F.B.
(3) (1934) A.I.R., All., 520. (4) (1921) I.L.R., 43 All., 564.
(5) (1936) A.I.R., Lah., 569. (6) (1939) A.I.R., All., 75.

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court against both defendants. Subsequently the plaintiffs on the 4th May, 1937, discharged Azhar Ali from the suit entirely. The defendant Ihtisham Ali raised a number of pleas, but particularly he contended that in view of the provisions of Act XXV of 1934 (the Encumbered Estates Act) and section 10 of the Code of Civil Procedure, the trial of the present suit should be stayed pending the decision of the Special Judge under section 9 of the Encumbered Estates Act on the claim made by the plaintiffs in the Encumbered Estates Act proceedings, that is under section 10 of the Act.

The learned Civil Judge framed an issue, "Cannot the trial of the present suit be proceeded with in view of the provisions of Act XXV of 1934, and section 10 of the Code of Civil Procedure?" He held that "the matter in issue in the present suit was not also directly and substantially in issue" in the proceedings before the Special Judge, and he therefore held that there was no bar to proceeding with the case before him. As regards the second question whether in view of the provisions of the Encumbered Estates Act it was competent for him, to proceed with the trial of the suit, he held that a person who has not made an application under the Encumbered Estates Act cannot urge that because another person who was a joint debtor with him has made an application under section 4 a creditor is barred from maintaining a suit against the person who has made no application under section 4 of the Encumbered Estates Act and cannot maintain a suit to enforce the debt against him individually in a proper court.

It is from this order that the present application in revision has been filed. The first question which arises is whether an application in revision lies from such an order. *Prima facie* this would have seemed to be an interlocutory order but in view of the decision of a Full Bench of this Court in *Sahdeo Singh, Sardar* v. *Chanun Kuer, Sardarni, and another* (1) that conten-

(1) (1928) I.L.R., 3 Luck., 650 F.B.

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tion cannot be maintained. It was held that an order allowing continuation of the trial of a suit which had been stayed and which ought to have remained stayed under section 10 of the Code of Civil Procedure is a "decided case" within the meaning of section 115 of the same Code and is capable of being revised by the High Court. It is true that there are remarks in the judgment of SRIVASTAVA, J. in *Paras Nath* v. *Raj Bahadur and others* (1), which would lead to a contrary conclusion but those remarks would not suffice by themselves to justify us in taking a different view, and we are clear that we must act upon the view that an application in revision is competent. We should, however, note that a different view is taken by the High Courts at Allahabad and Lahore, vide the cases of *Madan Mohan* v. *Kuar Kamla Narain Dube* (2) (based on the Full Bench ruling of the same Court in *Buddhu Lal* v. *Mewa Ram* (3), and *Durga Das* v. *Gobind Singh* (4).

Yorke and Radha Krishna, JJ.

It is contended on behalf of the applicant that the learned Civil Judge has not given proper consideration to the provisions of section 9(5) of the Encumbered Estates Act. Section 9(5) deals with the determination of the liability of joint debtors who are not members of a joint Hindu family. Sub-section (5)(*b*) provides that "If all the joint debtors have not applied under section 4 the creditors shall have a right to recover from the debtors who have not applied only such amount on account of the joint debts as may be determined by the Special Judge to be due by them." By section 9(5) (*a*) it is provided that "for the purpose of determining the amount of the joint debt which is due by the debtor or debtors who have applied and the amount due by those who have not applied, the Special Judge shall make the joint debtors who have not applied parties to the proceedings and shall hear any objection that they

(1) (1935) I.L.R., 11 Luck., 529F.B. (2) (1934) A.I.R., All., 520.
(3) (1921) I.L.R., 43 All., 564. (4) (1936) A.I.R., Lah., 569.

may make before recording his finding". The section thus contemplates the apportionment of liability for a joint debt between those debtors who have applied under the Encumbered Estates Act and those who have not applied, and it would seem that the intention of the Act is that in all cases of joint debts to which applicants under the Act are parties the jurisdiction to decide the amount recoverable from the applicants and that recoverable from the non-applicants rests with the Special Judge. If this is a correct interpretation of the intention of the legislature, and if these provisions of the Act are applicable to the debt in suit, it follows that it was the duty of the Civil Judge to leave to the Special Judge the decision of the amount recoverable from the defendant Mohammad Ihtisham Ali.

On behalf of the opposite-party creditors it is pointed out that this pro-note was executed by Mohammad Azhar Ali and Mohammad Ihtisham Ali jointly and severally. When the case came up in Court on the 16th March, 1937, a statement was made on behalf of Mohammad Ihtisham Ali that as between the plaintiffs and the defendants the position of Mohammad Ihtisham Ali was that of a joint debtor, but as between the defendants *inter se* the position of Ihtisham Ali was that of a surety for Azhar Ali. It was upon this statement that the plaintiff stated on behalf of the plaintiffs that they discharged Azhar Ali from the suit and gave an undertaking that they were not going to prove this debt in the Court of the Special Judge that is against Azhar Ali. This undertaking was evidently conditional on their being able to obtain a decree for the amount of the debt against Ihtisham Ali, leaving Ihtisham Ali to recover from his co-debtor Azhar Ali. The main argument for the opposite-party is that section 9(5) applies only to joint debts and not to debts for which the debtors are liable jointly and severally, and it follows that there is nothing in that section to preclude the Civil Judge from trying out the case against Ihtisham Ali and granting a decree to the plaintiffs for

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the full amount claimed, leaving Ihtisham Ali to seek his own remedy against Azhar Ali. In this connection reliance is placed on *Swadeshi Bima Co., Ltd., Agra* v. *Shiv Narain Katiyar and another* (1) in which it was held that "where the liability of two debtors is not merely joint, but also joint and several, and one of them happens to be a landlord who makes an application under section 4 of the Encumbered Estates Act, it is not open to the other in a suit brought by the creditor against both of them to raise the objection that the suit so far as it relates to him cannot be instituted." In this decision the learned Judge remarked that there could not be the slightest doubt that the plaintiff could have recovered the debt either from Shiv Narain Katiyar or from Kanhi Singh (Shiv Narain was the applicant under the Encumbered Estates Act). He went on to say at a later stage:

> "There is nothing, however, in any provision contained in the Encumbered Estates Act even to suggest that the plaintiff's right to bring a suit against Kanhi Singh is barred or limited in any way."

He noted that the Encumbered Estates Act provided only for a decree being passed in favour of a claimant against the landlord who makes an application under the Act, and he further remarked that "If the plaintiff was not allowed to institute the suit (that is against the joint-debtor Kanhi Singh) the necessary result would be that his claim against Kanhi Singh would be barred by time." On this view he held that the institution of the suit by the plaintiff against the joint debtor who was not an applicant under the Act was fully competent and the suit should not have been dismissed. In the event, however, he remarked that it would be open to the learned Small Cause Court Judge to wait for the decision of the Special Judge regarding the liability of Kanhi Singh.

With the greatest respect it appears to us that logically on the view taken by the learned Judge that it was

(1) (1939) A.I.R., All., 75.

competent for the plaintiff to institute the suit against the joint-debtor, it was equally competent for him to obtain a decree against the joint-debtor for the whole amount unless further proceedings in the suit were to be stayed either under section 10 of the Code of Civil Procedure or in view of the provisions of section 9(5)(*b*) conferring exclusive jurisdiction on the Special Judge. Either he *must* wait for the decision of the Special Judge or he need not do so. The learned Judge has left it open as to which view he takes on that point and that is the point which is the critical point in the present case.

Yorke and Radha Krishna, JJ.

The second point urged on this application on behalf of the creditors is that in virtue of his own statement that he is really a surety the defendant Ihtisham Ali is barred from asking for a stay of the proceedings before the Civil Judge in view of the proceedings in the Court of the Special Judge. Section 9(5) has been amended by Act XI of 1939, and two sub-sections 9(5)(*c*) and 9(5)(*d*) have been added. Sub-section 9(5)(*c*) relates to cases where no suit has been instituted in respect of a joint debt and we need not consider it. Sub-section 9(5)(*d*) relates to cases where a suit in respect of the joint debt had been instituted and proceedings therein were stayed under sub-section (1) of section 7. It provides that the court in which such suit has been instituted shall on the application of the creditor proceed with such suit in accordance with sub-section (*c*) as against those joint-debtors who had not applied under section 4 in respect of the amount of the joint debt determined by the Special Judge to be due from such joint-debtors . . . . provided that for the purposes of this Act a person who is liable for a debt as a surety shall not be deemed to be a joint-debtor. By this provision a surety is evidently excluded from the whole scheme of apportionment which finds a place in sub-section (5) of section 9 of the Act. The argument might have had some force if this sub-section had formed a part of the Act at the time when the matter was before

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the lower court, but in any case it is not part of the case that so far as relates to the creditors the defendant claims any consideration on the ground that in reality he was a surety. On the contrary he admits that as regards the creditors he is a joint debtor, and it is on that footing that the question at issue must be decided.

Yorke and Radha Krishna, JJ.

The most important point which is really being urged against this application is that section 9(5) has no application to joint and several debts but applies only in the case of debts which are strictly joint debts. We note that just as in the present case the learned Judge who decided the case of *Swadeshi Bima Co. Ltd., Agra* v. *Shiv Narain Katiyar and another* (1), was dealing with a debt for which the defendants were liable jointly and severally. We ourselves are clearly of opinion that the words used in this section, where mention is made of joint debtors and joint debts or joint decrees, are not used in the very strict sense of debts and decrees for which the debtors cannot be made liable or proceeded against individually. There is nothing in the wording of these sections which requires that they be interpreted in that very strict sense. We are therefore of opinion that the more general sense should be given to them, and we understand, as evidently did the learned Judge of the Allahabad High Court, that whatever injury may thereby be done to the rights of creditors under the general law the intention of this Act is to limit the rights of creditors even in the case of debtors who are not entitled to the protection of the Act by giving to the Special Judge deciding claims under that Act an exclusive jurisdiction to apportion the liability under joint debts as between those debtors who have applied under the Act and those who have not. On this view it is clear that whatever may be the position in regard to the "institution" of suits against non-applicant joint debtors in the ordinary civil courts those suits cannot go forward unless and until the Special Judge has exercised his special jurisdiction to distribute the amount of the debts. Sub-section 5(*b*) of section 9 has been

(1) (1939) A.I.R., All., 75.

a part of the Act from the very beginning and the wording of that sub-section makes it clear that in the ordinary civil courts a creditor can only recover from a non-applicant joint-debtor such amount as may be determined by the Special Judge to be due by him.

Only one other point has been put forward on behalf of the opposite-party. Learned counsel argues that the Full Bench ruling of this Court on which reliance has been placed for the competency of the present revision has no application because the application itself is really founded not on section 10 of the Code of Civil Procedure but on section 9(5)(*a*) and (*b*) of the Encumbered Estates Act. We do not think that that really affects the issue. Section 115 of the Code of Civil Procedure gives this Court a discretion to make such order in the case as it thinks fit where it is of opinion that the subordinate court has acted in the exercise of its jurisdiction illegally or with material irregularity. We are of opinion that where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encumbered Estates Act, and it elects none-the-less to proceed with the hearing of the suit, it acts with material irregularity, and it cannot be said that when the court passes such an order, as has been passed in the present case, it is any less a case decided because the decision is not with reference to section 10 but with reference to the provisions of the Encumbered Estates Act.

Yorke and Radha Krishna, JJ.

In our opinion therefore the learned Civil Judge was not justified in holding that the trial of the present suit could be proceeded with in spite of the provisions of the Encumbered Estates Act. We accordingly set aside his order and direct that pending the decision of the Special Judge under section 9(5)(*b*) of the Encumbered Estates Act the plaintiffs' suit to recover the amount of his debt from Mohammad Ihtisham Ali shall remain stayed. The applicant will get his costs of this application.

Application allowed.