1928.

KUNJA SUBUDHI v. KING-EMPEROR.

law must be strictly followed and the evidence which is inadmissible must be rejected and wholly excluded from our consideration in deciding the case. We hold that the evidence is insufficient to convict the accused on the charge of murder and we would, therefore, discharge the reference, acquit the two accused persons and, setting aside their conviction and sentence, direct that they be set at liberty.

FAZL ALI, J.

Terrell, C. J.—I agree.

APPELLATE CIVIL.

Before Das and Wort, JJ.

RAJA RAGHUNANDAN PRASAD SINGH

v.

1928.

RAJA KIRTYANAND SINGH BAHADUR*

August, 16.

Execution of decree—surety, whether is a joint judgment-debtor—Limitation Act, 1908 (*Act IX of* 1908), *Schedule I, article* 182.

A surety is not a joint judgment-debtor within the meaning of article 182, Limitation Act, 1908.

Narayan Ganpatbhat Agsal v. *Timmaya Bin Subbaya* (1), followed.

Appeal by the opposite party.

This appeal arose out of an order made by the Subordinate Judge of Monghyr on the 28th of July, 1927, in which he dismissed a decree-holder's claim under section 145 of the Civil Procedure Code for the realization of some 77,000 rupees under a surety bond

*Appeal from Original Order no. 198 of 1927, from an order of Babu Narendra Nath Chakravarti, Subordinate Judge of Monghyr, dated the 28th July 1927.

(1) (1907) I. L. R. 31 Bom. 50.

dated the 7th August, 1919. The circumstances under which the application was made were as follows.

The applicant obtained a decree against the Srinagar Raj on the 31st of August, 1918, for some 14 lakhs and on the 24th October, 1918, he made an application for execution. On the 10th January 1919, there was an application on behalf of the judgment-debtor for stay of execution and the Registrar of the High Court ordered execution to be stayed if the applicant furnished security to the satisfaction of the lower court, the property in execution to be an asset in considering the matter of security. Interest was also to be provided for. The order made by the lower court was taken to the High Court and on the 2nd April, 1919, it was agreed that an order be made in the following terms:—

"Let the respondent's petition for execution now pending be stayed for the period of one year as from the 1st of April, 1919, upon the appellant's furnishing solvent security in the lower court to the satisfaction of the Subordinate Judge by the 1st of May, 1919, for the sum of 1 lakh and 12 thousand rupees. In the event of the appellant's appeal to this Court not being disposed of within the period of one year calculated from the 1st of April 1919, a further stay will be granted for a period of one more year from the 1st of April, 1920, upon the defendant's furnishing security for a further sum of 1 lakh and 12 thousand rupees and such further security being furnished on or before the 1st of April, 1920."

The order of the Registrar and the lower court were set aside. The bond which was the subject matter of this application was made and entered into on the 12th of August, 1919. During the first year of the stay of the execution the security which was provided for by the judgment-debtor was considered by the learned Subordinate Judge to be insufficient. On the 7th of August, 1922, the first execution case, which was commenced on the 25th of October, 1928, was struck out on part satisfaction. On the 14th of March, 1922, a further execution case was commenced. In the meantime and in the year 1921 the High Court disposed of the appeal in the original suit. On the 26th of August, 1925, the sale of the property in execution

1928.

RAJA RAGHUNANDAN PRASAD SINGH v. RAJA KIRTYANAND SINGH BAHADUR.

took place. In December of the same year sale was confirmed in execution. In the meantime, on the 25th of October, 1919, the Judicial Committee of the Privy Council finally disposed of the original suit. In November of 1926, the second execution case was struck out on satisfaction. On the 18th of May 1927, the final decree under Order XXXIV, rule 4, was passed for the balance of the decretal amount being Rs. 72,989-15-2, together with interest amounting to Rs. 8,734-7-6: this made a total of Rs. 81,724-6-8. This balance being outstanding, the application, which was the subject-matter of this appeal, was made on the 25th June, 1927, against the respondent under the surety bond of 1919. The Subordinate Judge dismissed the application and hence this appeal.

A. B. Mukherji and *T. N. Sahai*, for the appellants.

Sir Sultan Ahmed (with him *S. N. Palit*), for the respondent.

WORT, J. (after stating the facts set out above proceeded as follows:)

The main ground upon which the learned Subordinate Judge has decided this matter is on the principle of appropriation. He applies the principle laid down by Order XXXIV, rule 13, that is to say, where the mortgage property is sold at the instance of a subsequent mortgagee with the consent of the prior mortgagee the proceeds are to apply in the following order:

(1) expenses incidental to the sale of the property,

(2) payment due on account of the prior mortgage and costs,

(3) payment of interest on account of mortgage and for payment of principal money due on account of that mortgage.

In this case he states that the decree-holder himself accepted the balance due on account of the principal and his due up to that date of grace otherwise he could not have charged interest on the entire dues from the date of sale to the date of the application

under Order XXXIV, rule 4. The respondent stood surety, he goes on to state, for a portion only of the interest due from the 1st of April, 1919, to 1920. The learned Subordinate Judge appears to have no doubt that that amount had already been realised by the decree-holder by sale of the mortgage property. The question of limitation was also argued and that was decided in favour of the decree-holder. The decree-holder in the appeal relies upon the terms of the surety bond and although the point of limitation was decided in his favour he supports the finding of the learned Subordinate Judge on this point by arguing that in order to resort to the surety it is necessary for him to take all steps against the principal debtor, and that his present application is saved from being barred by limitation by the various applications to execute the decree against the judgment-debtor. His argument is based on section 48 of the Civil Procedure Code. He argues that the application of November 1925 was a fresh application and therefore time begins to run from that date and it matters not whether article 181 or article 182 of the Limitation Act is applicable. This argument in its turn depends on the assumption that the respondent is a principal debtor: that can be said in the circumstances of this case only if he can be considered to be a joint judgment-debtor. In this connection the appellant contends that article 182 of the Limitation Act applies, whereas Sir Sultan Ahmed on behalf of the respondent contends that the relevant article is 181 which gives three years only as the period of limitation. In my judgment however article 182 is applicable. In the first place article 181 is a residuary article for cases to which no other article is applicable. Article 182 is the article which deals with the execution of decrees. By clause (5) of article 182 the period of limitation runs from the date of the final decree or order of the appellate court for execution or some step in aid of execution of the decree. The *Explanation* to the article is that where the decree

1928.

RAJA RAGHUNANDAN PRASAD SINGH v. RAJA KIRTYANAND SINGH BAHADUR.

WORT, J.

or order has been passed jointly against more person than one the application made against any one or more of them or his or their representative, shall take effect against them all. The question therefore resolves itself into the determination of whether, as I have already stated, the respondent is a joint judgment-debtor.

The appellant's argument in this connection is based on the language of section 145 of the Civil Procedure Code. Section 145 enables execution to be taken out against any person who has become liable as surety and the section provides

> " and such person shall for the purposes of an appeal be deemed to be a party within the meaning of section 147."

It is stated that being deemed to be a party under this section involves being a joint debtor within the meaning of article 182 of the Limitation Act. But in my judgment this contention is not well founded. The language of section 147 is explicit and the person who is deemed to be a party is deemed to be such for certain purposes only. On the plain reading of the section it cannot be said that the surety in this case was either a party for all purposes or a joint judgment-debtor. In support of this view there is the case of *Narayan Ganpatbhat Agsal* v. *Timmaya Bin Subbaya* (1). The decision on the words of this whole section of the Limitation Act namely the old article 179 was that the language in that article and article 182 is similar and that it was held in circumstances similar to those in the present case that the decree could not be held to have been " passed jointly." In the circumstances of the case the application to the execution of the surety was held to be time barred. Sir Sultan Ahmad on behalf of the respondent raises two questions. The first that the surety bond was given with respect to interest only and that his client cannot be made liable for the principal. There seems to be no justification

(1) (1907) I. L. R. 31 Bom. 50.

1928.

RAJA RAGHUNANDAN PRASAD SINGH v. RAJA KIRTYANAND SINGH BAHADUR.

WORT, J.

for this argument on the plain construction of the bond. It expressly provides that the surety shall be liable for the sum of Rs. 77,000 or whatever sum may be payable under the said High Court decree 'but' not exceeding Rs. 77,000. The second contention is based on the terms of the bond itself. The surety bond provides that

"If the decree of the first court be confirmed or varied by the appellate court within one year from the 1st of April, 1919, the said defendants shall duly act in accordance with the decree of the said appellate court and they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand."

It also provides that

"If the judgment-debtor fails to furnish security to the extent of rupees one lakh and twelve thousand on the 1st of April in case the appeals be not decided within that date then the decree-holder according to the order of the High Court shall be able to execute their decree with interest and shall be able to realise rupees seventy-seven thousand from me, etc."

The first contingency did not happen, that is to say, the decree was not confirmed or varied finally on the 1st April, 1919, so the provision of that part of the bond is not in point. The second contingency, however, did happen, that is to say, the judgment-debtor did fail to furnish security by the 1st of April, 1920. And in that state of affairs it is contended that the decree-holder was entitled to enforce the bond forthwith and that his cause of action dated from the 1st April, 1920. I think this contention is right and if the period of limitation was three years, as is suggested, the application will be time barred.

The position is that the surety not being joint judgment-debtor the events from which the period of limitation runs in the case of a judgment-debtor do not avail the decree-holder. Time runs therefore from the period at which the surety became liable, in this case in 1st April, 1920, and the application is therefore clearly out of time. The appeal must therefore be dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.