1931

MUSSAMMAT MOTI BAI
v.
THE AGENT, NORTH-WESTERN RAILWAY.

JAI LAL J.

widowed sister who has not remarried does fall within the definition of dependent in the Workmen's Compensation Act; I hold accordingly. There will be no order as to the costs of this reference. Let the records be returned to the learned commissioner.

N. F. E.

Reference answered in the affirmative.

LETTERS PATENT APPEAL.

Before Shadi Lal C. J. and Broadway J.

LACHHMI NARAIN GADODIA, Appellant
versus
RAGHUBAR DIYAL, Respondent.

1931

April 8.

Letters Patent Appeal No. 99 of 1928.

Indian Succession Act, XXXIX of 1925, sections 229, 230. Renunciation by executor—mode of—Doctrine of—whether limited to cases of letters of administration with will annexed. Renunciation—whether can be retracted.

One *R.K.* died in December 1924, leaving a widow and three minor children. In his will he had appointed four persons including *L.N.G.* the appellant and *R.D.* the respondent, his executors. None of them applied for Probate during the widow's life time and in January 1926 the lady applied to be appointed guardian of the persons and property of her minor children. In these proceedings the appellant appeared in Court and declared that he did not wish to perform the duties of an executor and his statement was recorded by the Court and signed by him. The widow died in October 1926, and on the 4th November 1926 the respondent *R.D.* applied for grant of Probate, the appellant, though cited, did not appear and Probate was granted to *R.D.* On 10th May 1927 the appellant applied for Probate to himself to which the re-

1931

LACHHMI NARAIN GADODIA v. RAGHUBAR DIYAL.

spondent objected, mainly on the ground that he had renounced the executorship.

Held, that for the renunciation by an executor named in the will of a deceased person to be effective, it must be in express terms and, as laid down in section 230 of the Succession Act, it may be declared by one of two modes:

(1) by an oral statement made, in the presence of the Judge, by the person making the renunciation; or

(2) by a writing signed by him.

And, that the statement made by the appellant before the Court in the guardianship proceedings and signed by him was clearly a writing signed by him within the meaning of the section.

Held also, that the renunciation described in section 230 is not confined in its operation to cases contemplated by section 229. The doctrine of renunciation is not limited to cases of letters of administration with the will annexed; and when there are several executors, one of them may prove the will, if the other executor or executors has or have renounced the executorship.

Held further, that section 230 shows that in British India a renunciation once made in the presence of the Judge or by a writing signed by the renouncing person is final and precludes such executor from ever thereafter applying for probate of the will. The question must be decided upon the language of the relevant Indian enactment, uninfluenced by any consideration of the previous state of the law or the English law upon which the enactment is founded.

Ramanandi Kuer v. *Kalawati Kuer* (1), and *Brojo Lal Banerjee* v. *Sharajubala Debi* (2), followed.

In the goods of Srimati Golap Sundari Dassi (3), dissented from.

Appeal under clause 10 of the Letters Patent from the judgment of Jai Lal J., dated the 30th March 1928.

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(1) (1928) I. L. R. 7 Pat. 221 (P.C.). (2) (1924) I. L. R. 51 Cal. 745
(3) (1901) 5 Cal. W. N. Clv.

KISHEN DAYAL and JIWAN LAL, for Appellant.

JAGAN NATH AGGARWAL, BISHEN NARAIN, AJIT PRASADA and KIDAR NATH, for Respondent.

1931

LACHHMI NARAIN GADODIA
v.
RAGHUBAR DIYAL.

SHADI LAL C.J.

SHADI LAL C.J.—On 2nd December, 1924, Seth Radha Kishen, a merchant of Delhi, died leaving him surviving a widow, *Mussammat* Inchi, and three minor children. The deceased had, in June 1924, made a will appointing four persons including the appellant, Lachhmi Narain Gadodia, and the respondent, Raghubar Diyal, his executors; but it appears that during the life-time of the widow none of them applied for probate of the will. On the other hand, the lady made an application, on the 28th January, 1926, asking the Court to appoint her to be the guardian of the persons and the property of her minor children. It appears that the appellant was duly notified of the application for guardianship, and it is admitted that he appeared in Court on the 6th August, 1926, and declared that he did not wish to perform the duties of an executor. To the same effect was the statement made by another executor.

Thereupon, *Mussammat* Inchi presented an application for the grant of letters of administration with the will annexed, but she died on the 22nd October, 1926, before the Court could adjudicate upon her application. On the 4th of November, 1926, the respondent Raghubar Diyal applied for the grant of probate of the will to him, and on the 20th January, 1927, a citation was issued to the appellant. He did not, however, appear in Court, with the result that on 22nd March, 1927, probate of the will was granted to Raghubar Diyal.

1931

LACHHMI NARAIN GADODIA *v.* RAGHUBAR DIYAL.

SHADI LAL C.J.

On the 10th May, 1927, Lachhmi Narain Gadodia himself applied for the grant of probate to him, but his application was opposed by Raghubar Diyal mainly on the ground that he had renounced the executorship and was, therefore, precluded from obtaining probate. This objection was upheld by Jai Lal, J., who has dismissed the application made by Gadodia.

The law on the subject of renunciation is embodied in section 230 of the Indian Succession Act (Act XXXIX of 1925) which runs as follows:—

"The renunciation may be made orally in the presence of the judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor."

The renunciation in order to be effective must be in express terms and, as laid down in the aforesaid section, it may be declared by one of the two modes:

(1) by an oral statement made, in the presence of the Judge, by the person making the renunciation, or

(2) by a writing signed by him.

The first question for determination is whether the appellant had renounced his executorship before making the application for probate. He admits that, when examined in the guardianship proceedings, he made the statement referred to above, and there can be no doubt that he declared in unequivocal language that he did not desire to act as executor. Whatever may be the motive which prompted that refusal, the statement was an express declaration of his refusal to assume the responsibility of an executor. The statement was recorded by the Court and signed by

1931

LACHHMI NARAIN GADODIA v. RAGHUBAR DIYAL.

SHADI LAL C.J.

the appellant. It clearly amounts to "a writing signed by the person renouncing" and satisfies all the requirements of the statute.

It is, however, contended that the renunciation, as described in section 230, is confined in its operation to the cases contemplated by section 229. That section provides that when a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship. It is argued that only an executor, who has been served with a citation pursuant to an application for letters of administration *cum testamento annexo*, can make the renunciation in either of the forms prescribed by section 230; and that that section has no application to an executor who has not been called upon by the Court to accept or renounce his executorship. It is, however, clear that the doctrine of renunciation is not limited to cases of letters of administration with the will annexed; and that, when there are several executors, one of them may prove the will, if the other executor or executors has or have renounced the executorship. Indeed, the opening words of section 229 clearly contemplate that an executor may renounce the executorship before any proceedings are instituted in a Court of law or before any citation is issued to him.

What is the law governing the renunciation by such an executor, if section 230 does not apply to him? The learned counsel for the appellant expresses his inability to rely upon any other provision in the statute prescribing the mode of renunciation; and there is no warrant for the suggestion that an

1931

LACHHMI NARAIN GADODIA v. RAGHUBAR DIYAL.

SHADI LAL C.J.

executor, who has not been cited under Section 229, should express his renunciation in some undefined manner.

Nor am I prepared to accede to the contention that the renunciation made by a writing in the absence of the Judge should be addressed to the Court. All that is required by section 230 is that the writing containing the renunciation must bear the signature of the renunciant executor, and we cannot read into the section a condition which is not mentioned there.

The appellant, however, seeks to avoid the result of his renunciation by urging that it is open to him to retract his renunciation before it has been acted upon by the Court. It is true that in England renunciation may be filed and recorded in the Registry, and that until that is done retraction is possible. There is, however, no such provision in the Indian Law. Section 230 shows that a renunciation once made in the presence of the Judge or by a writing signed by the renouncing person is final, and precludes him from ever thereafter applying for probate of the will.

The learned counsel for the appellant places his reliance upon a judgment of a Single Judge in *In the goods of Srimati Golap Sundari Dassi* (1), which is found in an abbreviated form in 5 C. W. N. Clv. That judgment expressly follows the English Law on the subject, but, as pointed out by their Lordships of the Privy Council in *Ramanandi Kuer* v. *Kalawati Kuer* (2), questions of probate law and procedure in India should be determined on an examination of the

(1) (1901) 5 Cal. W. N. Clv. (2) (1928) I. L. R. 7 Pat. 221 (P.C.).

APPELLATE CIVIL.

Before Jai Lal and Abdul Qadir JJ.

DIALU MAL (SURETY-DEFENDANT) Appellant

versus

1931

April 9.

NANDU SHAH-JAI LAL AND OTHERS (PLAINTIFFS)
MOLAK RAM-HANS RAJ AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 1922 of 1926.

Indian Limitation Act, IX of 1908, section 19, Articles 57, 115. Suit against principal debtor and surety for recovery of loan on Bahi *account—the entry fixing no date for re-payment. Section 19—Acknowledgment and part payments by principal debtor—whether effective as against surety. Acknowledgment by surety after lapse of period of limitation. Indian Contract Act, IX of 1872, sections 46, 128—whether applicable.*

On the 10th September 1920, *M.R.-H.R.* borrowed Rs. 3,000 from plaintiffs and signed a *bahi* entry which stated that the loan was taken for trade at Re. 0-13-9 *per mensem* interest, but specified no date for repayment. On the same day, *D.M.*, the surety, wrote to plaintiffs saying that he would pay the sum of Rs. 3,000 taken by *M.R.-H.R.* in case they did not pay the same, and that he would be responsible for it with interest. *M.R.-H.R.* paid three instalments with interest, the last of which was on 17th August, 1923. On 16th August 1924 plaintiffs served *M.R.-H.R.* with a notice that if the loan was not paid within a week, interest would be charged at the rate of Rs. 2 *per cent. per mensem.* The debtor promised to pay the debt on the 19th November, 1924, but did not pay it. On 4th August, 1924, the surety gave a notice to plaintiffs complaining of the principal debtor's failure to pay the debt and warning them to sue and to get attachment before judgment and concluding by saying "we do not hold ourselves liable from this date." The plaintiffs' suit was not, however, instituted until 25th February, 1925, and the surety, who was also impleaded as co-defendant pleaded that as against him the suit was barred

1931

DIALU MAL
v.
NANDU SHAH-JAI LAL.

by time and that even if that was not so, he must be held to be discharged from liability in view of his notice to the creditors. Plaintiffs contended that, as the loan was not on a pro-note, section 46 of the Contract Act governed the case and the limitation should be taken to start at a reasonable time after the loan, and that in any event time started again as against the surety also by the principal debtor's part payments with interest and also by the surety's notice of 4th August 1924.

Held, that the loan became payable at once on the date of it, *vide* article 57 of the limitation Act and the liability of the surety also began to run from the same date, *i.e.* 10th September 1920, the case being governed by article 115 of the Act.

Brajendra Kishore Roy Chowdhury v. *Hindustan Co-operative Insurance Society Ltd.* (1), *Raja Sree Nath Roy* v. *Raja Peary Mohan Mukerjee* (2), and *Charu Chandra Bando Padhaya* v. *Mr. L. Faithful* (3), followed.

Kaloo Singh v. *Mst. Sundera Bai* (4), referred to.

Held further, that even if the surety's notice dated 4th August, 1924, could be construed as an acknowledgment of liability, (which it was not) having been written *after* the period of limitation for the suit had expired, it was valueless, *vide* section 19 of the Limitation Act.

Maganlal Harjibhai v. *Aminchand-Gulabji* (5), followed.

Kahan Chand-Dula Ram v. Daya Ram-Amrit Lal (6), referred to.

Nor did the payments by the principal debtor save limitation against the surety, in the absence of proof that the latter allowed himself to be represented by the person who made the payments.

First appeal from the decree of Chaudhri *Niamat Khan, Senior Subordinate Judge, Kangra at Dharamsala, dated the 28th June 1926, ordering that the defendants do pay to the plaintiffs the sum of Rs. 3,845 with interest.*

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(1) (1917) I. L. R. 44 Cal. 978.
(2) (1917) 39 I. C. 205.
(3) (1919) 53 I. C. 999.
(4) (1926) 95 I. C. 707.
(5) 1928 I. L. R. 52 Bom. 521.
(6) (1929) I. L. R. 10 Lah. 745.

1931

DIALU MAL
v.
NANDU SHAH-JAI LAL.

ABDUL QADIR J.

BADRI DAS, ACHHRU RAM, and J. L. KAPUR, for Appellant.

JAGAN NATH AGGARWAL, and MEHR CHAND MAHAJAN, for Plaintiffs-Respondents.

ABDUL QADIR J.—A firm Nandu Shah-Jai Lal, doing business at Nagrota, in Kangra District, gave a loan of Rs. 3,000 to Molak Ram-Hans Raj of Pathankot on the 10th of September, 1920, and got a *bahi* entry made about it by their debtors on the same day. It was stated therein that the loan was taken for trade, at Re. 0-13-9 *per cent. per mensem* interest, and the entry was signed by Molak Ram on behalf of this firm. No date for re-payment was specified. (This entry is marked as Exhibit P. 1). On the same date *Lala* Dialu Mal wrote a letter to the Nagrota firm, saying that he would pay the sum of Rs. 3,000 taken by Molak Ram-Hans Raj in case they did not pay the same and that he would be responsible for it with interest. (This letter is marked as Exhibit P. 2). Molak Ram paid three items towards interest only, during the three years following the original loan; *i.e.*

Rs. 209 on the 26th of September 1922;
Rs. 134 on the 1st of December 1922;
Rs. 200 on the 17th August 1923;

Total Rs. 543

On the 16th of August, 1924, the creditors served Molak Ram with a notice to the effect that if the loan was not paid within a week, interest would be charged at the rate of Rs. 2 *per cent. per mensem*. The debtor promised to pay the debt on the 19th November 1924, but did not pay it. The plaintiffs, thereupon, instituted a suit on the 25th of February, 1925, against the principal as well as the surety, claiming Rs. 3,000 as

principal and Rs. 1,584-9-9 as interest, and after allowing Rs. 543 already paid by the principal debtor, they prayed for a decree for Rs. 4,041-9-9. This plaint was amended on the 11th of May 1925, the main amendment being as to the date on which the cause of action accrued. On the 20th of August the Court ordered that as the suit against the principal debtor and the surety was based on two separate contracts, a single court-fee on the sum of Rs. 4,041-9-9 was not sufficient. The plaintiffs consequently paid in a court-fee on Rs. 8,083-3-6 and the same sum was shown as the value of the suit for purposes of jurisdiction. This does not appear to be a correct order, as the sum claimed from both the principal debtor and the surety was Rs. 4,041-9-9, but this fact explains why the appeal in this suit has come direct to the High Court instead of going to the Court of the District Judge. The Senior Subordinate Judge of Kangra held the principal debtor, as well as the surety, responsible for the re-payment of the loan and gave a decree for Rs. 3,845 with proportionate costs, against Molak Ram and his firm and against Dialu Mal personally, adding that Dialu Mal would be liable to pay if the sum is not recovered from the other defendants. He also allowed interest at 6 *per cent. per annum* to run on the principal amount of Rs. 3,000 from the date of the suit to the date of realization. The reduction in the amount claimed was due to the fact that the learned Senior Subordinate Judge did not allow interest at a rate higher than Re. 0-13-9 *per cent. per mensem* for any period, while the Plaintiffs had charged it at the rate of 2 *per cent.* after the date of the notice referred to above. Dialu Mal, the surety, has preferred an appeal to this Court against the decree of the Court below.

1931

DIALU MAL
v.
NANDU SHAH-
JAI LAL.

ABDUL QADIR J.

The main pleas of the surety in the Court of first instance were that the suit against him was barred by time and that even if that was not so, he must be held to be discharged from liability, because he gave notice to the creditors that the principal debtor was going away with his property and that they should take steps to recover their money from him but they did not do so. There were some other points raised in the Court below on his behalf, but we need not notice them, as Mr. Achhru Ram, who argued the case for the appellant before us, has confined himself to these two points only.

With regard to the first point, the contention of the counsel for the appellant is that the loan became payable at once under Article 57 of the Indian Limitation Act and therefore the starting point for purposes of limitation was the 10th of September, 1920, and the suit not having been brought till 1925, was time-barred, even though the time against the principal debtor may be taken as extended by the Punjab Loans Limitation Act to six years instead of three. He urges that the case of his client was governed by Article 65 or 115 of the Limitation Act and was not affected by the Punjab Loans Limitation Act. Reliance is placed on *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Limited* (1), in which it was held that the liability of the surety on a promissory note executed by the principal debtor began on the date of the note and was three years from that date, whether Article 65 or 115 of the Limitation Act applied. Another ruling of the Calcutta High Court, *Raja Sree Nath Roy and others* v. *Raja Peary Mohan Mukerjee* (2), is cited, where it

(1) (1917) I. L. R. 44 Cal. 978. (2) (1917) 39 I. C. 205.

1931

DIALU MAL
v.
NANDU SHAH-
JAI LAL.

ABDUL QADIR J.

was laid down that a suit by a creditor against a surety, upon a letter of guarantee executed by the latter in respect of a debt payable on demand on a promissory note, is governed by Article 115 of the Limitation Act and limitation begins to run from the date of the execution of the guarantee, notwithstanding a stipulation in the guarantee to the effect that the creditor may look for repayment to the surety if the principal debtor makes default in payment. So far as the stipulation is concerned, it was very nearly the same in the present case as in the Calcutta case just cited. The learned counsel refers next to *Charu Chandra Bando Padhaya* v. *Mr L. Faithful* (1), which held that as against the surety limitation begins to run from the date of his own contract, and was simultaneous with that of the principal debtor in the case reported and therefore the suit against the surety was barred under Article 115 of the Limitation Act. Reference was also made to a Nagpur case, *Kaloo Singh and another* v. *Mussammat Sundera Bai* (2), showing that under section 128 of the Contract Act the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for by the contract and that a right of action against a surety will generally arise at the same time as a right of action against the principal debtor.

Mr. Jagan Nath, who represents the plaintiffs-respondents, has tried to distinguish the rulings cited by Mr. Achhru Ram and points out that all the Calcutta rulings relied upon referred to promissory notes payable on demand, in which the starting point for limitation is the date of the promissory note and if the surety executed his contract of guarantee on the same

(1) (1919) 53 I. C. 999. (2) (1926) 95 I. C. 707.

1931

DIALU MAL
v.
NANDU SHAH-JAI LAL.

ABDUL QADIR J.

date, the same would be the starting point of limitation *qua* him, but as the loan in question was not on a promissory note, he contends that section 46 of the Contract Act should be held to govern the present case and the limitation should be taken to start at a reasonable time after the loan. I am not impressed, however, by this argument and, in my opinion, this loan did become payable at once on the date of the loan under Article 57 of the Limitation Act and the liability of the surety also began to run from the same date, *i.e.* 10th of September, 1920. The principle laid down in *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Ltd.* (1), *Raja Sree Nath Roy* v. *Raja Peary Mohan Mukerjee* (2) and *Charu Chandra Bando Padhaya* v *Mr. L. Faithful* (3), appears to me to be applicable to the case before us, which, in my judgment, is governed by Article 115 of the Limitation Act.

Mr. Jagan Nath raises another contention in the alternative. He says that even if the limitation started on the 10th of September 1920, Dialu Mal extended the period by his own act, inasmuch as he gave a notice Exhibit P. 4, dated the 4th of August, 1924, to the plaintiffs creditors, acknowledging his obligations. This document is printed at the bottom of page 44 and at the beginning of page 45 of the printed record, and runs as follows :—

" After compliments be it known that Molak Ram-Hans Raj of Pathankot are doing away with the money of outstanding debts which they realize. They have been repeatedly asked, but they do not pay your money. They made many promises, but do not pay the

(1) (1917) I. L. R. 44 Cal. 978. (2) (1917) 39 I. C. 205.
(3) (1919) 53 I. C. 999.

money. Therefore, you should file a suit at once on receipt of this post card and get a warrant of attachment before judgment issued, and get an order of injunction issued in respect of the outstanding debts of Dalhousie, Bakloh, Chamba and Pathankot, and their *haveli* in Akbari Mandi, Lahore, otherwise you will repent. We shall not be liable for anything. Many times on previous occasions we asked you to file a suit against them. We have been saying so for 1½ years. We do not hold ourselves liable from this date."

Mr. Jagan Nath refers to *Kahan Chand-Dula Ram* v. *Daya Ram-Amrit Lal* (1), according to which an unconditional acknowledgment implies a promise to pay. Several other authorities to the same effect on the value of an unconditional acknowledgment are referred to, but they need not be discussed, because this argument is successfully met on the other side by the plea that the notice in question sought to exonerate the surety from liability rather than acknowledge any liability, but even if it can be construed to have the latter effect, it was valueless, because the letter was written after the period of limitation for the suit had expired. In this connection it has been clearly laid down by a Division Bench of the Bombay High Court in *Maganlal Harjibhai and another* v. *Aminchand Gulabji and others* (2), that an acknowledgment of liability to be valid and effective under section 19 of the Limitation Act must be made before the expiration of the period prescribed by the first Schedule.

Another contention of Mr. Jagan Nath is that the period of limitation against the surety was extended by the payments of interest by the principal debtor and

(1) (1929) I. L. R. 10 Lah. 745. (2) (1928) I. L. R. 52 Bom. 521.

1931

DIALU MAL
v.
NANDU SHAH-JAI LAL.

ABDUL QADIR J.

the last payment having been on the 17th of August, 1923, that date must be taken as giving a fresh starting point of limitation, both against the principal debtor and the surety. I am afraid this contention again is untenable. An acknowledgment by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment. This cannot be said to be the case here and the payments of interest by Molak Ram do not help to give a fresh starting point against Dialu Mal.

These findings are sufficient for deciding this appeal and for holding that the suit against the surety is barred by time. I would, therefore, accept this appeal with costs and set aside the decree of the trial Court, so far as it affects the surety Dialu Mal.

In view of the above findings, it is hardly necessary to say anything with regard to the second point raised by Mr. Achhru Ram, that the notice given by Dialu Mal to the creditors on the 4th of August, 1924, had the effect of discharging him from liability. This point has not been stressed before us and I may add that there is no substance in it, as the mere giving of a notice could not have discharged Dialu Mal from liability.

JAI LAL J.

JAI LAL J.—I agree.

N. F. E.

Appeal accepted.