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of fact in the confession but only rejecting an inference, which the appellant wishes to be drawn from the facts and which in our view is patently untenable.

We hold, therefore, that the appellant had a right of private defence against Qurban Ali but that he exceeded it. We, therefore, accept the appeal to the extent of altering the conviction to one under the second part of section 304 of the Indian Penal Code and we reduce the sentence to three years' rigorous imprisonment.

A. N. K.

Appeal partly accepted.

APPELLATE CIVIL.

Before Tek Chand and Dalip Singh JJ.

KISHAN SINGH (JUDGMENT-DEBTOR) Appellant,

versus

PREM SINGH AND OTHERS—Respondents.

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June 26.

Execution Second Appeal No. 1 of 1939.

Indian Limitation Act (IX of 1908), First Sch., Art. 182 — Execution — Application against surety — Whether a step-in-aid of execution of decree against the original judgment-debtor.

Held, that an application against a surety is a step-in-aid of execution of the decree within the meaning of Art. 182 of the First Sch. to the Limitation Act, so as to bring a subsequent application within time against the original judgment-debtor.

Badr-ud-Din v. *Muhammad Hafiz* (1), followed.

Other case-law, discussed.

Second appeal from the order of Mr. S. B. Capoor, Additional District Judge, Ferozepore, dated 13th October, 1938, reversing that of Khan *Abdus*

(1) I. L. R. (1922) 44 All. 743.

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Samad Khan, Subordinate Judge, 3rd Class, Moga, dated 7th February, 1938, and directing that the execution application should be proceeded with according to law.

J. L. KAPUR, for Appellant.

ACHHRU RAM, for Respondent.

Order of Skemp J. referring the case to a Division Bench—

The question in this second appeal is whether an application against a surety is a step-in-aid of execution of the decree within the meaning of Article 182 of the First Schedule to the Limitation Act, so as to bring a subsequent application within time against the original judgment-debtor.

Kesar Singh obtained a decree for Rs.600 and costs against Kishan Singh on the 1st April, 1930, and, on the 25th April, 1930, he took out execution. On the 21st May, 1930, Maghar Singh and Jowahar Singh became sureties for the payment of the decretal amount. On the 10th June, 1930, the judgment-debtor and his sureties failed to appear and the sureties were held liable to pay the decretal amount by order, dated the 6th February, 1932.

On the 2nd June, 1934, an application was made for the arrest of Maghar Singh surety, which was consigned to the record room on the 14th December, 1934.

Kesar Singh, the original decree-holder, sold his decree to two persons, who transferred it to the present appellant, Prem Singh. On the 15th May, 1937, Prem Singh applied for execution of the decree against Kishan Singh, who pleaded that execution was barred by time. The executing Judge held that

the application was so barred, but on appeal the learned Additional District Judge held that it was within time because the application, dated the 2nd June, 1934, against Maghar Singh could be regarded as a step-in-aid. For this view he relied on *Muhammad Hafiz* v. *Muhammad Ibrahim* (1). The judgment-debtor has come here in second appeal.

Admittedly *Muhammad Hafiz* v. *Muhammad Ibrahim* (1) and also *Bachhu Singh* v. *Radhe Lal* (2) are directly in point, and support the lower appellate Court. Mr. J. L. Kapur for the appellant relies on other rulings headed by *Narayan* v. *Timmaya* (3) and including *Birendra Chandra Singha* v. *Tulsi Charan Ghose* (4), *K. S. E. Mohamed Cassim* v. *Jamila Bee Bee* (5), *Curpen Chetty* v. *Ana Mahalingam* (6), *Raghunandan Prasad Singh* v. *Kirtyanand Singh Bahadur* (7), *Kirtyanand Singh* v. *Pirthichand Lal* (8) and *Wazir Baksh* v. *Hari Ram* (9). Of these rulings *Birendra Chandra Singha* v. *Tulsi Charan Ghose* (4) may be distinguished as in that case the surety only gave security as a condition for stay of execution during the pendency of the appeal promising to pay a certain sum in the event of the appeal being dismissed. In the other cases the application relied on as a step-in-aid was an application against the original judgment-debtor and the subsequent application sought to be brought within time was an application against the surety, that is, the facts are the converse of the present case.

It is difficult to say whether any distinction in principle can be drawn between the two cases. The

(1) I. L. R. (1921) 43 All. 152.
(2) I. L. R. (1938) 13 Luck. 353.
(3) I. L. R. (1907) 31 Bom. 50.
(4) (1925) 85 I. C. 657.
(5) I. L. R. (1928) 6 Rang. 334.
(6) (1917) 42 I. C. 100.
(7) I. L. R. (1929) 8 Pat. 310.
(8) (1929) 120 I. C. 315.
(9) 1922, A. I. R. (Lah). 208.

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matter is difficult and doubtful and I refer this case to the Hon'ble the Chief Justice with a view to its being heard by a Division Bench.

The judgment of the Division Bench—

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DALIP SINGH J.—One Kesar Singh obtained a decree for Rs.600 and costs against Kishan Singh. On the 25th of April, 1930, Kishan Singh was arrested in execution of this decree. Maghar Singh and Jowahar Singh stood sureties for the payment of the decretal amount, amounting to Rs.800, if the judgment-debtor failed to appear on the 10th June, 1930. Neither the sureties nor the judgment-debtor appeared on that date and the sureties were held liable by an order, dated the 6th February, 1931. Kesar Singh sold his decree to Bhag Singh and Gurpal Singh and they, in turn, assigned it to Prem Singh.

An application was made on the 24th March, 1934, but as it is not now forthcoming on the record, it is not known against whom it had been made. This application was dismissed on the 1st June, 1934. On the 2nd June, 1934, there was an application against Maghar Singh for his arrest and this was dismissed on the 14th December, 1934. Prem Singh became the assignee of the decree-holder on the 16th February, 1935, and on the 15th of May, 1937, he sought execution of the decree against the original judgment-debtor Kishan Singh. The learned Additional District Judge held three points on the question of limitation, which arose in the case, against the judgment-debtor. He held that the application of the 2nd June, 1934, against Maghar Singh surety for his arrest must be taken as a step-in-aid of execution against the judgment-debtor Kishan Singh. He also

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held that the fact that a notice had issued to the judgment-debtor must also be held to extend time. He further held that as the onus of the issue of limitation was placed on the judgment-debtor and the application of the 24th of March, 1934, dismissed on the 1st June, 1934, was missing, the decree-holder was entitled to assume that it was a step-in-aid of execution against both the judgment-debtor and the surety and, therefore, the present application for execution was within limitation.

On second appeal, the learned Judge sitting in Single Bench has referred the case to a Division Bench for the reason of conflict of authority and the difficulty of the point raised. One of the authorities holding that execution against the surety is not a step-in-aid of execution as against the judgment-debtor is *Birendra Chandra Singha* v. *Tulsi Charan Ghose* (1). This authority, however, seeks to distinguish the facts of the present case, [which are more or less on all fours with the facts in *Muhammad Hafiz* v. *Muhammad Ibrahim* (2) and *Badr-ud-Din* v. *Muhammad Hafiz* (3)] from the facts in that case and expressly purports not to decide a case coming within the purview of *Muhammad Hafiz* v. *Muhammad Ibrahim* (2). It, however, follows *Narayan* v. *Timmaya* (4) and in that case, which has on various occasions been followed in other High Courts, it was held that an application for execution against a surety would not be a step-in-aid of execution against the judgment-debtor. *K. S. E. Mohamed Cassim* v. *Jamila Bee Bee* (5) follows *Narayan* v. *Timmaya* (4). In *Raghunandan Prasad Singh* v. *Kirtyanand Singh Bahadur* (6)

(1) (1925) 85 I. C. 657, 659
(2) I. L. R. (1921) 43 All. 152.
(3) I. L. R. (1922) 44 All. 743.
(4) I. L. R. (1907) 31 Bom. 50.
(5) I. L. R. (1928) 6 Rang. 334.
(6) I. L. R. (1929) 8 Pat. 310.

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the facts are similar to those of *Birendra Chandra Singha* v. *Tulsi Charan Ghose* (1) and the ruling follows *Narayan* v. *Timmaya* (2). In *Kirtyanand Singh* v. *Pirthichand Lal* (3) the *dictum* is really *obiter but Narayan* v. *Timmaya* (2) was applied. The agreement in that case was given by the surety before the decree was passed. In *Wazir Baksh* v. *Hari Ram* (4), a Single Judge of this Court held that execution against the judgment-debtor was not a step-in-aid of execution against the surety. Two other rulings *Sayad Yusuf Ali* v. *Sayad Amin* (5) and *Jamundas Ravuji Sait* v. *Putham Marakar Kandiyil Krishan* (6) were cited. The last case has no bearing, that I can see, on the point before us, and the matter is not further cleared in *Sayad Yusuf Ali* v. *Sayad Amin* (5), which merely follows *Narayan* v. *Timmaya* (2). The learned counsel for the appellant has also relied on an article in 56 M. L. J. at page 27, which criticises the decision in *K. S. E. Mohamed Cassim* v. *Jamila Bee Bee* (7), but the general trend of which is in favour of *K. S. E. Mohamed Cassim* v. *Jamila Bee Bee* (7) and *Narayan* v. *Timmaya* (2) and against the Allahabad rulings already referred to.

The rulings for the proposition that an execution against either the judgment-debtor or surety is a step-in-aid of execution against either the surety or judgment-debtor are found in *Muhammad Hafiz* v. *Muhammad Ibrahim* (8), *Badr-ud-Din* v. *Muhammad Hafiz* (9), *Sadanala Gangaraju* v. *Indraganti Subbayya* (10) and *Bucchu Singh* v. *Radhe Lal* (11). *Honda Ram* v. *Seth Kanwar Bhan-Sukh Nand* (12),

(1) (1925) 85 I. C. 657.
(2) I. L. R. (1907) 31 Bom. 50.
(3) (1929) 120 I. C. 315.
(4) 1922, A. I. R. (Lah.) 208.
(5) I. L. R. (1923) 47 Bom. 778.
(6) 1933, A. I. R. (Mad.) 722.
(7) I. L. R. (1928) 6 Rang. 334.
(8) I. L. R. (1911) 42 All. 182.
(9) I. L. R. (1922) 44 All. 743.
(10) I. L. R. (1935) 58 Mad. 276.
(11) I. L. R. (1938) 13 Luck. 353.
(12) (1922) 67 I. C. 301.

was cited as a Lahore ruling, but as the decree was a joint decree against the surety I do not consider that that case has any bearing.

After hearing counsel on both sides, it appears to me that there is no escape from the dilemma propounded in *Badr-ud-Din* v. *Muhammad Hafiz* (1) by the learned Judges who decided that case. They pointed out that if the order against the surety under section 145, Civil Procedure Code, was to be considered as equivalent to a joint decree against the surety and the judgment-debtor, then Explanation 1 to Article 182 of the Limitation Act expressly covered the case and, therefore, execution against either the judgment-debtor or surety was a step-in-aid of execution against either the surety or judgment-debtor to the extent of the liability. If, on the other hand, the effect of section 145, Civil Procedure Code, was not to be considered equivalent to a joint decree against the judgment-debtor and the surety, then Explanation 1 to Article 182 did not apply at all and the only relevant provision was Clause (5) of Article 182. That Clause expressly stated that a step-in-aid of execution would be any application to execute the decree which had been made according to law. There was no restriction as to the party against whom the execution was sought. By reason of section 145, execution against a surety was considered equivalent to an execution of the decree: Therefore; Clause (5) applied and consequently, any application against the judgment-debtor or surety for execution was a step-in-aid of execution against the surety or the judgment-debtor. To this dilemma, the learned counsel for the appellant has really no reply.

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It might be contended that the real meaning of Clause (6) was that, by necessary implication, the application had to be against the party against whom it was sought to be used as a step-in-aid of execution and that the explanation enlarged the scope of the limited Article to holders of joint decrees. In the first place, this offends against the principle that an explanation does not enlarge the scope of the original section which it is supposed to explain, and in the second place, as pointed out in the Madras ruling, it seems to me just that the surety, who is really the judgment-debtor in another form, should not escape liability by reason of the fact that execution had been mainly sought against the judgment-debtor.

For these reasons, I am of opinion that the argument in *Badr-ud-Din* v. *Muhammad Hafiz* (1) really concludes the matter and, therefore, in the present case the execution against the original judgment-debtor is within limitation by reason of the application for the arrest of the surety made on the 2nd of June, 1934.

It is unnecessary to decide the other two points raised by the learned District Judge, but I must not be taken as expressing any agreement with his decisions.

The result is that the appeal fails and must be dismissed, but in the circumstances I would leave the parties to bear their own costs throughout.

TEK CHAND J.

TEK CHAND J.—I agree.

A. K. C.

Appeal dismissed.

(1) I. L. R. (1922) 44 All. 743.