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section 56 and consequently the only course open to the opposing creditor is to appeal under section 73 from the order granting the discharge. See *Re Blackwell* (1).

I would add that I have referred to two other cases: one *In re Jacob Aaron* (2), where an application was made to set aside an order of discharge upon the ground that it had been granted owing to the Insolvent Court sitting unexpectedly, and the opposing creditor consequently not appearing. That application was refused. A similar application was made in No. 376 of 1895 in which the order of discharge had been granted in consequence of the opposing creditor's counsel being accidentally not present in Court. That application was also refused. The present case is stronger, because the opposing creditor took no notice of the express notice given to him by the Clerk of the Insolvent Court in accordance with the practice in that behalf. Having regard to that practice I do not think the mere filing of the grounds of opposition is a sufficient compliance with Rule 18. I cannot but regret this result, and discharge the rule without costs, which was the course adopted in the cases I have referred to.

(1) (1872) 9 Bom. H. C. Rep., 319. (2) No. 147 of 1894, unreported.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

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October 3.

KUSAJI (ORIGINAL APPLICANT), APPELLANT, *v.* VINAYAK R. PARABHU (ORIGINAL OPPONENT), RESPONDENT.*

Surety—Limitation Act (XV of 1877), Sch. II, Art. 179, Expl. 1—Liability of surety in execution—Application for execution against a surety when a step in aid of execution against a principal—Mode of enforcing payment against a surety—Practice—Procedure.

Vinayak Ramchandra was awarded the sum of Rs. 4,951-13-11 by the District Judge as compensation for land taken up by the Collector under the Land Acquisition Act, 1870. The money was ordered to be paid over to him on his giving security for its refund in case the appellate Court so ordered. Damodar Viziarangam thereupon became his surety and executed a bond binding himself to pay into Court the said sum of Rs. 4,951-13-11, if ordered by the Court. On the

* Appeal, No. 45 of 1898.

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25th September, 1893, the High Court varied the order of the District Court and awarded Rs. 4,204-7-11 (part of the Rs. 4,951-13-11) to another claimant Kusaji Ramji (the appellant). On 17th February, 1894, Kusaji applied for execution of this order against the surety Damodar and claimed also interest (Rs. 1,635-10-0) and costs (Rs. 550-15-4). Damodar objected to pay interest or costs, and the High Court held that, as surety, he was liable only for the principal sum, but not to interest or costs. Subsequently, *viz.*, on the 16th February, 1897, Kusaji applied for execution against the principal debtor Vinayak of the order of the 25th September, 1893, in respect of the interest and costs, contending that his application of the 17th February, 1894, against the surety was a step in aid of the execution of the order under article 179 of the Limitation Act (XV of 1877) and prevented limitation.

Held, that his application was barred by limitation. The application for execution against the surety would not operate to keep alive the order as against the principal debtor unless it was made to enforce a liability which was common to both under the order. But under the order the surety was not liable for interest or costs. His liability was expressly confined by his bond to the principal sum, and it was only as to that sum that he was jointly liable with Vinayak. The previous application, therefore, for execution against the surety for money for which he was not liable under the order, could not be regarded as a step in aid of execution against the principal debtor Vinayak.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit.

APPEAL against the order of W. H. Crowe, District Judge of Poona, in a miscellaneous proceeding.

The Collector of Poona having acquired certain land under the Land Acquisition Act (X of 1870), it was decided that Rs. 4,951-13-11 should be paid as compensation to the owners. Several persons claiming this money, the Assistant Collector referred the adjudication of their claims to the District Judge The Judge decided that the entire sum should be paid to Vinayak Ramchandra (the respondent), but ordered that the money should not be handed over to him until the expiration of the period allowed for an appeal, or till further order, unless he (Vinayak) gave security that he would refund it if ordered.

Accordingly one Damodar Viziarangam Mudliar stood surety for Vinayak, and passed a bond, binding himself, in case of Vinayak's default, to pay into Court the sum of Rs. 4,951-13-11. The material part of the surety bond was as follows:—

"In default, I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11."

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Upon the execution of this bond, the whole sum was paid over to Vinayak.

The other claimants, however, appealed, and in appeal the High Court on the 25th September, 1893, varied the order of the District Judge by awarding the sum of Rs. 4,951-13-11 in different shares to three of the claimants, *viz.*, Kusaji Ramji (the present appellant) and two other persons. The share awarded to Kusaji (the appellant) was Rs. 4,204-7-11. The order was silent as to interest on this sum, but directed that Vinayak should pay Kusaji's costs.

On the 17th February, 1894, Kusaji applied to the District Court for the attachment and sale of the moveable property of the surety Damodar for the purpose of realizing his share (Rs. 4,204-7-11) together with Rs. 1,605-10-0 interest and Rs. 510-15-4 costs. Damodar objected that he was not liable to the interest or costs. The Judge held that he was liable for both. On appeal, however, the High Court on the 15th July, 1895, reversed this order and held that, as surety, Damodar was liable only for the principal sum and not for interest or costs(1).

Kusaji then proposed to recover the interest and costs from the principal debtor Vinayak, and accordingly on the 16th February, 1897, he applied that the original order of 25th September, 1893, against Vinayak (the opponent) should be transferred under section 223 of the Civil Procedure Code (Act XIV of 1882) to the Court of Small Causes at Bombay for execution, stating that Vinayak was a resident of Bombay and claiming the said interest and costs from him in execution of the order. Vinayak (the opponent) contended that this application for execution of the order of 25th September, 1893, was barred by limitation.

(1) In that case Farran, C. J., gave judgment as follows:—

It must be conceded that Vinayak Ramchandra could rightly be ordered to repay the amount paid to him with interest. The question, however, is whether the surety can be ordered to repay more than the principal sum. The material part of the bond, which was passed by the surety, is as follows:—"In default I, Damodar Viziarangam, will, when the Court shall order, repay into Court Rs. 4,951-13-11." Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. We think here that the extent of the obligation of the surety is limited by the express terms of the bond to the precise amount which the surety has in it undertaken to repay. (See Printed Judgments for 1895, page 227.)

The question was whether the application for execution against the surety (Damodar) on 17th February, 1894, prevented limitation against the principal debtor (Vinayak).

The Judge held that the present application was barred by limitation, on the ground that the proceedings against the surety should have been by way of a separate suit and not in execution, that the application of the 17th February, 1894, was, therefore, not in accordance with law, and did not prevent limitation (see article 179 of Limitation Act). In his judgment he said :—

"It is admitted that applicant did apply by application, dated 17th February, 1894, to recover from a surety a certain sum awarded by the decree of the High Court, dated 25th September, 1893. That surety had not under section 253, Civil Procedure Code, become liable prior to the passing of the decree, but under section 516 while the appeal was pending. His liabilities, therefore, could not be enforced in execution of the decree but by separate suit. The various High Courts appear to have held different views with respect to the procedure to enforce a security bond prior to Act VII of 1888, which made express provision with regard to matters coming under sections 549 and 610 of the Civil Procedure Code, but said nothing as to sections 545 and 546. The ruling in *Subjoo* v. *Balmakund*(1) appears to me in point, and by the light of that judgment I cannot hold that the application to enforce a security bond was an application for execution, or to take some step in aid of execution."

Kusaji then appealed to the High Court.

Vinayak S. Bhandarkar, for the appellant (Kusaji) :—Our application of 16th February, 1897, seeks execution against Vinayak of the order of the 25th September, 1893. The application against his surety Damodar on the 17th February, 1894, prevents limitation (article 179, clause 4). That application was a step in aid of execution and was the proper remedy against a surety —*Venkapa* v. *Baslingapa*(2); *Ex parte Bhikaji*(3). The liability of the surety and the principal debtor is co-extensive and joint, and the application for execution against one of two persons jointly liable keeps alive a decree against the other—*Janki Kuar* v. *Sarup Rani*(4); *Thirumalai* v. *Ramayyar*(5).

Trimbak R. Kotwal, for respondent (opponent) :—This application for execution is in respect of interest and costs. The order

(1) (1895) 23 Cal., 212.
(2) (1887) 12 Bom., 411.
(3) (1867) 4 Bom. H. C. Rep., 119 (A. C. J.)
(4) (1895) 17 All, 99.
(5) (1889) 13 Mad., 1.

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of 25th September, 1893, does not give interest. The applicant cannot, therefore, recover it in execution—*Pandarinath* v. *Lilachand*[1]. The application of 17th February, 1894, was not a step in aid of execution, inasmuch as it sought to obtain what was not granted in the order—*Ramchandra* v. *Kondaji*[2] ; *Daya Kishan* v. *Nanhi Begam*[3] ; *Krishnaji* v. *Anandrav*[4].

The liability created by the order was joint so far as the principal sum was concerned, but not as to interest and costs; for while Vinayak as principal debtor was liable to both, the surety was liable to neither. The present application against Vinayak being more than three years after the date of the order is, therefore, barred by limitation, as the application against Damodar, a surety, does not keep alive the order against Vinayak, the principal.

PARSONS, C. J. (ACTING) :—The facts are these : Compensation was awarded to the respondent under the Land Acquisition Act. The appellant, who had made a counter-claim to the compensation, appealed to the High Court. The respondent, when paid the money, gave security for its refund if the appellate Court so ordered. The High Court decided the appeal in the appellant's favour on the 25th September, 1893. The appellant applied in execution on the 17th February, 1894, against the surety alone for the recovery of the principal amount paid with interest on the same and the costs of the litigation. He recovered the principal amount only, as the High Court held that the surety was liable for the amount named in his surety bond only, and not for any interest or for costs : see *Damodar* v. *Kusaji*[5]. He filed his present application on the 16th February, 1897, to have the decree transferred to Bombay, in order to execute it against the respondent to recover from him the said interest and costs.

The District Judge held that the application to execute the decree against the respondent was time-barred, since the application against the surety was not made in accordance with law, citing *Subjoo Das* v. *Balmakund Das*[6]. This High Court, however, has decided that the mode of enforcing payment by a

(1) (1868) 13 Bom., 237.
(2) (1896) 22 Bom., 221 at p. 224.
(3) (1898) 20 All., 304.
(4) (1883) 7 Bom., 293.
(5) P. J., 1895, p. 227.
(6) (1895) 23 Cal., 212.

surety is by summary process in execution, and not by means of a separate suit—*Venkapa Naik* v. *Baslingapa*[1]; and the District Judge ought to have followed that decision of this Court, rather than that of another High Court.

Treating, then, the application against the surety of the 17th February, 1894, as a step properly taken in execution against him, and assuming that he is to be treated as a party to the suit bound by the decree in so far as he was a surety for its due performance, we have to see if the application is one that takes effect against the respondent. The answer to this question depends upon whether the liability under the decree was joint or separate, and as to this there can be no doubt. The surety was not liable either for interest or for costs. His liability was expressly confined by his bond to the principal sum of Rs. 4,951-13-11, which was paid to the respondent, and as to that sum only can there be said to be any joint liability under the combined effect of the decree and the surety bond. For the interest and costs there was but one person made liable under the decree, *viz.*, the respondent.

The case, therefore, is one in which the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, and according to Explanation 1 to article 179 of the Limitation Act, the application takes effect against only such of the said persons as it may be made against. The application of the 17th February, 1894, therefore, does not take effect against the respondent, and the present application to execute the decree is time-barred. For this reason we dismiss the appeal with costs.

RANADE, J.:—I concur. The authorities, cited on behalf of the appellant, only go to show that, where a decree imposes a joint liability upon several persons, execution taken out against any one of them is a step in aid of execution against the rest. In the present case, however, there is admittedly no joint liability in respect of the sum due for interest and costs, which the decree-holder now seeks to recover from his principal judgment-debtor. The surety was not liable for these sums under his bond, and it

(1) (1887) 12 Bom., 411.

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is thus obvious that the previous execution of the decree against the surety cannot be regarded as a step in aid of execution against the principal in respect of the sums now claimed. The District Judge, therefore, very properly held that the execution was time-barred under these circumstances.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898.
October 3.

IN RE BULAKIDAS.*

Maintenance—Husband and wife—Maintenance order obtained by a wife against husband—Subsequent decree for restitution of conjugal rights obtained by husband—Effect of such decree on previous order of maintenance—Criminal Procedure Code (Act X of 1882), *Sec.* 488.

A decree of a civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him, or rather treat it as determined, if the wife failing to comply with the decree for restitution refuses to live with her husband.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

On 22nd May, 1891, Bai Ganga obtained an order for maintenance against her husband Bulakidas under section 488 of the Criminal Procedure Code (Act X of 1882) in the Court of the First Class Magistrate of Ahmedabad.

On the 1st February, 1892, Bulakidas sued Bai Ganga in the Court of the First Class Subordinate Judge of Ahmedabad, and obtained a decree for restitution of conjugal rights.

On 19th September, 1893, Bai Ganga applied to the Magistrate to enforce the order for maintenance and to recover twenty months' arrears of maintenance. Thereupon the arrears were paid into Court by Bulakidas.

On the 25th September, 1893, Bulakidas applied to the Magistrate for a refund of the money so paid into Court, alleging that his wife had returned to his house in obedience to the decree for

* Application for Revision, No. 189 of 1898.