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The second reason given by the learned Judge at first sight creates a difficulty in the way of our interfering, because it would seem that he exercised a discretion, but that discretion was exercised on the basis that a new tenant had been already in occupation of the same shop.

It is asserted by the advocate for the applicant and is conceded by the advocate for the opponent that there is nothing on the record that substantiates that statement; and therefore, so far as the discretion of the learned Judge is based upon that statement, it has no legal foundation. It may be that it is true. If so, it must be proved in the usual way, and if it is proved, then it must be considered having regard to the decisions, what the effect is of this tenancy.

But the result is that we must make the present rule absolute and send back the case to the Fourth Judge in order that he may deal with the application according to law.

Costs will be costs in the application before the Fourth Judge.

*Rule made absolute.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Aston and Mr. Justice Heaton.*

1906. *September* 19.

NARAYAN GANPATBHAT AGSAL (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* TIMMAYA BIN SUBBAYA (ORIGINAL DEFENDANT) AND ANOTHER (ORIGINAL SURETY), RESPONDENTS.*

*Limitation Act (XV of 1877), Schedule II, Article 179, Explanation 1, para. 2—Decree—Jointly passed—Application for execution against surety—Civil Procedure Code (Act XIV of 1882), sec. 253—A decree cannot be treated as "jointly passed" as against the judgment-debtor and his surety.*

Before the passing of the decree in an original suit, N became liable as surety for the due performance of part of the decree. The decree in the original suit was passed in January 1893. The decree-holder filed several applications to execute the decree against the judgment-debtor. All these applications were within the periods prescribed by the Limitation Act (XV of 1877). But it was only in 1902, that he filed an application to execute the decree under section 253 of the Civil Procedure Code (Act XIV of 1882) as against the surety.

* Second Appeal No. 753 of 1905.

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*Held*, that the application to execute the decree against the surety was barred by time, since the decree cannot be treated as passed jointly as against the judgment-debtor and the surety, within the meaning of article 179, Explanation 1, paragraph 2, of the second Schedule to the Limitation Act (XV of 1877).

The words "passed jointly" in article 179, Explanation 1, paragraph 2, of the second Schedule to the Limitation Act (XV of 1877) refer to the decree which is "passed jointly" against more persons than one; and do not mean a decree where a joint liability may be deduced by combining the surety bond and the provisions of section 253 of the Civil Procedure Code, with the decree in dispute.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Kánara at Kárwár, varying the decree passed by J. A. Saldanha, Subordinate Judge at Sirsi.

Application to execute a decree against the surety.

The decree-holder Narayan Ganpatbhat brought a suit against one Timmaya; and during the pendency of the suit attached a debt of Rs. 202 due to Timmaya from one Dajiba Dongre, who was prohibited by an order of Court from paying the amount to Timmaya. This attachment was raised upon Narasinha giving surety before the decree for payment of the amount, *viz.*, Rs. 202 into Court, if so ordered. In the suit, Narayan obtained a decree against Timmaya for Rs. 88-4-0 with interest at 6 per cent.

The decree-holder then on the 12th October 1894 filed a darkhast to execute his decree against the judgment-debtor alone. And he then filed several other similar darkhasts all within the time allowed.

It was not till the 20th June 1902, that he sought to make the surety liable under the decree, when he filed a darkhast against the surety to recover Rs. 202, and against the judgment-debtor to recover the remainder. By this time the decretal debt had already gone up to Rs. 327-9-8.

The Subordinate Judge dismissed the darkhast as time-barred against the surety.

On appeal this decree was confirmed by the District Judge, who reasoned:

"As regards the surety, the case seems to me to be different. No application against him was filed till 20th June 1902; and then no notice was served upon

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him as the decree-holder did not pay the process fees. He is only liable if it is held that he falls within the purview of Explanation 1 to article 179, that is, that the decree was passed jointly against him and the judgment-debtor Timmaya; so that the darkhast application against the latter keep alive the liability of the surety. The surety from exhibit 3 is clearly liable under section 253, Civil Procedure Code, to be proceeded against in execution of the decree against the judgment-debtor. But that decree may be executed against him to the extent of Rs. 202 'in the same manner as the decree against the defendant.' But section 253, Civil Procedure Code, does not warrant the conclusion that a step against the one is tantamount even for the purposes of the Limitation Act, to a step against the other. In fact, the proviso to section 253, Civil Procedure Code, expressly safeguards the surety and militates against such an inference. In this case, up till 1902, the surety had no notice that his liability still existed; and if the Limitation Act provides for the notice to the judgment-debtor every three years at least of his continued liability till the complete discharge of his debt, and does not leave him to presume such continuance, because of his non-satisfaction of the decree, the surety may be presumed to be entitled to at least the same notice and not to be exposed to have his liability sprung upon him after the lapse of any number of years. To put it shortly, I do not think that the law makes such notice to the judgment-debtor tantamount to notice to the surety, much less the decree against the one tantamount to a joint decree against both even with the surety's liability under section 253, Civil Procedure Code, which only gives the decree-holder an alternative remedy against the surety and one which is more expeditious than a regular suit. The principle is, I think, the one laid down in *Kusaji* v. *Vinayak*, I. L. R. 23 Bom. 483 rather than in *Baboo Ram Kishen* v. *Hurkhoo*, 7 W. R. 329."

The decree-holder appealed to the High Court.

*G. S. Mulgaonkar* for the appellant:—The decision of the lower appellate Court is unsound in law. A surety can be proceeded against in execution under section 253 of the Civil Procedure Code (Act XIV of 1882), and in view of *Kusaji* v. *Vinayak*[1], the decree should be held to be joint decree passed against both the judgment-debtor and the surety. See also *Venkapa Naik* v. *Baslingapa*[2] and *Jamsedji* v. *Bawabhai*[3]. Hence, any step-in-aid of execution against the judgment-debtor would operate to keep the decree alive against the surety also.

*Nilkantha Atmaram* for the respondent:—I submit that the decree under execution is not a joint-decree at all. The surety

(1) (1898) 23 Bom. 478 at p. 483. (2) (1887) 12 Bom. 411.
(3) (1900) 25 Bom. 409.

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is not a party to the suit. The decree was passed in 1893 and it was not till 1902 that a darkhast was filed against the surety. The case of *Venkapa Naik* v. *Baslingapa*(1) is not in point: it only decides that a decree-holder can proceed in execution as against the surety: he need not file a separate suit. *Kusaji* v. *Vinayak*(2) also does not help the appellant.

*G. S. Mulgaonkar* was heard in reply.

ASTON, J.:—Respondent No. 2 had, before the passing of the decree in an original suit, become liable as surety for the due performance of part of the decree. The decree in the original suit was passed in January 1893. The first darkhast application, which was made to execute the decree under section 253, Civil Procedure Code, as against the surety was in 1902.

The appellant seeks to take advantage of the previous application for execution made as against the judgment-debtor in order to prevent the bar of limitation. Article 179, Explanation 1, paragraph 2, sets out that "where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all." It has been argued that although the decree in question was not in fact passed jointly against the judgment-debtor and the surety, the appellant should be allowed to take advantage of this provision and to treat the decree as passed jointly as against the judgment-debtor and the surety, because under section 253 there becomes established a statutory joint liability on his part. In support of that contention the case of *Kusaji* v. *Vinayak*(2) was cited, and it is contended that in that decision the decree against the judgment-debtor was treated as a joint decree against the judgment-debtor and the surety. But it is clear on referring to that case, that the judgment expressly describes as assumption the proposition that the surety was to be treated as a party to the suit, bound so far as surety for its due performance: and that case does not decide, that where there is joint liability with the judgment-debtor to be deduced from the decree and surety

(1) (1887) 12 Bom. 411.

(2) (1898) 23 Bom. 478 at p. 483.

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bond and section 253, Civil Procedure Code, combined, there the original decree must be treated as one "passed jointly" against the judgment-debtor and the surety. The words of the explanation to article 179 already read appear to be plain: they refer to the decree which is "passed jointly" against more persons than one, and do not mean as far as we understand them, a decree where a joint liability may be deduced, by combining the surety bond and the provisions of section 253, with the decree in dispute.

The appellant is thus not entitled to take advantage of the previous application for execution of the decree, which he made against the judgment-debtor.

Mr. Nilkanth for the respondent also contended that the decree of the lower Court may be supported on the ground that it can be shown that the District Judge was in error in holding that the decree as against the judgment-debtor, is not also barred. In view of the decision we have arrived as to article 179, Limitation Act, we need not go into this point.

Decree of the lower appellate Court confirmed with costs.

*Decree confirmed.*

R. R.

## ORIGINAL CIVIL.

*Before Mr. Justice Scott.*

1906.
*August* 17.

JAIRAM NATHU (PLAINTIFF) *v.* NATHU SHAMJI AND OTHERS (DEFENDANTS).*

*Hindu Law—Partition—Expenses for ceremonies of brother's sons—Share of step-mother—Value of* stridhan *to be deducted from share—Expenses for ceremonies of grandchildren.*

In a suit for partition brought by a Hindu against his father and brothers, the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses of their prospective thread, betrothal, and marriage ceremonies, such sum to be calculated according to the extent of the family property. A father's wife is on such partition entitled to a share

* Suit No. 841 of 1906.