

The 5th December 1874.

*Present :*

The Hon'ble J. B. Phear and G. G. Morris,  
*Judges.*

**Judgment-debtor's Assets—Liability of Security.**

Case No. 740 of 1874.

*Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 17th March 1874.*

Nowab Syud Villayet Ali Khan  
(Decree-holder), *Appellant,*

*versus*

Shah Ameenooddeen Ahmed and others  
(Judgment-debtors), *Respondents.*

*Mr. M. L. Sandel and Moonshah Mahomed Yusoof* for Appellant.

*Mr. C. Gregory* for Respondents.

Where a judgment-creditor or decree-holder releases his deceased judgment-debtor's representative, into whose hands that debtor's assets have come, and exempts the property in question from execution, he cannot go against property which only became liable by way of security for the due payment of the debt by the principal debtor.

*Phear, J.*—THIS was an application for execution of a decree which was made on the 30th September 1872. In the Schedule to the petition, the decree which was sought to be executed was described as a decree in favor of Villayet Ali Khan against several persons, the heirs of Maharanee Wazeerunnissa and others. The date of the decree was stated to be 10th May 1852 and 3rd February 1869. The parties against whom the execution was sought were named as follows:—"Leyakut Ali Khan for self and as father and guardian of Mussamuts Wahidunnissa and Sharifunnissa, minor daughters of Mussamut Muryum, deceased, and Shah Ameen Ahmed, husband of Mussamut Zamirun, heirs of Maharanee Wazirunnissa, deceased."

The assistance which was wanted from the Court was said to be that:—"The decretal money may be awarded and recovered by the sale of 4 annas of Pergunnah Khujra which is pledged in the decree."

And the petitioner prayed "that the suit may be numbered, the principal amount with interest and costs up to the day of realization may be awarded by attachment and sale of Mehal Khujra as described in this talika. Out of 8 annas of 16 annas of Mehal Khujra, Pergunnah Khujra, pledged

"in security, the right and interest of Maharanee Wazeerunnissa, deceased, original judgment-debtor, 3 annas 6 pie, the right and interest of Rajah Hossein Buksh Khan, one of the judgment-debtors, heir of the said deceased having been exempted, the remaining 4 annas 6 pie, the right and interest of the deceased Maharanee, which is in possession of the said judgment-debtor, her heirs, bearing towjee No. 683 and jumma Rs. 13,672-15-11 may be attached and sold, and the decretal money may be paid."

In answer to this application Hamidonnissa and the minors put in petitions. In the first place, the father and guardian of the minors, by the petition which he filed on their behalf, said that they were not the heirs of Maharanee Wazeerunnissa, that they were not in possession of any of her effects, that the property of the minors could only be held liable for the remaining amount of the decretal money which might remain due after the termination of proceedings against the principal debtor, because it was only liable if at all by reason of its having been made security for the satisfaction of the decree against him.

And the petition filed on behalf of Mussamut Hamidonnissa by her husband was to the same effect.

It was conceded in the argument before us, and indeed is found as a fact in the judgment of the Lower Court, that the persons against whom execution is now sought are not the heirs of the original judgment-debtor, and have not in fact any assets of hers in their hands. But it was maintained that the ancestors of these persons had effectually pledged the property, which was now sought to be attached and sold, as security for the due payment of the decree against Wazeerunnissa, and that it was on that ground liable to be taken in execution and sold. And it was said that Hamidonnissa and the minors had admitted in their petition that it was liable by way of security. On the other hand, it was also beyond contest that assets of the deceased judgment-debtor had come into the hands of one Hossein Bux who was and is her representative; and that the judgment-creditor or the decree-holder had, as he himself states in this very petition of September 1872, released Hossein Bux or exempted the property in his hands from execution. This being so, it seems to us quite plain that he cannot go against the property of the petitioners which was not liable in the first instance, but only at most

became liable by way of security for the due payment of the debt by the principal debtor. And therefore it seems to us that the judgment of the Lower Court dismissing this application is a right judgment.

It is not under the circumstances necessary for us to say whether or not, had the decree-holder established a right to proceed against the pledged property, the proper mode of doing so would have been by way of prosecuting the execution proceedings in the original suit or by a separate suit.

We dismiss the appeal with costs.

The 7th December 1874.

*Present :*

The Hon'ble F. B. Kemp and E. G. Birch,  
*Judges.*

**Rent-suit—Payment in kind—Set-off.**

Case No. 238 of 1873.

*Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 7th July 1873.*

Roy Nundeeput Mohatoon Bahadoor  
(Defendant), *Appellant,*

*versus*

Mr. W. Stewart (Plaintiff), *Respondent.*  
*Mr. C. Gregory* for Appellant.

*Baboo Unnoda Pershad Banerjee* for  
Respondent.

In a suit for arrears of rent where defendant pleaded that under an arrangement between him and plaintiff's ancestors, payment had been made by him in cash or in kind, and asked for an account to be taken, the Lower Court was held to have been wrong in decreeing the suit on the ground that it could not go into evidence on a question of set-off in a rent suit, and was bound to take an account.

*Kemp, J.*—THE defendant Roy Nundeeput Mohatoon Bahadoor is the appellant in this case. He was sued by Mr. William Stewart, the manager of the estate of Baboo Jumona Pershad and others under the Court of Wards, for rent for the year 1277 upon a kubooleut, dated the 24th of November 1861, and a deed of burnonanamah, dated the 19th February 1862. The defendant Roy Nun-

deput does not dispute the kubooleut or burnonanamah, but says that under an arrangement between him and Nidhoo Sooklain, the ancestor of the minors, the wards, which was continued also during the life-time of their father, it was understood as between the lessor and the lessee that a large portion of the jumma payable by Nundeeput Mohatoon, namely, Rs. 15,530, was to be credited against the debt of the lessor to the lessee, the banker defendant appellant, and that the balance of the jumma or Rs. 4,969-4 annas was the huq hajaree of the plaintiff, but that all along from the time of Nidhoo Sooklain, and after her death, from the time of Gooroo Pershad Sookkool, the father of the minor, the ward's business had been carried on between the lessor and the lessee on this footing that the lessee supplied articles to the lessor, and thus paid the rent due either in cash or in kind, or as per "farmaish" or orders of the lessor; and that if an account were taken between the parties, it would be found that so far from the defendant owing anything to the plaintiff, there was a balance due to the defendant by plaintiff.

Now the suit was instituted on the 3rd of June. The defendant was called upon to enter appearance on the 3rd of July. He did enter appearance on the 5th of July, and the Subordinate Judge decided this suit on the 7th of July. The defendant said that there had been a partition in his family, and that the books referring to the matters in question in this suit were in the hands of other members of the family, and he asked the Court for time to produce them. He also applied to the Court to summon Mr. Stewart with directions to produce the books and papers which he had received on taking charge of the ward's estate, which would show that the rent up to 1276 had been paid in cash or in kind by executing orders of the lessor in the way stated by the defendant. The Subordinate Judge has held that this is a pure question of set-off and that he cannot go into all this evidence in a rent suit. He has therefore given the plaintiff a decree.

We think the Subordinate Judge was decidedly wrong in not deciding the question which arose between the parties, namely, whether the rent had not been paid all along in the manner stated by the defendant. If so, he ought to have taken an account and come to a decision as to whether any thing is due to the plaintiff or not. We reverse his decision and remand the case to him for a retrial with reference to the above remarks. Costs to follow the result.