

(1924) 08 CAL CK 0041
In the Calcutta High Court

Kumar Birendra Chandra Singha Bahadur and Others

APPELLANT

Vs

Tulsi Charan Ghose and Others

RESPONDENT

Date of Decision : 04-08-1924

Acts Referred:

Citation : 85 Ind. Cas. 657

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Division Bench

Judgement

1. This appeal arises out of execution proceedings which originally were instituted in the Court of the Subordinate Judge of Hooghly. The predecessor of the present decree-holders (appellants) obtained a rent-decree in respect of a putni against the predecessor of the present judgment-debtors on the 10th August 1909 for Rs. 19,000. Several infructuous proceedings towards execution of these decrees were made to which we need not refer and in 1914 the decree was transferred to the Court of the Subordinate Judge of Howrah for execution. In that Court on the application of the decree-holder in Execution Case No. 1 of 1914, the defaulting tenure was advertised for sale. The judgment-debtors preferred some objections to the execution which were disallowed. They preferred an appeal to this Court and applied for stay of the sale pending the hearing of the, same. The order of this Court was that the sale should be stayed on the judgment-debtors obtaining certain persons to stand as sureties for a sum of Rs. 15,000. The surety-bond was duly executed by four persons and the sale was stayed. The judgment-debtors' appeal was eventually dismissed by this Court on the 20th November 1914. The decree-holder then applied for execution against the judgment-debtors in Execution Case No. 7 of 1915. The tenure was sold but the sale was subsequently set aside. In that execution case no relief was sought against the sureties. The next execution was taken against the sureties only in Execution Case No. 14 of 1915. Some amount was realised by the arrest of one of the sureties and after that the execution proceeding was struck off. Thereafter on the 15th May 1915 in a putni sale at the Collectorate the decree-holder put this putni to sale for rent of a subsequent period (i.e., 1321)

and purchased the same for Rs. 1,000. On 7th, September 1915 the decree-holder again applied for execution in Execution Case No. 21 of 1915 against the sureties only. The sureties raised various objections to execution proceedings against them and the objections were allowed and the execution case dismissed on the 30th September 1915. The decree-holders appealed to this Court and on 23rd August 1918 "it was ordered by consent of parties that the case should be remanded to the Executing Court for ascertaining the amount of damages that the decree-holder might have sustained by the stay of the sale in Execution Case No. 1 of 1914. The Subordinate Judge assessed the damages at Rs. 9,000 and ordered execution for that amount against the sureties. The sureties appealed to this Court against that order and the appeal was allowed on the 2nd July, 1920 and it was held that the sureties were not liable for any amount under the surety-bond in view of its nature and wording. The execution against the sureties was accordingly dismissed on 23rd November 1920. In the meantime, on the 18th August 1916 during the pendency of these proceedings against the sureties the decree-holders had applied for execution in Execution Case No. 24 of 1916 against the judgment-debtors. This execution case was dismissed on 14th February 1917. Farther, during the pendency of the appeal in this Court the original decree-holder died and on 11th January 1919; there was an application for substitution in the proceedings against the sureties by the heirs, and substitution was made after notice to them and to the judgment-debtors on 26th April 1919. There was another execution case started by the appellants against the original judgment-debtors on 3rd August 1921. But it was not proceeded with as during its pendency the present application, which gives rise to this appeal, was made on 10th December 1921 for execution of the decree against the judgment-debtors only. The judgment-debtors preferred objections to this execution on the grounds of want of jurisdiction of the Executing Court and of limitation, With regard to jurisdiction, the Court below found against the respondents and as there is no appeal against that finding, that question is now set at rest. On the question of limitation the learned Subordinate Judge held that the present execution case is barred under Article 182, Limitation Act. Against this decision of the Court below the present appeal is directed.

2. The grounds on which the Court below has based its decision is that as no step was taken by the decree-holders to execute the decree against the original judgment-debtors, within, three years from August 1916, the present execution against them is barred by limitation as the execution taken against the sureties and the substitution in the case against them of the heirs of the original decree-holders did not give a fresh start to the period of limitation as against the principal debtors. Against this view the appellants have taken two main objections.

3. It is argued that the Execution Case No. 21 of 1915 against the sureties which was ultimately dismissed on 23rd November 1920 is effective to save limitation against the judgment-debtors also. It is, therefore, necessary to give a precis of that application. In the first column the names of the appellants-decree-holders

and those of the judgment-debtors and the sureties are mentioned. In the next column the date of the decree is given. In another column the amount of decree is mentioned and there is a statement of the several executions taken against the judgment-debtors as well as the sureties. In the next column which requires mention of the person against whom execution is sought it is stated that the execution is prayed against the sureties only. There is no prayer for execution against the original judgment-debtors. In the next column under, the heading the amount for which execution is sought it is stated that out of Rs. 21,000 odd (the amount payable under the original decree) execution is prayed for Rs. 15,000 together with Rs. 96 being the costs of the execution in the previous execution case against the sureties. Under the column of reliefs sought, prayer is made for the attachment and sale of properties belonging to the sureties. The argument based upon this execution petition is two-fold. It is first argued that if this application is regarded as an application for execution against the sureties only, it yet saves limitation for execution against the principal debtors under the 2nd paragraph, of Explanation I to Article 182 of the Limitation Act. It is contended that the decree should be taken as a joint decree against the judgment-debtors and sureties, and under the clause above, referred to, execution against the sureties keeps alive the right to execute the decree against the judgment-debtors also. In our judgment this contention is without any substance. By the surety-bond the sureties did not undertake to pay any portion of the decretal amount; they agreed only to hold themselves be liable in the sum of Rs. 15,000 if the judgment-debtors were unsuccessful in the High Court. This construction of the surety-bond was accepted by the appellants in their appeal of 1915 before the High Court when they agreed, to a remand to the Court below for determination of the amount of damages which the decree-holders had sustained by the stay of the sale. The second appeal to this Court by the sureties was also fought out on the same footing, in which appeal the decision makes it clear that the liability, of the sureties under the surety-bond was a personal liability, as distinct from the decree. It cannot, therefore, be now maintained that the sureties had rendered themselves liable for any portion of the decretal amount or that they are joint judgment-debtors along with the respondent within the meaning of Article 182 of the Limitation Act. In this view it is not necessary to consider those cases which have gone to hold, that where a surety makes himself liable for a portion of the decretal amount, he becomes one of the persons against whom a joint decree is passed. See *Mohammad Hafiz v. Mohammad Ibrahim* 58 Ind. Cas. 794 : 43 A. 152 : 18 A.L.J. 988 : 2 U.P.L.R. (A.) 376. If any authority is needed for the plain meaning of the words of the Explanation to Article 182, reference may be made to the case of *Narayan Ganpatbhat v. Timmaya* 31 B. 50 : 8 Bom. L.R. 807. There the sureties had made themselves liable for the amount of the claim, but the decree that was subsequently passed was only against the defendant in the suit. It was held that the sureties were not joint judgment-debtors and execution against the judgment-debtors did not save limitation for execution against the sureties. A more direct authority is to be found in *Kusaji v. Vinayak* 23 B. 478 : 12 Ind. Dec.

(N.S.) 318. There the surety had made himself liable for the principal amount but not for interest. Execution was taken against the surety for both the principal and interest, but the claim for interest was disallowed. The decree-holder more than three years after the decree applied for execution against the judgment-debtor for the amount of interest. It was held that the execution was barred as the claim for interest was not common to both the surety and the judgment-debtor and the application for execution did not operate to keep alive the order as against the principal debtor.

4. In this connection a further point taken is that the application for execution in Execution Case No. 21 of 1915 was an application for the execution of the entire decree. Conceding that it was so, the decree not being a joint decree to which Article 182 of the Limitation Act applies, on the authority of *Kusaji v. Vinayak* 23 B. 478 : 12 Ind. Dec. (N.S.) 318 above referred to, execution against the sureties of the decree under which they were not liable did not keep it alive as against the principal debtors. But the execution taken in this Execution Case No. 21 of 1915 was not for the decretal amount but for the sum of Rs. 15,000 for which the sureties had in certain events made themselves liable under the surety-bond. If by intentional or unintentional mistake the appellants described in that application that sum of Rs. 15,000 as a part of the decretal amount, they cannot take advantage of their own misstatement. The final decision of this Court that the sureties were not liable even for the Rs. 15,000 for which execution was sought in Execution Case. No. 21 of 1915 makes the position of the appellants even" worse. The position thus is that it was finally settled that the sureties were not co-judgment-debtors with the principal debtors, or for that matter, judgment-debtors at all.

5. The second contention of the appellants is based on the application made by them in the above execution case on the 11th January 1919 for substitution for the original decree-holder or to be more precise, for permission to carry on the execution in place of the original decree-holder. It appears that on the 11th January 1919 the appellants as executors of the deceased decree-holder applied for substitution. On 1st February, the following order was passed on this application: "Let a formal notice be issued on judgment-debtors to show cause why the heirs of the deceased decree-holder should not be substituted." This notice appears to have been served both on the original judgment-debtors and the sureties. On the 8th March 1919 the order was thus recorded: "Notice duly served and proved; judgment-debtor No. 4 (i.e., a surety) has filed an objection, let it be filed." On these facts it is argued, firstly, that the application for, substitution filed on the 11th January 1919 was a step-in-aid of execution of the whole decree and, therefore, the present application having been presented within three years from the date is within time. It is now well-settled by authority and the law is clear that an application for permission to execute a decree: where the decree-holder on record is dead (duly followed by service of notice) is a step-in-aid of execution which gives a fresh start to the period of limitation, but in this case the question is, will it, in the facts of this case, enure for the benefit of the

substituted decree-holders against the original judgment-debtors or only, against those who were parties to the present proceedings at that time before the Court? The decree was being executed against sureties only and, undoubtedly, the period of limitation began afresh from the date on which the application was presented in respect of any future execution as against them. Does it also operate to keep alive the decree against the principal judgment-debtors? The answer to this question as to all other questions raised by the appellants depends upon the nature of the decree which we have already discussed, namely, whether by persons having given security for a certain sum it became a joint decree as contemplated by Article 182 of the Limitation Act. We have answered this query in the negative and it follows from the opinion we have expressed that any step taken in the above execution case against the sureties cannot be effective against the judgment-debtors. But it is argued, (and this is the second branch of the appellants' contention), that the service of notice of the application for substitution on the original judgment-debtors as appears from the order of 8th March, 1919 should save limitation as against them. But the notice was a notice to the judgment-debtors that the appellants were asking for permission to continue the execution proceedings against the sureties a matter of no concern to them. It is not easy to hold that an act which does not materially affect a party is still effective to give a fresh start of cause of action against such party. Further if it is accepted, (and we hold it was), that the service of notice was a step-in-aid of execution, the same question will arise, namely, execution against whom? To take a concrete example: If a decree is passed against A and B under which their liabilities are separate and several and execution is taken against A, will any step taken in such execution keep alive the decree against B? The question must be answered in the negative. (Article 182, Limitation Act, Explanation I, first paragraph). If under that Article in the hypothetical case stated by us, execution against A does not save limitation for execution against B, a fortiori any step taken in execution against A cannot enure to the prejudice of B. The fact that the judgment-debtors' names were mentioned in the application for execution in Execution Case No. 21 of 1915 does not, in our opinion, affect the question. We accordingly hold that this contention of the appellants must also fail.

6. In this view of the law, though, it may be urged that it is a hard, decision for the appellants we are unable to come to any other conclusion than that this appeal should be dismissed with costs and we order accordingly. We assess the hearing-fee at five gold mohurs.