

(1928) 08 PAT CK 0005

In the Patna High Court

Raghunandan Prasad Singh and Another

APPELLANT

Vs

Kirtyanand Singh Bahadur

RESPONDENT

Date of Decision : 16-08-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145, 47, 48

Citation : AIR 1929 Patna 595 : 120 Ind. Cas. 309

Hon'ble Judges : Wort, J;Das, J

Bench : Division Bench

Judgement

Wort, J.—This appeal arises out of an order made by the Subordinate Judge of Monghyr on 28th July, 1927, in which he dismissed a decree-holder's claim u/s 145, Civil Procedure Code, for the realization of Rs. 77,000 under a surety bond dated the 7th August, 1919. The circumstances under which the application has been made must be stated.

2. The applicant obtained a decree against the Srinagar Raj on 31st August, 1918, for some 14 lacs and on 24th October, 1918, he made an application for execution. On 10th January, 1919, there was an application on behalf of the judgment-debtor for stay of execution and the Registrar of the High Court ordered execution to be stayed if the applicant furnished security to the satisfaction of the lower Court, the property in execution to be an asset in considering the matter of security. Interest was also to be provided for. The order made by the lower Court was taken to the High Court and on 2nd April, 1919, it was agreed that an order be made in the following terms:

Let the respondent's petition for execution now pending be stayed for the period of one year as from 1st April, 1919, upon the appellant's furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge by 1st May, 1919, for the sum of Rs. 1,12,000. In the event of the appellant's appeal to this Court not being disposed of within the period of one year calculated from 1st April, 1919, a further stay will be granted, for a period of one more year from 1st April, 1920, upon the defendants furnishing security for a further sum of Eg.

1,12,000 and such further security being furnished on or before 1st April, 1920.

3. The orders of the Registrar and the lower Court were set aside. The bond which is the subject-matter of this application was made and entered into on 12th August, 1919. During the first year of the stay of the execution the security which was provided for by the judgment-debtor was considered by the learned Subordinate Judge to be insufficient. The terms of this bond will be considered later. On 7th August, 1922, the first execution case which was commenced on 25th October, 1928, was struck out on part satisfaction. On 14th March, 1922, a further execution case was commenced. In the meantime and in the year 1921 this Court disposed of the appeal in the original suit. On 26th August, 1925, the sale of the property in execution took place. In December of the same year sale was confirmed in execution. In the meantime on 25th October, 1919, the Judicial Committee of the Privy Council finally disposed of the original suit. In November, 1926, second execution case was struck out on satisfaction. On 18th May, 1927, the final decree under Order XXXIV, Rule 4, was passed for the balance of the decretal amount being Rs. 72,989 15-2 together with interest amounting to Rs. 8,734 7.6: this made a total of Rs. 81,724-6 8. This balance being outstanding, the application, which is the subject-matter of this appeal, was made on 25th June, 1927, against the respondent under the surety bond of 1919. The learned Subordinate Judge dismissed the application and hence this appeal.

4. The main ground upon which the learned Subordinate Judge has decided this matter is on the principle of appropriation. He applies the principle laid down by Order XXXIV, Rule 13, that is to say, where the mortgage property is sold at the instance of a subsequent mortgagee with the consent of the prior mortgagee the proceeds are to " apply in the following order:

(1) Expenses incidental to the sale of the property; (2) payment due on account of the prior mortgage and costs; (3) payment of interest on account of mortgage and for payment of principal money due on account of that mortgage.

5. In this case he states that the decree holder himself accepted the balance due on account of the principal and his due up to that date of grace: otherwise he could not have charged interest on the entire dues from the date of sale to the date of the application under Order XXXIV, Rule 4. The respondent stood surety, he goes on to state, for a portion only of the interest due from 1st April, 1919 to 1920. The learned Subordinate Judge appears to have no doubt that that amount had already been realized by the decree-holder by sale of the mortgage property. The question of limitation was also argued and that was decided in favour of the decree-holder. The decree-holder in the appeal relies upon the terms of the surety bond and although the point of limitation was decided in his favour he supports the finding of the learned Subordinate Judge on this point by arguing that in order to resort to the surety it is necessary for him to take all steps against the principal debtor, and that his present application is saved from being barred by limitation by the various applications to execute the decree against the judgment-debtor. His argument is based on Section 48, Civil

Procedure Code. He argues that the application of November, 1925, was a fresh application and therefore, time begins to run from that date and it matters not whether Article 181 or Article 182, Limitation Act, is applicable. This argument in its turn depends on the assumption that the respondent is a principal debtor. That can be said in the circumstances of this case only if he can be considered to be a joint judgment-debtor. In this connexion the appellant contends that Article 182, Limitation Act, applies whereas Sir Sultan Ahmad on behalf of the respondent contends that the relevant Article is 181, which gives three years only as the period of limitation. In my judgment, however, Article 182 is applicable. In the first place Article 181 is a residuary article for cases to which no other article is applicable. Article 182 is the article which deals with the execution of decrees. By el. 5, Article 182 the period of limitation runs from the date of the final decree or order of the Appellate Court for execution or some step-in aid of execution of the decree. The Explanation to the article is that where the decree or order has been passed jointly against more persons than one, the application made against any one or more of them or his or their representative, shall take effect against them all. The question, therefore, resolves itself into the determination of whether, as I have already stated, the respondent is a joint judgment-debtor.

6. The appellant's argument in this connexion is based on the language of Section 145, Civil Procedure Code. Section 145 enables execution to be taken out against any person who has become liable as surety and the section provides "and such person shall, for the purposes of an appeal, be deemed a party within the meaning of Section 47."

7. It is stated that being deemed to be a party under this section involves being joint debtor within the meaning of Article 182, Limitation Act. But in my judgment this contention is not well-founded. The language of Section 47 is explicit and the person who is deemed to be a party is deemed to be such for certain purposes only. On the plain reading of the section it cannot be said that the surety in this case was either a party for all purposes or a joint judgment-debtor. In support of this view there is the case of *Narayan Ganpatbhat v. Timmaya* 31 B. 50 : 8 Bom. L.R. 807. The decision on the words of this whole section of the Limitation Act, namely, the old Article 179 was that the language in that article and Article 182 is similar and that it was held in circumstances similar to those in the present case that the decree could not be held to have been "passed jointly." In the circumstances of the case the application for execution against the surety was held to be time-barred. Sir Sultan Ahmad on behalf the respondent raises two questions. The first that the surety bond was given with respect to interest only and that his client cannot be made liable for the principal. There seems to be no justification for this argument on the plain construction of the bond. It expressly provides that the surety shall be liable for the sum of Rs. 77,000 or whatever sum may be payable under the said High Court decree but not exceeding Rs. 77,000. The second contention is based on the terms of the bond itself. The surety bond provides that: "If the decree of the first Court be

confirmed or varied by the Appellate Court within one year from the 1st April, 1919, the said defendants shall duly act in accordance with the decree of the said Appellate Court and they shall pay the sum of Rs. 77,000 or what ever may be payable under the said High Court order not exceeding Rs. 77,000"

8. It also provides that: "If the judgment-debtor fails to furnish security to the extent of rupees one lakh and twelve thousand on the 1st April in case the appeals be not decided within that date then the decree-holder according to the order of the High Court; shall be able to execute their decree with interest and shall be able to realize rupees seventy seven thousand from me etc."

9. The first contingency did not happen, that is to say, the decree was not confirmed or varied finally on the 1st April, 1919, so the provision of that part of the bond is not in point, The second contingency, however, did happen, that is to say, the judgment debtor did fail to furnish security by the 1st April, 1920. And in that state of the affairs it is contended that the decree holder was entitled to enforce the bond forthwith and that his cause of action dated from 1st April, 1920. I think this contention is right and if the period of limitation was three years, as is suggested, the application will be time-barred.

10. The position is that the surety not being a joint judgment-debtor the events from which the period of limitation runs in the case of a judgment-debtor do not avail the decree holder. Time runs, therefore, from the period at which the surety became liable in this case in 1st April, 1920, and the application is, therefore, clearly out of time. The appeal must, therefore, be dismissed with costs.

Das, J.

11. I agree.