

(1929) 07 PAT CK 0027

In the Patna High Court

Raja Kirtyanand Singh and Others

APPELLANT

Vs

Raja Pirthiohand Lal Choudhri

RESPONDENT

Date of Decision : 10-07-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145, 43, 48
Limitation Act, 1963 — Section 15

Citation : AIR 1929 Patna 597 : 120 Ind. Cas. 315

Hon'ble Judges : Macpherson, J;Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—This is an appeal by the decree-holders and the question involved is whether the execution of the decree is barred by limitation, The Court below has held that the execution was barred u/s 48 of the CPC and also under Article 182 of the Indian Limitation Act. The decree-holders have preferred the present appeal.

2. It appears that during the pendency of the suit for rent in which the decree under execution was passed the plaintiffs applied for attachment of the defendants' property before judgment and the present respondent stood surety for the defendants and executed a zamanatnama dated the 19th September, 1912, whereby he stood surety in the sum of Rs. 2,00,000 and undertook that in case the defendants failed to pay the decretal amount that may be awarded to the plaintiffs in the suit then he (the surety) shall pay the entire decretal amount principal with interest and cost. The suit, which was No, 15 of 1912, was ultimately decreed on compromise on the 1st of April, 1914. It appears from the decree that the surety, who was not a party to the suit, appeared through a Pleader and agreed to the decree being passed under the terms of the compromise arrived at between the plaintiffs and the defendants in the suit. By this compromise decree the defendants were made liable to the plaintiffs for a sum of Rs. 1,84,521 besides future interest thereon at 8 annas per cent par mensem and one of the terms of the compromise was that the plaintiffs shall not take out execution of the decree till the 31st of March, 1915. The compromise

also recited that the petition was filed with the consent of the surety Babu Pirthichand Lal Chaudhury, in attestation and approval whereof the signature of his Pleader was affixed. This compromise was accepted and a decree was passed in terms thereof.

3. The decree was executed not less than six times before the present execution. The first application for execution was made in 1915 and it was registered as Execution Case No. 8 of 1915, It was struck off on the 24th of June, 1915. The second application for execution, which was No. 25 of 1918, was filed on the 10th of September, 1918, and was struck off on the 25th of March, 1919. The third application for execution was No. 26 of 1919, filed on the 10th of April, 1919, and was struck off on the 24th of February, 1920. The fourth application which was registered as No. 83 of 1923, was filed on the 15th of May, 1923, and was struck off on the 8th of June, 1923. The fifth application, which was registered as No. 113 of 1923, was filed on the 11th of June, 1923, and struck off on the 30th of March, 1926. There was another application for execution in June 1925 but we have not got any materials in respect thereof in the present record. The present application for execution was filed on the 13th July, 1927. Under the terms of the compromise the plaintiffs were not entitled to take out execution of the decree till the 31st of March, 1915. The right to execute the decree, therefore, accrued on the 1st of April, 1915, and the present application, which was filed in July 1927, was beyond twelve years of the date when the right to execute the decree accrued, and it is, therefore, contended on behalf of the surety, against whom the decree is sought to be executed, that the execution is barred by the provisions of Section 48 of the Code of Civil Procedure. It is further contended on his behalf that the fourth application for execution, which, was filed on the 15th of May, 1923, was beyond three years from the previous application which was filed on the 10th of April, It may be noted that all the previous applications were against the judgment-debtors and the surety was not a party to any one of the previous execution, The decree is sought to be executed against the surety for the first time by the present application of July 1927. The learned Subordinate Judge has given effect to the objection of the surety and has held that the decree is incapable of execution.

4. A number of points of law as well as of fact have been argued by the learned Counsel on both sides. It is, however, hardly necessary to consider all of them as the decision of the learned Subordinate Judge on the submission that the decree is barred u/s 48 of the CPC appears to be correct. Section 48 prescribes that where an application to execute a decree of the nature now under execution has been made no order for the execution of the same shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed, or, where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. The present application for execution has been made after the expiration

of twelve years from the date of default in making the payment of the money as directed in the compromise decree, even if it be taken to be 1st April, 1915. The case, therefore, comes directly within the provisions of Section 48 of the Code of Civil Procedure.

5. Reliance, however is placed on behalf of the decree holders on Sub-section (2) of Section 48 which provides as follows:

Nothing in this section shall be deemed:

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve year, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Article 180 of the Second Schedule to the Indian Limitation Act, 1877".

6. It is contended on behalf of the appellants that the execution of the decree was prevented by fraud within the meaning of this sub-section and that, therefore, the bar of twelve years provided in Sub-section (1) does not apply. In support of this contention reference is made to the order sheet-(Ex. D) of the Court of the Subordinate Judge of Monghyr in Suit No. 225 of 1920 and to the decision of the High Court in Civil Revision No. 371 of 1922 (Ex. C).

7. It appears that in a suit (No. 225 of 1920) brought by Rani Jograma against Kumar Kalikanand Singh and others a receiver was appointed to take charge of the properties belonging to the defendants in that case who are the judgment-debtors under the decree in execution in the present case. The present decree holder applied on several occasions to the Subordinate Judge who had appointed the receiver in Suit No. 225 of 1920 for permission to execute the decree against the properties in the hands of the receiver. The first application in this regard was filed on the 7th of November, 1921. The learned Subordinate Judge in effect refused to grant the permission and asked the decree-holders to wait. The last order of the Subordinate Judge in the order-sheet (Ex. D) is dated the 16th of September, 1922, and thereunder he directed the present decree-holders to wait for some time for payment of their decree. Against this order of the 16th of September, 1922, the decree holders applied to this Court in revision and this Court by Us order dated the 16th of April, 1923,, set aside the order of the Subordinate Judge and gave the decree-holders leave to execute the decree in due course of law against the properties in the hands of the receiver. It is contended by Mr. Sen on behalf of the appellants that the decree-holders were prevented by fraud on the part of the judgment debtor from executing the decree and the time from the 7th of November, 1921, when the decree-holders made their first application before the Subordinate Judge for permission to proceed against the receiver, up to the 16th of April, 1923, when the High Court granted them such leave, ought to be excluded.

8. In order to succeed, the appellants have to prove that they were prevented from executing the decree by reason of fraud or force on the part of the judgment-debtors. There is absolutely no evidence on this record to show that the judgment debtors had any hand in preventing the execution of the decree against the properties in the hands of the receiver. All that the order-sheet of the Subordinate Judge shows is that the receiver made certain representations to him which induced the Subordinate Judge to direct the decree-holders to wait. In the absence of any evidence to connect the judgment-debtors with the orders passed by the Subordinate Judge, I am of opinion that the decree-holders are not entitled to take advantage of the provisions of sub-s. (2) of Section 48 of the CPC and to urge that the bar of twelve years' limitation does not apply because the judgment-debtors by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application. Moreover, it is to be noticed that the application of the decree-holders to the Subordinate Judge was for permission to proceed against the properties in the hands of the receiver. That was only one mode of execution of the decree now sought to be executed. It was open to the decree-holders to proceed in execution of the decree against the surety. The order of the Subordinate Judge did not operate as a total stay of the execution of the decree. There was nothing to prevent the decree-holders from taking out execution of the decree against the surety even when the Subordinate Judge refused to give permission to proceed against the properties in the hands of the receiver. Furthermore, there was nothing to prevent the decree-holders from proceeding in execution against the original judgment debtors' persons and other properties. The Subordinate Judge merely refused to give permission to proceed against the properties in the hands of the receiver and, it was, therefore, open to the decree holders to proceed either against the persons and other properties of the original judgment-debtors or against the surety. Sub-section (2) of Section 48, therefore, is of no help to the decree holders and does not prevent the operation of Sub-section (1) to Section 48.

9. It is next contended on behalf of the appellants that they are entitled to exclude the period from the 7th of November, 1921, up to the 16th of April, 1923, during which they were prevented from taking out execution against the properties in the hands of the receiver under the provisions of Section 15 of the Indian Limitation Act. This section provides as follows:

In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

10. In my opinion this section has no application to the present case. There was no stay of the execution of the decree by injunction or order during the period stated above within the meaning of Section 15 of the Indian Limitation Act. This

section to my mind contemplates an absolute stay of execution which renders the decree-holder incapable of taking out execution of the decree. The order of the Subordinate Judge referred to above did not operate as a complete or absolute stay of the execution of the decree. All that it amounted to was a refusal to give permission to proceed against the properties in the hands of the receiver. As observed above it was open to the decree holders to proceed against the surety or against the persons and other properties of the original judgment-debtors. There was, therefore, no stay of the execution within the meaning of Section 15 so as to entitle the decree-holders to exclude the period from the 7th of November, 1921, to the 16th of April, 1923.

11. In this view of the case it is not necessary to consider the argument of the learned Counsel for the appellants that Section 48 of the CPC is controlled by Section 15 of the Indian Limitation Act. Several authorities have been cited on both sides on the question whether the word "prescribed" in Section 15 of the Indian Limitation Act means prescribed by the Limitation Act or whether it covers also the period of limitation prescribed by Section 48 of the Code of Civil Procedure, and also on the question whether Section 48 of the CPC does prescribe any period of limitation at all. The following cases have been cited on one side or the other:

Phoolbas Koonwur Lalla v. Jogeshur Sahoy 1 C. 226 : 25 W.R. 285 : 3 I.A. 7 : 3 Sar. P.C.J. 573 (P.C.), Jurawan Das v. Mahabir Dube 44 Ind. Cas. 24 : 40 A. 198 : 16 A.L.J. 71, Shyam Karan v. Collector of Benares 52 Ind. Cas. 742 : 42 A. 118 : 17 A.L.J. 1140 and Krishna Dayal Gir v. Sakina Bibi 34 Ind. Cas. 27 : 20 C.W.N. 952 : 2 P.L.W. 370 : 1 P.L.J. 214.

12. In view of my finding that Section 15 has no application to the present case it is not necessary to consider whether Section 48 of the CPC is controlled by Section 15 of the Indian Limitation Act. Had it been necessary to come to a finding on the point I would have been inclined to take the view that Section 43 of the CPC is not controlled by Section 15 of Indian Limitation Act and that the only exception to Sub-section (1) is that contained in Sub-section (2). But as it is not necessary to decide the point in the present appeal (1)I refrain from considering the question in the present case.

13. In this view of the case it is also not necessary to consider whether the application is barred under Article 182 of the Indian Limitation Act. The ground upon which the surety contends that the execution is barred under Article 182 is that the fourth application for execution was barred by limitation and also on the ground that the previous executions were directed only against the original judgment-debtors and not against him. The appellants refer to Expl. (1) to Article 182 where it is provided 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 affect them all. The question for consideration is whether in the present case the surety may be considered to be a person against whom the decree was jointly passed in the

present case. It is clear on the terms of the decree itself that there was no decree passed against the surety. The surety becomes liable under the terms of his bond and execution can be taken out against him under the provisions of Section 145 of the Code of Civil Procedure. Mr. P. K. Sen, however, on behalf of the appellants refers to *Mohammad Hafiz v. Mohammad Ibrahim* 58 Ind. Cas 794 : 43 A. 152 : 18 A.L.J. 888 : 2 U.P.L.R. (A.) 376. In that case the learned Judges held that the surety was not a person against whom the decree had been jointly passed within the meaning of the words in the first Explanation to Article 182. Their Lordships, however, held that the decree-holders were entitled to the benefit of Clause (5) of the Article. In *Badrudin v. Muhammad, Hafiz* 77 Ind. Cas. 129 : 44 A. 743 : 20 A.L.J. 726 : AIR 1922 All. 481 Piggott, J., in further proceedings in the same case affirmed the view taken by him in the earlier case in *Mohammad Hafiz v. Mohammad Ibrahim* 58 Ind. Cas 794 : 43 A. 152 : 18 A.L.J. 888 : 2 U.P.L.R. (A.) 376. In *Honda Ham v. Firm Seth Kanwar Bhan Sukh Nand* 67 Ind. Cas. 301 : 4 U.P.L.R. (Lah.) 70 : AIR 1922 Lah. 457 : 38 P.W.R. 1922 : 74 P.L.R. 1922 a single Judge of the Lahore High Court held that a surety is a person against whom a decree is jointly passed within the meaning of the Explanation to Article 182. The respondent relies on *Narayan Ganpatbhat Agsal v. Timmaya* 31 B. 50 : 8 B. L.R. 807 which is a distinct authority for holding that the decree could not be said to have been passed jointly against the judgment-debtors and the surety, and on *Birendra Chandra Singha v. Tulsi Charan Ghose* 85 Ind. Cas. 657 : AIR 1926 Cal. 267 where the Calcutta High Court held that a surety does not become a joint debtor with the principal judgment-debtor within the meaning of the second paragraph of Expl. (1) to Article 182; and further that an application to take a step-in-aid of execution, which gives a fresh start to the period of limitation, saves limitation only as against the judgment debtor against whom the application is made and not against the person who is not a joint judgment-debtor. This Court has held in *Raghunandan Prasad Singh v. Kirtyanand Singh* 120 Ind. Cas. 309 : 8 Pat. 310 that a surety is not a joint judgment-debtor within the meaning of Article 182 of the Limitation Act. It is to be noted that the surety in that case was the present decree-holder and the original judgment-debtors in that case were the present principal judgment-debtors. On a consideration of all these authorities I am of opinion that the surety is not a joint judgment-debtor within the meaning of the Explanation to Article 182 and accordingly the previous execution cases against the principal judgment-debtor do not save limitation as against the surety by reason of the Explanation to Article 182. However, it is not, as I have said, necessary to decide the point for the purpose of the present appeal.

14. The result is that the appeal must be dismissed with costs.

Macpherson, J.

15. I agree