

1919.

SHRINIWAS-  
DAS  
LAKSHMI-  
NARAYAN  
v.  
RAM-  
CHANDRA  
RAMRATTAN-  
DAS.

were at the time permitted by the Government. It was indeed impossible to give any "convincing, logical or theoretical reason" for holding them opposed to public policy. It was however felt that they amounted to "trafficking in one branch of the currency during the great war" and that they, therefore, must have been opposed to the public financial policy, which "might be mistaken or might be unwise" and wherein experts notoriously differ, because that trafficking was subsequently prohibited by the Government. These were surely strong reasons for applying the dicta of the English Judges and for leaving the exposition and protection of the public financial policy to the Executive Government and the Legislature. There was, in my opinion, no substantial justification for holding that those dicta should be disregarded by Judges in India and that public policy should be interpreted under section 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India.

Solicitor for appellants : Mr. N. C. Dalal.

Solicitor for respondents : Mr. G. B. Pandya.

*Appeal allowed.*

G. G. N.

## APPELLATE CIVIL.

*Before Mr. Justice Shah and Mr. Justice Hayward.*

1919.

June 16.

CHOLAPPA BIN GATTINHA SAUNA AND OTHERS (ORIGINAL DEFENDANT AND OPONENTS), APPELLANTS, v. RAMCHANDRA ANNA PAI (ORIGINAL PLAINTIFF AND APPLICANT), RESPONDENT\*.

*Civil Procedure Code (Act V of 1908), section 145—Execution of decree—Sureties of judgment-debtors—Application to enforce liability against*

\* Second Appeal No. 1014 of 1916.

*sureties—Application made within three years of the date of final appellate decree is in time—Indian Limitation Act (IX of 1908), Article 182.*

1919.

When an *ex parte* decree was set aside against the defendant, the appellants became sureties for him. The suit was re-tried and a decree was passed against the defendant on the 22nd March 1907. On appeal, the decree was confirmed by the District Court on the 15th April 1908 and by the High Court on the 13th February 1911. On the 20th December 1913, the decree-holder applied for a transfer of the decree for execution, when the sureties (appellants) contended that the execution as against them was time-barred as no application for execution was made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy:—

CHOLAPPA  
v.  
RAM  
CHANDRA.

*Held*, that the execution was not time-barred and that the sureties were liable to be proceeded against in execution under Clause 2 of Article 182 of the Indian Limitation Act, 1908.

SECOND appeal from the decision of E. H. Leggatt, District Judge of Kanara, reversing the order passed by B. G. Kadkol, Subordinate Judge at Sirsi.

Execution proceedings.

In 1901, the plaintiff obtained an *ex parte* decree against the defendant in the Subordinate Judge's Court at Sirsi. The *ex parte* decree was, on defendant's application, set aside and the appellants stood sureties for him for fulfilment of the decree. The suit was re-tried; and the trial Court passed a decree against the defendant on the 22nd March 1907. On appeal, this decree was confirmed by the District Court on the 15th April 1908, and by the High Court on the 13th February 1911.

On the 20th December 1913, the plaintiff applied to the Sirsi Court for transfer of the decree to the Bellary Court for execution, and joined the judgment-debtor and also the sureties as parties to those proceedings. The sureties contended that so far as they were concerned the application was time-barred, because their liability to pay arose when the trial Court passed its decree and no application had been made against them within three years of the date of the decree.

1919.

CHOLAPPA

v.

RAM  
CHANDRA.

The first Court upheld the contention of the sureties, on the following grounds :—

The contending opponents incurred their liability at the date of the original decree alone and their liability could not be affected by their principals preferring appeals from the said decree. The appeals could, at the most, determine the extent of their liability alone. Under the circumstances of the present case and in view of the wording in the surety bond, it is obvious that they could not have preferred any appeals from the original decrees. Under the provisions of section 145 of the Code of Civil Procedure of 1908, the decree-holder can, immediately after the passing of the decree, take out execution against them. This the decree-holders and the applicant have failed to do. They have not kept the decree alive against the contending opponents and under the provisions of Article 182, clause 1 of Schedule I to the Limitation Act, execution against these persons is clearly barred. Explanation 1 to the said Article refers to the decree which is passed jointly against more persons than one and does not refer to a decree where a joint liability can be deduced by combining the surety bond and the provisions of section 145, Civil Procedure Code, with the decree in dispute, *vide* 8 Bom. L. R., page 807. The case is sought to be distinguished from the present one on the ground that the decree of the original Court which inflicted upon the sureties the liability and which proceeded on the ground common to the principal-debtor and the sureties was appealed against and that the liability continues to be the same at the date of the final appeal. I quite fail to see the force of this reasoning. It is obvious that the liability of the contending opponents was not revived in the course of the appeals preferred against the original decree and that the terms of the surety bond clearly indicate that the liability incurred by them could not be extended any further.

This order was on appeal reversed by the District Judge on the following grounds :—

— A surety's liability continues in spite of the fact that an appeal has been preferred from the original decree and that the original decree has become merged in the decree of appellate Court : *Narayan Dev v. Gajanan Dikshit* (10 Bom. H. C. 1) and *Shek Suleman v. Shivram Bhikaji* (I. L. R. 12 Bom. page 71).

In the present case the sureties entered into a contract binding themselves to pay a certain sum if defendant failed to pay the amount awarded against him by a decree of the Sirsi Court. The Sirsi Court did pass a decree and that decree has been confirmed on appeal. If therefore the defendants fail to pay the sureties will be liable, and apart from any special provision for the

enforcement of that liability the decree-holder would bring a suit against the sureties. But section 145, Civil Procedure Code, provides a special method of enforcing the liability of the sureties, viz., by executing the decree against him. And this although he is not actually a party to the decree, for he is only to be deemed a party for purposes of appeal.

So far as the liability of the sureties is concerned, it is the decree of the Sirsi Court with which execution is concerned, and in considering the question of limitation we may leave out of consideration the application to execute the decree against the judgment-debtor and may assume that the judgment-debtor has made default and that, therefore, the decree is now capable of execution against the sureties. In order to discover whether the application to execute against the sureties the decree of the Sirsi Court passed on 22nd March 1907 is in time, we have to refer to Article 182 of the Limitation Act. That Article provides that the period of limitation for an application for execution of a decree shall be three years from the date of the decree, or, where there has been an appeal, from the date of the final decree of the appellate Court. But the present application, dated the 20th December 1913, is within three years of the decree of the High Court (in second appeal), dated the 13th February 1911, and it is therefore in time.

The sureties appealed to the High Court.

*Coyajee with A. G. Desai*, for the appellants :—We say that the execution of the decree is barred by time as against us. For under the surety bond we were bound to pay the amount that was decreed by the Sirsi Court when the suit was re-tried; and our liability arose on 22nd March 1907 when the decree by that Court was passed. We could not have appealed against that decree. The decree-holder need not have waited till the decision of the High Court. It was competent to him to give his Darkhast as against the sureties on the day following the decree: see section 145, Civil Procedure Code.

The case falls under Article 182, clause 1, neither the judgment-creditor nor the judgment-debtor can extend the time to my prejudice. No doubt the decree of the Sirsi Court became merged in the decree of the Appeal Court: But though it became so merged, their

1919.

---

CHOLAPPA  
v.  
RAM-  
CHANDRA.

1919.

CHOLAPPA  
v.  
RAM-  
CHANDRA.

liability did not cease which arose from the decree of the Sirsi Court: *Shek Suleman v. Shivram Bhikaji* <sup>(1)</sup>. The principle of the case of *Narayan v. Timmaya* <sup>(2)</sup> applies though the case itself is distinguishable.

*Nilkant Atmaram*, for the respondent-decree-holder:—The period of limitation, viz., of three years should be computed from the date of the final decree in appeal and the case falls under Article 182, clause 2 and not clause 1. For clause 1 would apply only where there is no appeal. But if there is an appeal, clause 1 has no application at all, and the case would fall under clause 2. Whether the surety was a party to the suit, or whether he could have appealed from the original decree or not are foreign to the consideration as to which is the starting point for computing limitation. Directly the appeal decree is passed he has no right to execute the decree of the trial Court. It becomes merged in the appeal decree which is the only executable decree: *Sakhalchand Rikhawdas v. Velchand Gujar* <sup>(3)</sup>. I say “the Court” used in the surety bond is intended to include “First Appeal Court” and also “Second Appeal Court”. For an appeal is by way of re-hearing of a suit: *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* <sup>(4)</sup>.

Suit, appeal, second appeal are really but steps in a series of proceedings connected by an intrinsic unity: per West J, in *Chinto Joshi v. Krishnaji Narayan* <sup>(5)</sup> cited in *Gopal v. Rajaram* <sup>(6)</sup>.

The appeal to the District Court and the second appeal to the High Court were nothing but steps in the action or proceeding already instituted. The case of *Narayan v. Timmaya* <sup>(2)</sup> is distinguishable. It was not a case

<sup>(1)</sup> (1887) 12 Bom. 71.

<sup>(2)</sup> (1906) 31 Bom. 50.

<sup>(3)</sup> (1893) 18 Bom. 203.

<sup>(4)</sup> [1912] A. C. 788 at p. 801.

<sup>(5)</sup> (1879) 3 Bom. 214.

<sup>(6)</sup> (1911) 14 Bom. L. R. 14 at p. 17.

under clause 1 or clause 2 of Article 182 of the Indian Limitation Act, but under clause 5 which is controlled by Explanation 1 of the Article. Therefore the case has no application here.

1919.

---

CHOLAPPA  
v.  
RAM-

SHAH, J.:—In this case an *ex parte* decree was originally passed against defendant No. 1 in Suit No. 342 of 1901; but that *ex parte* decree was set aside and the suit was ordered to be re-tried on the defendant No. 1 furnishing security. Two persons, who are now represented by the present appellants, stood sureties for the amount that the Court, in which the suit was filed, i. e., the Sirsi Court, might find the defendant liable for. Ultimately a decree was passed by the Sirsi Court against the defendant No. 1 on the 22nd March 1907 for a certain amount. The defendant appealed to the District Court, which, subject to some variation, with which we are not now concerned, confirmed the decree of the trial Court on the 15th April 1908. In second appeal this Court confirmed the decree of the District Court on the 13th February 1911. The decree-holder applied for a transfer of the decree for execution against the sureties, on the 20th December 1913. The sureties contended that the execution as against them was time-barred as no application for execution was made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy. The first Court allowed this contention; but in appeal the District Court has disallowed it and has ordered the Court of first instance to proceed with the application against the sureties according to law.

In the appeal before us the same contention has been raised on behalf of the sureties: I am of opinion that the view taken by the District Court is right. It is

1919.

CHOLAPPA  
v.  
RAM-  
CHANDRA.

clear from section 145 of the Code of Civil Procedure that the decree-holder has a right to execute the decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The Article which governs the applications for execution is Article 182 of the first Schedule of the Indian Limitation Act. The Article prescribes three years' limitation from the date of the decree or where there has been an appeal from the date of the final decree of the appellate Court. The execution of the decree is clearly not time-barred, if the period of limitation begins to run from the final decree of the High Court in Second Appeal. Under this Article the decree-holder has clearly a right to proceed against the sureties within the time allowed under clause 2 in the third column.

It is contended, however, that the sureties undertook to satisfy the decree of the Sirsi Court, that they have nothing to do with the appeal preferred by the defendant, to which they were not parties and that the application is governed by clause 1 and not clause 2. I do not think that this contention is sound. For instance, if the defendant's appeal had succeeded, the sureties would have taken the benefit of the appellate Court's decree in favour of the defendant. It cannot be said that when they stood sureties for the defendant in the trial Court they could not have contemplated the possibility of an appeal which would be an ordinary incident of the litigation which was re-opened with their assistance at the instance of defendant No. 1, and which would have the effect of extending the time from which the limitation would begin to run according to the Indian Limitation Act. The fact that the sureties would not be parties to the appeal could not make any difference.

Mr. Coyajee has relied upon the decision in *Narayan v. Timmaya*<sup>(1)</sup>; but that decision is based upon the consideration of the explanation applicable to clause 5 in the third column. It has nothing to do with the point arising in this case. I do not think that that case lends any support to the contention that in determining the date from which the prescribed period of limitation under Article 182 should run in the present case, clause 1 only should be considered and that clause 2 can have no application, as the sureties were not parties to the appellate Court's decree. I would dismiss the appeal and confirm the decree of the lower appellate Court with costs.

HAYWARD, J.:—I concur. The applicants became sureties for the execution against defendants of the decree of the original Court. Their liability would be enforceable to the extent to which they have rendered themselves personally liable in the manner provided for the execution of decrees under section 145 of the Civil Procedure Code. They were, therefore, liable to be proceeded against, within the ordinary period prescribed by limitation for the execution of such decrees. That period has been prescribed by Article 182 of the First Schedule to the Limitation Act. They have claimed to be governed by the 1st clause of that Article and they have contended that execution has become time-barred against them as more than three years have elapsed since the date of the decree of the original Court. They have contended that the 2nd clause applies only to parties who have appealed, and that it is only in the case of parties who have appealed that execution can be brought within three years of the date of the final decree of the appellate Court. It seems to me that their contention is unsound and

1919.

---

CHOLAPPA  
v.  
RAM-  
CHANDRA.

<sup>(1)</sup> (1906) 31 Bom. 59.

1919.

CHOLAPPA  
v.  
RAM-  
CHANDRA.

contrary to the plain and wide words of the clause, and that view was held in the similar case of defendants who had not appealed in *Shivram v. Sakharam*<sup>(1)</sup>. It seems to me, therefore, that the execution was not time-barred and that the appellants were liable to be proceeded against in execution under clause 2 of Article 182 of the First Schedule of the Indian Limitation Act. I am of opinion, therefore, that the appeal must be dismissed with costs.

*Appeal dismissed.*

R. R.

---

### CRIMINAL REFERENCE.

---

*Before Mr. Justice Shah and Mr. Justice Hayward.*

EMPEROR v. VISHVANATH VISHNU JOSHI.\*

1919.

June 20.

*Criminal Procedure Code (Act V of 1898), section 190—Cattle Trespass Act (I of 1871), section 20—Magistrate—Cognizance of offences—Special authority to try cases under the Cattle Trespass Act.*

A Magistrate, who is authorized under section 190 of the Code of Criminal Procedure, 1898, to take cognizance of offences upon receiving complaints, can take cognizance of complaints under section 20 of the Cattle Trespass Act, 1871, although he is not specially authorised in that behalf.

THIS was a reference made by J. Ghosal, District Magistrate of Satara.

The accused was charged with an offence under section 20 of the Cattle Trespass Act, 1871, and placed for trial before the Second Class Magistrate of Patan. The Magistrate acquitted the accused under section 245 of the Criminal Procedure Code, 1898.

<sup>(1)</sup> (1908) 33 Bom. 39 at p. 43.

\* Criminal Reference No. 8 of 1919.