

*Privy Council Appeal No. 110 of 1936*

*Allahabad Appeal No. 1 of 1935*

Haji Maula Bux - - - - - *Appellant*

*v.*

Abdul Latif, since deceased (now represented by Musammat  
Badre Munir *alias* Musammat Bismilla and others) - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1939.

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*Present at the Hearing :*

LORD MACMILLAN.

SIR GEORGE RANKIN.

MR. M. R. JAYAKAR.

[*Delivered by* LORD MACMILLAN.]

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In this appeal the point for decision arises on a few simple facts. It appears that Mohammad Raza and Haji Maula Bux were in partnership under the firm name of Whitfield & Co. The partnership was dissolved on the 5th May, 1926, and on the 14th November, 1927, Messrs. Bevis & Co., who were creditors of the dissolved firm, instituted through Babu Bhagwan Das a suit in the Court of the First Subordinate Judge at Cawnpore against the dissolved firm, Whitfield & Co., and its two partners, Mohammad Raza and Haji Maula Bux. The claim of the plaintiffs in that action was for a decree for 8,548 rupees with interest and costs. After the action had proceeded for some time a compromise was arrived at and a decree was passed which forms the subject of the present controversy. The material part of the decree is as follows:—

“ The parties have compromised on the terms that the claim of the plaintiff be decreed for a lump sum of 8,000 rupees with future interest at 6 per cent. per annum with the condition that the defendant No. 1 ”—that is Mohammad Raza—“ would pay to the plaintiff the said decretal amount in instalments of 200 rupees per mensem. The first instalment to be due on 4th March, 1929, and the other instalments would fall due on the 4th of each coming month of English calendar. In case of default in payment of six instalments the plaintiff would be entitled to take out execution against defendant No. 1, and the plaintiff would realise his money from defendant No. 1 by taking out execution (of his decree). Defendant No. 2 ”—that is Haji Maula Bux, the present appellant—“ would in every way help the plaintiff in the execution. If within two years from the date of the first execution the decretal amount is not realised in any way, i.e., through attachment of property,

moveable and immoveable, and by the issue of the warrant of arrest from defendant No. 1 in spite of the help of defendant No. 2, the plaintiff would be entitled to realise from defendant No. 2 that part of the decretal amount which would remain due, and the latter would be entitled to realise (that amount) from defendant No. 1 in any way he likes."

That decree having been pronounced, Mohammad Raza failed to pay any instalments, and when on 4th August, 1929, he made default in payment of the sixth instalment the plaintiff became entitled to take out execution against him.

The question is whether the steps taken by Bhagwan Das to enforce the decree against Mohammad Raza have been such as are contemplated in the decree, and such as to entitle him now to proceed against Mr. Parikh's client. On the expiry of the six months, it certainly cannot be said that the plaintiff tarried at all because by the 15th August, 1929, he is found already in Court taking active steps to enforce the decree against Mohammad Raza.

The facts found by the learned Sessions Judge on this matter are as follows:—

" We find as a matter of fact that the decree-holder only filed two execution applications against Mohammad Raza. The first was on 15th August, 1929. This was for arrest of Mohammad Raza. On 5th December, 1929, Mohammad Raza applied for time being allowed to him to pay up. The decree-holder agreed to give him three months and accordingly the execution proceedings were shelved. After the expiry of this period execution by way of arrest was renewed but it was found that judgment-debtor Mohammad Raza had left India and gone to Persia. The execution application was therefore shelved and consigned to records. It appears that Mohammad Raza returned about July, 1930. The second execution application was moved on 13th October, 1930. This was also for arrest. The notice could not be personally served as it was reported that Mohammad Raza was out of Cawnpore."

Their Lordships thus observe that the plaintiff twice endeavoured to enforce the judgment against Mohammad Raza by way of execution. It is complained with regard to the first execution application, upon which Mohammad Raza appeared and asked for time, that the plaintiff ought not to have agreed to allow him three months in which to pay. Their Lordships do not think that that complaint has any foundation because it may well have been that the plaintiff was assured that if the three months delay were given the money would be forthcoming; at any rate, this not being a case of suretyship, there was no reason why the decree-holder should not allow three months time if he thought that by so doing he was more likely to get payment.

The first execution application, however, proved abortive because after the expiry of the three months, when it was proposed to proceed by way of arrest, the judgment-debtor Mohammad Raza had left India and gone to Persia and was therefore out of the jurisdiction. Mohammad Raza having returned home the plaintiff on the 13th October, 1930, again applied for execution and on this occasion he applied also for arrest. It appears from the record of the proceedings that the first notice of that application was returned unserved,

because although the judgment-debtor is stated to have been present at his house service could not be effected. Undeterred by this, the plaintiff applied to the Court for a notice of arrest of the judgment-debtor to be again issued, and upon that matter coming before the Subordinate Judge at Cawnpore, the pleader for the decree-holder stated that the judgment-debtor had gone out and could not be arrested; in stating that he had "gone out" he meant he had left the jurisdiction and therefore service could not be effected.

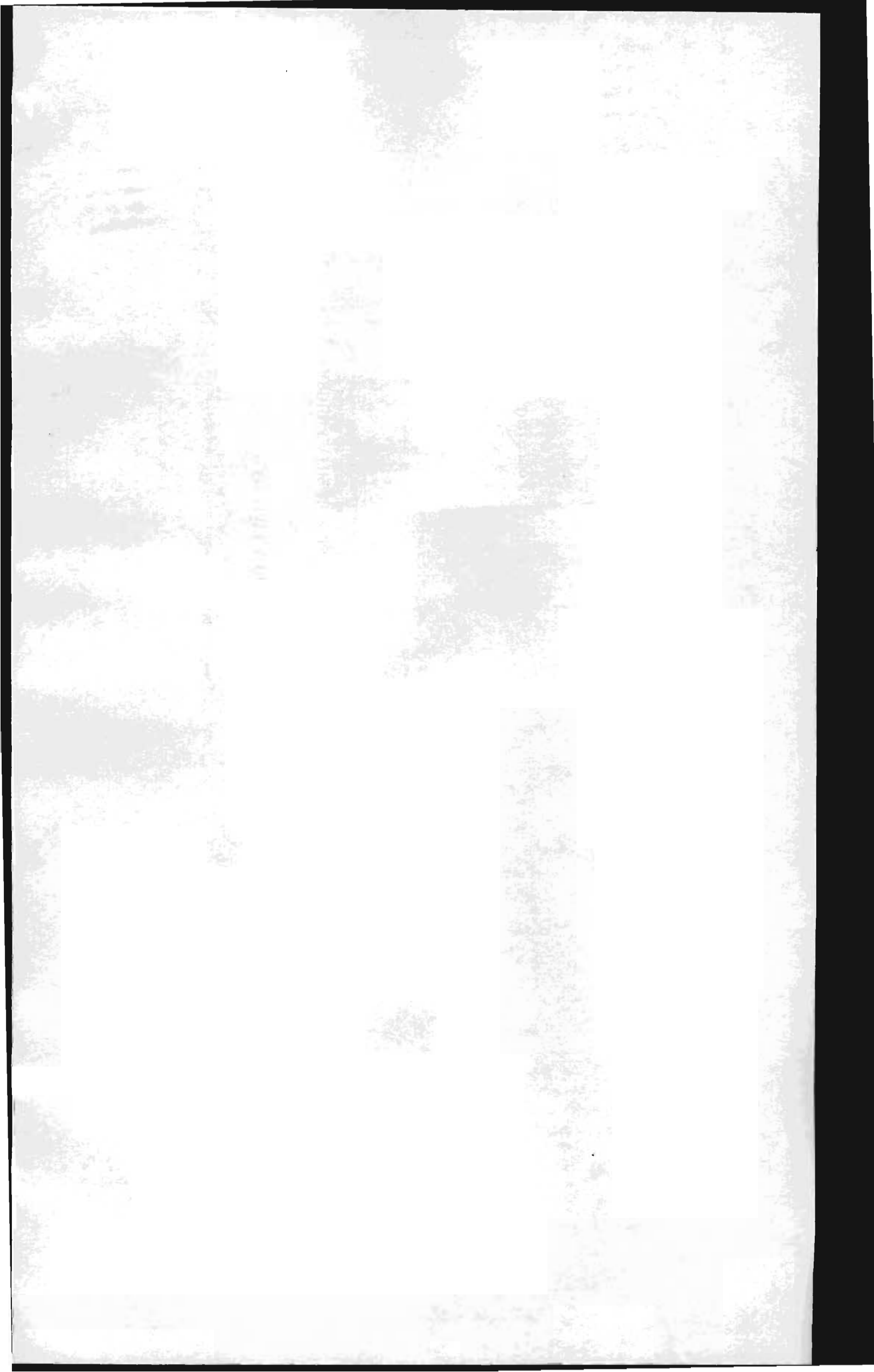
It appears to their Lordships that by taking these steps, by twice applying for execution and twice being foiled in his attempts to recover the money, the plaintiff showed reasonable and due diligence in carrying out the terms of the decree which put upon him the duty of doing his best to recover the money from Mohammad Raza. It will be noticed from the decree that Haji Maula Bux was to give his assistance to the plaintiff in the matter of the recovery of the money. There has been some comment as to whether he really gave adequate assistance or not, and there is a letter in the record complaining that active assistance was not given. Their Lordships, however, do not attach much importance to that aspect of the case. It is very significant, as justifying the action of the plaintiff in not proceeding to further extremes, that contemporaneously another creditor of Mohammad Raza was also in the field, namely, the Punjab National Bank, a creditor not affected by any personal considerations in the matter and concerned merely to recover a debt due to the bank, which was a substantial debt of 12,000 or 13,000 rupees. A representative of the bank gave evidence and stated that the bank had done their best against Mohammad Raza and had taken out no less than eight or nine executions against him, all of which had proved abortive—apparently because whenever it was sought to arrest him Mohammad Raza had disappeared and could not be found. The representative of the bank also stated that they had made investigations as to the property of their debtor and had been unable to find that he had any assets worth attaching or capable of attachment. As the bank failed entirely to recover anything, their Lordships may reasonably assume that if Bhagwan Das had persisted further in his proceedings he would have been equally unsuccessful.

The last act in the drama is an application by Mohammad Raza to have himself declared insolvent, and a declaration to that effect was granted on the 5th August, 1932. There is a report on record by the Official Receiver which indicates that, after realisation of everything which was possessed by the debtor, a sum in all of 350 rupees was realised which, in view of the state of indebtedness of the debtor, as he had many other creditors, would provide quite a negligible dividend to the decree-holder. It should be mentioned, by the way, that the decree had, before the present proceedings were raised, been transferred to one Abdul Latif, since deceased, who is now represented by the present respondents.

The question therefore comes to be the quite short one whether the plaintiff showed due diligence within the meaning of the decree in proceeding against Mohammad Raza. If he is found to have done so but without effect, then the liability in execution proceedings of the present appellant emerges. It is important to bear in mind that the compromise decree was a decree against both the debtors, and that the present appellant was therefore himself a debtor thereunder, though with this indulgence that his co-debtor was to be proceeded against in the first instance. The learned Sessions Judge came to the conclusion that the plaintiff had not shown sufficient diligence. He was, however, obviously to some extent influenced by his understanding, which he states in his judgment, that the appellant had himself obtained a decree against Mohammad Raza and recovered a sum of 16,000 rupees from him. It now appears that that was a misapprehension on the part of the learned Sessions Judge and that in point of fact the 16,000 rupees were not obtained from Mohammad Raza, but from Mohammad Raza's mother-in-law, whose property had apparently been hypothecated in some fashion. On the other hand, the High Court at Allahabad reviewed the circumstances again and came to the conclusion that all reasonable efforts had been made by the decree-holder to have the decretal amount satisfied by Mohammad Raza.

Their Lordships see no reason to differ from the view which was taken by the High Court and, in the whole circumstances of the case, they are satisfied that the condition precedent to the liability in execution of the appellant was satisfied and that the judgment of the High Court should be affirmed.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed with costs.



In the Privy Council

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HAJI MAULA BUX

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ABDUL LATIF, since deceased (now represented by Musammât Badre Munir *alias* Musammât Bismilla and others)

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DELIVERED BY LORD MACMILLAN

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