

(1911) 08 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 528 of 1910

Bidhu Sekhar Bandopadhyaya

APPELLANT

Vs

Sudhury Mahatabuddin and Another

RESPONDENT

Date of Decision : 03-08-1911

Acts Referred:

Citation : (1911) 08 CAL CK 0004

Final Decision : Dismissed

Judgement

1. This is an appeal by the decree-holder against an order of the first Court confirmed by the lower Appellate Court, allowing the judgment debtors to pay by installment of ten rupees per mensem, the amount decreed under Or. 34, r. 6 corresponding to sec. 90 of the Transfer of Property Act, 1882. It is urged that Or. 20, r. 11, which provides for payment by instalment, is not applicable to the case of decrees in mortgage suits, and that in the circumstances of this case, the order for payment by instalments, postponing the satisfaction of the decree for a term of about seven years is bad as not passed in the exercise of a proper judicial discretion.

2. No reported authority cited to us is in point. The case of Shankarapa Dargo Patel v. Danapa Virantapa ILR 5 Bom. 604 (1881) was decided before the passing of the Transfer of Property Act, and no doubt, it lays down that the indulgence granted by sec. 210 of the former CPC only applies in cases to which the section strictly applies, that is to say, in cases where decrees are passed in money suits. There is an observation, however, in the judgment of Melvill, J., from which we gather that a decree for payment by instalments may be passed where the decree is against an agriculturist personally, though not a decree for the recovery of money by the sale of the agriculturist's immoveable property. In the present case, there can be no question that the decree passed against the judgment-debtor is a personal decree; it is also a decree for the payment of money.

3. Or. 20, r. 11 says-"Where and in so far as a decree is for the payment of

money, the Court may, for any sufficient reason at the time of passing the decree, order that the payment of the amount decreed shall be postponed or shall be made by instalments, with, or without, interest notwithstanding anything contained in the contract under which the money is payable." The rule does not say "where and in so far as the decree is passed in a suit for the recovery of money; " nor does the "contract" under which the amount decreed was payable exclude an original mortgage contract. In the circumstances of Or. 34, r. 6, the decree is no longer directed against the mortgaged property; but in virtue of the contract, it binds the judgment-debtors personally. The decree has been passed under Or. 34, r. 6 in accordance with the judgment, and the general provisions relating to judgments and decrees embodied in Or. 20 undoubtedly cover the decree based on an antecedent judgment, which is allowable under Or. 34, r. 6.

4. Furthermore, the decree now passed must be executed under the general provisions of the Code, and we cannot regard Or. 34 as self-contained. We cannot say that because there are no provisions for payment by instalments in the Or. 34, the general provisions of Or. 20, r. 11 do not apply. Viewing the decree, as it appears, to be a decree for the payment of a definite sum of money, we think that it was open to the lower Appellate Court to pass the order it has passed in favour of the judgment-debtors. The first contention, therefore, is overruled.

5. The second contention is one which we cannot entertain in second appeal. The case relied on, *Balgobindram Bhakat v. Chhedilal Saha* 11 C.L.J. 431 (1910), was not a second appeal but a rule in which the judgment of a Small Cause Court Judge, permitting the decretal amount to be paid by instalments, was sought to be modified, and the learned Judges held that the discretion under Or. 20, r. 11 must be exercised in a judicial manner. We think that, in second appeal, the question of discretion cannot now be gone into. It is, perhaps, somewhat anomalous that the decree-holder should be kept out of his money for seven years; but, on the other hand, he has already recovered a substantial sum nearly double the amount of his original debt-so that the hardship complained of is more apparent than real. The appeal, accordingly, fails and is dismissed with costs. We assess the hearing fee at two gold mohurs.