

(1940) 02 AHC CK 0004
In the Allahabad High Court

Chaube Mahendra Rao and Others

APPELLANT

Vs

Lala Bishambhar Nath and Others

RESPONDENT

Date of Decision : 01-02-1940

Acts Referred:

Citation : AIR 1940 All 270 : (1940) 10 AWR 281

Hon'ble Judges : Bajpai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bajpai, J.—This is an execution first appeal by the judgment-debtors. It came for hearing before a Division Bench on 10th May 1939 when that Bench came to the conclusion that the matter was of great importance and merited a reference to a Full Bench. Certain questions of fact had not been determined satisfactorily by the trial Court and therefore an issue was remitted to the Court below. The Court below returned its findings on the said issue and when the matter came again before the Division Bench on 6th November 1939 the papers were directed to be laid before the Hon'ble Chief Justice for the constitution of a Full Bench. The case has now come before us and we have come to the conclusion that the appeal ought to be dismissed. When the execution matter was before the Court below and when the appeal came for hearing before the Division Bench there was the authority of the Full Bench decision of this Court reported in Gobardhan Das Vs. Dau Dayal and learned Counsel for the parties contended that the observations of the Full Bench supported them. Since then there has been a decision of their Lordships of the Privy Council reported in AIR 1939 80 (Privy Council) and it appears to us that this decision concludes the matter in favour of the decree-holders respondents.

2. On 29th March 1924 the respondents obtained a final decree for sale from the Court of the Subordinate Judge of Mainpuri. The first application for execution was made on 6th March 1926 and was for the recovery of Rs. 46,346-13-0 by sale of the mortgaged property. The 20th October 1926 was fixed for sale, but a

day previous, that is on 19th October 1926, the parties arrived at a compromise. Under this compromise the decree-holders gave up a small sum of money and received Rs. 6000 in cash with the result that there was a balance of Rs. 41,000 outstanding against the judgment-debtors. The stipulation was that Rs. 2000 were to be paid on 19th December 1926 and the balance was to be paid by annual instalments of Rs. 7000 each, the first instalment being payable on 8th December 1927. It was provided that if any instalment was not paid the result of the instalments could be recovered in a lump sum by auction sale of the hypothecated property in respect whereof a final decree had already been passed and in which decree the said property stood advertised for auction sale. The compromise was presented by the parties and by their pleaders before the Court and the prayer was that an order for postponement of the auction sale may be sent to the Collector's Court at Etawah. It might be mentioned at this stage that the property being ancestral the sale was being conducted through the agency of the Collector.

3. As usual, in cases of this kind, some moneys were paid from time to time by the judgment-debtors, but the instalments were not paid on due dates nor in full measure. Out of the sum of Rs. 2000 payable on 19th December 1926, Rs. 1500 were paid on 19th December 1926 and Rs. 500 were paid on 12th January 1927. Out of the sum of Rs. 7000 payable on 8th December 1927, Rs. 2500 were paid on 26th December 1927 Rs. 2500 were paid on 5th June 1928 and Rs. 2000 were paid on 19th December 1928, it would thus appear that there was a default in the payment of the first instalment due on 8th December 1927; the default in connexion with the payment of Rs. 2000 due on 19th December 1926 may be ignored inasmuch as that cannot be considered as an instalment under the compromise. On 14th February 1931 the decree-holder certified payment of Rs. 9000 under Order 21 Rule 2 Civil P.C., and on 23rd February 1931 the decree-holders filed the present application for execution and it is this application which has given rise to this appeal. It was contended on behalf of the judgment-debtors in the Court below and it is contended again before us that the decree-holders' application for execution dated 23rd December 1931 is barred by time. It is further submitted that the compromise that was effected between the parties on 19th October 1926, more than six months after the passing of the decree, was outside the competence of the executing Court and the parties cannot be bound by the same. In connexion with the plea of limitation, it was pointed out that the present application was more than three years from the first application and it was also more than three years from the first default. The submission was that the whole sum became due on 8th December 1927 when under the compromise the first instalment fell due and was not paid.

4. As we said before, both these contentions on behalf of the judgment-debtors can be repelled on the authority of the Privy Council decision to which reference has been made already. In this case their Lordships point out at p. 487 that the learned Judges of the Chief Court relied upon the Full Bench case of the Allahabad High Court, Gobardhan Das Vs. Dau Dayal They go on to say:

This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of Section 47 involve that questions relating to such terms may fall to be determined by the executing Court.... They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties' right under the decree and the executing Court u/s 47 has jurisdiction to ascertain its legal effect and to order accordingly. It may or may not be that any and every bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term "adjustment"; on that their Lordships do not pronounce.... If...the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with u/s 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.

5. It is thus clear that their Lordships recognized the jurisdiction of an executing Court to record an adjustment entered into between the decree-holder and the judgment-debtor. This is what has been done in the present case and the rights of the parties have got to be determined in accordance with the agreement of 19th October 1926. On this application of compromise being presented before the Court, the Court was pleased to sanction the compromise (certain minors were involved in it) and ordered that the case be struck off as the parties had compromised. On the authority of the Privy Council decision it cannot now be contended that the compromise between the parties filed in execution proceedings cannot be recognized.

6. The application dated 23rd December 1931 is in a tabular form as provided by Order 21, Rule 11, Civil P.C., and the mode in which the assistance of the Court is required is stated to be that Rs. 43,806-6-3 be caused to be realized by means of auction sale of the mortgaged immovable property detailed at the foot of the application. Reference is made to the date of the final decree and to the compromise of 19th October 1926. Payments that have been made from time to time by the judgment-debtors have been credited and the auction sale is prayed for the recovery of the balance of the decretal amount. There was some controversy in the Court below about the payments of the sums admitted by the decree-holders and it was said that the sums were not paid, but there is a finding that these sums were paid, and although a ground of appeal is taken to that

effect, it was not seriously disputed before us nor indeed could it be argued on the evidence on the record that these sums were not paid by the judgment-debtors to the decree-holders.

7. We have already indicated that the main contention on behalf of the judgment-debtors was that the application dated 23rd December 1931 was barred by time. It has, however, to be admitted that if the second application is in continuation and is a revival of the first application no question of limitation would arise. It would appear that when the compromise of 19th October 1926 was effected the prayer was simply for the postponement of the auction sale and that to our mind has an important bearing on the question under discussion. The mere fact that the Court ordered the case to be struck off does not show that the application came to an end nor does the fact that the present application is on the usual tabular form suggest that it is a fresh application. In circumstances very similar to these their Lordships in AIR 1939 80 (Privy Council) came to the conclusion that the application which they were considering was not a fresh application. The question whether an application is a fresh application or is merely one to revive the previous execution proceedings has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. It is true that the decree-holders did not put their case in this way before the Court below nor did the learned Subordinate Judge consider it from this point of view, but this omission does not disentitle the decree-holders from advancing the present argument. For the reasons given above, we hold that the application dated 23rd December 1931 was in substance an application to revive the previous execution proceedings and in this view of the matter no question of limitation arises. We accordingly dismiss this appeal with costs.