
(1869) 09 CAL CK 0038
In the Calcutta High Court
Case No : Reference No. 91

Fakir Chand Bose

APPELLANT

Vs

Madan Mohan Ghose

RESPONDENT

Date of Decision : 13-09-1869

Acts Referred:

Citation : (1869) 09 CAL CK 0038

Judgement

Sir Barnes Peacock, Kt., C.J.—This question arises out of a point of law stated by the Small Cause Court Judge for the opinion of this Court. The plaintiff obtained a decree for a sum of money payable by instalments, the whole amount of the decree to be recovered if any one of the instalments should not be paid as it became due. The earliest instalment was due more than three years before the application for execution, but the instalments which the plaintiff wished to levy under an execution fell due within the three years. The plaintiff applied u/s 216, Act VIII of 1859, for the issue of a notice calling on the judgment-debtor to show cause why the decree should not be executed against him, and he stated that the defendant had paid the earlier instalments which became due more than three years before the time of the application. The question was whether the plaintiff could be allowed to prove that those payments had been made to him as the instalments became due, the payments not having been made by the defendant to the plaintiff through the intervention of the Court. In consequence of some decisions holding that a plaintiff was not at liberty to show that the earlier instalments had been paid, and that he was not therefore barred by limitation, the question was raised for the opinion of the High Court as to whether the plaintiff could, notwithstanding section 206 of Act VIII of 1859, come into Court and certify to the Court and prove that the defendant had paid the earlier instalments, and that he was not barred from applying for execution of the decree or the later instalments. I do not think I can add any thing to what I stated in the case of *Bhubaneswari Debi v. Dinanath Sandyal* 2 B. L.R.A. C. 320. The section only requires the certificate to be made by the plaintiff.

2. I am of opinion that the plaintiff had a right to come into Court and ask for

execution of the later instalments, and to certify to the Court and prove that the defendant had paid the earlier instalments as they fell due. The Judge of the Small Cause Court ought to be told that he will be justified in issuing a notice, on the plaintiff's certifying that the defendant paid the earlier instalments, and on his proving, to the satisfaction of the Judge, that those payments were made as they became due. The defendant will then be at liberty to come in and show that he had not made the payments, and consequently that the plaintiff was barred by reason of not having taken out execution within three years from the time when the first instalment fell due, upon which the whole decree became payable.