

(1909) 05 AHC CK 0020
In the Allahabad High Court

Mahabir Sahai and Others

APPELLANT

Vs

Oudh Bihari Pande and Another

RESPONDENT

Date of Decision : 31-05-1909

Acts Referred:

Citation : (1909) ILR (All) 590

Hon'ble Judges : Richards, J;Alston, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Richards and Alston, JJ.—The decree-holders obtained two decrees on the 26th of March, 1896. One decree was obtained in suit No. 275 of 1895. The other was obtained in suit No. 272 of 1895. The decrees were for sale on foot of mortgages; Orders absolute were obtained on the 15th of December, 1899. The first application for execution was made in respect of the decree in suit No. 275. The decree was apparently time-barred. The decree-holders, however, alleged that the proceeds of certain timber had been applied in part payment of the decree. The court executing the decree found the part payment not proved by the decree-holders, and rejected the application. The first application in suit No. 272 for execution of the present decree was made on the 9th of January 1903. The decree-holders there also alleged part payment. The decree-holders obtained an order that notice should go to the judgment-debtors. The application was, however, subsequently struck off without any further order having been made. The present application for execution was made on the 18th of September, 1905. The judgment-debtors have raised a number of objections. First, it is urged that the part payment of the decree by means of the sale of timber had already been adjudicated upon when execution of the other decree was being asked for. Both the courts below have found that the decision in the previous execution case did not operate as *res judicata*. In this conclusion we agree. The matter in issue then was whether or not a payment had been made on foot of the other decree. The question now in issue is whether or not part

payment has been made on foot of the present decree. Both the courts below have found that there was a part payment made by means of a sale of the timber. This is a finding of fact binding upon this Court.

2. The judgment-debtors next urge that there was no adjustment certified to the Court under the provisions of Section 258 of the CPC of 1882, and that therefore the Court could not recognise the payment. As against this the decision in *Roshan Singh v. Mata Din* ILR (1903) All. 36 has been relied on, and the decree-holders urge that the part payment is a good part payment within the meaning of Section 20 of the Limitation Act of 1877. The part payment made out of the proceeds of the timber was, if a part payment at all, part payment on foot of the principal of the debt, and it is necessary, in order that the provisions of Section 20 should apply in favour of the decree-holders, that the payment should appear in the hand-writing of the judgment-debtors. The decree-holders urge that this point should be taken as one arising out of a question of fact not decided in the court below. We think, however, that the decree-holders were, both in the first court and in the lower appellate court clearly put on proof that the part payment they relied on was a good part payment within the meaning of Section 20. Furthermore, if the decree-holders relied on part payment as being a part-payment within the meaning of Section 20, it lay" on them to show that the part payment was in the hand-writing of the judgment-debtors, It is absolutely clear on reading the judgment of the court below that the part payment did not appear in the hand-writing of the judgment-debtors. If it had, the decree-holders would have certainly produced and proved it when they were seeking execution of the first decree, and there never would have been any doubt on the question whether or not the payment had been made. In the present case the decrees are extremely stale, the suit having been instituted in the year 1895 and the decree nisi made in the year 1896. We allow the appeal, set aside the orders of both the courts below, and dismiss the application with costs.