

(1869) 03 CAL CK 0014

In the Calcutta High Court

Case No : Miscellaneous Special Appeal No. 435 of 1868

Upendra Mohan Tagore and Others

APPELLANT

Vs

Takalia Bepari and Another

RESPONDENT

Date of Decision : 29-03-1869

Acts Referred:

Citation : (1869) 03 CAL CK 0014

Judgement

Norman, J.—Upendra Mohan Tagore, as executor of the late Prasanna Kumar Tagore, applied for execution of a decree, dated in April 1853, against Garibulla Bepari and others. The facts are that, on the 29th of September 1858, the defendants executed a bond for payment by installments of 50 rupees payable in Bhadra (August and September) and Magh (January and February) of each year, with a stipulation that; if they failed to pay a single installment, the whole amount of the bond, including a part which had been remitted, should become due, and plaintiff should be entitled to realize the same by execution. The decree-holder admitted by his vakil in Court his assent to these terms, and it was ordered "that the case be decided according to the terms of the installment-bond," a copy of which was ordered to be kept in the record. The installment due in Bhadra 1271 (August and September 1864) was paid on the 5th of Aswin 1271 (20th September 1864). The installment due in Magh 1271 (January and February 1865) was not paid, but subsequent payments were made the last of which is said to have been in Paush 1272 (December 1864 and January 1865). The application for execution was in Paush 1274 (December 1867 and January 1868).

2. The first Court held that, as the application for execution was within three years of the time when the defendant failed to pay the installment of Magh 1271, it was within time.

3. The Judge calls the proceeding an action for execution, and holds that limitation runs from the first default, i.e., in Bhadra 1271, notwithstanding subsequent payments. He refers to the case of Hurrenath Roy v. Maherulla (7

W.B., 21). That case, however, turns on the construction of Section 4* of Act XIV of 1859.

4. The question in the present case depends on the construction of the 20th section of that Act. The effect of the order of the Court that the case should be decided according to the installment-bond, a copy of which was to be kept with the record, appears to us to have been to add a condition of defeasance to the decree, by the terms of which, so long as the debtor continued to pay the installments, the decree-holder was precluded from executing his decree.

5. The installment due in Bhadra 1271 was not paid till a few days after the end of the month of Bhadra. There is nothing in the terms of the installment-bond to prevent the decree-holder from taking the payment made on the 5th of Aswin as a good payment of the installment due in Bhadra. It is quite certain that if, after accepting it as such, he had immediately applied to execute the decree, the Court would have stayed his proceedings as being contrary to good faith. The case of *Breen v. Balfour* (Bourke, 120), referred to by the Judge, arose not between the principal debtor and the decree-holder, but between the decree-holder and a surety; and there was an express stipulation that, on any default, "notwithstanding the installment might be afterwards paid," the whole should become due. This was an express stipulation that default should not be waived, and, of course, no subsequent agreement as between the decree-holder and the principal debtor could affect the surety who was party to it.

6. The acceptance of the installment due in Bhadra operated as a suspension of the right of the decree-holder to execute the decree till Magh 1271. The application for execution was within three years from that date. Can it be said that the right to execute the decree is gone? In a case of a decree for the payment of a debt by installments extending over six years, without any condition that the whole amount of the decree should be exigible on the first default, a Full Bench, consisting of all the Judges of the High Court of North-West Provinces, on the 9th of March 1867, held that the decree, so far as regarded the last installment, could be executed within three years from the date when it was made payable by the decree, notwithstanding the omission to realize all previous installments due from and after the date of the decree, which, in fact, had been paid by private arrangements made without recourse to the Court.

7. The Court said that the provision "supposes a present right to execute the decree accruing at the time when the judgment was pronounced. In the case of an installment made payable at a future date by the terms of the decree, there is, of course, no present right to realize the installment at the date of the decree; and when the installment becomes due, then the present right to enforce it accrues. An application to enforce payment of such an installment is within time if made before the lapse of three years from the date fixed for payment by the terms of the decree." We assent to the rule laid down in that case; though, in some respects, it may appear to conflict with a decision of this Court, *Tiluck Chandra Gooho v. Gourmani Debi* (6 W.R., 93).

8. In the present case, by the joint operation of the order of Court made on production of an installment-bond, and the payment of the installment for Bhadra 1271, the right to execute the decree was suspended till Magh 1271. Until that date there was no present right to execute the decree. On that date the decree came into force as a decree which could be executed. Now it is clear that Section 20 does not apply to decrees passed less than three years before the application for execution. By parity of reasoning, it seems to us that it does not apply to decrees which come into force, or become capable of being executed less than three years before the application for execution. The case of Bipro Das Gossamee v. Chunder Sekhar Bhattacharjee (7 W.R., 528) appears in some degree to support our view on this point.

9. We need not discuss the question whether the payments on account of the decree made subsequently to Aswin 1271 are not of themselves sufficient to keep alive the decree. It appears to us that the right to execute the decree is not barred by Section 20. We, therefore, reverse the decision of the Judge, and remand the case to the first Court for execution of the decree. The respondent will pay the cost of the appellant, both in this Court and in the lower Appellate Court.

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Revival of right to sue by admission in writing.

Sec.-4:--If in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission; provided that if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Proviso.