

APPELLATE CIVIL.

Before Guha and Bartley J.J.

HARENDRANATH BASAK

1934

Nov. 27, 28.

v.

GOPALCHANDRA BASU THAKUR.*

*Injunction—Breach of obligation by decree-holder—Anterior agreement—
Estoppel by conduct—Waiver.*

A suit will lie for an injunction to restrain the defendant from putting in execution a decree obtained by him, in view of an agreement entered into by the defendant and the plaintiff anterior to the passing of the decree to the effect that the defendant would not execute the decree against the plaintiff, for there cannot be any bar to a party asking for relief by way of an injunction to restrain the decree-holder from putting in execution the decree, if the decree-holder committed a breach of his obligation under an anterior agreement.

Panchananda Debnath v. Brojendra Kumar Sutradhar (1) followed.

Involuntary payments by a judgment-debtor made under compulsion of law and under protest, to prevent execution sales, which would otherwise have inevitably taken place, would not operate as estoppel by conduct. Such payments in the course of execution proceedings cannot amount to waiver of his rights in the matter of obtaining an injunction restraining the decree-holder from executing his decree.

Coventry v. Tulshi Pershad Narayan Singh (2) distinguished.

Dulichand v. Ramkishan Singh (3) and *Kanhaya Lal v. National Bank of India* (4) referred to.

APPEAL FROM APPELLATE DECREE, by some of the defendants.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

*Appeal from Appellate Decree, No. 1532 of 1933, against the decree of Rebatiranjan Mukherji, First Additional District Judge of Dacca, dated April 8, 1933, confirming the decree of Nishikanta Banerji, First Subordinate Judge of Dacca, dated April 27, 1932.

(1) (1929) 34 C. W. N. 150.

(2) (1904) I. L. R. 31 Calc. 822.

(3) (1881) I. L. R. 7 Calc. 648 ;

L. R. 8 I. A. 93.

(4) (1913) I. L. R. 40 Calc. 598 ;

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Basu Thakur.**Saratchandra Basak*, Senior Government Pleader,
and *Subodhchandra Basak* for the appellants.*Bhupendrakishore Basu* and *Surajitchandra Lahiri*
(for the Deputy Registrar) for the respondents.*Cur. adv. vult.*

The judgment of the Court was as follows:—

This is an appeal by defendants Nos. 1 to 5 in a suit for permanent injunction in the matter of execution of a decree in a suit for rent, on the ground that there was a contract between the plaintiff and the contesting defendants before the decree was passed in the suit, that the decree was not to be executed against the plaintiff, if he withdrew from contest in the suit in which the decree was passed. The plaintiff's case before the court was that he did withdraw from the contest, and suffered the decree to be passed in view of the contract. The plaintiff set up another agreement between the parties to the rent suit, in the nature of adjustment of the decree, which was passed in the suit. As indicated already, the prayer made by the plaintiff, in the suit in which the appeal has arisen, was, in view of the two different agreements between the parties concerned, one for a permanent injunction, so that the decree passed in the suit for rent might not be allowed to be executed against him. The claim made by the plaintiff in the suit was resisted by the contesting defendants, the appellants in this Court. The contract alleged by the plaintiff as to arrangement not to execute the decree prior to the passing of the decree, as also the subsequent adjustment of the decree were denied; and it was asserted by the defendants that there was waiver on the part of the plaintiff, inasmuch as, in the proceedings for execution of the decree for rent, the plaintiff took time on seven occasions, and made payments, waiving fresh sale proclamations and admitting service of process in execution. On the pleadings of the parties, three distinct issues were

raised for determination in the suit, on the points raised before us, in support of the appeal :—

1. Was there any agreement that the father of the defendants 1 to 5 would not execute the decree as against the plaintiff ?
2. Has the ante-decretal agreement been superseded by any subsequent adjustment ?
3. Is the suit barred by estoppel, waiver and acquiescence ?

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The courts below have agreed in deciding all the above points in favour of the plaintiff in the suit. The defendants Nos. 1 to 5 have appealed to this Court. The first ground taken in this appeal is that the courts below should have held that the decree in the suit for rent, having been passed against the plaintiff and in his presence, it was a valid and binding decree so far as he was concerned; and it was not competent to the plaintiff so long as that decree stood to obtain a permanent injunction preventing the defendants from executing the decree, and reliance was placed on the decision in *Benode Lal Pakrashi v. Brajendra Kumar Saha* (1), in support of the arguments advanced in this behalf, in which it was laid down that a decree once made must be taken to be conclusive between the parties; an agreement, alleged to have been come to between the parties before the decree was made, could not be given effect to. The decision aforesaid was given in an appeal to this Court, arising out of proceedings in execution, and, as it has been pointed out by Rankin C. J. in *Panchananda Debnath v. Brojendra Kumar Sutradhar* (2), the decision in *Benode Lal Pakrashi's* case (1) mentioned above, laid down a sound proposition of law, inasmuch as a case of an agreement anterior to the passing of a decree could not be allowed to be set up in a proceeding for execution of a decree. There was not, and there could not, however, be any bar to a party asking for relief by way of an injunction to restrain the decree-holder from putting in execution the decree, if the decree-holders committed a breach of their obligation under an anterior agreement. This was clearly laid

(1) (1902) I. L. R. 29 Calc. 810.

(2) (1929) 34 C. W. N. 150.

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down by the learned Chief Justice in his judgment in *Panchananda Debnath's* case (1) referred to above; and no principle nor authority has been cited before us, which could possibly enable us to consider the propriety of the decision in that case. In our judgment, the plaintiff was entitled to bring a suit of the nature which is before us now, in which the relief prayed for was one for an injunction to restrain the defendants Nos. 1 to 5 from putting in execution a decree obtained by them, in view of an agreement, entered to by the parties concerned, anterior to the passing of the decree.

The point next argued in support of the appeal is the one relating to the adjustment subsequent to the passing of the decree for rent, described as a second agreement, which must, according to the defendants-appellants, be taken to have superseded the first agreement come to, anterior to the passing of the decree. On this part of the case, the courts below have arrived at findings on evidence, which is in accordance with the case of the contesting defendants in the suit—the appellants in this Court. The plaintiff, according to the courts below, failed to establish the adjustment of the decree set up by him; and this decision, on evidence, must be treated as conclusive in the appeal before us. There was no adjustment after the decree, or any second agreement as set up by the plaintiff; and there was no question of a second agreement having superseded the agreement anterior to the passing of the decree.

It has to be considered next, whether the anterior agreement was to be allowed to operate, as it must operate, in favour of the plaintiff in the suit and enable him to get the relief he prayed for in the suit,—namely, a perpetual injunction preventing the defendants Nos. 1 to 5 from executing the decree for rent, unless there was any legal bar to the same. The anterior agreement has been found to have been established on evidence by both the courts

below, and that agreement was not superseded by any subsequent agreement or adjustment after decree. On these conclusions the plaintiff was entitled to get the relief he sought in the suit, unless there was any waiver on his part, as indicated by the third issue referred to in a previous part of this judgment, namely, whether the suit was barred by estoppel, waiver and acquiescence? The courts below have, on the materials before them, come to the conclusion on evidence that there was no waiver or acquiescence on the part of the plaintiff. The question was whether the plaintiff had waived his right to bring an action of the present description and have a permanent injunction restraining the defendants, appellants, as he was alleged to have waived his rights under the agreement anterior to the passing of the decree in the suit for rent, by taking several adjournments and making several payments in the course of the proceedings in execution of the decree. The facts that adjournments were taken in the matter of the impending sale in execution of the decree and payments were made by the plaintiff for averting the sale are not in dispute. There were seven applications before the executing court, and in one of them it was expressly mentioned that the judgment-debtor did not waive his right to establish that the decree-holders were not entitled to execute the decree against him. On the materials before the court, it is not possible for us to refuse to accept the finding arrived at by the courts below that, in the circumstances of the case, adjournments were taken and payments made under protest, and there was, therefore, no waiver or acquiescence.

It is to be noticed, on the above question of waiver, the decision in *Coventry v. Tulshi Pershad Narayan Singh* (1) was relied upon, on the side of the appellant in support of the position that the plaintiff in the suit, the respondent in this Court, having successfully obtained stay of sale from court on the plea that he would satisfy the decree, if time were allowed, and

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having approbated the execution proceedings by paying the decree-holder a part of the debt, and thus inducing him to consent to time being granted for the payment of the balance, could not be permitted by the principle of estoppel to say that the decree was incapable of execution against him. The decision in *Coventry's* case (1) mentioned above, was given by this Court on the facts and circumstances in that case, in which the principle of estoppel by conduct was clearly applicable; in the case before us, we are unable to hold, as a matter of law, that there was estoppel operating against the plaintiff, respondent. In our judgment, it further appears to be beyond question that the payments made by the plaintiff in execution proceedings to arrest an impending sale were involuntary. They were made to prevent sales, which would otherwise have inevitably taken place, and as such payments were made under compulsion of law. The payments, made by the plaintiff-respondent in the course of execution proceedings, could not amount to waiver of his rights in the matter of having the relief now sought in the suit in which the appeal has arisen. [See in this connection the observation of their Lordships of the Judicial Committee in *Dulichand v. Ramkishan Singh* (2) and *Kanhaya Lal v. National Bank of India, Ltd.* (3).] On the question of waiver on the part of the plaintiff, as raised before us, our decision is that the findings arrived at on evidence by the courts below must be accepted, and further that, as a matter of law, there was no waiver of his rights sought to be enforced in the present action by virtue of payment made by the plaintiff, which must be taken to be involuntary, and made under compulsion of law.

The result of the conclusions we have arrived at, as indicated above, is that the appeal fails, and it is dismissed with costs.

Appeal dismissed.

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- (1) (1904) I. L. R. 31 Calc. 822. (2) (1881) I. L. R. 7 Calc. 648 ;
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