Before Mr. Justice Morris and Mr. Justice Tottenham.

1881 *March* 11.

ASMUTULLAH DALAL AND ANOTHER (JUDGMENT-DEBTORS) *v.* KALLY CHURN MITTER (DECREE-HOLDER).*

Execution of Decree—Debt payable by Instalments—Failure to Pay—Limitation Act (XV of 1877), sched. ii, art. 179.

The terms of compromise in a suit for money, provided that the debt should be paid by monthly instalments, and that, on the failure to pay any three successive instalments, the entire amount should be recoverable by application to execute the full decree. The decree was dated the 12th June 1875, the first instalment was due in July 1875, and the last in October 1877. Default was made in payment of the first three instalments, but the decree-holder did not apply for execution, and accepted subsequent payments. On the 13th December 1879, he applied for execution for the amount then remaining due.

Held, that the period of limitation prescribed by art. 179, sched. ii of Act XV of 1877, began to run on the third default taking place, and that no subsequent payment could stop limitation once begun.

ON the 12th June 1875, one Kally Churn Mitter obtained a decree against one Asmutullah Dalal and another for Rs. 751-1-6. The parties had filed a solenamah in the suit, and it was provided, that the sum for which the decree had been obtained should be paid by instalments, commencing from the 10th Assar 1282 (July 1875), and extending to the 30th Assin 1284 (October 1877); and that, on failure to pay any three consecutive kists, the entire amount should be recoverable by application to execute the full decree. Default was made by the judgment-debtors in the first three instalments, but the decree-holder did not apply for execution, and accepted payments in subsequent months in satisfaction of the various instalments. On the 13th December 1879, an application for execution for Rs. 345-7-9, the amount remaining due, was made. The Munsif held, that the right to levy execution accrued on the 1st Bhadro 1282, or August 1875, when the judgment-debtors failed to pay the

* Appeal from order, No. 326 of 1880, against the order of T. D. Beighton, Esq., Judge of Rungpore, dated the 19th August 1880, reversing the order of Baboo Jogendro Nath Deb, Munsif of that District, dated the 25th May 1880.

1881

ASMUTULLAH DALAL v. KALLY CHURN MITTER

third instalment; and that, as more than three years had elapsed from that date, the application was barred by limitation. This decision was reversed by the District Judge, who held, that the "certain date," mentioned in art. 179, cl. 6 of sched. ii to Act XV of 1877, *was in this case any one* of several successive dates, "*i.e.*, the 30th of each successive group of three months in which default was made," and that time began to run after default of any three of the kists.

The judgment-debtors appealed to the High Court.

Baboo *Trailokynath Mitra* for the appellants.

Baboo *Kali Charan Banerjee* and Baboo *Ishan Chunder Chuckerbutty* for the respondent.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

TOTTENHAM, J.—The question for decision in this appeal is, whether the execution of the decree held by the respondent is barred by limitation as is contended by the appellants. The law applicable is Act XV of 1877.

The date of the decree is the 12th June 1875, and this application for execution, apparently the first, was filed on the 13th of December 1879,—*i.e.*, four and-a-half years after the above date.

It appears that the parties had filed a solenamah in the original suit, the terms of which were embodied in the decree. It was accordingly directed that the decretal amount should be paid off by instalments on particular dates specified, the last instalments falling due between two and three years after the date of the decree. And it was provided, that should the judgment-debtors make default in the payment of the three instalments, the decree-holder might thereupon execute the decree for the whole amount at once, without waiting for the subsequent instalments. In the very first three instalments there occurred default, and on no subsequent occasion was the due instalment paid up, punctually or in full. Payments were, however, made at uncertain intervals down to the month of Assar 1286,—that is, one year and nine months after the last instalment ought, accord

1881

ASMUTULLA DALAL v. KALLY CHURN MITTER.

ing to the decree, to have been paid off. A considerable amount is said to be still outstanding, and the present application, which is simply for execution of the decree for the amount still due, after deduction of the various sums already realised, was filed, as already stated, on the 13th December 1879, which corresponds with the end of Aghran 1281.

The period of limitation applicable to the case is admittedly three years. The dispute is as to the date from which the period is to be counted. The first Court was of opinion, that it should be counted from the date on which the judgment-debtors had first been guilty of three defaults in paying the instalments specified in the decree. The Munsif thus held that limitation began to run on the 1st Bhadro 1282, or in August 1875, and the application not having been made within three years of that date, he held that execution was barred. The lower Appellate Court reversed this decision, being of opinion that cl. 6 of art. 179 in the second schedule of the Limitation Act governed the application, and that the "certain date" therein mentioned is in this case "any one of several successive dates,—*i. e.*, the 30th of each successive group of three months in which default is made." And further on the Judge says,—"According to my view, time may begin to run after default 'of any three of the kists.'"

By this decision the Judge seems to accord to the decree-holder the privilege of selecting for himself the date from which limitation shall be counted. Clearly he will not allow the first Court or the judgment-debtors to settle the date. It seems to us that the Judge is wrong in supposing that the law intends to leave the question of limitation to the option either of any Court or of any party to the proceedings.

The Judge refers to two cases, *Upendra Mohan Tagore* v. *Tahalia Bepari* (1) and *Krishna Chandra Shaha* v. *Omed Ali* (2), dealing with the old law of limitation in respect of execution of decrees, *viz.*, s. 20, Act XIV of 1859, decided in this Court, in order to show, that, under that law, fresh limitation ran from each fresh default made by a judgment-debtor in paying instalments provided by a decree.

(1) 2 B. L. R., 345. (2) 6 B. L. R., Ap., 31.

He observes, that these rulings are no doubt based on the principle, that a creditor shall not suffer in consequence of having shown consideration to a defaulting debtor by any strained application of the law. And he goes on to say that his own view is, that the new Limitation Act does not alter the law in this particular.

The rulings quoted do not, however, seem to us to be based upon any sentimental principle whatever. The first case was decided upon the principle, that the law allowed a period of three years from the date upon which the right to execute accrued, which, in the case of a decree for instalments, could not be until the first default in payment of an instalment, and the decree-holder was within three years of the accrual of his right to execute. In the second case it was simply held, with reference to the provisions of s. 20, that proceedings to keep the decree alive had, in fact, been taken within three years before the application then under consideration.

We find nothing in the present law to show that there are, or may be, various recurrent starting points from which limitation is to run in respect of the execution of a decree *as a whole* after it has become final. Excepting that each application or notice referred to in cls. 4 and 5 of art. 179 of the second schedule gives a fresh starting point, otherwise there is but one starting point provided for limitation in respect of execution of a decree *as a whole*, *viz.*, the date of its becoming final, or if the decree orders that the whole amount be paid on a certain date, then such date. Section 4 of the Act requires, that any application made after the period of limitation prescribed therefor by the second schedule, shall be dismissed.

The decree before us ordered certain sums to be paid on certain dates, and in respect of those sums the provision contained in cl. 6 of art. 179 was applicable. But the decree nowhere directs that the payment of the whole amount outstanding shall be made at a certain date. It only gives the decree-holder the option of applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments. Under the decree, therefore, the decree-holder had several courses open to him, subject, of course, to the rules of limitation. He could have, upon the occurrence of

1881

ASMUTULLAH DALAL v. KALLY CHURN MITTER.

three defaults, forthwith taken out execution of the whole decree, or he could have executed for each instalment severally within three years after it became due, or he might have contented himself with accepting whatever was paid from time to time and then applied for execution of the decree for the outstanding balance, taking care to do so before the expiry of three years from the date of the decree or from the date of the third default, if he thought the terms of the decree altered the period of limitation. The law, by cl. 6 of art. 179, sufficiently recognizes and provides for the Court's power under s. 210 of the Civil Procedure to order the amount of a decree to be paid by instalments, but there is nothing in the limitation law which recognizes any authority in this Court to supersede its provisions by extending the period of limitation and admitting an application for execution of a decree as a whole more than three years after the date mentioned in art. 179.

The lower Appellate Court seems to have supposed that the decree ordered the whole amount to be paid at the date of any third default in the prescribed instalments, and that, therefore, cl. 6 would save limitation any time within three years of the last such instalment falling due. But that opinion is untenable. If the bar to immediate execution contained in the decree itself does at all extend the period prescribed by art. 179, that period certainly began to run on the third default taking place, and no subsequent payment could stop limitation once begun (s. 9). This application was not made within three years of even the third default, and therefore, in so far as it is an application under the penalty clause of the decree for execution of the decree as a whole, it is barred by limitation. But we think that the decree-holder is still entitled to the benefit of cl. 6 of art. 179 as respects any instalments ordered in the decree, and which fell due on dates not exceeding three years before the application was filed.

The present appeal is, therefore, dismissed, and the lower Court will be directed to execute the decree for such instalments as are not barred, and the amounts of which may be found to be still outstanding on an account being taken.

We make no order as to costs.

Appeal dismissed.