

GNANAMUTHU
UPADESI
v.
VANA
KOILPILLAI
NADAN.

Civil Miscellaneous Appeal No. 130 of 1892.—The order of the Judge cannot be supported. It is wrong, because when the appellant was legally entitled to make a second application on the 10th March 1892, it was not competent to the Judge to impose a restriction upon appellant's right and to direct that he should make an application under the Code of Civil Procedure, so as to let in the law of limitation and indirectly to defeat the object of the legislature in exempting applications for probate from the Act of Limitations. The Judge is also in error in construing section 261, which only renders the provisions of the Code of Civil Procedure as nearly as may be so as to let in the limitation bar, from which applications for probate are saved.

This order must be, and is hereby, set aside, as both appeals were heard at the same time, and as the same vakils appeared in both, there would be no order for costs in this appeal.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

JUJI KAMTI AND OTHERS (DEFENDANTS), PETITIONERS,

v.

ANNAI BHATTA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 257A—Adjustment of decree out of Court—Instalment bond—Consideration.

An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under s. 257A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. *Sellamayyan v. Muthan*(1), *Jhabor Mahomed v. Modan Sonahar*(2), and *Hukum Chand Oswal v. Taharunnessa Bibi*(3) followed.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the revised decree of S. Subbaiyar, Subordinate Judge of South Canara, in Small Cause Suit No. 22 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

* Civil Revision Petition No. 547 of 1892.

(1) I.L.R., 12 Mad., 61. (2) I.L.R., 11 Calc., 671. (3) I.L.R., 16 Calc., 504.

Sankaran Nayar and *Sankara Menon* for petitioner.
Narayana Rau for respondent.

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 BHATTIA.

JUDGMENT.—Two questions are argued in support of this petition for revision. The first is that the bond sued on is void as an agreement falling under section 257A of the Code of Civil Procedure. That section is inserted in the code in the chapter relating to the execution of decrees and in the section headed ‘mode of executing decrees.’ This suggests that the intention was to render such agreement void only so far as it affects the right to execute the decree. As observed in *Sellamayyan v. Muthan*(1) where the benefit of a decree is given up, and in consideration of it a bond is executed, it cannot be intended that the bond should not be the foundation of a fresh suit. This is also the view taken by the High Court of Calcutta. *Hukum Chand Oswal v. Tuharunnessa Bibi*(3), *Jhabar Mahomed v. Modan Sonahar*(2). We are aware that the High Court at Bombay has held otherwise, but the scheme of the code does not appear to have been allowed due effect in arriving at those decisions.

The second question is whether the suit is time-barred. If, as alleged in the plaint, the first instalment of Rs. 50 was paid in February 1886, as the next instalment was not payable till February 1887, the suit brought in January 1890 was in time. In the revision petition defendants claim credit for the sum of Rs. 50. We cannot, therefore, say the suit is time-barred.

A further question raised is as to the liability of the third defendant for the debt. Third defendant was not a party to the bond on which the suit is brought, and the karar referred to in the bond to which third defendant is alleged to have been a party appears to have been superseded by the plaint bond. We therefore exonerate third defendant from all liability for the debt and direct plaintiff to pay her costs; and we modify the decree as against defendants 1 and 2 by reducing the amount decreed from Rs. 420 to Rs. 370.

Plaintiff and defendants 1 and 2 will pay each others costs throughout proportionate to the amounts now allowed and disallowed.

(1) I.L.R., 12 Mad., 61.

(2) I.L.R., 11 Calc., 671.

(3) I.L.R., 16 Calc., 504.