

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

KANJI MAL (DECREE-HOLDER) v. KANHIA LAL (JUDGMENT-DEBTOR).*

1885
February 19.

*Execution of decree—Decree payable by instalments—Civil Procedure Code, s. 230—
Finality of order made in execution proceedings.*

In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent per mensem. In 1877, the decree-holder applied for execution of the decree, asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100 each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment debtor, but eventually the case was struck off. In 1883, the decree-holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could not be recognised, not having been certified.

Held that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution.

ON the 27th February, 1868, the appellant obtained a decree against the respondent for Rs. 1,100, which provided that, commencing from the 2nd Phagun Sudi Sambat 1925 (13th February, 1869,) instalments of Rs. 100 yearly should be paid (Rs. 200 having been paid on that date); and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent. per mensem. On the 20th April, 1877, the decree-holder applied for execution of the decree. He asserted that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200 and four of Rs. 100 each, and default had been made in

* Second Appeal No. 34 of 1884, from an order of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 28th January, 1884, reversing an order of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 1st September, 1883.

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payment of the 5th instalment of Rs. 100, and he asked to recover the whole amount due on the decree. Notice was served on the judgment-debtor; he did not appear; and eventually the case was struck off. On the 17th April, 1880, the decree-holder applied again for execution of the decree, the grounds of the application being the same as those on which the previous application had been based. Notice was issued and served and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. On the 3rd March, 1883, execution was again applied for on the same grounds. Notice was issued, but eventually the case was struck off. On the 2nd April, 1883, the decree-holder made, on the same grounds, the application for execution out of which this appeal arose.

The judgment-debtor contended that the application should not be allowed, inasmuch as the first application for execution, dated the 20th April, 1877, was barred by limitation, as no instalments had been paid, and time began to run from the date of the first default, which occurred more than three years before that application was made. The Court of first instance disallowed this objection on the ground that the judgment-debtor had not at any time, after that application had been made, denied that the instalments which the decree-holder asserted had been paid had not in fact been paid. The lower appellate Court allowed the objection, holding that the application for execution of the 20th April, 1877, should not have been granted, as the payments alleged by the decree-holder to have been made had not been certified, and were therefore not recognizable, and consequently that that application, time running from the first default, was barred by limitation.

It was contended, *inter alia*, for the appellant in this appeal that the lower Court should not have gone behind the previous proceedings.

For the respondent it was contended that execution of the decree was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and, even if they had been paid, the payments could not be recognized, not having been certified.

Munshi Kashi Prasad, for the appellant.

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the respondent.

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PETTERAM, C. J.—I think that this appeal must be allowed. The question is whether the judgment-creditor is entitled now to execute his decree obtained in 1868. The facts are that in 1868 the judgment-creditor obtained a decree for a sum of Rs. 1,100. By the terms of the decree it was provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments, should be Rs. 100 at the end of each subsequent year. There was a proviso to the effect that, in the event of any instalment not being paid, the whole amount should become due. This happened in 1868, and in 1877 the decree-holder applied to the Court for leave to execute his decree for the balance due, and the account on which he asked this showed that a payment had been made of Rs. 600, that is to say, of the first five instalments, and the claim was made in respect of default in payment of the sixth instalment. For some reason, which is not very apparent, no order was made, and the application was abandoned by the decree-holder. In 1880 another application was made on the basis of the last one, and the result of this was that the decree-holder obtained an order allowing him to issue execution, and ordering the arrest of the judgment-debtor for the amount due, giving credit for what had been paid. On that order nothing was recovered by the decree-holder; and the question now arises whether the proper time from which to reckon the limitation period of twelve years is the date of the decree of 1868, or the time down to which credit was given for payment of instalments. In my opinion, the proper time from which to reckon limitation is the fifth year from the date of the bond. The whole claim from the beginning has gone upon this basis, and the order passed in 1880 also went upon it. It appears to me that we cannot now go behind that order, and that consequently the judgment-creditor is within time, and may take out execution. This seems to me the only conclusion which is in accordance with justice, because the judgment-creditor has always tried to obtain execution.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.