

Before Mr. Justice Norris and Mr. Justice Marpherson.

1886
July 22.

ABDUL RAHAMAN SODAGUR (JUDGMENT-DEBTOR) v. DULLARAM
MARWARI (DECREE-HOLDER.)³

*Limitation Act, 1877, Art. 179 and Art. 175—Application for execution of
decree—Order on petition to pay by instalments—Civil Procedure Code,
s. 210.*

An application to execute a decree, dated 30th August, 1880, was made on 25th May, 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following order: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March, 1885: *Held*, that the order was not one recognizing or sanctioning the arrangement within the meaning of s. 210 of the Civil Procedure Code, inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by Art. 175 of Act XV of 1887. The application for execution was, therefore, barred under Art. 179 as not having been made within three years of 25th May, 1881. *Jhoti Sahu v. Bhubun Gir* (1) dissented from.

In this case the decree-holder obtained a decree on the 30th August, 1880. Application for execution was first made on 25th May, 1881; and whilst the execution proceedings were pending, a petition was filed by the judgment-debtor, setting forth that he had already paid a certain amount of the decree, and praying that he might be allowed to pay the remainder by instalments as detailed in the petition. The decree-holder consented to this, and an order was made by the Munsiff in the following terms: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The details of the instalments mentioned in the petition were endorsed on the decree by one of the amlahs of the Munsiff, but when or

³ Appeal from Order No. 126 of 1885, against the order of Baboo Gunga Nund Mukerjee, Subordinate Judge of Manbhoom, dated the 31st of December, 1885, reversing the order of Baboo Purna Chandra Mitter, Munsiff of Burrabazar, dated the 30th of May, 1885.

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by whose order this was done did not appear. On 7th March, 1885, application for execution was made for the amount due, the decree-holder basing his claim on the terms of compromise as set forth in this kistbandi. The judgment-debtor contended that the kistbandi had materially altered the terms of the decree, and that the application for execution was barred as not having been made within three years of the last application in May, 1881.

The Munsiff held that the application was barred, the arrangement between the parties not having been recognized and sanctioned by the Court.

The Subordinate Judge on appeal held that the order made on the petition to be allowed to pay by instalments was practically an order granting the prayer of the petition as to the payment, and, therefore, the Court had recognized the arrangement for payment.

The judgment-debtor appealed to the High Court.

Baboo *Dwarkanath Chuckerbutty* and Baboo *Prannath Pundit*, for the appellants.

Baboo *Jogesh Chunder Dey*, for the respondent.

The case of *Jhoti Sahu v. Blubun Gir* (1) was referred to on behalf of the respondent.

The following judgments were delivered by the Court (NORRIS and MACPHERSON, JJ.)

MACPHERSON, J.—I think the Munsiff's decision is right and that of the Subordinate Judge wrong.

The decree is dated the 30th August, 1880, and the first application to execute it was preferred on the 25th May, 1881.

Three days afterwards the judgment-debtor petitioned to be allowed to pay the amount due under the decree by instalments, extending over many years, the instalments being set out in the petition, which was made with the consent of the decree-holder. The Court passed this order: "According to the application of both parties it is ordered that the case be struck off and the decree be returned." The present application to execute was made on the 7th March, 1885. The Munsiff has held

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that it is out of time, more than three years having expired since the date of the last application. The Subordinate Judge considered that the Court recognized the arrangement proposed by the parties, and that under s. 210 of Act X of 1877, which corresponds with s. 210 of the present Code, the order above referred to must be taken to embody an order that the amount of the decree should be paid by instalments.

I am unable to adopt this view. The second clause of s. 210 empowers a Court, after the passing of a decree for the payment of money, to order, on the application of the judgment-debtor and with the consent of the decree-holder, that the amount decreed be paid by instalments; and the last clause enacts that, "save as provided in this section and s. 206, no decree shall be altered at the request of parties." If, therefore, a decree is silent as to the manner in which it is to be executed, and no subsequent alteration is made by order of the Court, the decree must be executed as it stands. It is clear that in this case there was no order either directing an alteration of the decree, or that the amount should be paid by instalments, and the Court was not in a position to make any such order as, under Art. 175 of Sch. II of the Limitation Act, the application should have been made within six months from the date of the decree. We cannot, therefore, give to the order of the Court the extended meaning which the Subordinate Judge gives, and the mere fact that an amlah of the Munsiff has recorded on the back of the decree the instalments set out in the petition of the parties, does not help the appellant, as it is not shown when or under whose orders he did this.

A case *Jhoti Sahu v. Bhubun Gir* (1) has been cited, in which the Court held that, although there was no direct order, there was a substantial compliance with the provisions of s. 210. Whether this is so or not must depend on the facts of each case.

As more than three years have expired since the date of the last application, or since any written admission of the judgment-debtor of his liability, the decree cannot be executed. I would, therefore, reverse the order of the Sub-Judge and restore

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that of the Munsiff but I would under the circumstances allow no costs of this appeal.

NORRIS, J.—I agree with Macpherson, J., in allowing this appeal. I have pointed out to my learned colleague, Mr. Justice Mitter, that in the case of *Jhoti Sahu v. Bhubun Gir* (1) we overlooked the provisions of Art. 175 of the Limitation Act, and I am authorized by him to say he concurs with me in thinking that our decision in that case was erroneous.

J. V. W.

Appeal allowed.

Before Sir W. Conner Pelheram, Knight, Chief Justice, and Mr. Justice Cunningham.

MULLA ADJIM, *In re* (PETITIONER).^{*}

Burmah Courts Act (XVII of 1875), s. 95—Certificate of administration—Act XL of 1858, s. 28—Appeal under Act XL of 1858.

The appeal given by s. 28 of Act XL of 1858 is subject to the ordinary law of appeal laid down in the Burmah Courts Act.

No appeal, therefore, will lie from an order refusing an application for the issue of a certificate of administration under Act XL of 1858, it being impossible to place any specific money valuation on such an application.

THIS was an application made by one Mulla Adjim, in the Court of the Officiating Recorder of Rangoon, for the issue of a certificate of administration, under Act XL of 1858, to the estate of certain minors. The application, for reasons immaterial to the report, was dismissed.

The petitioner appealed to the High Court against this order of dismissal, the appeal being admitted by the Registrar subject to the question as to whether an appeal would lie at all being raised at the hearing.

Mr. *Stokoe* for the appellant.—I contend that an appeal lies from the decision under s. 28 of Act XL of 1858, and that neither the Burmah Courts Act nor the Civil Procedure Code interfere with the power of appeal given under Act XL. The case of *Golam Rahman v. Futima Bibi* (2) is a decision under the Burmah Courts Act, and is therefore inapplicable.

* Appeal from Order No. 440 of 1886, against the order of R. S. T. MacEwen, Esq., Officiating Recorder of Rangoon, dated the 25th of September 1886.

(1) I. L. R., 11 Calc., 143.

(2) I. L. R., 13 Calc., 232.

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