

Before Mr. Justice Banerji.

BHAGWAN DAS (DECREE-HOLDER) v. JANKI (JUDGMENT-DEBTOR).*

1905
November 14.

Execution of decree—Limitation—Decree payable by instalments—Default in payment of instalments—Art No. XV of 1877 (Indian Limitation Act), section 20—Civil Procedure Code, section 257A.

A decree for sale on a mortgage made the amount due thereunder payable by instalments with a condition that if default were made in payment of any instalment the decree-holder might execute for the whole amount at once. Default was made, and the decree-holder exercised his option and obtained an order absolute for recovery of the whole amount due under the decree. On the 23rd of February, 1901, the decree-holder applied for execution in respect of the whole amount due and for sale of the mortgaged property. That application was, however, dismissed on the 15th May 1901 for default of prosecution. On the 1st of July, 1904, the decree-holder again applied for execution. *Held* that execution of the decree was barred by limitation, and that the decree-holder could not under the circumstances pray in aid two payments of Rs. 150 and Rs. 50 alleged to have been received on the 11th of May, 1901, and the 15th of July, 1901, respectively. *Shankar Prasad v. Jalpa Prasad* (1) distinguished.

THIS was an appeal arising out of an application of execution of a decree. The decree was one for sale of mortgaged property and was passed on the 22nd of November, 1898. It directed that the amount of the decree (Rs. 315) should be paid in six annual instalments, each of Rs. 50 principal and Rs. 6 interest. The first two instalments, which became due in November, 1899 and 1900, not having been paid, the decree-holder applied for an order absolute under section 89 of the Transfer of Property Act for the recovery of the whole amount due under the decree, as allowed by the first decree in the event of the instalments not being paid. An order under section 89 was made on the 1st of December, 1900, and on the 23rd of February, 1901, the decree-holder applied for execution in respect of the whole amount due and asked for sale of the mortgaged property. On the 15th of May, 1901, that application was dismissed for default of prosecution. The next application was made on the 1st of July, 1904. This application being on the face of it barred by limitation, the decree relied upon two payments of Rs. 150 and Rs. 50 alleged to have been made on the 11th of

* Second Appeal No. 568 of 1905, from a decree of W. R. G. Moir, Esq., District Judge of Jaunpur, dated the 3rd of April 1905, reversing a decree of Maulvi Sayid Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 27th of August, 1904.

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May, 1901, and the 15th of July, 1901, respectively. The court of first instance (Subordinate Judge of Jaunpur) held that the application was not time-barred and granted it. This decision was however reversed on appeal by the District Judge, who dismissed the decree-holder's application. The decree-holder thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji* and *Munshi Lakshmi Narayan*, for the appellant.

Maulvi Ghulam Mujtaba, for the respondent.

BANERJI, J.—The question to be determined in this appeal, which arises out of an application for execution, is whether the application was time-barred. The decree is dated the 22nd of November, 1898, and was one for sale of mortgaged property. It directed the amount of the decree (Rs. 315) to be paid by six annual instalments, each of Rs. 50 principal and Rs. 6 interest. It further provided that in case of default in the payment of any instalment the decree-holder would have the option to take out execution of the decree for the recovery of the whole amount of it. The first two instalments, which became due in November 1899 and 1900, not having been paid, the decree-holder applied for an order absolute under section 89 of the Transfer of Property Act for the recovery of the whole amount due under the decree. An order under that section was made on the 1st of December, 1900, and on the 23rd of February, 1901 the decree-holder applied for execution in respect of the whole amount due and asked for the sale of the mortgaged property. On the 15th of May, 1901, that application was dismissed for default of prosecution. The present application was made on the 1st of July, 1904. This was clearly beyond three years from the date of the last application. The decree-holder, however, alleged that two sums of Rs. 150 and Rs. 50 had been paid, respectively, on the 11th of May, 1901, and 15th of July, 1901, and urged that these payments saved the operation of limitation. The Court of first instance found in favour of the decree-holder, but the lower appellate Court has held that the application for execution is time-barred. That Court is of opinion that the payments alleged to have been made to the decree-holder could not save limitation under the provisions of section 20 of the Limitation Act, as it had not been

proved that these amounts were paid on account of interest as such, and that the payments if made on account of principal did not appear in the handwriting of the person who made them. The correctness of this view of the Court below is not questioned in this appeal. But the learned vakil for the appellant contends that, as the original decree of the 22nd of November, 1898, allowed the amount of it to be paid by instalments, it was open to the decree-holder to receive instalments, and he is entitled to apply for execution for such instalments as have remained unpaid. This might have been a valid contention had the decree-holder not exercised the option of applying for enforcement of payment of the whole amount of the decree upon default being made in payment of some of the instalments. As I have already said, he did exercise that* option and applied for an order absolute under section 89. Again when on the 23rd of February, 1901, he applied for execution of the decree in respect of the whole amount of it, he sought in the exercise of his option to put an end to the instalments provided for in the decree. Those instalments could be adhered to only in the event of the decree-holder not exercising the option which the decree gave him. He having elected to put an end to the instalment arrangement cannot now fall back on the provisions of the decree relating to payment by instalments. His right to execute the decree arose when default was made in the payment of instalments, and he exercised that right. Therefore it is no longer open to him to say that he could give effect to the provisions of the decree and receive instalments. If he did consent to take the decretal amount by instalments, that must be treated as a subsequent agreement between him and the judgment-debtor by which he gave time to the latter to satisfy the decree. For such agreement the sanction of the Court is necessary under section 257A of the Code of Civil Procedure. The learned vakil for the appellant referred to the case *Shankar Prasad v. Jalpa Prasad* (1). That case is distinguished from the present, as in that case the decree-holder had not exercised his option to enforce the decree as he did in the present instance. The position therefore is this. The decree-holder became entitled to execute his decree so far back as the year 1900, and he

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enforced his right and put an end to the instalments. As he did not apply for execution within three years of the date of the last application, his present application is time-barred. If he subsequently consented to take the amount due under the decree by instalments, that was an agreement within the meaning of section 257A, and not having been made with the sanction of the Court which passed the decree was void. In either view, therefore, the decree-holder is not entitled to execute the decree, and the order of the Court below is right. I accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Richards.

1905
December 14.

LACHMAN DAS AND OTHERS (JUDGMENT-DEBTORS), v. CHATURBHUJ DAS AND ANOTHER (DECREE-HOLDERS).

Civil Procedure Code, section 231—Act No. V of 1881 (Probate and Administration Act), section 92—Execution of decree—One of several joint decree-holders not competent to give a full discharge for the amount of the decree—Executors.

Held that one out of several joint decree-holders is not competent to give a valid discharge for the amount of the joint decree, and his position in this respect is not affected by the fact that he and his fellow-decree-holders are co-executors. *Tammam Singh v. Lachmin Kumari* (1) and *Moti Ram v. Mannu Prasad* (2) followed.

THIS was an application for execution of a decree passed in favour of four persons who had obtained probate of the will of one Babu Raghunath Das. The application was made by two of the decree-holders for the benefit of all, under the provisions of section 231 of the Code of Civil Procedure, the applicants alleging that the other two decree-holders were unwilling to join them in making the application. The decree under execution was based upon a compromise, which provided that a receiver should be appointed who was to recover the amount of a certain other decree in favour of the judgment-debtors against a person whose estate was under the Court of Wards. One of the conditions of the decree was that the judgment-debtors should be personally liable to satisfy the decree if they realized and

* First Appeal No. 9 of 1905, from a decree of Rai Muta Prasad, Subordinate Judge of Benares, dated the 3rd of December 1904.

(1) (1904) I. L. R., 26 All., 318. (2) (1904) I. L. R., 26 All., 334.