FULL BENCH

Before Mr. Justice Iqbal Ahmad, Mr. Justice Bajpai and Mr. Justice Ismail

MAHENDRA RAO AND OTHERS (JUDGMENT-DEBTORS) *v.* BISHAMBHAR NATH AND OTHERS (DECREE-HOLDERS)* 1940 *February*, 1

Adjustment of decree—Agreement between parties giving time and fixing instalments for payment of the decree—Execution court recording such adjustment—Jurisdiction—Limitation—Application for execution, whether a fresh application or a revival of former application—Substance, and not merely the form, to be considered—"Striking off" of former application, effect of.

A final decree for sale on a mortgage was put in execution, but shortly before the date fixed for sale the parties arrived at a compromise under which a part of the decretal amount was paid down in cash and the balance was to be paid in certain specified instalments, in default whereof the property already advertised for sale was to be sold by auction for realisation of the amount remaining due. Upon a joint application by the parties the compromise submitted by them was recorded by the execution court, their prayer for postponement of the auction sale was granted and the execution case was struck off. After some time default took place in the due payment of the instalments, and the decree-holder made an application, in the form prescribed by order XXI, rule 11 of the Civil Procedure Code, praying for auction sale of the mortgaged property for realisation of the money remaining due:

Held, (1) that the court executing the decree had jurisdiction to recognize and record an adjustment of the decree arrived at by mutual agreement between the decree-holder and the judgment-debtor;

(2) that the application under consideration was not a fresh application for execution but one merely to revive and continue the previous application and no question of limitation arose.

The question whether an application is a fresh application or is merely one to revive the previous execution proceedings has always to be decided upon the circumstances of each case, and in each case the substance of the matter must prevail over

*First Appeal No. 20 of 1938, from a decree of S. C. Chaturvedi, Civil Judge of Etawah, dated the 16th October, 1937.

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the form of the application. The mere fact that the court ordered the case to be struck off did not show that the application came to an end, particularly as the prayer was simply for the postponement of the auction sale, nor did the fact that the present application was on the usual tabular form make it conclusive that it was a fresh application for execution.

Dr. *S. N. Sen* and Mr. *M. L. Chaturvedi,* for the appellants.

Messrs. *B. Malik* and *S. N. Seth,* for the respondents.

IQBAL AHMAD, BAJPAI and ISMAIL, JJ.:—This is an execution first appeal by the judgment-debtors. It came for hearing before a Division Bench on the 10th of May, 1939, when that Bench came to the conclusion that the matter was of great importance and merited a reference to a Full Bench. Certain questions of fact had not been determined satisfactorily by the trial court and therefore an issue was remitted to the court below. The court below returned its findings on the said issue and when the matter came again before the Division Bench on the 6th of November, 1939, the papers were directed to be laid before the Hon'ble the CHIEF JUSTICE for the constitution of a Full Bench.

The case has now come before us and we have come to the conclusion that the appeal ought to be dismissed. When the execution matter was before the court below and when the appeal came for hearing before the Division Bench there was the authority of the Full Bench decision of this Court in *Gobardhan Das* v. *Dau Dayal* (1), and learned counsel for the parties contended that the observations of the Full Bench supported them. Since then there has been a decision of their Lordships of the Privy Council in *Oudh Commercial Bank* v. *Bind Basni Kuer* (2), and it appears to us that this decision concludes the matter in favour of the decree-holders respondents.

On the 29th of March, 1924, the respondents obtained a final decree for sale from the court of the Subordinate

(1) (1932) I.L.R. 54 All. 573. (2) (1939) I.L.R. 14 Luck. 192.

Judge of Mainpuri. The first application for execution was made on the 6th of March, 1926, and was for the recovery of Rs.46,346-13-0 by sale of the mortgaged property. The 20th of October, 1926, was fixed for sale, but a day previous, that is, on the 19th of October, 1926, the parties arrived at a compromise. Under this compromise the decree-holders gave up a small sum of money and received Rs.6,000 in cash with the result that there was a balance of Rs.41,000 outstanding against the judgment-debtors. The stipulation was that Rs.2,000 were to be paid on the 19th of December, 1926, and the balance was to be paid by annual instalments of Rs.7,000 each, the first instalment being payable on the 8th of December, 1927. It was provided that if any instalment was not paid, the rest of the instalments could be recovered in a lump sum by auction sale of the hypothecated property in respect whereof a final decree had already been passed and in which decree the said property stood advertised for auction sale. The compromise was presented by the parties and by their pleaders before the court and the prayer was that an order for postponement of the auction sale may be sent to the Collector's court at Etawah. It might be mentioned at this stage that the property being ancestral the sale was being conducted through the agency of the Collector.

As usual in cases of this kind some moneys were paid from time to time by the judgment-debtors, but the instalments were not paid on due dates nor in full measure. Out of the sum of Rs.2,000 payable on the 19th of December, 1926, Rs.1,500 were paid on the 19th of December, 1926, and Rs.500 were paid on the 12th of January, 1927. Out of the sum of Rs.7,000 payable on the 8th of December, 1927, Rs.2,500 were paid on the 26th of December. 1927, Rs.2,500 were paid on the 5th of June, 1928, and Rs.2,000 were paid on the 19th of December, 1928. It would thus appear that there was a default in the payment of the first instalment due on the 8th of December, 1927; the default in connection with the payment of Rs.2,000 due on the 19th of Decem-

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ber, 1926, may be ignored inasmuch as that cannot be considered as an instalment under the compromise. On the 14th of February, 1931, the decree-holders certified payment of Rs.9,000 under order XXI, rule 2 of the Civil Procedure Code and on the 23rd of December, 1931, the decree-holders filed the present application for execution and it is this application which has given rise to this appeal.

It was contended on behalf of the judgment-debtors in the court below and it is contended again before us that the decree-holders' application for execution dated the 23rd of December, 1931, is barred by time. It is further submitted that the compromise that was effected between the parties on the 19th of October, 1926, more than six months after the passing of the decree, was outside the competence of the executing court and the parties cannot be bound by the same. In connection with the plea of limitation it was pointed out that the present application was more than three years from the first application and it was also more than three years from the first default. The submission was that the whole sum became due on the 8th of December, 1927, when under the compromise the first instalment fell due and was not paid.

As we said before, both these contentions on behalf of the judgment-debtors can be repelled on the authority of the Privy Council decision to which reference has been made already. In this case their Lordships point out at page 208 that the learned Judges of the Chief Court relied upon the Full Bench case of the Allahabad High Court, *Gobardhan Das* v. *Dau Dayal* (1). They go on to say: "This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes

(1) (1932) I.L.R. 54 All. 573.

sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing court. . . . They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree and the executing court under section 47 has jurisdiction to ascertain its legal effect and to order accordingly. It may or may not be that any and every bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term 'adjustment'; on that their Lordships do not pronounce. . . . . If . . . the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under section 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing court." It is thus clear that their Lordships recognized the jurisdiction of an executing court to record an adjustment entered into between the decree-holder and the judgment-debtor.

This is what has been done in the present case and the rights of the parties have got to be determined in accordance with the agreement of the 19th of October, 1926. On this application of compromise being presented before the court, the court was pleased to sanction the compromise (certain minors were involved in it) and ordered that the case be struck off as the parties had

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compromised. On the authority of the Privy Council decision it cannot now be contended that the compromise between the parties filed in execution proceedings cannot be recognized.

The application dated the 23rd of December, 1931, is in a tabular form as provided by order XXI, rule 11 of the Civil Procedure Code and the mode in which the assistance of the court is required is stated to be that Rs.43,806-6-3 be caused to be realised by means of auction sale of the mortgaged immovable property detailed at the foot of the application. Reference is made to the date of the final decree and to the compromise of the 19th of October, 1926. Payments that have been made from time to time by the judgment-debtors have been credited and the auction sale is prayed for the recovery of the balance of the decretal amount. There was some controversy in the court below about the payments of the sums admitted by the decree-holders and it was said that the sums were not paid, but there is a finding that these sums were paid, and although a ground of appeal is taken to that effect it was not seriously disputed before us nor indeed could it be argued on the evidence on the record that these sums were not paid by the judgment-debtors to the decree-holders.

We have already indicated that the main contention on behalf of the judgment-debtors was that the application dated the 23rd of December, 1931, was barred by time. It has, however, to be admitted that if the second application is in continuation and is a revival of the first application no question of limitation would arise. It would appear that when the compromise of the 19th of October, 1926, was effected the prayer was simply for the postponement of the auction sale, and that to our mind has an important bearing on the question under discussion. The mere fact that the court ordered the case to be struck off does not show that the application came to an end nor does the fact that the present application is on the usual tabular form suggest that it is a fresh appli-

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cation. In circumstances very similar to these their Lordships in the case of the *Oudh Commercial Bank* v. *Bind Basni Kuer* (1) came to the conclusion that the application which they were considering was not a fresh application. The question whether an application is a fresh application or is merely one to revive the previous execution proceedings has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. It is true that the decree-holders did not put their case in this way before the court below nor did the learned Subordinate Judge consider it from this point of view, but this omission does not disentitle the decree-holders from advancing the present argument.

For the reasons given above we hold that the application dated the 23rd of December, 1931, was in substance an application to revive the previous execution proceedings and in this view of the matter no question of limitation arises. We accordingly dismiss this appeal with costs.

APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

JASWANT SINGH (PLAINTIFF) *v.* EXECUTIVE OFFICER, MUNICIPAL BOARD, MEERUT (DEFENDANT)*

1940
February, 2

Municipalities Act (Local Act II of 1916), sections 160, 164—Illegal exaction of licensing fee for thelas not liable therefor—Remedy—No remedy prescribed by the Act—Civil suit maintainable—"Assessment" does not include demand for licensing fee.

A civil suit, for the refund of money illegally exacted by municipal authorities from the plaintiff as licensing fee in respect of his thelas which were not liable under the Municipalities Act for any such payment, is not barred by section 164 of the Act and is maintainable.

*Appeal No. 44 of 1939, under section 10 of the Letters Patent.

(1) (1939) I.L.R. 14 Luck. 192.