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THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. GURU PROSHAD DHUR.

It has been found that the plaintiff's claim has been so established in the presence of the other parties interested, so that in truth the question before the lower Court of appeal was only that of limitation: and the fourth paragraph of the memorandum of appeal to this Court does not arise.

The Secretary of State was properly given his costs in the original Court.

But he appealed on the ground of limitation alone to the lower Appellate Court, and from that Court to this.

Article 120 applies, and as the objection under the concluding portion of the first paragraph of section 31 was waived in the written statement of Government, the case must be treated as though the demand was duly made on behalf of all the sharers; and if so, it was within time.

The appeal must therefore be dismissed with costs.

Appeals No. 913 *and No.* 1161 *of* 1890 *dismissed.* *Appeal No.* 1001 *of* 1890 *decreed.*

A. A. C.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

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BIR NARAIN PANDA AND OTHERS (DECREE-HOLDERS) *v.* DARPA NARAIN PRODHAN AND ANOTHER (JUDGMENT-DEBTORS).*

Decree payable by instalments—Default in payment of instalments—Right of decree-holder to waive his right to execute entire decree—Waiver—Limitation Act (XV of 1877), *Sch. II, Art.* 179, *paragraph* 6.

A decree dated the 18th July 1883, which was made against *D* and *K* in terms of a solehnamah filed by them, directed payment by instalments in the month of Choitro (Vilaity year) each year, with a proviso that if default was made in the payment of any instalment, then, without waiting for

* Appeal from Order No. 234 of 1891, against the order of Babu Dwarka Nath Bhuttacharji, Subordinate Judge of Midnapore, dated the 24th of March 1891, affirming the order of Baboo Jogendro Nath Ghose, Munsiff of Nemal, dated the 11th of December 1890.

default in other instalments, the decree-holder should be at liberty to take out execution and realise the whole amount of the kistbundi with interest. *D* admittedly paid the instalments due from him up to Choitro 1292 (March-April 1885) and a portion of that due in Choitro 1293 (March-April 1886), and *K* admittedly paid those due from him up to Choitro 1293 (March-April 1886), and although in the application for execution payments made subsequent to these dates were alleged by the decree-holders to have been made, both lower Courts found such payments not to have been proved. On the 1st September 1890, more than three years after the default made by *D* in Choitro 1293 (March-April 1886) and that made by *K* in Choitro 1294 (March-April 1887), the decree-holder applied for execution of the whole decree with interest after deduction of all instalments alleged by them to have been paid. On second appeal before the High Court it was contended that although the application to execute the entire decree was barred, yet as the proviso was for the benefit of the decree-holders they were competent to waive it and claim execution in respect of the instalments that fell due within three years before the date of their application for execution.

Held, that this was not the case made out in the Courts below, and further that the proviso could not be said to be waived, as there had been no acceptance of payment subsequent to the first default, nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but on the contrary there had been an affirmative act done by him showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree.

Mon Mohun Roy v. *Durga Churn Gooee* (1) referred to.

THIS was an appeal against the order of the lower Appellate Court, by which it affirmed an order of the Munsiff, dismissing an application for execution of a decree on the ground that it was barred by limitation under Article 178, Schedule II of the Limitation Act, 1877.

On the 18th of July 1883 the plaintiffs obtained a decree for Rs. 648 in terms of a solehnamah filed by the defendants Darpa Narain Prodhan (defendant No. 1) and Krishna Narain Prodhan (defendant No. 2). The terms of the solehnamah which were embodied on the decree were as follows:—"We have entered into a compromise with the plaintiffs, which is to the following purport:—That out of Rs. 648, inclusive of the amount under claim and costs, I, Darpa Narain, shall pay to the plaintiffs

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Rs. 324 (three hundred and twenty-four), being a moiety of the above amount, and I, defendant Krishna Mohun, Rs. 324 (three hundred and twenty-four), the other moiety, in the following instalments, by endorsing payments on the back of the decree; that if we make default in the payment of any instalment, then, without waiting for default in the payment of other instalments, the plaintiff shall be competent to take out execution and realize the whole amount of the kistibundi, together with interest thereon at the rate of 5 pie per rupee per month from this day to the date of realization by attachment and sale of the lands mentioned in the schedule to the plaint, 8 annas at a time separately, and of our other moveable and immoveable properties, and from our own persons, and that the plaintiffs shall be competent to take out execution against any one of us who will be unable to pay the instalments to the plaintiffs, or who will make default in payment of the instalments."

In the schedules of instalments to the solehnamah it was provided that each of the defendants should pay the first instalment of Rs. 24 on 25th Bhadro 1290 Vilaity (8th September 1883), and the remaining instalments of Rs. 14 annually in Cheyt (March-April) each year until the year 1312 (1905).

Krishna Mohun admittedly paid the instalments due by him up to Cheyt 1293 (March-April 1886), and Darpa Narain those due by him up to Cheyt 1292 (March-April 1885), and a portion of the instalment due in Cheyt 1293 (March-April 1886).

On the 1st September 1890 the plaintiffs applied for execution. They alleged that Darpa Narain had paid the balance of the instalment due in Cheyt 1293 (March-April 1886) and that both Krishna Mohun and Darpa Narain had paid the instalments for Cheyt 1294 (March-April 1887), and that they had made default in payment since the last-mentioned date. Accordingly they prayed for execution of the whole decree with interest, as stipulated, after deducting the instalments admittedly paid and then alleged by them to have been paid.

The judgment-debtors Krishna Mohun and Darpa Narain denied payment in Cheyt 1294 (March-April 1887), as well as the payment of the balance of Cheyt 1293 (March-April 1886), and pleaded that the application was barred.

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The Munsiff found that Darpa Narain had made default in Choyt 1293 (March-April 1886) and Krishna Mohun in Cheyt 1294 (March-April 1887), and accordingly held that the application for execution of the balance of the decretal amount with interest at the stipulated rate was barred by clause 6 of article 179, schedule II of the Limitation Act.

The Munsiff also noticed the point, although not put forward by the decree-holders, as to whether they would be entitled to realise the instalments which fell due within the three years before the date of their application, and he held upon the authority of the case of *Mon Mohun Roy* v. *Durga Churn Gooee* (1) that it would be barred, as there could be no waiver by the mere fact of doing nothing.

On appeal the Subordinate Judge upheld the order of the Munsiff on the ground that the application was barred by article 179, schedule II of the Limitation Act.

The decree-holders appealed to the High Court.

Baboo *Ishur Chunder Chuckerbutti* for the appellant.

Baboo *Horendro Nath Mookerjie* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

The only question raised in this case is whether execution is barred with reference to the instalments that fell due within three years before the date of the last application for execution. The decree, which was based upon a compromise, directs payment by instalments, with a proviso that if default is made in the payment of any instalment, then, without waiting for default in other instalments, the plaintiff shall be competent to take out execution and realise the whole amount of the kistibundi together with interest. In the application for execution the decree-holder alleged that since 1295 the judgment-debtors had made default in the payment of the instalments, and that consequently the remaining instalments had all become recoverable, and he accordingly asked for execution of the whole decree after deducting the sums alleged to have been paid. The judgment-debtors pleaded limitation and denied the payments said to have been made in 1293

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and 1294. The Courts below have found that the decree-holder has failed to make out that any payment was made in 1293 and 1294, and they have accordingly held that as the present application is made more than three years after the date of the first default, the application is barred. The decree-holder did not, in either of the Courts below, make any application to be allowed to execute the decree in respect of the instalments that fell due within three years before the date of his application. But the Court of first instance, in its judgment, noticed the point as to whether such application, if it had been made, would not be barred; and it held upon the authority of the case of *Mon Mohun Roy* v. *Durga Churn Gooee* (1) that an application of that kind would be barred. It is admitted before us that upon the facts found by the Courts below, the decree-holder is barred in his application to execute the entire decree, as the default upon which the right to execute the entire decree must be based occurred more than three years before the date of the application. But it has been argued that though that was so, yet as the proviso authorising the decree-holder to execute the entire decree in the event of default in the payment of any instalment was a provision for his benefit, it was competent to him to waive the benefit of that proviso and claim execution only in respect of the instalments that were not barred. In the first place, we do not think that that was the case made in the Courts below; and in the second place, we cannot, in the face of the present application, say that the proviso may be waived, seeing that in this case there has been no acceptance of payment subsequent to the first default nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but, on the contrary, there has been an affirmative act done by him, showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree. The facts of this case are therefore very much stronger than those of the case of *Mon Mohun Roy* v. *Durga Churn Gooee* (1), and we think that the decree-holder is not entitled to execute the decree.

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

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