

Before Mr. Justice Norman and Mr. Justice E. Jackson.

UPENDRA MOHAN TAGORE AND OTHERS (DECREE-HOLDERS) v.  
TAKALIA BEPARI AND ANOTHER (JUDGMENT-DEBTORS.)\*

1869  
March 29.

*Execution--Limitation--Instalment-Bond.*

Upon an application for execution being made, the judgment-debtor executed in Court an instalment-bond, by which he bound himself to pay his debt by half-yearly instalments in the months of Magh (January and February) and Bhadra (August and September) of each year; and it was stipulated that, on failure to pay a single instalment, the whole of the bond might be realised by execution. A decision was given accordingly, and the instalment-bond was filed.

The judgment-debtor did not pay the instalment due in August and September 1864, till a few days after the expiry of that month. He did not pay the instalment of January and February 1865 at all, but subsequent payments were made and accepted. In December 1867 and January 1868, the decree-holder applied to execute the decree and realise the whole amount of the bond.

The lower Appellate Court, holding that time ran from the first default in August and September 1864, dismissed the application.

Held, by High Court on appeal, that the application was not barred, and that time ran from January and February 1865.

Baboo *Srinath Doss* and *Kali Prasanna Dutt* for appellants.

The respondent was not represented.

The facts are fully set out in the judgment of the Court, which was delivered by

NORMAN, J.—Upendra Mohan Tagore, as executor of the late Prasanna Kumar Tagore applied for execution of a decree, dated in April 1853, against Garibulla Bepari and others. The facts are that, on the 29th of September 1858 the defendants executed a bond for payment by instalments of 50 rupees, payable in Bhadra (August and September) and Magh (January and February) of each year, with a stipulation that, if they failed to pay a single instalment, the whole amount of the bond including a part which had been remitted, should become due, and plaintiff

\* Miscellaneous Special Appeal, No. 433 of 1868, from an order of the officiating Judge of Zilla Rungpore, dated the 17th August 1868, reversing an order of the Sudder Ameen of that district, dated the 28th of March 1868.

1869

UPENDRA  
MOHAN  
TAGORE  
v.  
TAKALIA  
BEPARI.

should be entitled to realize the same by execution. The decree-holder admitted by his vakeel in Court his assent to these terms, and it was ordered "that the case be decided according to the terms of the instalment-bond." A copy of which was ordered to be kept in the record.

The instalment due in Bhadra 1271 (August and September 1864) was paid on the 5th of Aswin 1271 (20th September 1864). The instalment due in Magh 1271 (January and February 1865) was not paid, but subsequent payments were made; the last of which is said to have been in Paush 1272 (December 1864 and January 1865.) The application for execution was in Paush 1274 (December 1867 and January 1868.)

The first Court held that, as the application for execution was within three years of the time when the defendant failed to pay the instalment of Magh 1271, it was within time.

The Judge calls the proceeding an action for execution, and holds that limitation runs from the first default, *i. e.*, in Bhadra 1271, notwithstanding subsequent payments. He refers to the case of *Hurronath Roy v. Maherulla* (1). That case, however, turns on the construction of section 4 of Act XIV. of 1859.

The question in the present case depends on the construction of the 20th section of that Act. The effect of the order of the Court that the case should be decided according to the instalment-bond, a copy of which was to be kept with the record, appears to us to have been to and a condition of defeasance to the decree, by the terms of which, so long as the debtor continued to pay the instalments, the decree-holder was precluded from executing his decree.

The instalment due in Bhadra 1271 was not paid till a few days after the end of the month of Bhadra. There is nothing in the terms of the instalment-bond to prevent the decree-holder from taking the payment made on the 5th of Aswin as a good payment of the instalment due in Bhadra. It is quite certain that if, after accepting it as such, he had immediately applied to execute the decree, the Court would have stayed his proceedings as being contrary to good faith. The case of *Breen v. Balfour* (2),

(1) 7 W. R., 21

(2) Bourke, 120.

referred to by the Judge, arose not between the principal debtor and the decree-holder, but between the decree-holder and a surety; and there was an express stipulation that, on any default, "notwithstanding the instalment might be afterwards paid" the whole should become due. This was an express stipulation that default should not be waived, and, of course, no subsequent agreement as between the decree-holder and the principal debtor could affect the surety who was party to it.

The acceptance of the instalment due in Bhadra operated as a suspension of the right of the decree-holder to execute the decree till Magh 1271. The application for execution was within three years from that date. Can it be said that the right to execute the decree is gone? In a case of a decree for the payment of a debt by instalments extending over six years, without any condition that the whole amount of the decree should be exigible on the first default, a Full Bench, consisting of all the Judges of the High Court of North-West Provinces, on the 9th of March 1867, held that the decree, so far as regarded the last instalment, could be executed within three years from the date when it was made payable by the decree, notwithstanding the omission to realize all previous instalments due from and after the date of the decree, which, in fact, had been paid by private arrangements made without recourse to the Court.

The Court said that the provision "supposes a present right to execute the decree accruing at the time when the judgment was pronounced. In the case of an instalment made payable at a future date by the terms of the decree, there is, of course, no present right to realise the instalment at the date of the decree; and when the instalment becomes due, then the present right to enforce it accrues. An application to enforce payment of such an instalment is within time if made before the lapse of three years from the date fixed for payment by the terms of the decree." We assent to the rule laid down in that case; though, in some respects, it may appear to conflict with a decision of this Court, *Tiluck Chandra Gooho v. Gourmani Debi* (1)

1889

UPENDRA  
MOHAN  
TAGORE  
v.  
TAKLIA  
BEPARI.

1869

UPENDRA  
MOHAN  
TAGORE  
v.  
TAKALIA  
BEPARI.

In the present case, by the joint operation of the order of Court made on production of an instalment bond, and the payment of the instalment for Bhadra 1271, the right to execute the decree was suspended till Magh 1271. Until that date there was no present right to execute the decree. On that date the decree came into force as a decree which could be executed. Now it is clear that section 20 does not apply to decrees passed less than three years before the application for execution. By parity of reasoning, it seems to us that it does not apply to decrees which come into force, or become capable of being executed less than three years before the application for execution. The case of *Bipro Das Gossamee v. Chunder Sekhar Bhattacharjee* (1) appears in some degree to support our view on this point.

We need not discuss the question whether the payments on account of the decree made subsequently to Aswin 1271 are not of themselves sufficient to keep alive the decree. It appears to us that the right to execute the decree is not barred by section 20.

We, therefore, reverse the decision of the Judge, and remand the case to the first Court for execution of the decree. The respondent will pay the cost of the appellant, both in this Court and in the lower Appellate Court.

(1) 7 W. R. 523.