

HIGH COURT OF JUDICATURE, CALCUTTA | B. L. R

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

BHUBANESWARI DEBI (PLAINTIFF) v. DINANATH
SANDYAL AND ANOTHER (DEFENDANTS).*

1869
March 13.

Payment—Kistbandi—Limitation—Act VIII. of 1859, s. 206.

A judgment-creditor is entitled to prove payment made according to the terms of a kistbundi for the purpose of shewing that his right to sue out execution under the kistbundi was not barred by limitation.

Query, whether part payment under a decree may not be proved, although they have not been made through the Court, or certified to the Court, under section 206 of Act VIII. of 1859.

Baboo *Nil Madhab Bose* for plaintiff.

Baboo *Mahendra Lal Shome* for defendants.

THIS was a reference from the Judge of the Small Cause Court at Ranaghat, under the circumstances set out in the Reference, which was as follows:—

The question in these two cases is whether payments made out of Court by a judgment-debtor to a decree-holder will keep a decree alive. I have little doubt that this question should be answered in the negative; but as the sums in dispute are considerable (upwards of rupees 800), and the decree-holder has taken the trouble to employ a pleader of the High Court to argue the case before me, I submit it herewith for the Court's decision.

The decrees were passed in the year 1862; and in February of the following year, the parties came before the Court, and filed two kistbandis; executed by the judgment-debtors, whereby they bound themselves to pay off the decrees by instalments. The Judge ordered this agreement to be entered in the register book, and returned the kistbandis to the decree-holder.

No application for execution was made until December 1868, or nearly six years from the execution of the kistbandis; but several payments are entered on the backs of those documents,

* Reference to the High Court by the Judge of the Small Cause Court at Ranaghat dated the 27th January 1869.

which, however, were not made through the Court, nor certified to the Court (section 206, Act VIII. of 1859).

The decree-holder's arguments are mainly, first, that section 206 does not apply to a case like the present; and, second, that the Court, by accepting and recording the kistbandis, in which there is a stipulation that all payments should be made on the backs of those documents, and that the debtors could not claim the benefit of payments made in any other manner, virtually gave a direction within the meaning of section 206 that the money might be paid out of Court. On the *first* point, the case of *Kedar Nath Mahata v. Heeralol Mundul* (1) seems directly in point; and with regard to the *second*, I do not agree in the construction endeavored to be put on the words of the kistbandis, and the inference attempted to be drawn from the Court's acceptance of those documents.

The judgment-debtors having denied the alleged payments, decree-holder adduced some oral evidence in support of them, which, however, I do not think it necessary to take into consideration, unless the High Court disagree with me on the question referred. I think the decrees are barred.

The opinion of the High Court was delivered by

PEACOCK, C. J.—I think that the plaintiff was entitled to prove the payments made under the kistbandi for the purpose of showing that his right to sue out execution under the kistbandi was not barred by limitation. I am not sure that a part payment under a decree may not be proved for the purpose of avoiding limitation, although the payment has not been made through the Court, or certified to the Court. I am disposed think that the words "no adjustment of a decree in part or in whole shall be recognized by the Court" in section 206, mean that no adjustment shall be recognized as an adjustment in favor of the debtor, unless it is made through the Court, or certified to the Court by the person in whose favor decree has been made; the meaning being that the person in whose favor the decree has been made, is not to be bound by an alleged payment out of

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Court, unless he has certified it. If the Legislature had contemplated the Statute of Limitation, and had intended to prevent a payment made within the period of limitation, from being made use of to prevent the operation of limitation, I should think they would have required the payment to be certified by the defendant, who would, in that case, be affected by it.

I am corroborated in this view by finding that no time is fixed within which the plaintiff is to certify. If the plaintiff comes in at any time, and certifies that he has been paid, he must be bound by it ; but if limitation was the object of the Legislature, they would have required the certificate to be made within a fixed time.

Further, in this case the defendant was paying under the kistbandi or agreement, and not under the decree, and the Court had recognized that agreement as the terms upon which the decree was to be executed. It was stipulated in that kistbandi or agreement that the payments were to be endorsed on the kistbandi, without any stipulation that they should be certified to the Court.

With these remarks the case will go back to the Court which referred it, to try, if necessary, whether the payments were made. At present it does not appear to this Court that proof of those payments is necessary, if it should appear that the plaintiff is seeking to enforce payment of instalments which have become due within three years previous to the application. We express no opinion upon that point, inasmuch as the facts are not sufficiently before us, and we have only to answer the question put to us. We merely throw it out as a suggestion to the Small Cause Court Judge when he comes to deal with the case.

The costs in this Court for either side will be costs in the execution case.
