

It seems to me then that, when a claimant can only be allowed to come in under certain provisions of the law, a person who appears, on behalf of that claimant, must shew that he has a right to be heard; and in this case he has not been able to do so. The order of the Principal Sudder Ameen of the 30th November 1867, was strictly a legal order, and could only be disputed, if it could be disputed at all in review. When, therefore, the Principal Sudder Ameen virtually set aside the order on the claim of a third person who had no legal standing before him, he usurped a jurisdiction which the law does not give him.

I think therefore that this rule ought to be made absolute with costs.

1869
IN THE MAT-
TER OF THE
PETITION OF
MAHARAJA
DHIRAJ MAH-
TAB CHAND
BAHADUR OF
BURDWAN

Before Mr. Justice Loch and Mr. Justice Mitter.

TARIF BISWAS AND ANOTHER (JUDGMENT-DEBTORS) v. KALI-
DAS BANERJEE AND OTHERS (DECREE-HOLDERS.)*

1869
Feb'y. 1.

Kistbandi—Execution of Decree.

Where a judgment-debtor executed a kistbandi or instalment bond providing for the satisfaction of the decree which had been obtained against him, and subsequently failed to pay according to the terms of the kistbandi, *heli*, that the decree-holder could enforce his claim under the terms of kistbandi by proceedings in execution, and need not file a fresh suit.

See also 14
B L R. 239.

This was a suit to execute a decree upon the terms of the kistbandi hereunder given. The facts appear on the face of the document and the decision of the High Court:—

To the High in Dignity SARBA CHANDRA BANDOPADHYA.

I, Sankar Biswas, indite this judgment instalment bond, (kistbandi) in the year 1260. You have applied for the execution of a decree dated 5th November 1853 for the recovery of rupees 161-6, besides costs, against me in the Court of the Moonsiff of Hanskhali; now by way of compromise, I have settled to pay you 166 rupees 12 annas, inclusive of costs, upon the security (mal zamin) of Tarif and Jarif of Patika Bati.

* Miscellaneous Special Appeal No. 471 of 1868, from a decree of the Officiating Judge of Nuddea, dated the 2nd July 1868, affirming a decree of the Sudder Moonsiff of that district, dated the 8th August 1867.

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The seal of the Sudder Ameen's Court appears on the back of the document. Whenever I make any payment, I shall have it recorded on the back of this judgment bond. Whatever will be recorded on the back of this kistbandi, I shall admit. I shall not claim in respect of any payment which shall not be recorded on the back of this kistbandi. If I do, it shall be null and void. If I fail to pay according to the instalments, you shall recover the amount, with interest, under this judgment kistbandi (instalment bond) and mal zamini (security) as by execution of a decree.

Baboo *Khettra Mohan Mookerjee* for appellants.

Baboo *Banshidhar Sen* for respondents.

The judgment of the Court was delivered by

LOCUR, J.—The ancestors of the respondents in this case obtained a decree against the appellants' ancestor, who, on 24th June 1853, executed a kistbandi, agreeing to pay the amount of the decree by certain instalments; Tarif and Jarif, the appellants before the Court, being sureties for the due performance of the terms of the kistbandi. One of the terms of that document was to the effect that, if the debtors failed to make payment as agreed upon the decree-holder was to take out execution of the kistbandi. On this document and the surety bond being filed in Court by the parties concerned, the execution proceedings were struck off the file.

The decree-holder at different times proceeded to enforce his claim under the terms of the kistbandi and, in the last endeavor to realize the sum due to him, attached certain property belonging to his debtor, which was advertised for sale, when the sureties filed objections to further proceedings in execution. These objections were heard and rejected by both the lower Courts, and a special appeal has been filed in this Court.

The grounds taken before us are, 1st, that, if the debtor failed to pay the debt according to the terms of the kistbandi, the decree-holder should have taken out execution of his decree; for the law does not permit execution to be taken on a kistbandi, but

only on a decree ; and if the judgment-creditor wish to recover under the terms of the kistbandi, he must bring a fresh suit for that purpose, and a judgment of this Court of 1st March 1867, in *Aghore Chunder Mookerjee v. Wooma Soonderee Debea* (1), is quoted in support of this averment ; 2nd, it is pleaded that execution is barred by limitation.

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The judgment-creditor in this case could not, as supposed by the appellant's pleader, now execute his decree ; for the kistbandi entered into between him, and the debtor is in substitution for that decree, and he can only proceed on the terms of his new contract, which was entered into by the parties in the presence, and with the sanction, of the Court making the decree. The kistbandi was for the benefit of the debtor, and we think he cannot, on his failing to carry out its terms, turn round upon his creditor, and require him to recommence a course of litigation to recover what has already been decreed to him. Nor does the judgment quoted above support the view taken by the appellants' vakeel ; for in that case the terms of the contract were that, if the debtor failed to pay, the creditor might enforce his decree. There are two other cases which go dead against the appellants : one is *Anund Chander Mozoomdar v. Goburdhun Khan* (2) ; and the other is *Dwarka Nath Sadhookhan v. Doorga Churn Saha* (3). The judgments in these cases should, I think, be followed in the present.

The plea of limitation must fail, as the lower Courts have found that the steps taken by the decree-holder to enforce payment of his decree were *bond fide*, and this is a finding of fact.

A preliminary objection to hearing this appeal was raised to the effect that, as the amount in dispute was for a sum under Rs. 500, and the case was one of a Small Cause Court nature, no special appeal could, under the terms of section 27, Act XXIII. of 1861, be admitted. We must decide the objection against the respondent, for we have not the decree before us, and the kistbandi is silent as to the nature of the debt to which it relates.

We dismiss the special appeal with costs.

(1) 7 W. R., 217.

(3) 6 W. R., S. C. C. Ref., 1.

(2) 5 W. R., S. C. C. Ref., 19.