1878

BIDDOMOYE DABEE DABEE v. SITTARAM AND BIDDOMOYE DABEE DABEE v. SOOBUL DAS MULLICK.

Phear, J., that the defendant was liable in *trover* to the plaintiff, although it was found that he acted in perfect good faith. The Court thought that the possession, which was acquired by the hirer of the piano, was not such a possession as was contemplated by s. 108 of the Contract Act.

That case will be found a much stronger one than the present, because there the hirer of the piano was undoubtedly entitled to the possession of it for the time in his own right; whereas here, the possession of Sheoruttun was in fact the possession of the plaintiff. The plaintiff in the first suit will be entitled to judgment for Rs. 490, and in the second suit for Rs. 150.

Attorney for the plaintiff: Baboo *Norendronath Sen.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Tottenham.

1878 *Aug.* 7 & *Dec.* 20.

HEERA LALL MOOKHOPADHYA AND ANOTHER (DEFENDANTS) *v.* DHUNPUT SINGH (PLAINTIFF).*

Kistibandi, Suit on—Acknowledgment of barred Decree—Limitation Act (XIV of 1859), *s.* 4—*Contract Act (IX of* 1872), *s.* 25, *cl.* 3—*Consideration.*

A obtained a decree in 1858 against *B*, but did not apply for execution till 1864, when *B*, although objecting that the decree was barred, presented to the Court, under arrangement with *A*, a petition acknowledging a certain sum to be due, and executed a kistibandi, agreeing to pay the debt by mouthly instalments. *B* paid several instalments, but did not do so on one occasion until execution was taken out against her. On her death shortly afterwards, execution was taken out against her representatives. The representatives objected that the decree was barred, and that the kistibandi could not be substituted for the decree. The objection was, on appeal to the High Court, allowed. *A* then brought a suit on the kistibandi. *Held*, that at the time the kistibandi was entered into, the decree was under the limitation law then

* Special Appeal, No. 1909 of 1877, against the decree of A. J. R. Bainbridge, Esq., Judge of Zilla Moorshedabad, dated the 28th of July 1877, reversing the decree of Baboo Omrito Lall Chatterjee, Subordinate Judge of that District, dated the 29th of March 1877.

1878

HEERA LALL MOOKHOPADHYA v. DHUNPUT SINGH.

in force capable of being executed, and that there was, therefore, valid consideration for the kistibandi.

Held also that, even had there been no valid consideration for the kistibandi, yet the principle laid down in s. 25, cl. 3 of Act IX of 1872, and which prevailed before the passing of that Act, would have saved the kistibandi from becoming void for want of consideration.

THIS was a suit brought to recover a sum of Rs. 1,500 under the following circumstances :—

On the 31st May 1858, Roy Dhunput Singh obtained a money-decree against one Chitkumari Bibi, the predecessor in estate of the present defendants. No proceedings were taken in execution of that decree until the year 1864, when the plaintiff applied for execution. Chitkumari objected to the application, on the ground that it was barred by limitation. Pending the decision of that objection, some negociations took place, and Chitkumari presented a petition to the Court through her pleader, in which she acknowledged a certain amount of principal and interest to be due from her, and executed a kistibandi agreeing to pay the amount with interest at thirteen annas per cent. per mensem by instalments of Rs. 500 a year. The instalments were regularly paid, except on one occasion, when default being made, execution was issued out, and the instalment paid. Subsequently, Chitkumari died, leaving the present defendants, her personal representatives. They neglected to pay further instalments, and execution being applied for as against them, they objected on the ground that there was nothing to execute as the decree was barred, and that the kistibandi had no force as against them. The Subordinate Judge allowed execution to issue, and on appeal his order was upheld; but the High Court on special appeal reversed the decisions of the lower Courts, on the grounds that the decree was barred, and that there was no consideration for the kistibandi. In the course of the judgment of the High Court in special appeal their Lordships made the following observations :— "Of course if it (the kistibandi) were relied on as a contract and were made the subject of a suit, other questions would arise, which do not arise at present." The plaintiff, therefore, brought the present suit upon the kistibandi. The defendants

1878

HERRA LALL MOOKHOPADHYA v. DHUNPUT SINGH.

contended that the suit was barred by s. 11 of Act XVIII of 1861; that it was further barred by limitation: and that if it was not, there was no consideration for the kistibandi. The Subordinate Judge held that the suit was not barred by s. 11 of Act XVIII of 1861, but that the suit could not be maintained, as the consideration for the kistibandi was the sum due under a barred decree, and as such an invalid consideration, and without deciding as to whether the suit was barred by limitation, dismissed the plaintiff's suit. The plaintiff appealed to the District Judge, who decided that, although there was no valuable consideration for the contract beyond a trifling reduction in the rate of interest, yet there was the decree and the conditional forbearance at the time the kistibandi was made, and that these, therefore, were sufficient to support a promise to pay a debt which, but for the statute of limitations, was capable of being enforced, and that as the original promisors and their representatives had both acted upon such promise for nine years, the defendants were not in a position to say that they were not bound by it, and that the contract ought to be treated as a new contract independent of the decree.

The defendants appealed to the High Court.

Mr. *Evans* and Baboo *Mutty Lal Mookerjee* for the appellants.

The Advocate-General (Mr. *G. C. Paul*) and Baboo *Sreenath Doss* for the respondents.

Mr. Evans.—The question of consideration cannot arise, as that question has been adjudicated upon between the parties in the execution proceedings. The debt is extinct when the remedy is barred—*Krishna Mohun Bose* v. *Okhilmoni Dossee* (1),—and when there is no consideration, there is no contract, except when the case falls within the exception in the Contract Act; and the Contract Act does not apply to this case, not having come into operation until 1872. Further, the judgment cannot stand on the ground that the matter is *res adjudicata.* [The *Advocate-General.*—There is no mention of *res adjudicata* in your grounds

(1) I. L. R., 3 Calc., 331.

of appeal.] We say there is no consideration, and that point was taken and tried between the very same parties as are now before the Court, and decided in the judgment given in the case of *Heera Lall Mookerjee* v. *Roy Dhunput Singh* (1), and therefore it is *res adjudicata*.

The kistibandi has not been put in, but a petition has been put in instead, and it is on that petition which they are now suing, and that is the same document proceeded upon in the execution-proceedings. They now seek to call it a contract. If it is to be taken as a contract, there has been no consideration for it, and the contract is inoperative, as it cannot be brought under s. 25, cl. 3, of the Contract Act, that Act not applying to the case. Further, assuming the Contract Act to apply, in the words of the Contract Act, there must be "a promise to pay wholly or in part a 'debt' of which the creditor might have enforced payment but for the law for the limitation of suits." Now as regards the meaning of the word 'debt,' as used in ss. 20 and 21 of Act IX of 1871, it has been held in the case of *Kally Prosonno Hazra* v. *Heera Lal Mundle* (2) to mean a liability to pay money for which a suit could be brought, and not one for which judgment has been obtained.

Section 20 says, "No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, etc." It is clear that the word 'debt,' as used in the Contract Act in s. 25, must have the same meaning as the word has in the Limitation Act, as the Limitation Act is referred to in s. 25 of the Contract Act.

As to the admission of the debt by the kistibandi after it was barred, Act XIV of 1859, s. 4, shows that the admission must be made *before* the debt has become barred, and the petition in this case, which is said to be the admission on our part that the debt was due, was given in 1865; and again the kistibandi, or rather the petition presented to the Court, cannot be said to be a contract; it can at most be only secondary evidence of one; it never was intended to be a contract, but simply a Court petition; it recites a kistibandi which is not produced: and

(1) 24 W. R., 282. (2) I. L. R., 2 Calc., 468.

1878

HEERA LALL MOOKHOPADHYA v. DHUNPUT SINGH.

further, if it were a contract, it deals with immoveable property above the value of Rs. 100, and therefore requires registration under s. 17 of the Registration Act; and this document has not been registered, and therefore cannot be used in evidence.

Parties by consent cannot extend the period of limitation allowed by law, and this kistibandi is said to be given by consent of both parties—*Dinonath Sen* v. *Guru Churn Pal* (1).

The *Advocate-General* for the respondents.—The kistibandi must be considered something separate from a decree. The plaintiff had a good cause of action on the kistibandi in 1865, and by the law in force then, Act XIV of 1859, a person could revive even a barred-debt. Section 4 of Act XIV of 1859 does not say the promise to pay must be made before the period of limitation expires. That section has been split up into the Limitation Act of 1871, s. 20A, and into the Contract Act, s. 25.

Section 20A of Act IX of 1871 makes it compulsory that the promise should be made before the period for limitation had expired, and that period is extended by the Contract Act; and s. 25 of the Contract Act (cl. 3) lays down that such a contract as the present one is perfectly good. As far as the Limitation Act applies, the period in which the promise must be made has been regarded. As far as the Contract Act applies, the contract is good. As to the word '*debt*' not including a decree, art. 169, sched. ii of Act IX of 1871 shows it does. Act XIV of 1859 puts no such construction on the word 'debt.'

By Act XIV of 1859, a debt barred by limitation could be revived by a promise to pay the debt made after the period of limitation had passed; and such a promise could be sued on. [Mr. *Evans*.—A promise to revive must be signed by the party himself and not by an agent; in this case the promise to revive has been signed by a pleader—see *Budoobhoosun Bose* v. *Enaet Moonshee* (2).] It is submitted that the kistibandi is not a decree, the decree merged in the kistibandi. As to a kistibandi being a contract, see the case of *Pearee Mohun Mitter* v. *Mohen-*

(1) 14 B. L. R., 287. (2) 8 W. R., 1.

dro Narain Singh (1). Assuming that the case *Budoobhoosun Bose* v. *Enaet Moonshee* (2) is good law as to the fact that the signature of the agent has not the same effect as the signature of the principal, then we come to the question as to whether there is a good contract in law; the lower Court has held that the consideration was good. In the case of *Huckum Chand Tikaram* v. *Bhagvantrav* (3) it was held, that, as Act XIV of 1859 did not come into force till 1862, a decree-holder obtaining his decree after Act XIV of 1859 was enacted, had a right to get a fresh start from 1862. If so, our application for execution was not barred.

As to what has been said about the debt being extinguished on the determination of the period of limitation, the only reference to that is to be found in s. 29 of Act IX of 1871, and that section says nothing about the word 'debt,' and in Act XIV of 1859 there is no such provision.

Mr. *Evans* in reply.—If the plaintiff depends on s. 4 of Act XIV of 1859, on the revival of the promise, he must show that the acknowledgment was signed by the person to be charged—Thomson on Limitation, 246; *Budoobhoosun Bose* v. *Enaet Moonshee* (2). The Act of 1871 made a different kind of acknowledgment necessary to revive a promise, one that must be signed before the expiration of the period prescribed by the Limitation Act.

As to the fact that it was uncertain whether the debt was barred or not, and that therefore there was a sufficient consideration, see *Rajbullub Bhunj* v. *Taranath Roy* (4). Then as to the case being *res adjudicata*, it is clear that the judgment of Mr. Justice Jackson and Mr. Justice Mitter in 24 W. R., 282, was before the Court; that appears from the judgment of the first Court itself. As to the kistibandi being a contract, it was a contract without consideration, if one at all; and as the Contract Act was not in force at the time, no exception, such as cl. 3, s. 25,

(1) 23 W. R., 465.
(2) 8 W. R., 1.
(3) 1 Bom. H. C. Rep., 94.
(4) 6 W. R., Mis., 30.

1878

HEERA LALL MOOKHOPADHYA v. DHUNPUT SINGH.

mentioned in the Contract Act, can save such an agreement from being void.

The judgment of the Court was delivered by

PRINSEP, J.—This case is practically in continuation of the litigation of which the last stage is reported in Vol. XXIV, Weekly Reporter, page 282. The present plaintiff obtained a decree against one Chitkumari for a certain sum of money, and, in the course of executing it, a petition, to which the plaintiff, decree-holder, assented, was presented on behalf of the debtor, acknowledging a certain amount to be due from her and promising to pay it off by instalments. Money was paid under this agreement, but Chitkumari having died, execution of the decree for the balance outstanding was taken out against the present defendants as her representatives. Objection was raised, and finally allowed by a Division Bench of this Court—see *Hera Lall Mookerjee* v. *Roy Dhunput Singh* (1), which held that execution could not proceed as it was barred by limitation, and the agreement for payment by instalments could not be substituted for that decree, or extend the ordinary term of limitation. The plaintiff has now brought the present suit to recover the balance due on the agreement entered into by Chitkumari as specified in the petition presented by her.

The Subordinate Judge dismissed the suit, holding that the consideration of the kistbandi "was the sum due under the decree, execution of which was at that time barred by limitation," and that as the debt covered by that agreement could not be legally recovered, there was no valid legal consideration for supporting the kistibandi.

In appeal this order was set aside, the claim being allowed, and the defendants have now brought this special appeal.

Mr. Evans for the special appellant contends, that the fact that there has been no consideration has already been decided by the judgment reported in Vol. XXIV, Weekly Reporter, page 282, but we are of opinion that this matter was not and would not be then decided, inasmuch as in that stage of this case the only

(1) 24 W. R., 282.

question before the Court was whether execution could proceed with respect to the original decree or on the kistibandi in substitution of that decree; and in accordance with precedents of this Court, it was held that execution of the decree itself was barred by limitation, and the kistibandi could not operate as a revival of that decree so as to make it capable of being executed. There may be expressions in the course of the judgment that intimate the absence of consideration, but that was not properly before the Court and cannot preclude our determination of the point in the present case.

As regards the petition made on behalf of the debtor, now represented by the defendants, in the proceedings in execution of the decree held by the plaintiff, we are of opinion that it may be regarded as embodying the terms of an agreement entered into between the parties such as has been found to have been entered into, whereby, in modification of the terms of the decree which permitted immediate realization of the judgment-debt, it was agreed that payment should be made by instalments. In consideration for this the decree-holder consented to abstain from enforcing his right to immediate payment by executing his decree. That he could and would have done so is clear from the action of the Court. In giving effect to this agreement more than one payment of the instalments has been made by the original debtor and the defendants, and it is only on default made by the latter, that objection has been raised. The only objection that we need consider is, whether there was a good consideration for this agreement, since it is contended that, inasmuch as the consideration depended upon the right to execute the decree, and it has been held that that decree was at that time inoperative, there is an absence of all valid legal consideration.

We are of opinion that, though this appears to have been the finding of the Court when the decree was afterwards executed in default of payment of some of the instalments, when that agreement was made the decree was capable of being executed under the law as it was then administered, it was by the parties, "as well as by the Court of execution," treated as a good decree, and we should be disinclined to hold that what was then a valid agreement has since become null and void.

1878

HEERA LALL MOOKHOPADHYA v. DHUNPUT SINGH.

But we agree with the learned Advocate-General that the principle, which is expressed in s. 25, cl. 3, of the Contract Act of 1872, is not one altogether new to our Courts, and that under it this kistibandi would be valid without any consideration, so that we have no difficulty in affirming the decree of the lower Appellate Court and dismissing this special appeal with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice White.

1879
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SURBOMUNGOLA DABEE *v.* MOHENDRONATH NATH & ANOTHER.

Hindu Will—Probate—Renunciation by Executor—Proof of Execution in Court—Administration Accounts.

A Hindu testator empowered his executor to lay out such portion of his estate as the executor might think fit towards charitable purposes, and did not dispose of the residue of the estate. The executor renounced, and no probate of the will or letters of administration with the will annexed was granted. In a suit by the testator's sole heiress for construction of the will and for administration, the Court allowed the execution of the will to be proved in Court, declared that it was void for uncertainty, and directed the usual administration accounts to be taken.

NUNDOLALL NATH, by his will dated the 21st day of June 1877, after directing his executor to get in his estate, directed him "to "lay out and expend such portion thereof as my said executor "may in his discretion think necessary and proper in and towards "the construction and erection of a pucca bathing-ghaut at a suit-"able place in the river Hooghly, to be surmounted by a chadney, "and two temples for Seva, for whose daily worship a monthly "allowance will be made by my said executor, the amount whereof "shall be in his absolute discretion, and I will and direct that my "said executor shall hold the rest and residue of my said property, "and shall invest the accumulations thereof to the best advantage." The testator died on the 21st day of June 1877, leaving the plaintiff his sole daughter and heiress. The executor renounced probate, and the present suit was instituted by the plaintiff against