

Before Mr. Justice Ghose and Mr. Justice Geidt.

BENODE LAL PAKRASHI

v.

BRAJENDRA KUMAR SAHA.*

1902
June 4.

Decree—Execution of decree—Instalment decree—Agreement before decree not to enforce payment of an instalment—Part payment—Civil Procedure Code (Act XIV of 1882) s. 244—Limitation.

A decree being once made, it must be taken to be conclusive between the parties. When an instalment decree was duly made, neither an agreement that the payment of a certain instalment would not be enforced, alleged to have been come to between the parties before the decree was made, nor a plea of payment of a part of the claim, alleged to have been made before the decree for the full claim was made, can be given effect to.

Laldas Narandas v. Kishordas Devidas (1) distinguished.

THE judgment-debtor, Benode Lal Pakrashi, appealed to the High Court.

This appeal arose out of an application for execution of an instalment decree for over Rs. 29,000, dated the 15th August 1887, made in the Court of the Subordinate Judge of Pubna, the prayer being for the recovery, by execution, of Rs. 2,278-10-10, the balance of the last or tenth instalment of Rs. 4,189 due under the decree. The judgment-debtor took several objections, amongst which were the following:—

(1) that at the time of the settlement of the original suit with the decree-holders, under a *kistbundi*, and prior to presenting it in Court, there was a separate oral agreement in June 1887, to the effect that in the event of regular and timely payment of the amount of the first nine *kists*, the judgment-debtor would be exempted from the payment of the 10th *kist*; and

(2) that the agent of the judgment-debtor paid the decree-holder Rs. 2,500 in January 1884, that the decree-holders

* Appeal from order No. 51 of 1902, against the order of Babu J. N. Roy, Subordinate Judge of Pubna, dated the 11th of January 1902.

fraudulently omitted to deduct the said amount when the decree was passed, and that, therefore, the judgment-debtor was entitled to get back the said amount from the decree-holder.

The Subordinate Judge overruled both these objections on the ground that they could not be entertained after the decree as well as on the ground that there was no evidence to support the allegations.

Dr. Asutosh Mukerjee and Babu Braju Lal Chakravarti for the appellant.

Babu Joyesh Chandra Roy for the respondents.

GHOSE AND GEIDT JJ. This is an appeal by the judgment-debtor.

The decree-holders obtained a decree which was for the sum of Rs. 29,000 odd in the year 1887. The amount of the decree was payable in ten instalments, the last of the instalments covering the sum of Rs. 4,189. It appears that all the nine instalments were duly paid up, and execution was taken out for the last instalment of Rs. 4,189. To this execution two objections were raised by the judgment-debtor, the first being that before the decree in question was passed, it had been agreed between the parties that in the event of the judgment-debtor paying up in due time the first nine instalments, the decree-holders would not enforce the last instalment; and, secondly, that the judgment-debtor had paid into the hands of the decree-holders the sum of Rs. 2,500 in the year 1884 on account of the claim which the latter had against the judgment-debtor, and that therefore the decree-holders were not entitled to execute the decree for the sum of Rs. 4,189, and that, if they be held entitled to obtain any relief, they were bound to give credit for the sum of Rs. 2,500 paid to them in the year 1884.

The Court below has negatived both the objections, and hence the judgment-debtor has appealed to this Court, the learned Vakil for the appellant contending that the objections raised by the judgment-debtor in the Court below ought to have been given effect to.

1902

BENODE LAL
PAKRAISHI
v.
BRAJENDRA
KUMAR
SAHA.

1902

BRUNO LAL
FAKRASHI
v.
BRAJENDEA
KUMAR
SAHA.

We are, however, unable to agree with the view that has been propounded before us on behalf of the appellant. If the agreement which was pleaded as having been come to between the parties, before the decree was made, be given effect to, it would have the effect of nullifying the decree; and it seems to us that upon this single ground the objection could not be entertained. A decree was duly made between the parties, and, if they entered into such an agreement, as is now alleged, it should have been incorporated in the decree. The decree being once made, it must be taken to be conclusive between the parties, and an agreement like the one which has been pleaded could not be given effect to.

The learned vakil for the appellant has called our attention to the case of *Laldas Narandas v. Kishordas Devidas* (1), decided by a Full Bench of the Bombay High Court, in support of the view that he has propounded. But it seems to us that the question that was discussed before the Bombay High Court was a question somewhat different from the one with which we are now concerned. There, the question raised was whether the existence and validity of an agreement made between the parties before an arbitration decree was made, ought to be determined in execution of the said decree under the provisions of s. 244 of the Code of Civil Procedure, or in a separate suit; and it was held that that question should be determined in the course of execution of the decree, and not in a separate suit. The question, however, that we have to determine is whether an agreement like the one which is said to have been entered into by the parties before the decree was made could be given effect to. We are of opinion that it could not be given effect to. We accordingly overrule this objection.

As to the other objection, it appears to us that, if the money was paid in 1884 (and it was, according to the story of the judgment-debtor paid in respect of the claim which the decree-holders had, and upon which claim the decree was obtained in 1887), such payment ought to have been raised in the suit itself, and before the decree was made between the parties.

It is apparent that the claim of the appellant in regard to the payment made in 1884 is now barred by limitation, and it would, we think, be improper to give effect to such a plea—a plea which, as already stated, ought to have been made in the suit in which the decree was passed.

Upon these grounds we overrule both the objections. The result is that the appeal will be dismissed with costs.

M. N. R.

Appeal dismissed.

Before Mr. Justice Hill and Mr. Justice Brett.

AKHOY KUMAR SOOR

v.

BEJOY CHAND MOHATAP (MINOR).*

1902

July 17.

Sale—Rent—Bengal Tenancy Act (VIII of 1885) ss. 160 cl. (g) and 167—Sale of mortgage of darpatni tenure—Right, title and interest of debtors—Regulation VIII of 1819, ss. 3, and 4—Incumbrance—Limitation Act (XV of 1877) s. 7—Where limitation is determined by the provisions of the Bengal Tenancy Act, whether a minor is entitled to a further period of limitation under the Limitation Act.

The terms "right, title and interest of the debtors," as used in the sale certificate and order must be construed with reference to the circumstances under which the suit was brought, and the true meaning of the decree under which the sale took place as well as the proceedings leading up to the sale.

In a case where proceedings were taken under the provisions of the Bengal Tenancy Act and application was made for the simultaneous issue of the order of attachment and proclamation as provided in s. 163 of the Act, what was intended to be sold was the entire tenure and not merely the right, title, and interest of the defaulter therein.

Jotendro Mohun Tagore v. Jogul Kishore (1) and Nitayi Behari Saha Paramanick v. Hari Govinda Saha (2) referred to.

A mortgage created by a darpatnidar of his interest in the taluq does not amount to a "protected interest" within the meaning of s. 160 cl. (g) of the Bengal Tenancy Act.

When a mortgagee of a tenure had enforced his lien and obtained his decree it would no longer remain as an incumbrance on the tenure, which could be avoided under the provisions of s. 167 of the Bengal Tenancy Act.

S. 7 of the Limitation Act allows a minor a further period of limitation in the case of a suit or application for which the period of limitation is

* Appeal from order No. 193 of 1901, against the order of Babu Prasanna Kumar Ghose, Subordinate Judge of Hooghly, dated the 22nd April, 1901.

(1) (1881) I. L. R. 7 Calc. 357.

(2) (1899) I. L. R. 26 Calc. 677.