APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
Jan. 11.

CHANDRABALA DEBI
v.
PRABODH CHANDRA RAY.*

Execution—Sale—Adjournment of sale for compromise—Time, the essence of the agreement of parties—Failure to pay on the final date—Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882), ss. 244, 311.

Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties :—

Held, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor, in spite of the protest of the decree-holder.

Harakh Singh v. *Saheb Singh* (1) explained and followed. *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (2) referred to.

Held, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding.

Behary Lal Pundit v. *Kedar Nath Mullick* (3) followed.

Held, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

SECOND APPEAL by the petitioner, Chandrabala Debi.

The property of one Rajendra Kumar Ray Chaudhuri was sold in execution. Chandrabala Debi, the petitioner in this

* Appeals from Appellate Orders Nos. 145 and 158 of 1908, against the order of E. P. Chapman, District Judge of 24-Parganas, dated Jan. 20, 1908, reversing the order of Amrita Lal Palit, Munsif of Alipur, dated Aug. 27, 1907.

(1) (1907) 6 C. L. J. 176. (2) (1901) I. L. R. 29 Calc. 577.
(3) (1891) I. L. R. 18 Calc. 469.

case, applied as the administratrix of her husband's estate, under sections 244 and 311 of the Civil Procedure Code to have the sale set aside. Thereupon, an agreement had been come to with the decree-holder that if the amount due under the decree were paid the sale would be set aside. Petitions setting forth the terms of the agreement were filed on the 29th June 1907, and there was no stipulation as to the time within which the decretal amount should be paid. On the 22nd July the judgment-debtor filed a petition saying that the parties had agreed to 15 days' time being given for payment. The hearing was adjourned to the 31st July. On the latter date, the judgment-debtor filed another petition setting out an agreement with the decree-holder for 15 days' time for payment, and that it was agreed that if the payment were not made within that time the sale should hold good. On the 15th August the judgment-debtor again applied for time. The application was resisted by the decree-holder. The Court, however, allowed a week's time and permitted the judgment-debtor to deposit part of the decretal amount. The judgment-debtor deposited the remainder of the decretal amount on the 21st August, and applied on the 27th August to have the sale set aside. Tday followiholder objected on the ground that the Courthe case to the to grant time after the 15th August, the partiejon be taken as that in default of payment on that date, the sale no time was ld good. The Munsif overruled the objection any event the sale. On appeal, the District Judge reversed the orders of the Munsif. The petitioner preferred a second appeal to the High Court.

Mr. A. Caspersz (*Babu Surendra Chandra Sen* with him), for the appellant, contended that time was not the essence of the contract. See, as to the effect of agreement, *Munshi Amir Ali* v. *Inderjit Koer* (1) and *Anant Das* v. *Ashburner & Co.* (2). The decree-holder sold the property in execution. By the agreement, my right to reopen under sections 244 and 311 was abandoned: see *Uttam Chandra Krithy* v. *Khetra Nath*

(1) (1871) 9 B. L. R. 460. (2) (1876) I. L. R. 1 All. 267.

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Chattopadhya (1) and *Harakh Singh* v. *Saheb Singh* (2). As to discretion of Court and its powers, see the new Code (Act V of 1908), section 151.

Babu Neelmadhab Bose, for respondent. In these matters, besides the parties, there is a third party, *viz.*, the Court. Without the sanction of the Court no agreement can be effective, nor can an agreement be modified. The Court has neither the jurisdiction to vary the terms of the agreement against the wishes of one of the parties to the agreement. In all such applications, time is of the essence of the agreement. The third application (*viz.*, of the 31st July) conclusively proved that time was of the essence of the contract. The time allowed for payment was sufficient, and it was never contended in the Courts below that it was not.

Mr. Caspersz, in reply. Certainly, the decree-holder should have appealed against the interlocutory orders immediately after they were passed.

MOOKERJEE AND CARNDUFF JJ. These appeals are directed against two orders of the District Judge [illegible] 24-Parganas by which he discharged two orders m[illegible] Munsif setting aside two execution sales hel[illegible] March and 30th October 1906, respectively. [illegible]stances under which these orders were made mus[illegible] in detail in order that our decision may be intelligible.

It appears that applications were made by the judgment-debtor to set aside these execution sales under sections 244 and 311 of the Code of Civil Procedure of 1882, on the ground of fraud and material irregularity. During the pendency of these proceedings the parties negotiated for a compromise, and on the 1st June 1907 an application was made to the Court for an adjournment to enable them to carry it out. In this application it was stated that a proposal for an amicable settlement was in progress, that the decree-holder had agreed to

(1) (1901) I. L. R. 29 Calc. 577. (2) (1907) 6 C. L. J. 176.

give back the auction-purchased property and that consequently a month's time was necessary. The Court, however, did not adjourn the case for a month, and fixed the 29th June as the next date for hearing. On that date the judgment-debtor made another application asking that the case might be adjourned again. This application recited that an agreement had been entered into by the parties to the effect that the sales would be set aside on payment to the decree-holder of the whole amount of the decree with costs, that the judgment-debtor had not been able to collect the necessary money, that she was in difficulty and that she could not raise funds without the permission of the District Judge, apparently because she was in possession of her husband's estate as administratrix. The petition concluded with the statement that if she found herself unable to pay any money to the opposite party, on default of payment the sale would stand good, and she consequently prayed for three weeks' time. The Court thereupon adjourned the case to the 22nd July. It should be observed that this exceeded by two days the period of three weeks' time for which the parties had asked, the explanation apparently being that the first day after the three weeks as well as the day following were holidays and the Court adjourned the case to the first open day after the holidays. If this petition be taken as a whole, it may reasonably be contended that no time was fixed for the payment of the money, and that in any event time was not made the essence of the agreement, and this is the view most favourable to the case of the judgment-debtor. On the 22nd July there was again another petition on behalf of the judgment-debtor. In this it was stated that the money had not then been raised, that it could be raised only by a mortgage of the properties upon permission of the District Judge, and that in order to enable her to do so, it was necessary to adjourn the case for a further period of 15 days. The petition also recited that on the date fixed the dues would be paid, and on default the sale would stand good. The decree-holder signified his consent to this application in consideration of Rs. 9 paid on that date. The

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Court, however, did not sanction the arrangement and granted only nine days' time as appears from the following order recorded in the order sheet: "on the application of the petitioner consented to by the opposite party, ordered to be put up on the 31st July 1907 for hearing, Rs. 9 to be credited towards the decretal money." It will be observed that as the Court did not sanction the application of the parties, it cannot be successfully contended that upon the failure of the judgment-debtor to pay the decretal amount to the decree-holder as agreed upon, the sale would stand confirmed. On the 31st July there was a fresh application by the judgment-debtor. In this she stated that although two adjournments had been previously granted with the consent of the decree-holder for payment of the sum decreed to him, she had not been able to raise the necessary funds. She, therefore, prayed that another 15 days' time might be given to her. The petition concluded with the following very important provision: "If I pay the whole of the decretal amount, the sales will stand cancelled. On default of payment of the whole money on that date, the sales will stand good, and I shall not further pray for time." The decree-holder signified his consent in the following terms at the foot of the petition: "If the money is not paid within the date fixed, the sale will stand good. Upon this condition I take Rs. 10 and give sanction to this application." The matter was then placed before the Court and the following order was recorded on the order sheet: "On the application of the petitioner consented to by the opposite party, ordered—put up on the 15th August next for orders on condition stated thereon, Rs. 10 to be credited against the decretal money." When, however, the 15th August came, the judgment-debtor still found herself unable to pay the decretal amount as she had agreed to do, and on that date she applied for further time. To this the execution-creditor objected. The learned Judge did not then decide what the effect of a partial payment on that date or at a later stage would be, but permitted the judgment-debtor to deposit Rs. 150 in Court and allowed her time till the 21st August to pay the balance of the decretal

money. The decree-holder, however, declined to accept the sum deposited. Subsequently on the 21st August the judgment-debtor put in another application in which it was stated that she had offered the balance to the decree-holder, who had refused to accept the money. The Court thereupon ordered that the applicant might be allowed to deposit the money as prayed for. The money was deposited, and on the 27th August 1907 the Court set aside the sales. The Munsif held in substance that he had jurisdiction to extend the time for payment of the money, and that the execution creditor was bound to accept the sums deposited in Court and to apply the same in satisfaction of his decree. The decree-holder was dissatisfied with these orders and appealed to the District Judge, who has held that the orders cannot be supported. His view in substance is that the application of the 31st July, which was assented to by the decree-holder and confirmed by the Court, embodied an agreement binding upon both parties, that upon breach of that agreement an indefeasible right accrued to the decree-holder to demand that the sale should stand unreversed, and that it was not open to the Munsif, in the exercise of his discretion, to extend the time for the payment of the money due by the judgment-debtor. In support of this view the learned District Judge placed reliance upon the decision of this Court in the cases of *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (1) and *Harakh Singh* v. *Saheb Singh* (2).

The judgment-debtor has now appealed to this Court, and on her behalf it has been contended that the District Judge was in error in relying upon the application of the 31st July 1907, and that the agreement which regulates the rights of the parties is to be found embodied in the application of the 29th June 1907. It has also been argued that the effect of this petition, which was assented to by the decree-holder, was to leave it open to the Court to decide what would be a reasonable time within which the judgment-debtor might satisfy the decretal amount. The learned counsel for the appellant has,

(1) (1901) I. L. R. 29 Calc. 577. (2) (1907) 6 C. L. J. 176

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in fact, contended that, after this application of the 29th June had been made, the Court had seisin of the case, and it was not open to the parties subsequently to modify the arrangement into which they had entered on that date. In support of this contention, much reliance was placed upon an observation in the judgment of this Court in *Harakh Singh* v. *Saheb Singh* (1) to the effect that, in cases of this description, what the Court has to do is to determine whether the parties intended in the first conception of the agreement to make time the essence of the contract. On the other hand, it has been argued on behalf of the decree-holder that an agreement of this character can be operative only with the assent of the Court, and that, if the Court does not sanction a particular arrangement and refuses to grant an adjournment, the agreement can have no practical effect. This position the appellant did not contest, and we feel no doubt that it represents the right view of the matter. But the necessary inference from this position is that, if initially an agreement is entered into by the parties with the assent of the Court, it is open to the parties at a subsequent stage with the approval of the Court to modify that agreement. This view is in no way inconsistent with the decision in *Harakh Singh* v. *Saheb Singh* (1) where no question arose or was decided as to the power of the parties to modify the original agreement. The question then is—Was there such a modification in the present case? In our opinion, there is no room for doubt that, whatever might have been the character of the original agreement of the 29th June 1907, it was modified by the application of the 31st July 1907. Assume for a moment that upon the application of the 29th June it would have been open to the Court, as a Court of Equity to determine what would be a reasonable time for the payment of the money, it cannot be suggested that the Court could not at a later stage, upon the joint application of the parties, alter that agreement and give its sanction to a fresh arrangement which would finally regulate the rights of the parties. What was then the effect of this agreement of the 31st

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July? Time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holder. On the 31st July the judgment-debtor prayed for further time, the decree-holder insisted, not unreasonably, upon more stringent terms and demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease. The judgment-debtor consented, and the Court sanctioned this arrangement. We need not, therefore, consider what the position of the parties would have been, if the arrangement proposed by the parties on the 31st July had not been approved by the Court; possibly it might then have been open to the Court to proceed on the footing of the original application of the 29th June and exercise its jurisdiction accordingly. But after the Court had sanctioned the arrangement entered into by the parties on the 31st July, the Court could not, in our opinion, subsequently at the instance of the judgment-debtor and in spite of the protest of the decree-holder, vary the terms of the agreement. This is clear from the decision of this Court in *Harakh Singh* v. *Saheb Singh* (1) already referred to. As the learned vakil for the respondent contended, there were three parties to the agreement, the decree-holder, the judgment-debtor, and the Court, and, once the agreement had resulted from their concurrence, it could not be subsequently modified except by the assent of each and every one of them. That was not done in this case. We must, therefore, hold that the orders of the Munsif made on the 15th August 1907, permitting the judgment-debtor to deposit Rs. 150 on that date to the credit of the decree-holder and also allowing her time to put in the balance of the decretal money on the 21st August, were made without jurisdiction. The learned counsel for the appellant, however, contended that if this view be adopted, the decree-holder ought to have immediately preferred an appeal against these orders. In our opinion,

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it was not necessary for him to do so. As was pointed out by this Court in the case of *Behary Lal Pundit* v. *Kedar Nath Mullick* (1) an appeal need not be preferred against every order in an execution proceeding. If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. Besides, in this case, as the learned vakil for the respondent pointed out, in the appeal which was preferred against the final order, the order of the 15th August was specifically mentioned as an order which ought not to stand. We are of opinion, therefore, that it was open to the learned District Judge, in hearing the appeal against the orders of the 27th August, to determine the validity of the orders of the 15th August. On these grounds, we must hold that the orders of the District Judge are correct and should be affirmed. The result is that the appeals fail and must be dismissed with costs.

Appeal dismissed.

S. M.

(1) (1891) I. L. R. 18 Calc. 469.