

(1877) 05 PRI CK 0001

Privy Council

Case No: None

Delhi and London
Bank, Limited

APPELLANT

Vs

Melmoth A. D.
Orchard

RESPONDENT

Date of Decision: May 14, 1877

Citation: (1877) 4 IndApp 127

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Barnes Peacock, J.

1. This is an appeal from a judgment and order of the Chief Court in the Punjab, dated the 31st of July, 1874, reversing on review a former judgment and order of the same Court of the 17th of March, 1873, and thereby disallowing the execution of a decree obtained by the Appellants against the Respondent for the recovery of a sum of Rs. 14,508. Ma. for debt and costs.

2. The judgment was recovered on the 5th of October, 1866, in the Court of the Deputy Commissioner of Delhi. Subsequently to the decree the Defendant made various payments on account up to the month of October, 18G9. On the 22nd of that month the Plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of Rs. 19,227. 3a. for principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at Meerut, transferring the decree, in order that it might be executed in that Court.

3. It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that on the 10th of December, 1869, the Deputy Commissioner made the following order:

The decree is of a prior date to the introduction of Act XIV. of 1859. It should be executed according to the civil law of the Punjab; and as, according to the said law,

the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that (the petition) be sent to the record-room.

4. There can be no doubt that the application made on the 22nd of October, 1869, was bond fide, and, indeed, the learned Counsel for the Respondent has very properly resitted that it was so.

5. No appeal was preferred from the order of the 10th of December, 1869; but the Defendant, notwithstanding the order, made further payments on Account.

6. On the 4th of May, 1871, the Plaintiff, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772. 13a. 7p., made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of Meerut for execution, and prayed that a summons might be issued under the provisions of Act VIII. of 1859.

7. Upon that petition the Deputy Commissioner, on the 6th of May, 1871, made the following order:

As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room.

8. With reference to the statement that the period for execution had then totally expired, it may be as well to point out that Act XIV. of 1859 was extended to the Punjab on the 1st of January, 1867, and consequently that the period of three years from the time when the Act came into operation in the Punjab had expired before the application of the 4th of May, 1871, was made. On the 30th of June, 1871, the Deputy Commissioner refused to review his judgment, and on the 10th of July of that year the Plaintiff appealed to the Commissioner, who, on the 18th of August, 1871, dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st of January, 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

9. The case was appealed to the Chief Court of the Punjab, which at first rejected the appeal. Subsequently a Full Bench of that Court, on the 17th of March, 1873, upon review, decreed the appeal with costs, and, reversing the orders of the lower Courts, ordered and decreed the Appellant's application for execution with costs and the costs of the Appellant in the Appellate Court. They said:

The application for execution in 1869 to the Assistant-Commissioner at Delhi was, in the opinion of this Court, a bond fide proceeding to enforce the decree of 1866. It

was a proceeding to enforce the decree, and not merely to keep the decree in force. Before the expiration of three years from, the date of that proceeding the present application was filed.

10. Subsequently, on the 31st of July, 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th of March, 1873, upon the ground that the decree having been obtained before the introduction of Act XIV. of 1859 into the Punjab, the case must be governed by the provisions of Section 21, and not by Section 20. The case was decided by Mr. Justice Boulnois and Mr. Justice Melvill upon the authority of the cases of *Bdivdehuvar v. Mulji Ndran* 3 Bomd H.C. Ap. Cas. 177, and *Malcundd Valad Bdlachdrya v. Sitaram and Nilo* 5. Bomb. H.C. Ap. Cas. 102. Mr. Justice Thornton held a contrary opinion, and recorded his reasons for dissent.

11. It was not contended that the decision of the Chief Court of the 17th of March, 1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

12. The case depends upon the proper construction to be put on Sections 20 and 21 of Act XIV. of 1859. The following are the words of those two sections:

20. No process of execution shall issue from any Court not established by royal charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

21. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire.

13. It was pointed out, in the case of *Gooroo Doss Auekholee and Ors. v. Modhoo Koondoo and Ors.* 6 Suth. W.R. (Mis. Full Bench Rul.) 98, that according to the literal wording of Section 20 no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by royal charter, after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution.

14. That was held to be the proper construction of Section 20, both in that case and in the subsequent Full Bench case of *Kangaleechurn Ghosal v. Bonomalee Mullick*

and Ors. 7 Suth. W.E. 515.

15. In the latter case it was held that, under the 21st section, execution might issue after the expiration of three years from the time of the passing of the Act to enforce a judgment which was in force at the time when the Act was passed, provided some proceeding to enforce the judgment within the meaning of Section 20 had been taken within three years next preceding the application for execution.

16. That decision was followed by the High Court in Madras, in the case of *Karuppanan v. Muthannan* 5 Mad. H.C. Rep. 105.

17. The High Court in Bombay put a different construction upon Section 21. The cases are referred to in the judgment now under appeal See the Bombay cases cited on p. 133. They hold that the words, " nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act," could not be rejected without violating a fundamental rule for the construction of statutes; and that the words, " may be issued," should be read as " must be issued;" and the Chief Court treated the words, "judgmsnt in force at the time of the passing of this Act," as applicable to a judgment in force at the time of the extension of the Act to the Punjab, though not in force at the time of the passing of Act XIV. of 1859.

18. It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab, is correct, a judgment creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV. of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

19. There is no doubt that in some cases the word " must," or the word " shall," may be substituted for the word " may; " but that can be done only for the purpose of giving effect to the intention of the Legislature; but, in the absence of proof of such intention, the word " may " must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense.

20. On the construction of this inartificially drawn statute their Lordships are of opinion that the words, " nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding

section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words, " but process of execution may be issued," mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first happen.

21. It appears, then, to their Lordships that the words, " nothing in the preceding section " (as used in Section 21), mean that the prohibition laid down in Section 20 should not apply to judgments in force at the time of the passing of the Act.

22. Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited, their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of Delhi, on the 22nd of October, 1869, being bona fide, though unsuccessful, was a proceeding to enforce the judgment within the meaning of Section 20; and that that proceeding having been taken within three years next preceding the application made on the 4th of May, 1871, to which the judgment now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV. of 1859, and ought to have been granted.

23. It was contended that the rule *res judicata* applied, and that the application made on the 4th of May, 1871, was barred by the order of the Deputy Commissioner of the 10th day of December, 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December, 1869, was not an adjudication within the rule of *res judicata*, or within Section 2 of Act VIII. of 1859.

24. For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab, of the 31st of July, 1874, be reversed, and that the judgment and order of the 17th of March, 1873, be affirmed and stand in force; and that the Defendant do pay to the Plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The Respondent must pay the costs of this appeal.