

(1877) 05 PRI CK 0003

Privy Council

Case No: None

The Delhi and London
Bank Limited

APPELLANT

Vs

Orchard

RESPONDENT

Date of Decision: May 14, 1877

Citation: (1878) 3 ILRPC 47

Hon'ble Judges: J. W. Colvile, B. Peacock, M. E. Smith, R. P. Collier, JJ.

Judgement

B. Peacock, J.

1. This is an appeal from a judgment and order of the Chief Court of the Punjab, dated the 31st July, 1874, reversing on review a former judgment and order of the same Court of the 17th 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. 14,408-14 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, 1869. On the 22nd of that month the plaintiff's presented a petition to the Deputy Commissioner, claiming a balance of Rs. 19,227-3 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 October, 1869, was bond fide, and, indeed, the learned Counsel for the respondent has very properly admitted that it was so.

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

6. On the 4th May, 1871, the plaintiff's, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772-13-7, 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. Upon that petition the Deputy Commissioner, on the 6th 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."

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

8. 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 appellants' application for execution with costs and the costs of the appellants 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."

9. Subsequently, on the 31st July, 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th 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 *Bai Udekwar v. Mulji Naran* 3 Bom. H.C. Rep. A.C. 177 and *Makunda Valad Balacharya v. Sitaram* 5 Bom. H.C. Rep. A.C. 102. Mr. Justice Thornton held a contrary opinion, and recorded his reasons for dissent. It was not contended that the decision of the Chief Court of the 17th March, 1873, was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

10. 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, as 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.

11. It was pointed out in the case of *Ram Sahai Sing v. Sheo Sahai Sing* B.L.R. Sup. Vol. 492 S.C. 6 W.R. Mis. 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. That was held to be the proper construction of Section 20, both in that case and in the subsequent Full Bench case of *Kangalee Churn Ghosal v. Bonomalee Mullick* B.L.R. Sup. Vol. 709. 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. That decision was followed by the High Court of Madras in the case of *Karuppanan v. Muthannan Servedy* 5 Mad. H.C. Rep. 105.

12. The High Court of Bombay put a different construction upon Section 21. The cases are those of *Bai Udekwar v. Midji Naran* 3 Bom. H.C. Rep. A.C. 177 and *Makunda Valad Balacharya v. Sitaram* 5 Bom. H.C. Rep. A.C. 102, referred to in the judgment now under appeal. They held 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 "judgment 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.

13. 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, for 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 endeavoring 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.

14. 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, therefore in a permissive, and not in an obligatory, sense.

15. On the construction of this in artificially 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 expire.

16. 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.

17. Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited *Kangaleechurn Ghosal v. Bonomalee Mullick* B.L.R. Sup. Vol. 709, 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 bond 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 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.

18. 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 1859.¹

19. 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.

20. Upon this sentence, see the explanation of Westropp, C.J., and Melvill, J., in *Manjunath v. Venkatesh* (1881) 6 Bom. 54 at p. 60:

It appears to us that the above order was not in the nature of an adjudication at all, and that the description of it in the head-note to the report in the Indian Appeals, and still more the description in the head-note to the Calcutta Report is incorrect and gives an erroneous idea of the meaning of the Judicial Committee's observations. The Deputy Commissioner did not, in fact, decide that the application was time-barred, nor did he decide anything. He simply said that, as he could not execute the decree without the Commissioner's sanction, and as the Commissioner had not given the sanction which had been applied for, nor made any other order, it was not within his power to execute the decree and therefore the application must go to the record-room. The Judicial Committee might well say that this was not an adjudication within the rule of *res judicata*, or within Section 2 of Act VIII of 1859. We do not think that the question, whether a decision that an application is time-barred is *res judicata* is in any way concluded by the observation of the Privy Council in *The Delhi and London Bank Ltd. v. Orchard*, but we think that it is concluded by necessary inference from the judgment of the same tribunal in *Mungul Pershad v. Girija Kant* 8 I.A. 133.

In *Dhankal v. Phakkar* (1893) 13 All 84 F.B. at p. 99 Sir John Edge observed as follows:

It will be noticed that Sir M. Wwstropp, C.J., and in giving that explanation of the decision of their Lordships of the Privy Council sought for the explanation in the reasons given by the Deputy Commissioner for ordering the petition to be sent to the record-room and did not lay any stress upon the words used having been "be sent to the record-room "instead of the words" dismissed." I think the explanation given by Sir M. Westkopp, C.J., and Melvill, J. of the views which may have influenced their Lordships of the Privy Council is probably correct, and if it be, it follows that in considering the effect of an order passed by a Court in a proceeding for the execution of a decree we must be guided by the reason stated for making the order and not by the mere phraseology employed in the formal direction which concludes the order.

21. In *Khosal Chandra Roy v. Ukil Addi* (1909) 14 C.W.N. 114 Mookerjee and Vincent, C.J. observed as follows:

As was pointed out by Mr. Justice Melvill with the concurrence of Westropp, C.J., in the case of (1881) 6 Bom. 54, the order in the case before the Judicial Committee which is set out in the judgment of Sir Barnes Peacock was very peculiar in its terms. It did not decide that the application was barred by limitation, it was simply to the effect that as the sanction of the Commissioner which was required under a local law had not been received the application for execution must be sent to the record-room. This could not be treated as an adjudication that the application was time-barred. This explains why the Judicial Committee held that the order relied upon as a bar was not an adjudication. We may add that from the report of the case in the Indian Appeals (4 I.A. at 13) it is fairly clear that Sir Barnes Peacock intended to limit the decision to the question whether the doctrine of *res judicata* applied to oases in execution; this is obvious from the observation made by him in course of the argument of the counsel for the Respondent. The wider question, whether upon general principles of law, an order made in the course of execution proceedings ought to be allowed to be reopened at any subsequent stage of the proceedings, does not appear to have been raised before the Judicial Committee. This explains the guarded statement that the order relied upon as a bar was not an adjudication within the rule of *res judicata* or within Section 2 of Act VIII of 1859. If this view were not taken of the true effect of the decision of the Judicial Committee in *The Delhi and London Bank, Ltd. v. Orchard* 3 Cal. 51 we should be driven to the conclusion that it is inconsistent with at least three subsequent decisions of Judicial Committee, namely, *Mungul Pershad Dichit v. Girija Kant Lahiri* (1881) 8 Cal. 51, *Ram Kirpal v. Rup Kuari* (1883) 6 All. 269, and *Bani Ram v. Nanhu Mal* (1884) 7 All. 102; and it is worthy of note that the judgment in the first and second of these cases was delivered by Sir Barnes Peacock who was also a party to the judgment in the third case. These cases affirm the doctrine that a decision at one stage of execution proceedings cannot be questioned at a later stage of the proceedings, not because

it is res judicata under Section 13 C.P.C., but upon general principles of law, for if it were not binding there would be no end to litigation. We are therefore not prepared to interpret the decision of the Judicial Committee in *The Delhi and London Bank, Ltd. v. Orchard* 3 Cal. 47, as laying down any general principle of law inconsistent with the principle enunciated in the three subsequently decisions to which reference has been made, and this view we may add has been taken by a Full Bench of the Allahabad High Court in the case of *Dhonkal Singh v. Phakkar Singh* (1893) 15 All. 84 at p. 98.