

(1869) 02 CAL CK 0001

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 471 of 1868

Tarif Biswas and
Another

APPELLANT

Vs

Kalidas Banerjee and
OthersRESPONDENT

Date of Decision: Feb. 1, 1869

Final Decision: Dismissed

Judgement

Loch, J.

The ancestors of the respondents in this case obtained a decree against the appellants' ancestor, who, on 24th June 1853, executed a kistbandi, agreeing to pay the amount of the decree by certain installments; Tarif and Jarif, the appellants before the Court, being sureties for the due performance of the terms of the kistbandi. One of the terms of that document was to the effect that, if the debtors failed to make payment as agreed upon, the decree-holder was to take out execution of the kistbandi. On this document and the surety bond being filed in Court by the parties concerned, the execution proceedings were struck off the file. The decree-holder at different times proceeded to enforce his claim under the terms of the kistbandi and, in the last endeavour to realize the sum due to him, attached certain property belonging to his debtor, which was advertised for sale, when the sureties filed objections to further proceedings in execution. "These objections were heard and rejected by both the lower Courts, and a special appeal has been filed in this Court.

2. The grounds taken before us are, 1st, that, if the debtor failed to pay the debt according to the terms of the kistbandi, the decree-holder should have taken out execution of his decree; for the law does not permit execution to be taken on a kistbandi, but only on a decree; and if the judgment-creditor wish to recover under the terms of the kistbandi, he must bring a fresh suit for that purpose, and a judgment of this Court of 1st March 1867, in Aghore Chundra Mookerjee v. Wooma Soonderee Debea (7 W.R., 217), is quoted in support of this averment; 2nd, it is pleaded that execution is barred by

limitation.

3. The judgment-creditor in this case could not, as supposed by the appellants' pleader, now execute his decree; for the kistbandi entered into between him, and the debtor is in substitution for that decree, and he can only proceed on the terms of his new contract, which was entered into by the parties in the presence, and with the sanction, of the Court making the decree. The kistbandi was for the benefit of the debtor, and we think he cannot, on his failing to carry out its terms, turn round upon his creditor, and require him to recommence a course of litigation to recover what has already been decreed to him. Nor does the judgment quoted above support the view taken by the appellants' vakeel; for in that case the terms of the contract were that, if the debtor failed to pay, the creditor might enforce his decree. There are two other cases which go dead against the appellants: one is *Anund Chander Mozoomdar v. Goburdhun Khan* (5 W.R., S.C.C. Ref., 19); and the other is *Dwarka Nath Sadhookhan v. Doorga Churn Saha* (6 W.B., S.C.C. Ref., 1). The judgments in these cases should, I think, be followed in the present.

4. The plea of limitation must fail, as the lower Courts have found that the steps taken by the decree-holder to enforce payment of his decree were bona fide, and this is a finding of fact.

5. A preliminary objection to hearing this appeal was raised to the effect that, as the amount in dispute was for a sum under Rs. 500, and the case was one of a Small Cause Court nature, no special appeal could, under the terms of Section 27, Act XXIII of 1861,^{*} be admitted. We must decide the objection against the respondent, for we have not the decree before us, and the kistbandi is silent as to the nature of the debt to which it relates. We dismiss the special appeal with costs.

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No special appeal from decision of any Court subordinate to the Sudder Court in certain suits.	Sec. 27:--No special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court subordinate to the Sudder Court, in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860 (for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter), when the debt, damage, or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final.
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