
(1869) 06 CAL CK 0018

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 70 of 1869

Mussamat Khedu and
Others

APPELLANT

Vs

Kalu Sahu

RESPONDENT

Date of Decision: June 22, 1869

Judgement

Glover, J.

The appellant in this case got a decree against one Kalu Sahu on the 31st of May 1859, and took out execution in October 1860, and in the same month came to an arrangement with his debtor by which a kistibandi was executed by the latter. This kistibandi covenanted to pay the decree-holder 11 rupees monthly from Aswin 1268 (1655) to Kartik 1277 (1870), and there was a provision inserted in it that if at any time within that period five consecutive monthly kists remained unpaid, the judgment-creditor should have the power to call upon the debtor to pay up the whole amount due under the kistibandi, and to proceed against any of his property in satisfaction thereof. On the 26th of March 1867, the decree-holder petitioned the Court, stating that of the whole sum due to him under the kistibandi he had only realized 55 rupees, and that he now prayed to take out execution against his judgment-debtor for the balance of the sum due, minus a sum of 451 rupees, which he admitted to be barred by limitation as representing instalments for a period anterior to three years before the institution of the suit. Both the lower Courts held the decree-holder to be barred by limitation. The Judge says that the conditions of the kistibandi not having been complied with, the arrangement made between the parties came to an end, and that the decree then became an ordinary unconditional decree, execution of which, as such, should have been taken out within three years from the date of the last proceeding for its enforcement, that is to say from the date of realization of the last kist, and as that had admittedly not been done, the Judge held the decree-holder to be barred by limitation. We do not precisely understand how, if the Judge supposes that the arrangement made between the parties had come to an end, and if the original decree became the only instrument under which the decree-holder could proceed the last proceeding could date from the last kist paid, as that kist was not paid under the original

decree but under the arrangement entered into under the kistibandi. With reference however to his finding we do not think that this suit can be barred by limitation. The words of the kistibandi are not imperative but permissive: they do not say that supposing five consecutive instalments not to be paid, the decree-holder should recover his money then and there from the judgment-debtor. It does not say that he is restricted to this particular remedy and does not take away from him the right of receiving, if he chose so to receive it, the amount of his debt month by month. It appears to us that under the terms of this kistibandi the decree-holder had a perfect right to elect which of the two courses he should pursue; that he might, if he had chosen, have sold up his judgment-debt at once or kept to the terms of the deed and received payment month by month, and if this be so, it is clear that the non-payment of the instalment under the kistibandi was a constantly recurring cause of action; that every month the decree-holder would have a fresh claim on his debtor for the instalment due, and that he can now in execution recover so many of these instalments as come within the period of three years preceding his application. The same principle is laid down in a judgment of this Court in *Girdhari Singh v. Lala Kunwar Mia*. App. No. 248 of 1965; July 28th, 1866, (3 W.R. (Mis. R) 23).

2. It is contended by the pleader for the respondent that the Courts below had no jurisdiction in this case, and that before execution could have been taken out upon the kistibandi, it was necessary to bring a suit on the kistibandi, and that without such a suit the decree-holder had no right to recover. We do not feel inclined to allow this objection to be taken, inasmuch as it was never a part of the judgment-debtor's case at any stage of the proceedings in either of the Courts below. On the contrary, the judgment-debtor's case was that, assuming the kistibandi to be a proper ground on which to bring an application for execution of decree, the decree-holder's remedy was barred, he not having brought it within proper time; and we are the less inclined to allow this objection now, inasmuch as all the equities in the case are in favour of the decree-holder. The judgment-debtor has had great indulgence shown him; instead of having his property sold up at once in satisfaction of the debt, he has had time and opportunities given him for paying it off, and has moreover received, in consequence of the neglect of the decree-holder in bringing his suit before, the advantage of being released from payment of a sum of 451 rupees which he was clearly bound to pay, but which he cannot now be made to pay by reason of the Statute of Limitation.

3. The case of *Hurro Nath Roy v. Maherullah Mollah* Reference from the Small Cause Court of Kooshtea, January 8th 1867. (7 W.R. 21), which has been brought to our notice by the pleader for the special respondent, appears to us to have nothing in common with this suit. In that case there was no fresh agreement, and the suit was on the original instalment bond whilst in this case the kistibandi was a fresh arrangement making fresh terms and creating fresh liabilities. We think therefore that the decree of the lower Court is erroneous, and should be reversed with costs, and that the decree-holder should be allowed to take out execution in the usual way.