(1914) 01 CAL CK 0027

Calcutta High Court

Case No: None

Jogendra Prosad Mitra and Others		APPELLANT
	Vs	
Asutosh Goswami and Others		RESPONDENT

Date of Decision: Jan. 9, 1914

Acts Referred:

- Limitation Act, 1908 - Article 182, 19

Citation: 37 Ind. Cas. 738

Hon'ble Judges: Beachcroft, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by five of the judgment debtors against an order for execution of a decree for mesne profits, made on the 11th December 1899. There were applications for execution in 1901 and 1903 to which no detailed reference is necessary for the purposes of this appeal. These were followed by a third application for execution on the 22nd August 1905. The present application was not made till the 6th January 1909, and is prima facie barred by limitation. The decree holders endeavour, however, to take the case out of the bar of limitation by reliance upon Section 19 and Article 182 of the First Schedule of the Indian Limitation Act.

2. In so far as the first ground is concerned, it is Contended that on the 19th February 1906 there was an acknowledgment by the appellants sufficient for the purpose of Section 19. On that date, an application was presented to the Court for adjournment of the sale. The application on the face of it purports to have been made on behalf of one of the appellants Jogendra Prosad Mitter. It has been argued, however, that the application was in reality-made by him on behalf of the other judgment-debtors as well. Before we deal with this question, it is necessary to point out that the application is not explicitly on behalf of all the judgment-debtors. An examination of the original application shows that an attempt has been made to tamper with it. In the right hand corner, there appears the signature of Jogendra

Prosad Mitter. He is consequently the applicant and the application purports to have been made on his behalf by his Pleader Amrit Lal Mitter. In the body of the petition, it was originally stated that the application was on behalf of Jogendra Prosad Mitter, but an alteration has been effected, which on the face of it looks like a subsequent interpolation. This is obvious from an examination of the two paragraphs which constitute the body of the petition. In the first paragraph, it is stated explicitly that there was a prayer for one month to be granted to the petitioner. The word used is amake (* *) in the singular. In the second paragraph also, it is clear that in the petition as originally drawn up, there was a statement that ''I,'' that is the petitioner, will not take any objection to the validity of the sale which might be held. An attempt, however, has been made to alter the word * * into * *, In these circumstances the petition must be taken to have been made by Jogendra Prosad Mitter alone. Hence arises the question whether the application, if it be construed to embody an acknowledgment, avails against the other defendants. That the application does embody an acknowledgment is clear, because the petitioner states that in case of his failure to pay up the decretal money on the date to be fixed for sale in the month following, he will not to be able to take any objection to the validity of the sale. This implies and acknowledges an obligation to pay the decretal debt. In order to make this acknowledgment operative against the co-judgment-debtors of Jogendra Prosad Mitter, the requirements of Section 19 must be fulfilled. Section 19 requires that the acknowledgment of liability be made in writing, signed by the party against whom the right is claimed or by some person through whom he derives title or liability. The second explanation to the Section then states, that the term ''signed'' means signed either personally or by an agent duly authorised in this behalf. The application was, as already stated, signed by Jogendra Prosad Mitter alone and by his Pleader Amrita Lai Mitter on his behalf. It has been contended on behalf of the respondents-decree-holders that this signature may be taken to have been made by an agent of the other judgment-debtors. But there is no proof that Jogendra Prosad Mitter was authorised duly to make this acknowledgement on behalf of his co-judgment-debtors It is clear, therefore, that the decree-holders have failed to establish that there has been a valid acknowledgment under Sub-section (1) of Section 19 of the Indian Limitation Act as against the four judgment-debtors other than Jogendra Prosad Mitter. The acknowledgment is of no avail against them.

3. In so far as the second ground is concerned, it has been argued that within three years antecedent to the application of the 16th January 1909, the decree-holders had applied to the proper Court to take a step-in-aid of execution of the decree. Reliance is placed, in this connection, upon an application made by the decree-holders on the 19th February 1906 for leave to bid at the sale which had then been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holders to make a purchase for the decretal amount, if no other purchaser

offered any bid, and it was prayed that permission might be granted in that behalf. For the decree-holders, it has been argued that this application was an application to the proper Court to take a step-in-aid of execution of the decree, and reliance has been placed in support of this view upon the case of Bansi v. Sikree Mal 13 A. 211 : A.W.N. (1890) 230 : 7 Ind. Dec. (N.S.) 132. Dalel Singh v. Umrao Singh 22 A. 393 : A.W.N. (1900) 129 : 9 Ind. Dec. (N.S.) 1302. and Vinayakrao Gopal Deshmukh v. Vinayak Krishna Dhebri 21 B.331 : 11 Ind. Dec. (N.S.) 224. These cases, it may be conceded, do support the contention of the decree-holders. But it has not been disputed that a contrary Rule was laid down by this Court in the cases of Toree Mahomed v. Mahomed Maboob Bux 9 C. 730 : 3 C. L.R. 91 : 5 Shome L.R. 21 : 4 Ind. Dec. (n s.) 135 Raghunandan Misser v. Kallydut Misser 23 C. 690 : 2 Ind. Dec. (N.S.) 459. On behalf of the decree-holders, the view taken in the case last mentioned has been criticised and we have been invited to refer the question for decision to a Full Bench. Our attention has also been drawn to the dictum of Mr. Justice Banerjee in Troylokya Nath Bose v. Jyoti Prokash Nandi 30 C.761 : 8 C.W.N. 251. and reference has been made to the judgment of one member of this Bench in Hira Lal Bose v. Dwija Charan Bose 3 C. L.J. 240 : 10 C.W.N. 209. We may say at once that we are not prepared to accept the view expounded in Bansi v. Sikree Mai 13 A. 211 : A.W.N. (1890) 230 : 7 Ind. Dec. (N. s.) 132. Dalel Singh v. Umrao Singh 22 A. 393 : A.W.N. (1900) 129 : 9 Ind. Dec. (N.S.) 1302 and Vinayakrao Copal Deshmukh v. Vinoyak Krishna Dhebri 21 B.331 : 11 Ind. Dec. (N.S.) 224., For our present purposes, it is also unnecessary to determine whether, in any conceivable circumstances, an application for leave to bid may be deemed an application to the proper Court to take a step-in-aid of execution, because even if it be assumed that there may be cases in which an application for leave to bid may be an application to the proper Court to take a step-in-aid of execution, such circumstances undoubtedly do not exist in the case before us. It has been established that on the very day when the application for leave to bid was granted, the decree holders consented to an adjournment of the sale, and on the date when the property was subsequently put up for sale, although there were no bidders present, the decree-holders themselves did not avail themselves of the opportunity granted to them to offer bids Under these circumstances, it is impossible to hold that the application of the 19th February 1906 was in any sense an application to the proper Court to take a step-in-aid of execution. The conduct of the decree-holders shows that not only was execution not aided, it was rather retarded by them. The two grounds assigned to support the contention that the application for execution, dated the 6th January 1909, is not barred by limitation, both prove unsustainable in so far as the judgment-debtors other than Jogendra Prosad Mitter are concerned. As regards him, however, there was clearly a valid acknowledgment within the meaning of Section 19 of the Indian Limitation Act. We must consequently hold that the application is barred by limitation as regards the four judgment-debtors other than Jogendra Prosad Mitter.

4. On behalf of Jogendra Prosad Mitter, it has been finally contended that the appeal should succeed on two other grounds. It has been argued, in the first place, that the decree-holders were disentitled, in view of their own conduct, to execute the decree against him for recovery of the balance thereof. It has been stated that on a previous occasion the decree-holders accepted from some of the judgment-debtors moneys alleged to represent their rateable share of the entire judgment-debt. On this basis, it has been contended that the judgment-debt was by the conduct of the decree-holders split up and the decree-holders can pursue their remedy against each judgment-debtor only to the extent of his separated liability. In our opinion, there is no foundation for this contention. The decree-bolders, no doubt, accepted sums tendered by the different judgment-debtors from time to time. They also undertook not to proceed with execution against those judgment-debtors : but at the same time, they did not release them from liability under the decree, On the other hand, it was expressly stated that if upon execution of the decree against the other judgment-debtors, the whole of the judgment-debt was not realised, the decree-holders would be at liberty to proceed with execution for recovery of the balance even as against those who had made the payments mentioned. Consequently, the principle recognised in the case of Ram Ratan Kapali v. Aswini Kumar Dutt 6 Ind. Cas. 69 : 37 C. 559 : 11 C. L.J. 503 : 14 C.W.N. 849. cannot be applied to the circumstances of this case.

5. The next ground upon which it has been urged that execution should not be allowed to proceed against Jogendra Presad Mitter is that he had from time to time made payments towards satisfaction of the decree for which no credit had been allowed by the decree-holders. Rut these payments were not duly certified as required by Rule 2 of Order XXI of the Code, and the time within which the judgment-debtor could have invited the Court to have the payments recorded, has elapsed. It is thus no longer open to the execution Court to take notice of the alleged payments. Reliance, however, has been placed upon the case of Gadadhar Pande v. Shyam Chum Naik (9), in support of the proposition that as this omission on the part of the decree-holders to allow credit for the payments made was an act of fraud, it is open to the Court to investigate the question of fraud u/s 47 of the Code. In our opinion, there is no foundation for this contention. If this argument were to prevail, the restriction imposed by the Legislature upon the execution Court under Rule 2 of Order XXI of the Code would be nullified. It is worthy of note that the view taken in the case of Gadadhar Pande v. Shyam Chum Nik 12 C.W. N. 455. which accords with that adopted in Ramayyar v. Ramayyar 21 M. 356 : 7 Ind. Dec. (N.S.) 608. has been repudiated: Ganapathy Aiyar v. Chinna Chenga Reddy 29 M. 312 : 16 M. L.J. 33. Veerappa Chtttiar v. Arurnugam Poosari 17 M. L.J. 67. Kamini Deli v. Aghore Nath Mukerjee 4 Ind. Cas. 402 : 11 C. L.J. 91 : 14 C.W.N. 357 Nistarini Last v. hazim Ali 7 Ind. Cas 258 : 12 C. L.J. 65. Mon Mohan Karmakar v. Dwarka Nath Karmakar 7 Ind. Cas. 55 : 2 C. L.J. 32. Hiramony Biswas v. Musa Khan 7 Ind. Cas. 625 : 16 C. L.J. 169. Biroo Gerain v. Jainnrat Koer, 13 Ind. Cas. 63 :16 C. L.J. 174 : 16 C.W.N.

923. As it is not competent to the execution Court to allow credit for uncertified payments, it is not necessary for us to investigate whether the alleged payments were actually made. The result is that this appeal is allowed in so far as the appellants other than Jogendra Prosad Mitter is concerned, and any sums belonging to them, which may have been taken away by the decree-holders under the order of the Court below, must be refunded at once. In so far as Jogendra Prosad Mitter is concerned, the appeal will stand dismissed. The decree-holders-respondents must pay the successful appellants their costs both here and in the Court below; but they will be entitled to receive from Jogendra Prosad Mitter their costs in both the Courts. We assess the hearing-fee in this Court at five gold mohurs.