
(1874) 03 CAL CK 0005

Calcutta High Court

Case No: Miscellaneous Special No. 390 of 1873

Dinonath Sen

APPELLANT

Vs

Guruchurn Pal

RESPONDENT

Date of Decision: March 11, 1874

Final Decision: Dismissed

Judgement

Sir Richard Couch, Kt., C.J.

The decree in this case was made on the 1st of July 1863, and by a kistbandi, dated the 3rd of July 1864, it was agreed that the, amount payable by the decree should be paid by installments with interest. It was an arrangement which the decree-holder might very reasonably make, for although his decree did not give interest the was entitled to have the money paid at once. He seems to have arranged with the debtor that he would receive it by installments with interest in consideration of the payment being postponed. Then it appears that an application was made for execution on the 8th of May 1866, and notice was served. That being struck off, a third application was made on the 4th of December 1866, and the property of the debtor was attached and advertised for sale. A part-payment was made, which was certified to the Court by an application, dated the 7th of March 1867, on the part of the debtor, he also asking to have the money applied towards satisfaction, of the terms of payment in the kistbandi, treating that as being what was intended to be enforced. Then, on another installment becoming due, the decree-holder took out execution on the 29th of January 1870, and the property being advertised for sale, the debtor made an application, which was assented to by the decree-holder, for time to pay the amount which was due, again treating the kistbandi as a binding arrangement, and that which the Court was enforcing by execution proceedings. This application was struck off on the 80th of May 1870, and the amount not being paid as had been agreed, another application was made for the sale of the property on the 22nd of May 1861. Then the judgment-debtor objected to the sale on the ground that a fresh attachment was necessary. No objection was made at that time that the original decree must be enforced, and not the kistbandi. The Judge finds that these facts show that the parties had treated and acted upon the kistbandi as if it had become part of

the decree, and that they moved the Court to credit the payment which was made as a satisfaction of the installments due according to it. Under these circumstances, I think that the present appellant is precluded from saying that the judgment-creditor is bound to execute the original decree, and if he cannot execute that, he is bound to bring a regular suit upon the kistbandi. He has, by his conduct for some years, treated this as the decree which the Court had made. Without deciding how far an alteration of a decree, such as this was, could be made by consent, at the time the kistbandi was entered into, I think we must hold in the present case that the objection taken cannot, and ought not, to prevail. The decree-holder is entitled to take proceedings upon the kistbandi as if it were a part of the original decree. The appeal must be dismissed with costs.