Privy Council Appeal No. 60 *of* 1937

Oudh Appeal No. 16 *of* 1934

The Oudh Commercial Bank, Limited, Fyzabad - - *Appellants*

v.

Thakurain Bind Basni Kuer and others - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY, 1939

Present at the Hearing:

LORD ATKIN
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

This is a decree-holder's appeal. It is brought by the Oudh Commercial Bank, Ltd., Fyzabad, against an order of the Chief Court of Oudh dated 14th August, 1934, dismissing an application for the execution of a final decree for sale passed on 22nd January, 1916, by the Subordinate Judge, Mohanlalganj, Lucknow. The respondents are the representatives of Babu Narindra Bahadur Singh (herein called the "judgment-debtor") who died in 1936 while the present appeal was pending.

He was the grantor of a mortgage to the appellants dated 2nd September, 1894, for Rs.2,35,000 at 8 per cent. per annum over a large number of ancestral properties including both proprietary (*kham*) and under-proprietary (*pukhtadari*) villages. To enforce this mortgage a suit was brought against him by the appellants in 1911 and a preliminary decree for sale obtained on 31st October, 1912, from the Subordinate Judge. On appeal to the Judicial Commissioner's Court this preliminary decree was on 15th June, 1915, varied, so as to fix the amount outstanding on the mortgage at Rs.7,96,763, carrying interest at 4 per cent. from 3rd July, 1915. Very soon thereafter the Court of Wards, by order of the Government, assumed management of the judgment-debtor's estate, which was not released till 29th September, 1917. Accordingly the Deputy Commissioner of Fyzabad, as manager for the Court of Wards, became the defendant in the mortgage suit and the final decree for sale was passed against him (22nd January, 1916). It fixed the amount then due at Rs.8,14,470 with future interest at 4 per cent. on Rs.7,96,763.

The proceedings in execution of this decree have been protracted, but apart from the application which has now been brought before their Lordships, consist of an application to the Court which passed the decree (Mohanlalganj) to

transfer it for execution to the Subordinate Judge at Fyzabad (7th September, 1916); an application to the Fyzabad Court for an order for sale of all the mortgaged property (3rd July, 1917); and an application of 16th January, 1922, asking that the previous proceedings, which had been much interfered with by stay of execution and otherwise, should be restored and continued notwithstanding that the Revenue Court and the Court of the Subordinate Judge had "consigned it to records." This last application was granted by order of the Subordinate Judge dated 17th January, 1922.

It appears that when in 1916-17 the appellants were proceeding to enforce their decree for sale the Court of Wards made a bargain with them for time in which to pay off the mortgage debt gradually, the rate of interest to be increased from 4 per cent. to 6½ per cent. Sufficient payments had been made under this arrangement to meet this interest and to repay a certain amount of the principal monies due on the decree, when the judgment-debtor recovered the management of his own affairs in September, 1917, and repudiated the action of the Court of Wards; maintaining that its intervention in his affairs had been wholly illegal. In December, 1917, he carried in objections to the appellants' execution proceedings, maintaining (1) that the final decree for sale was not binding upon him as the Deputy Commissioner did not represent him; (2) that the Court of Wards had no right to agree to pay interest at a higher rate than the 4 per cent. mentioned in that decree. The Subordinate Judge dismissed these objections (17th May, 1918): on appeal the Court of the Judicial Commissioner dismissed the first but gave effect to the second; holding that all payments made by the Court of Wards should be credited in reduction of the decretal dues on the footing of interest at 4 per cent. only. To their decree of 16th December, 1918, a statement of account was annexed showing the amount outstanding as at that date for which execution could proceed. This sum should have been entered as Rs.7,65,898, but by an error in calculation it was entered as Rs.6,70,610: this error was put right on an application under section 152, C.P.C., by order of the Judicial Commissioner's Court dated 29th August, 1918.

Both parties obtained a certificate enabling them to appeal to His Majesty in Council from this decree of 16th December, 1918. On 9th February, 1920, by Order in Council on the judgment-debtor's petition, a stay was granted until the determination of the appeal; upon the terms (*a*) that the judgment-debtor would pay interest at 6½ per cent. in lieu of 4 per cent. from 7th September, 1916, until realisation and (*b*) that the present appellants' appeal should be withdrawn. The judgment-debtor's appeal to His Majesty was dismissed in May, 1921, but, the Order in Council not having been so drawn as to give effect to the undertaking to pay increased interest, another Order in Council was passed on 25th May, 1922, amending the previous Order in Council by directing that this provision

for increased interest be added to the decree of the Court of the Judicial Commissioner dated 16th December, 1918. This direction was not formally communicated to the Fyzabad Court (under O. XLV, C.P.C.) till November, 1922, and in the meanwhile execution had been stayed from January to July, 1922, by an injunction obtained by the judgment-debtor in a separate suit attacking the legality of the action of the Court of Wards.

These were the causes which had rendered ineffectual until 1922 the application for execution made by the appellants to the Subordinate Judge at Fyzabad in July, 1917, and which account for their application of 16th January, 1922, to restore and continue the execution proceedings, and for the order granting this application. The circumstance that the appellants when applying for transfer of the decree, for an order for sale, and for an order to continue, did so on each occasion upon a tabular statement (O. XXI, rule 10, C.P.C.), hardly conceals the fact that so far they had made one application for execution of the final decree and one only.

As the property comprised in the mortgage was ancestral, execution proceedings had to be transferred to the Collector, and Schedule III, C.P.C. applied to them (sections 68, 69, C.P.C.). After the order of the Subordinate Judge in 1922, the judgment-debtor's under-proprietary rights in certain villages were sold by the Revenue Court in October, 1922, but on 18th November, 1922, the sales were cancelled by agreement, the judgment-debtor agreeing to pay certain sums by October, 1923. These he paid. Another agreement was made on 3rd April, 1924, by which half of the amount then due should be paid by 1st April, 1925, and the balance by 1st April, 1926, interest after March, 1924, being increased from 6½ to 8 per cent. per annum, to be paid half-yearly and with half-yearly rests. As a term of this agreement, half of the proprietary and all the under-proprietary villages were released from the mortgage to enable the judgment-debtor to raise the money necessary to make the promised payments. This agreement was not fully carried out, but time was given to the judgment-debtor who made several payments in 1926. On 9th March, 1927, a final agreement was made by the parties. This final agreement was embodied in a petition of compromise which fixed the amount then due at about 3½ lacs of rupees and arranged for payment of principal by annual sums of Rs.50,000 and of interest at 8 per cent. per annum half-yearly with a liability for compound interest in case of default:—

> "The proceedings for auction sale shall remain in abeyance in case the fixed instalments be paid regularly. In case any instalment or part of any instalment or amount of interest or part of interest be not paid at the appointed time, then the decree-holders will be competent to immediately take out execution in respect of their entire demand and recover their entire demand from that property which the decree-holders have not released from the liability of their demand by auction sale in accordance with the terms of this compromise."

On 14th March, 1927, the Sales Officer at Fyzabad sent the compromise petition to the Fyzabad Court in order that it might be forwarded to the Court which was competent to amend the decree of 22nd January, 1916, in accordance with the new arrangement for compound interest at 8 per cent. What provision of the Civil Procedure Code was thought to authorise such an "amendment" of a decree does not appear; but the Sales Officer and the parties expected, it would seem, to receive through the Fyzabad Court an "amended decree." In fact, as we now know, though execution proceedings had been actively proceeding before the Sales Officer at Fyzabad from 1923 to 1927, the Subordinate Judge at Fyzabad had in October, 1923, consigned the execution case to records and returned the papers to the Court at Mohanlalganj. This he had done, apparently, without notice to the decree-holders, and as a result of correspondence with the Deputy-Commissioner, in view of the fact that the judgment-debtor had been carrying out the terms of the arrangement of November, 1922, cancelling the judicial sales of October, 1922. In these circumstances the Fyzabad Court on 21st March, 1927, sent the compromise petition to the Court at Mohanlalganj and the Subordinate Judge of the latter Court recorded the substance of it in the appropriate register as an adjustment under O. XXI, rule 2, C.P.C., this being the only action upon the compromise which he had any authority under the Code to take. No amended decree was ever brought into existence and the Sales Officer's reminders to the Fyzabad Court did not result in his getting any such document; but in 1927 and down to 1930 the judgment-debtor made various payments under the compromise arrangement which were recorded in the Court at Mohanlalganj. He was, however, in default when on 24th March, 1930, the appellants applied on a tabular statement to the Mohanlalganj Court to transfer the decree back to Fyzabad for execution. Despite the objection of the judgment-debtor that his default had not made the total sum immediately payable, a transfer certificate was issued for Rs.2,14,287, and on the 19th March, 1931, the appellants filed another application under O. XXI, rule 10, at Fyzabad. In this they asked that the balance due under the compromise—Rs.2,10,985—should be realised by the sale of certain proprietary villages which had not been released from the mortgage, reciting that the arrangement in case of default had been that "the sale proceedings would be resumed according to the papers."

The main question before their Lordships is whether this application of the appellants is barred by section 48 of the Civil Procedure Code as being more than 12 years from the date of the final decree for sale (22nd January, 1916). The learned Subordinate Judge on 26th November, 1932, held that the application was a fresh application within the meaning of that section, but that the appellants were entitled under clause 3 of rule 11 of Schedule III of the Code to an allowance of time which was sufficient to bring them within 12 years from 1916. The Chief Court (14th August, 1934), considered that the appellants were not entitled to

any allowance of time under this clause, that they could not be allowed to treat any other date than 22nd January, 1916, as the date of the decree and that sections 19 and 20 of the Limitation Act did not apply to the period limited by section 48 of the Code. They also held that the appellants could not in any case have execution for any higher rate of interest than 6½ per cent. From their decision dismissing the appellants' application for execution the present appeal has been brought to His Majesty in Council.

In view of the great difference of judicial opinion disclosed by the decisions of High Courts in India as to the effect in execution cases of bargains for time or other compromises a number of matters have been discussed by learned counsel on both sides. But the first matter for consideration under section 48 of the Code is whether or not the appellants' application for sale is a "fresh application" or is to be regarded as merely ancillary to or incidental to the prosecution or continuation of the application of 1917 which had been reinstated in 1922. The appellants proceeded by way of tabular statement under O. XXI, rule 11, both on 24th March, 1930, when asking for transfer of the decree to Fyzabad and also on 19th March, 1931, when asking for an order for sale, but one of these tabular statements was unnecessary in any view. They seem always to have approached the Court in this particular manner even when in 1922 they were expressly asking for continuation of proceedings previously brought. And they adopted the same course on 19th March, 1931, though their prayer was that the sale proceedings which had been depending at the date of the compromise of 1927 should be resumed or taken up according to the papers already prepared in the Revenue Court. The learned Subordinate Judge considered that the application should be regarded as a fresh application because the property sought to be sold was not the whole taluqa but only half of the proprietary villages, because interest was to be realised at 8 per cent. and because the appellants had applied afresh to the Court which passed the decree and had obtained in 1930 a transfer back to Fyzabad. The learned Judges of the Chief Court do not discuss this question in their judgment and it may be that it was not argued before them. But though the procedure adopted by the appellants tells against them on this point, it is very necessary if their rights under their decree are to depend upon it, to examine closely the position in which they were placed by the compromise of 1927. In their Lordships' opinion the recording of the payments made thereunder by the Court at Mohanlalganj and the application to that Court for a retransfer of the decree to Fyzabad were consequential upon and are attributable to the circumstance that the execution Court at Fyzabad had acted as though the execution in that Court were at an end. In September, 1923, the Subordinate Judge had written to the Deputy Commissioner asking what had happened in this execution case and had been told that 5 lacs had been paid, that the parties were coming to an agreement, that the matter would not be settled for at least

two years and that there was no need for him to keep the file pending any longer. Accordingly the case was by order of 6th October, 1923, consigned to records as partly satisfied and a sum of 5 lacs credited. From the judgment of the Subordinate Judge we learn that the papers were returned to Mohanlalganj. Nevertheless for four years sale proceedings had actively continued before the revenue authorities at Fyzabad in the sense that bargains for time had been made, recorded, partly carried out, and renewed while the necessary steps for carrying out the sale were being from time to time adjourned. In 1924 a compromise had been recorded by the Subordinate Judge and a number of properties released by his order of 5th April, 1924. The compromise of 1927 was made upon the footing that there was a subsisting execution proceeding in the Fyzabad Court under which action could be taken for sale at any moment, and in respect of which postponement of sale could be made conditional upon the judgment-debtor carrying out the terms agreed. The fact that the parties or their advisers or the officials of the Revenue Court desired to have an amended decree from whatever Court was competent to give it resulted in the Subordinate Judge at Fyzabad taking action in continuation of what he had done in October, 1923, which unexpectedly ended the execution case at Fyzabad and involved a retransfer of the decree by the Court at Mohanlalganj. "This Court," says the Subordinate Judge, "had sent the papers back to the original Court and so forwarded the compromise also." No doubt the learned Judge was much puzzled as to the proper course to take on receiving the request to obtain an amended decree. Their Lordships appreciate his difficulty, but in these circumstances they cannot think it right to regard the appellants' application as a fresh application in the sense of section 48 of the Code merely by reason of the steps which they thought it necessary to take to undo the action of the Court at Fyzabad in terminating the execution case contrary to the intention of the parties. Nor do they consider that the claim of interest at 8 per cent. (agreed to in 1924 for the first time and acted on thereafter by the parties in their protracted negotiations) made the application a fresh application as distinct from one to continue the previous proceedings as contemplated by the compromise of March, 1927. Nor did the fact that only part of the original properties remained bound by the security and saleable under the decree. It was on the contrary an application to revive the previous proceedings on the footing that they had not terminated. The question of the character of the application has to be decided upon the circumstances of each case and in the present case the bargain of the parties is a circumstance of great importance as is the fact that the Fyzabad Court acted by inadvertence contrary thereto. The substance of the matter must prevail over the form of the application which in their Lordships' opinion is not a fresh application as contemplated by section 48.

This conclusion renders it unnecessary that their Lordships should examine other contentions of the parties save

the contention upheld by the Chief Court that in any event interest cannot be recovered in execution of the decree of 22nd January, 1916, at more than 6½ per cent. It is said that there is no order of any Court for more than 6½ per cent. The agreement for 8 per cent. was first made in 1924. It was made with the knowledge of the Sales Officer and approval of the Deputy Commissioner and a large number of villages were released from the mortgage as part of that bargain. The bargain was referred to in the petition of the appellants to the Subordinate Judge at Fyzabad filed in 1924 under O. XXI, rule 2, though the term as to interest was not expressly mentioned. An order was obtained from him directing the release of the villages from sale. So, too, in 1927 the amount due under the decree was fixed by agreement of the parties upon a calculation of 8 per cent. for part of the time and further time was given to the judgment-debtor upon that footing from 1927 to 1930. The decree in the present case was a final decree for sale and as is now recognised by rule 10 of O. XXXIV the mortgage account has to be carried down to the time of actual payment in order to get a final adjustment of the amount to be paid. All costs charges and expenses properly incurred by the mortgagee up to that time have to come into the account. Yet if the Chief Court's view be right the executing Court is wholly without jurisdiction to include even by agreement interest payable under an arrangement whereby the mortgaged properly has been saved from a forced sale under the decree. The authority relied upon by the learned judges of the Chief Court is *Gobardhan Das* v. *Dau Dayal* (1932) I.L.R. 54, All. 573, and the principle invoked is that the original decree cannot be altered or varied by the parties even with the sanction of the Court and that in any case mere consent of the parties cannot confer such a jurisdiction on the executing Court. This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution discharge or satisfaction of the decree, the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing Court. "Amendment," or alteration of the decree whether under section 152 or by review is a different matter under the Code. No doubt an adjustment, if not recorded under O. XXI, rule 2, cannot be recognised by any Court executing the decree. The compromise of 1927, however, was recorded: it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to. It was not an attempt to bring under the decree a liability extraneous to the mortgage or the mortgage suit (*cf.*

Pradyumna Kumar Mullick v. *Kumar Dinendra Mullick* (1937) L.R. 64, I.A. 302, 308). Their Lordships see nothing in the Code requiring them to hold that had the judgment-debtor paid the agreed instalments punctually the appellants, after 1927, could have executed the decree for the whole sum outstanding contrary to the terms of the compromise. Nor do they think it reasonable that such a compromise, if enforced by the executing Court, should not be enforced as a whole. They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree and the executing Court under section 47 has jurisdiction to ascertain its legal effect and to order accordingly. It may or may not be that any and every bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term "adjustment": on that their Lordships do not pronounce. Nor will they here consider what consequences would flow from a finding that a particular bargain for time was not an adjustment. In the absence of express statutory authority it is not possible in their Lordships' view to regard O. XX, rule 10, as excluding any possibility of the parties coming to a valid agreement for time to which the Court under section 47 will have regard. The rule does not apply to all decrees: but only to decrees for the payment of money in so far as they are of that character. The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain and the objects may be more than one: but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time enforceable in execution proceedings. Such bargains may take different forms and it is not possible to pre-judge the individual case. If it appears to the Court, acting under section 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under section 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court. Their Lordships are in agreement with the statement in the case of *Gobardan Das* (p. 585 of the report *supra*) that "in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced" and they are not of opinion that

the practice, which is both widespread and inveterate, is contrary to the Code. They are of opinion that in the present case the compromise can and should be enforced in these execution proceedings.

They will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside and the order of the Subordinate Judge dated the 26th November, 1932, restored. The respondents must pay the costs of the appellants in the Chief Court and of this appeal: in addition, the appellants will have liberty to add these costs, if unpaid, to their security.

(14657—3A) Wt. 8168—30 190 2/39 P. St. G. 338

In the Privy Council

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v.

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