

CALCUTTA HIGH COURT

Sham Lal Chatterjee

Vs

Hazari Mal Babu

(Coxe and Chatterjea, JJ.)

13.12.1911

JUDGMENT

Coxe, J.

1. The opposite party in this case is a decree-holder, who obtained an instalment-decree against the petitioners. Instalments were to be paid twice a year, from 1314 to 1325; and there was also a stipulation that if a certain estate, called Lot Chandrabati, was sold out of Court at an adequate price, the sale-proceeds should be paid to the decree-holder and credited against the decretal amount.

2. It is not disputed that the two instalments due in 1316 were not paid in full. It has been faintly argued that this did not constitute default, because the terms of the agreement were that the decree-holder should not be entitled to execution, unless these two instalments remained wholly unpaid. But, on referring to the terms of the contract, it seems to us perfectly clear that the meaning of the parties was that if these two instalments were not paid in full, that is to say, if any portion of these two instalments remained unpaid, the decree-holder should be entitled to execute his decree. When this default had been made the decree-holder took out execution against all the property covered by the decree and for the whole balance due to him. The judgment-debtor, petitioner, made no objection; but he asked that Lot Chandrabati only might be sold. This request was agreed to by the decree-holder. Lot Chandrabati was sold; and the sale-proceeds, amounting to Rs. 10,000, were credited against the decretal amount. The decree-holder then took out execution against the remaining property;

3. The judgment-debtor has now objected to this execution; and he says that he made these two defaults in 1316 in collusion with the decree-holder; that it was arranged between the parties that he should make these two defaults, in order to give the decree-holder an opportunity of executing his decree, so that Lot Chandrabati, instead of being sold out of Court, according to the stipulation in the compromise, should be sold in execution.

4. The learned Subordinate Judge held that the judgment-debtor was not entitled to put forward this argument at all, and he rejected the objection and allowed execution to proceed.

5. The judgment-debtor appeals to this Court and for the purposes of this appeal we must take it

that his story is untrue, although, of course, at present there is no evidence whatever in support of it. We must assume that he and the decree-holder made this arrangement that he should make these two defaults; but that the decree-holder should not thereby be entitled as he otherwise would have been entitled by the decree, to realise the whole balance of the money, but should only be entitled to sell Lot Chandrabati and should then be debarred from proceeding with the execution of his decree until further default had been made. The sum of Rs. 10,000, realised by the sale of Lot Chandrabati, would have covered the instalments for about 5 years from 1316; so that by this alleged agreement the decree-holder was debarred from proceeding with his decree until 1321.

6. It appears to me that an arrangement of this kind is certainly an adjustment of the decree in part to the satisfaction of the decree-holder within the meaning of Order XXI, Rule 2, of the Code of Civil Procedure. It may be open to doubt whether a mere agreement to grant time would be an adjustment within the meaning of that section; although, speaking for myself, I should be inclined to think that it would be such an adjustment.

7. But, be that as it may, it is quite clear that the agreement pleaded by the judgment-debtor amounts to a good deal more than an agreement to grant time; and, therefore, it was incumbent on the parties to certify it to the Court, and they had no right actively to conceal it from the Court's knowledge. As it was not certified it would not be recognised by the execution Court.

8. It has been argued, firstly, that this adjustment is saved from the operation of Sub-section 3 of the Section I have quoted, by reason of the fact that the conduct of the decree-holder was fraudulent, and, secondly, that the decree holder is estopped from denying the adjustment. It seems to me, however, that to hold that Sub-section 3 has no application where the decree-holder has been guilty of fraud, would take all real meaning out of the sub-section, as there must be few cases in which, when the payment is not certified to the Court, the concealment is not fraudulent. As to estoppel, there can be no question of estoppel against the precise terms of a provision of the Code.

9. It appears to me, therefore, that the decision of the learned Subordinate Judge is right and should be upheld. The appeal is accordingly dismissed with costs, which we assess at two gold mohurs.

N. Chatterjea, J.

10. I agree.