

Bireswar Mookerjee and ors. Vs. Ambika Charan Battacharjee

Bireswar Mookerjee and ors. Vs. Ambika Charan Battacharjee

SooperKanoon Citation : sooperkanoon.com/884812

Court : Kolkata

Decided On : Jun-19-1917

Reported in : 42Ind.Cas.472

Judge : Asutosh Mookerjee and ;Walmsley, JJ.

Appellant : Bireswar Mookerjee and ors.

Respondent : Ambika Charan Battacharjee

Judgement :

1. The question for determination in this Rule is whether an application presented on the 7th June 1916 for execution of a decree for money, made on the 24th November 1909, is or is not barred by limitation. The application is prima facie barred by limitation under Article 182 of the second Schedule to the Indian Limitation Act. The decree-holder consequently seeks to escape the bar of limitation by reference to two payments alleged to have been made by the eldest brother of the petitioners on the 8th, October 1912 and the 9th June 1913 respectively. The petitioners argue, first, that as the payments were not certified they cannot be taken into account; and secondly, that if taken into account they are of no avail under Section 21 of the Indian Limitation Act. In our opinion, these contentions are well-founded and must prevail.

2. As regards the first contention, it is not disputed that neither of these payments was certified to the Court; consequently, under Order XXI, Rule 2, Sub-rule (3),

Civil Procedure Code, the payments cannot be recognised by any Court executing the decree. This view is supported by the decisions in *Jogendra Nath Sarkdr v. Prbbhat Nath Chatterjee* 21 Ind. Cas. 926: 19 C. L. J. 126, *Kutulullah Sarkar v. Durga Charan Rudra* 13 Ind. Cas. 424: 16 C. L. J. 396 and *Bhajan Lall v. Cheda Lall* 24 Ind. Cas. 215: 12 A. L. J. 825. It may be observed that Order XXI, Rule 2 (3) of the Code of 1908 is different in terms from Section 258 of the Code of 1882. The present Code provides that a payment which has not been duly certified shall not be taken into account by any Court executing the decree. The previous Code provided that a payment which had not been certified should not be recognised as a payment or adjustment of the decree. This alteration in language justifies the inference that an uncertified payment or adjustment cannot now operate to prolong the period of limitation for an application for execution of a decree under the Indian Limitation Act. This interpretation is perfectly legitimate, and if adopted, will induce decree-holders to certify payments made to them out of Court.

3. As regards the second contention, we are of opinion that the payments which were made by the eldest brother of the petitioners, who were infants, while their mother was alive, cannot be said to have been made by a 'lawful guardian' within the meaning of Section 21 of the Indian Limitation Act. It is well-settled that, under the Hindu Law, in the absence of the father; the mother is entitled to be the guardian of her infant sons in preference to their brother. [*Musammat Muhtaboo v. Gunesh Lal* 10 Beng. S. D. A. R. 329: 13 Ind. Dec. (o. s.) 1004.]

4. The Rule is made absolute and the order for execution as against the petitioners is set aside.