APPELLATE CIVIL.

Before Suhrawardy and Cuming JJ.

JALIM CHAND PATWARI

v.

YUSUF ALI CHOWDHURI.*

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Dec. 1.

Limitation—Limitation Act (IX of 1908) Schedule I, Article 181—Certification by decree-holder of payment made out of Court—Civil Procedure Code (Act V of 1908), O. XXI, r. 2(1)—Instalment decree with provision that in case of default the whole amount became recoverable—Acceptance of overdue instalment—Waiver.

Where an application was made for the execution of an instalment decree alleging certain payments made by the judgment-debtor and objection was taken to execution on the ground of limitation as the alleged payments were neither certified to Court nor entered in the handwriting of the person making the same :—

Held, that the decree-holder was entitled to prove the payments and that article 181 of the Limitation Act had no application to the case as there was no time required for the decree-holder certifying payments already made.

Bahy Muhammad Saha v. *Aijanmai* (1) discussed and dissented from *Bahuballabh Roy* v. *Jogesh Chandra Banerjee* (2) explained and approved. *Pandurang* v. *Jogya* (3) considered.

The right to execute the decree accruing from time to time on account of the non-payment of an instalment is waived by the decree-holder by the acceptance of the overdue instalment and time begins to run only from the date of the actual default.

Sitab Chand Nahar v. *Hyder Molla* (4) relied upon.

*Appeal from Order No. 322 of 1923, against the order of C. Bartley District Judge of Dinajpur, dated May 25, 1923, affirming the order of Sasi Kumar Ghose, Munsif of that place, dated July 13, 1922.

(1) (1921) 26 C. W. N. 529.
(2) (1918) 23 C. W. N. 320.
(3) (1920) I. L. R. 45 Bom 91.
(4) (1896) I L. R. 24 Calc. 281.

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SECOND APPEAL by Jalim Chand Patwari and another, the decree-holders.

This appeal arose out of an application for the execution of a decree. The decree was an instalment decree with a provision that in case of default of any instalment the whole amount remaining unpaid became due and recoverable. It was alleged by the decree-holders that some of the instalment dues had been paid up. The judgment-debtor objected to the Court taking cognisance of these payments on the ground that they were neither certified under O. 21 r. 2 nor acknowledged in the handwriting of the person making them and pleaded the bar of limitation. The Court of first instance dismissed the application, accepting the contention of the judgment-debtor. The decree-holders then appealed before the District Judge but it was dismissed. They thereupon preferred this second appeal to the High Court.

Babu Girija Prasanna Sanyal and *Babu Indu Prokas Chatterjee*, for the appellant.

Babu Bansorilal Sarkar, for the respondent.

SUHRAWARDY J. This appeal is by the decree-holder against an order of dismissal of his application for execution made by the Court below on the ground that it is barred by limitation. The decree was an instalment decree, the amount of which was made payable in six equal instalments distributed over the months of Kartick and Chaitra of 1325, 1326 and 1327. The first instalment was to begin on the 30th Kartick 1325 corresponding to the 15th November 1918, and it was agreed that on default of payment of any instalment the whole decretal amount would become immediately payable. The decree-holder alleged that the judgment-debtor paid the first *kist* partly on the

30th Kartick 1325 and partly on the 1st Pous 1325; the 2nd *kist* partly on the 30th Chaitra 1325 and partly on the 30th Baisakh 1326 and the third *kist* partly on the 29th Kartick 1326 and partly on the 6th Pous 1326 corresponding to the 21st December 1919 which was the last payment made by the judgment-debtor. The present application for execution was filed on the 20th January 1922 stating that Rs. 664-5-9 had been paid out of Court by the judgment-debtor. In these circumstances, the learned District Judge in the Court of appeal below has held that the application was time-barred. The ground which the learned Judge has given is that the payment made on the Kartick and Pous 1325 were not certified within three years from the date of payment and as such the Court cannot take cognizance of them; the payments could not be certified on the day the application for execution was filed as being beyond three years from the date of payment and therefore it must be held that the whole amount became payable on the 1st Aghrahayan 1325 corresponding to 16th November 1918, that is, the first day after the first instalment became due. The learned Judge has further held that limitation was not saved under section 20, Limitation Act, as admittedly no entry of payments was made by the person who had made them.

With regard to the first ground on which the Court below has held the present application for execution as time-barred, the view of law that an application for certifying payments under Order XXI, rule 2, Civil Procedure Code, should be made within three years is supported by the decision in the case of *Bahy Md. Saha* v. *Aijanmai* (1). There the learned Judges held that as there is no period of limitation fixed by the Limitation Act for an application by the

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decree-holder for certifying payments made by the judgment-debtor out of Court, the residuary Article 181 should apply. This point, however, did not directly arose in that case and their Lordships were not called upon to decide it on the facts that were before them. In that case the final decree in the mortgage suit was passed on the 16th January 1916. On the 11th August 1919 the decree-holder applied for execution and alleged payment by the judgment-debtor on the 25th October 1917. The payment therefore was within three years before the application for execution was made and therefore it was not necessary to consider whether there was any period fixed by law within which the decree-holder should apply for certifying payments out of Court. Though the observations were clearly *obiter dicta*, coming from the learned Judges who decided that case they are entitled to great deference, but I must respectfully decline to accede to the proposition. My reason is, that Article 181 applies to an application for which no period of limitation is provided in the schedule to the Indian Limitation Act. Order XXI, rule 2 (*1*), provides that where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. Under clause (*2*), the judgment-debtor also may inform the Court of such payment or adjustment and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. The difference in the language of these two clauses is apparent. In clause (*1*) the decree-holder is required only to certify such payment; where as in clause (*2*) the judgment-debtor is required to inform the Court of such

payment and also to apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. The word "certify" as used in the two clauses above quoted is not defined in the Code but has received judicial interpretation. It has been held in a number of cases of this Court as well as in other Courts that in order to certify payment it is enough that the decree-holder mentions the fact of such payment in the application for execution of the decree in respect of the balance. *Eusuff Zeman Sarkar* v. *Sanchia Lal Nahata* (1) *Lakhi Narayan* v. *Felamani Dasi* (2) *Pandurang* v. *Jogya* (3) *Masilamani Mudalier* v. *Sethuswami Ayyar* (4). The same view has been adopted by the Patna High Court in the case of *Sheik Elahi Buksh* v. *Nawab Loll* (5). If the view firmly established by these cases and others that followed them is correct, the word "certify" as used in Order XXI, rule 2(*1*), becomes synonymous with the word "inform" as used in clause (*2*) of that rule. It is not therefore incumbent upon the decree-holder to certify payment by making an application; and if he is not required to make an application, it is difficult to argue that Article 181 applies. In the case of *Bahy Md. Saha* v. *Aijanmai* (6) the learned Judges conceded the correctness of the law as stated above. But they proceeded to consider what period of limitation would be applicable to an application by the decree-holder to record payment, The use of the word "application," in connection with this matter might have misled the learned Judges. There is no case directly on the point in this Court as

(1) (1915) I. L. R. 43 Calc. 207.
(2) (1914) 20 C. L. J. 131.
(3) (1920) I. L. R. 45 Bom. 91.
(4) (1916) I. L. R. 41 Mad. 251.
(5) (1919) 4 P. L. J 159.
(6) (1921) 26 C. W. N. 529.

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against the view adopted in the case of *Bahy Md. Saha* v. *Aijanmai* (1), but the question came up before the Bombay High Court in the case of *Pandurang* v. *Jogya* (2), where a similar objection was taken and overruled. In that case a decree was passed in 1906 making a certain quantity of paddy or its equivalent sum of money payable by instalments commencing from 1907. It was agreed that if two instalments were not paid the whole decree would be executed at once. The decree-holder filed an application for execution on the 10th September 1915, alleging that the first nine instalments from 1907 to 1915 had been paid to him regularly in January of each year as they fell due and as two instalments of 1916 and 1917 had not been paid he asked that the decree for the balance should be executed. The judgment-debtor denied having made any payment at all and as none of the alleged nine instalments had been certified and recorded by the Court he contended that the execution Court should not take cognizance of these payments and therefore the entire amount fell due on the date of the first defaults and the execution was barred by limitation. The learned Chief Justice considered the question of limitation and came to the conclusion that there was no time required for the decree-holder certifying payments already made under Order XXI, rule 2, Civil Procedure Code. The view taken in the case of *Lakhi Narain* v. *Felamani Dasi* (3) points to the same conclusion. There is no doubt that in that case payments were made within 3 years of the date of the filing of the application for execution but the learned Judges observed that if there was no period fixed within which the decree-holder must certify, the decree-holder could certify part payment at any time

(1) (1921) 26 C. W. N. 529. (2) (1920) 45 I. L. R. Bom. 91.

(3) (1914) 20 C. L. J. 131.

and if the payment was within time so as to prevent the decree being barred, the execution could not be said to have been barred.

There is one other case which deserves a passing notice. In the case of *Bahubullabh Roy* v. *Jogesh Chandra Bannerjee* (1), an instalment decree was passed in 1910, the condition being that in default of payment of one instalment the entire amount was to become recoverable. The decree was put to execution in 1916 and the decree-holder, to avoid limitation, alleged two uncertified payments. The learned Judges remark that it is not proved that any instalment had been paid. They further observe: "The "appellant, the decree-holder, states that he can certify "the payment made at any time. That is quite true, "subject of course, to the ordinary rule of limitation "that the certification must take place within such time "as is required to save the case from being barred by "limitation. He cannot postpone the certification for a "long period of years and then say that he will save the "decree from being barred by limitation by certifying "the payments then. The point that is raised in "this case really turns on whether the decree was saved "from being barred by reason of these alleged uncerti-"fied payments. There is nothing to show that it was." The last sentence is ambiguous but if it is read with the previous finding of fact that it was not proved that any instalment had been paid, the conclusion is perfectly correct. It is also right to say that the certification cannot be postponed indefinitely for it must be made within three years before execution is applied for to save the decree from limitation under section 20, Indian Limitation Act, or on the ground of waiver. This decision is really in

(1) (1918) 23 C. W. N 320.

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support of the view I take of the law. It is worthy of note that one of the Judges (Fletcher J.) who decided this case was a party to the decision in the case of *Lakhi Narayan* v. *Felamani* (1). To my mind clause (*3*) of Order XXI, rule 22, presents no difficulty as certification of payments may be made by the decree-holder by stating them in his application for execution.

We are therefore clearly of opinion that article 181 does not apply to the present case and that the decree-holder is entitled to prove the payments alleged by him made in Kartick 1325 and Pous 1326 and subsequent payments.

The next question that arises for consideration on the findings of the learned Judge is whether the application for execution is barred under section 20 of the Limitation Act. The last payment alleged to have been made by the judgment-debtor on the 6th Pous 1326 (corresponding to the 21st December 1919) was clearly within 3 years of the date of the application for execution. It is not the decree-holder's case that this payment was entered in a way so as to bring it within section 20 of the Indian Limitation Act. But his submission is that the decree is an instalment decree and that though it was provided therein that in default of one instalment the whole decretal amount would be recoverable, the right which accrued to him from time to time from non-payment of any instalment was waived by receipt of defaulted instalments which the judgment-debtor had neglected to pay in time and hence his right to execute the decree accrued from the date of the default of 1326 Chait kist. In support of this argument reliance has been placed upon the case of *Surendra Nath* v. *Raja*

(1) (1914) 20 C. L. J. 131.

Rishikesh Law (1). The principle of the law of limitation as laid down in article 75, Limitation Act, has been applied to the case of instalment decrees and it must now be taken to be well-settled that waiver being allowed under clause 7 of article 182, Limitation Act, time runs from the date of the actual default. See the case of *Sital Chandra Nahar* v. *Hyder Molla* (2). If the plaintiff's allegations are correct, he had received payment of the kists for Kartick and Chaitra 1325 and of the Kartick kist of 1326. The next kist would be due in Chait 1326 (April 1920). Whether the period is counted from the end of Chaitra (15th April 1920) or from the last date of payment (21st December 1919) when the decree-holder exercised his right of waiver, the present application is clearly within time. We therefore hold that the view taken by the Courts below that the decree-holder's application is barred by limitation is wrong and this appeal must be allowed.

The result is that this appeal succeeds the order of the Court below dismissing the decree-holder's application for execution must be set aside and the case must go back to the Court of first instance for trial of the question of payment or such other questions that may arise in the case.

Costs will abide the result.

CUMING J. I agree.

Appeal allowed; case remanded.

A. S. M. A.

(1) (1923) 27 C. W. N. 893. (2) (1896) I. L. R. 24 Calc. 281