

of 1877 fell due on the 20th February. To ascertain whether it was barred, it is necessary to see whether an application to recover it might have been successfully made between 20th February 1877 and 1st October 1877, the date of the *Limitation Act* of 1877 coming into force. It clearly would have been successful, as execution would have been admissible as to that instalment under clause 6, article 167 of the second schedule of the Act of 1871.

The provision as to the whole amount being recoverable at once, if default is made, does not affect the admissibility of the application for execution, because that provision has never been enforced and the obligation to pay by instalments is still subsisting.

The application was not therefore barred before Act XV of 1877 came into operation, and the instalment was clearly recoverable under that Act, because the period of three years runs from 20th February 1877 and had not expired on the date of the application—17th November 1879.

**NOTES.**

[A similar view was taken in 14 Cal. 352; 15 Cal. 502. See also (1895) 19 Mad. 162. In 'Starting on Limitation' (5th Edn., 1911) it is remarked with reference to this case that "it does not clearly appear from the report of this case whether the decree made the whole amount payable on default in one instalment, or whether it only gave the creditor the option of enforcing the whole amount, but it would rather seem as if the latter were the case." (p. 535). See also 100 P.R. 1902.]

**[259] APPELLATE CIVIL.**

*The 22nd August, 1881.*

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE TARRANT.

Ragava Chariar.....(Plaintiff) Appellant.

*versus*

Vedanta Chariar and others.....(Defendants) Respondents.\*

*Civil Procedure Code, Sections 185-394—Dismissal of suit on failure to pay fee of Commissioner to examine accounts.*

The Code of Civil Procedure does not authorise the dismissal of a suit on refusal or failure of a party to deposit the amount ordered by the Court as remuneration to a Commissioner appointed under Section 394† to examine accounts.

The remuneration of a Commissioner appointed by the Court to examine accounts should, as a rule, be a definite amount and not at a monthly allowance.

\* Appeal No. 5 of 1881 against the decree of J. H. Nelson, District Judge of South Arcot, dated 24th November 1880.

†[Sec. 394:—In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as Commission to examine it thinks fit directing him to make such examination or or adjust accounts. adjustment.]

THE question raised in this appeal was whether the District Judge was warranted by law in dismissing the suit because the plaintiff declined to pay 250 rupees a month, the sum fixed by the Court as a remuneration for a Commissioner (a Treasury Deputy Collector) appointed by the Court to investigate the accounts of a pagoda for ten years past. The plaintiff offered to pay Rupees 25 a month to a clerk, but the District Judge considered that only a skilled accountant was competent to do the work properly, and dismissed the suit as the plaintiff persisted in his refusal to pay the larger sum.

V. *Bhashyam Ayyangar* for the Appellant.

S. *Gopalachari* for Respondents 1 to 6.

The arguments appear in the Judgment of the Court (INNES and TARRANT, JJ.)

**Judgment.**—We are of opinion that the Code does not authorise the dismissal of a suit on refusal or failure of a party to deposit the amount ordered by the Court as remuneration to a Commissioner appointed under section 394 of the Code to examine accounts.

The only section apparently bearing upon the question is Section 158,\* which admits of the Court proceeding to decide the suit on the occasion of a default by a party to whom time has been given to perform an act necessary to the further progress of the [260] suit. But even that section, if applicable at all, which may be doubtful, to a default of the kind under notice, does not, we think, at all events apply to the present case, in which the plaintiff represented that he was prepared to prove his case independently of the accounts. It seems to us, looking at the nature of the case, that it was somewhat premature to determine that it would be necessary to examine accounts. With regard to the first and most important item, for instance, the plaintiff's allegation is that a sum of some 1,133 rupees has been paid in to the defendants, but not credited by them. Defendants admit that it has not been credited and say that this is because it is not yet collected. This answer appears to dispense with the accounts. The plaintiff has to prove the payment and would necessarily have to produce the persons who paid and their receipts. It might be that a reference to the accounts would then be necessary, but until that evidence be taken it cannot be positively determined that such a reference would be called for. As to the other items also, it is not at present apparent that it would be necessary to consult the accounts, or that, if necessary, the Court could not itself try the case throughout with greater convenience to the parties than if a Commissioner were deputed to examine the accounts and make a report.

We think, too, that the sum of 250 rupees a month was unnecessarily high for the remuneration of the Commissioner. A definite and not a monthly sum should, in such cases, generally be fixed. There are obvious objections, except in very special cases, to a remuneration at a monthly rate.

We shall set aside the order of dismissal and direct the District Judge to replace the suit upon his file and to proceed with it.

The costs of and up to this appeal will be costs in the cause.

**NOTES.**

[See (1905) 10 C. W. N., 234 as to the proper mode of enforcing costs of the commission ; see also (1882) 4 Mad. 399 as to omission in depositing the amount.]

\* [Sec 158 :—If any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform

Court may proceed notwithstanding either party failsto produce his evidence. any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.]