

a muchalka accepting those terms, this is some evidence of his having dispensed with the delivery of a patta. If he has dispensed with the delivery of a patta and accepted the terms offered, that is sufficient to fix him with liability.

We must require the District Judge to find—

- I. Whether plaintiff dispensed with a patta.
- II. If he did so, whether he has, as contended, paid the full amount owing.

The District Judge is directed to try the foregoing issues upon the evidence already recorded and upon such further evidence as the parties may adduce, and to return his finding thereon together with the evidence to this Court within six weeks from the date of receiving this order, when ten days will be allowed for filing objections.

NOTES.

[See (1908) 18 M.L.J. 246 where it was held that a mere acceptance of them muchalka was not sufficient proof of the patta having been dispensed with. See also (1886) 10 Mad. 363.]

[3 Mad. 256.]

APPELLATE CIVIL.

The 11th August, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI IYYAR.

Karakavalasa Appayya.....(Defendant) Appellant
versus
 Karanam Papayya.....(Plaintiff) Respondent.*

Decree for payment by instalments—Proviso on default that whole sum became recoverable—Payments out of Court—Default in fifth instalment—Application for execution as to fifth instalment not barred—Right to recover whole amount not enforced—Original obligation not affected.

Where a decree was passed by consent in 1872 for payment to plaintiff through the Court of Rs. 300 by fifteen annual instalments on 20th February in each year, and in default of payment of any instalment the whole amount became recoverable, and four years' instalments were paid out of Court and default made on 20th February 1877, and plaintiff applied to recover the instalment of 1877 by execution on 17th November 1879, and 1st March 1880 ;

Held, that the application of November 1879 was not barred under Clause b, Article 179, Schedule II of the Limitation Act of 1877, inasmuch as when the Indian [257] Limitation Act, 1877, came into force (1st October 1887), the application was not barred under Clause 6, Article 167, Schedule II of the Indian Limitation Act, 1871.

Held also, that the provision as to the whole amount becoming recoverable at once if default was made did not affect the admissibility of the application for execution, because that provision had not been enforced and the obligation to pay by instalments was still subsisting.

THIS was a case stated and referred under Section 617 of the *Civil Procedure Code* by the District Judge of *Ganjam*. The facts are set out in the High Court's Judgment.

The parties were not represented before the High Court, but before the District Court the Counsel for the defendant cited *Arunachella Pillai v. Aupavu*

* Referred Case 15 of 1880, stated by J. Wallace, Acting District Judge of Ganjam.

Pillai (3 M. H. C. R., 188) and *Dulsook Rattan Chand v. Chugon Narrun*, (I.L.R. 2 Bom., 356) and the *Vakil* for the plaintiff *Lakshmi Ammal v. Seshadri Ayyanigar* (4 M. H. C. R., 275) and *Fakir Chand Bose v. Madar Mohan Ghose* [4 B. L. R. (F. B.), 130.]

The District Judge was of opinion that the application was barred because he considered the effect of the provision in the decree, that in default of payment the whole amount should become recoverable, was, not only that the whole remaining balance became recoverable at once by execution, but also that the decree thereby became modified in nature and ceased to be any longer a decree for instalments, and that *Limitation* ran from the day following the date of the first default. But as, in his opinion, it was open to argument whether it was optional to the judgment-creditor to waive the effect of the modification of the decree caused by the default of the judgment-debtor, the case was referred for the decision of the High Court.

The Court (INNES and MUTTUSAMI AYYAR, JJ.) delivered the following

Judgment :—A Razinama decree was passed on 24th September 1872 for the payment to plaintiff, through the Court, of the sum of Rs. 300 in fifteen annual instalments payable on the 20th February of each year, a proviso being added that, in default of payment of any instalment, the whole amount became recoverable. The plaintiff received out of Court payment of the instalments due for 1873, 1874, 1875 and 1876; the defendant failed to pay that due [258] for 1877. The plaintiff sought execution of the decree on 17th November 1879, and 1st March 1880.

Section 258 of the *Civil Procedure Code* provides that payments made out of Court shall not be recognized, and such being the case, defendant pleaded the bar of *Limitation*.

The District Judge refers for our decision the question whether or not in the above circumstances plaintiff's application is barred.

The application was made on 17th November 1879 and the *Limitation Act* of 1877 is the Act first to be consulted. The Decree which was passed in 1872 admits of the amounts due being paid in fifteen yearly instalments, each due on the 20th February.

The instalments up to and including 1876 have been paid but out of Court. The recovery of the instalment for 1877 by the terms of clause 6, Article 179, Second schedule of the Act 1877 is clearly admissible, if not barred previous to that Act coming into force (Section 2, Act XV of 1877).* Now the instalment

Repeal of Acts.

*[Sec. 2:—On and from that day the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.

References to Act IX of 1871.

But all references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25.

Saving of titles already acquired.

Saving of Act IX of 1872, Section 25.

Notwithstanding anything herein contained, any suit mentioned in No. 146 of the second schedule hereto annexed may be brought within five years next after the said first day of October 1877, unless where the period prescribed for such suit by the said Indian Limitation Act, 1871, shall have expired before the completion of the said five years; and any other suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871 may be

Suits for which period prescribed by this Act is shorter than that prescribed by Act IX of 1871.

brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.]

brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.]

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 it thinks fit directing him to make such examination or adjustment.]