1884

FAKARUDDIN MAHOMED AHSAN v. THE OFFICIAL TRUSTEE OF BENGAL.

in consequence of a decree having been passed against him, and an account having been made, showing that a balance of Rs. 732 was still due from him. That account was not a final one, but subject to revision, and appears to have been subsequently revised." We are not in a position, therefore, to say what was the nature of the account in that case, and how far the decision itself is applicable as a precedent. The view which we take of the law is in accordance with the decision of the Madras High Court in the case of *Ramanadan Chetti* v. *Kunnappu Chetti* (1). That also was a case under the old law. We think, however, that this question must now be determined with reference to the provisions of the new Code, and as s. 647 has made applicable to all proceedings other than suits or appeals, the provisions of the Code which are applicable to suits or appeals, we think, as already stated, that the only course open to the judgment-debtor was to apply for a review. We are then asked to treat this application of the 3rd July as an application for review, but we are of opinion that this course is not open to us. The appeal is therefore dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1884
March 4 & 14.

FUZLOOR RUHMAN (JUDGMENT-DEBTOR) APPELLANT *v.* ALTAF HOSSEN AND OTHERS (DECREE-HOLDERS) RESPONDENTS.*

Decree, Execution of—Step in [illegible] *ution of decree—Informal application for execution—Limitation* [illegible] *t XV of* 1877), *Sch II, Art.* 179.

An application for execu[illegible] of a decree having been made on the 19th January 1882 wi[illegible] time, but not in the form prescribed by the Civil Procedure Code, inasmuch as it did not contain the right number of the suit in which the decree was passed, an order was made on the 19th January directing the petitioner to amend the application within four days by [illegible]ing the correct number. That order was not complied with, and the petition was left on the file of the Court without being

* Appeals from Appellate Orders Nos. 200 and 201 of 1883, against the orders of H. Beveridge, Esq., Judge of Patna, dated 29th of March 1883, affirming the orders of Baboo Poresh Nath Banerjee, Second Subordinate Judge of that District, dated respectively the 27th of January 1883 and 30th of December 1882.

(1) 6 Mad. H. C. R., 304.

1884

FUZLOOR RUHMAN *v.* ALTAF HOSSEN.

disposed of in any way till the 21st September 1882; on which dat[illegible] more than three years having then elapsed since the date of the decree, it wa[illegible] returned to the vakeel of the petitioner for amendment within eight days. The required amendment was made, and the application again placed o[illegible] the file of the Court on the 22nd September.

On an objection being taken that the decree was barred, and tha[illegible] execution could not issue, *Held*, following the principles laid down in th[illegible] case of *Syud Mahomed* v *Syud Abedoollah* (1), *viz.* that it was the duty of the Court to dismiss the application when it found that it was informal, and thus to give the applicant an opportunity of putting in a proper application, and that the decree-holder should not be made to suffer for such omission on the part of the Court; that the former application could not, though informal, be treated as a nullity; and that the application on the 22nd September must be taken as having been presented with the object of amending the original informal application; and that it was in continuation of the execution proceedings commenced however informally on the 19th January 1882; and that consequently the decree was not barred. *Held*, also, that the fact of the application having been returned to the vakeel for amendment instead of being amended while on the file of the Court, made no difference to the application of the above principle.

THE fact of these two appeals, which were analogous ones, are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. *C. Gregory* for the appellants.

Moulvie *Serajul Islam* for the respondents.

The judgment of the High Cou[illegible] MITTER and [illegible], JJ. was delivered by

MITTER, J.—In this case an a[illegible]tion for execution of the decree of the Appellate Court, whic[illegible] passed in the month of February 1879, was made on the 19th Janary 1882. The petition did not contain the right number of [illegible] in which the decree was passed, and an order was made on the 19th January directing the petitioner to amend the pe[illegible]ion by giving the right number within four days. This order was not complied with, but notwithstanding the petition was left on the record of the Court without being disposed of in any way. It was brought up again on the 21st September 1882, and on that date it was returned to the vakeel of the petitioner to amend it by

(1) 12 C. L. R., 279.

giving the correct number of the suit within eight days from that date. The required amendment, however, was made on the day following, *viz.*, on the 22nd September 1882, and the application was put upon the record again. Thereupon the Court directed it to be registered and ordered notice to issue. It is quite clear that if the application be considered to have been made on the 22nd of September, the decree would be barred by limitation as it was more than three years from the date of the decree. If, on the other hand, the application is to be considered as having been made on the 19th January 1882, it would be within time. The lower Courts have decided in favour of the decree-holder. The objection taken before us in appeal is that under the circumstances stated above the lower Court should have held that the application was really made only on the 22nd September 1882, and therefore was barred by limitation. Our attention has been called to a decision in the case of *Synd Mahomed* v. *Synd Abedoollah* (1), and although the facts of that case are not exactly similar to those of the present, yet the principle upon which that decision proceeds seems to us to be applicable here. The only difference that we can find in the facts is that, in the case under consideration, there was originally an order requiring the appellant to amend the application within four days, whereas in the case cited there was no limit fixed by the Court requiring the petitioner to amend the application. There is also another difference in the facts, *viz.*, that in the case now before us the [illegible]n was actually returned to the vakeel for amendment, while [illegible]e case cited the petition always remained on the file of th[illegible]urt. But these are differences upon points which are not essential. The principle upon which the decision cited proceeded was that, as it was the duty of the Court to dismiss the application when it found that it was informal, and, as the Court did not so dismiss it, the decree-holder ought not to suffer for the omission on the part of the Court to dismiss the application; and the reason assigned for this is that, if the Court had done its duty and dismissed the application, the decree-holder might have put in a proper application on the

(1) 12 C. L. R., 279.

1884

FUZLOOR RUHMAN v. ALTAF HOSSEN.

next day. Applying the same principle here, if, on the 19th of January, which in that case was within time, or on the expiration of four days from that date the application had been refused, the decree-holder would have been in time to make a fresh application in proper form. Therefore it seems to us that the Court not having dismissed the application on the expiration of the four days allowed by it, and allowed the petition to remain on the file, the case comes within the purview of the decision cited. As to the other difference it is no difference at all, because, instead of allowing the vakeels to amend the petition while it was on the file of the Court, the Court simply allowed the vakeel to take it away and to amend it within the time given by the Court. That would not make any difference as to the application of the principle upon which the decision cited was passed. That being so, and it not being shown that the decision cited does not correctly lay down the law, we dismiss these appeals but without costs.

Appeals dismissed.

Before Mr. Justice Maclean and Mr. Justice Field.

1884 *March* 31.

WATSON & Co. (DEFENDANTS) *v.* NISTARINI GUPTA (PLAINTIFF.)*

Vis major—Ijara Settlement—Land acquired by Government for public purposes—Deduction from Rent.

An ijaradar took on lease certain lands, giving a *kabuliat* which contained the following clause:—"In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight, of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion, &c."

During the lease part of these lands were taken up by Government for the purpose of a railway, and compensation was paid to the lessor therefor. The ijaradar claimed to make a deduction from his rent for the land taken away from him. Held, that such a claim did not come under the meaning of the words "abatement" as used in the rent law, nor was it intended by the parties to be within the clause of the lease, but the land having been taken from the whole area demised, not by natural causes, but by *vis major*, the ijaradar was entitled to a deduction from the rent on his showing that there were tenants of his on the land who, before the land was taken by Government, paid rent to him which they had now ceased to pay.

* Appeal from Appellate Decree No. 1529 of 1882, against the decree of Baboo G. C. Chowdhry, Subordinate Judge of Rajshahye, dated 11th of May 1882, reversing the decree of Baboo Kali Charan Ghosal, Sudder Munsiff of Beauleah, dated 16th of August 1881.