

appealed to the District Judge against the order disallowing her objection, who referred to the High Court the question whether or not Sultan Kuar's decree was saleable in the execution of the order dated the 14th September, 1878.

The parties were not represented.

The judgment of the Court was delivered by

PEARSON, J.—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in s. 166 of Act X of 1877, yet it is apparent from the provisions of s. 273 of the Act that the sale of a money-decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

In our opinion the Judge is wrong in holding the last clause but one of s. 273 to be applicable in the present case. That clause applies to other than money-decrees. Although the two decrees held by Gulzari Lal and Sultan Kuar respectively were not passed by the same Court, nevertheless as they are being executed by the same Court, the provisions of the first clause of the section are applicable on principle.

Our opinion may be communicated to the Judge in reply to his reference.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

KANCHAN SINGH AND OTHERS (JUDGMENT-DEBTORS) v. SHEO PRASAD
(DECREE-HOLDER).*

Execution of decree—Decree for money payable by Instalments—Adjustment of Decree—Act VIII of 1859 (Civil Procedure Code), s. 206—Act IX of 1871 (Limitation Act), sch. ii, art. 167.

A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the moneys due under the decree.

* Second Appeal, No. 111, of 1878, from an order of G. L. Lang, Esq., Officiating Judge of Aligarh, dated the 28th May, 1878, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 14th December, 1877.

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SULTAN KUAR
v
GULZARI
LAL.

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April 28th

KANCHAN
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v.
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SAD.

Held per PEARSON, J., that whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, with reference to art. 167, sch. ii of Act IX of 1871, within time (1).

SPANKIE, J., refused to interfere in second appeal inasmuch as the lower appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree.

THE decree in this case was a decree for the payment of Rs. 2,750 by annual instalments and was dated the 6th April, 1866. The annual instalments were fixed by the decree at Rs. 250, and extended to 1876, and were payable in the month of Bhadon, the first instalment being payable in Bhadon 1866. Under the terms of the decree all payments were to be endorsed on the decree, and, if the judgment-debtors failed to pay two instalments in succession, the decree-holder was empowered to enforce payment of the whole amount due under the decree. The decree-holder, alleging that he had received all but Rs. 100, being a portion of the instalment for 1875, and Rs. 250, the whole of the instalment for 1876, applied on the 17th July, 1877, to recover Rs. 350 by the execution of the decree. It appeared that the payments which had been made under the decree had been endorsed on the copy of the decree in the decree-holder's possession. The judgment-debtors objected to the execution of the decree on the ground that the application for execution was barred by limitation, alleging that the payments which had been made had been made out of Court, and contending that, inasmuch as under s. 206 of Act VIII of 1859 payments of instalments out of Court could not be recognised, it must be taken that the judgment-debtors had failed to pay the first and second instalments, and the decree-holder should have applied for the execution of the decree within three years from the dates those instalments became due. The Court of first instance allowed this contention and held that the application was beyond time. On appeal by the decree-holder the lower appellate Court held that the payments of the instalments had been made in accordance with the terms of the decree, and such payments could be recognised, and that the application was within time.

(1) See, however, *Dulsook Rattanchand v. Chugon Narrun*, I. L. R., 2 Bom. 356, where it was held, in the case of a decree payable by instalments, with a proviso that in default of payment of any one instalment the whole

amount of the decree should become payable at once, the decree is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

The judgment-debtors appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Jogindro Nath Chaudhri*,
for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

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KANCHAN
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SAD

The following judgments were delivered by the Court :

PEARSON, J.—Art. 167, sch. ii of Act IX of 1871, provides that an application to enforce payment of an instalment which the decree directs to be paid on a specified date may be made within three years from the date so specified. The present application to enforce the payment of instalments which became due under the decree in Bhadon 1875 and Bhadon 1876 was preferred on the 17th July, 1877, within the time allowed by the law. It is difficult therefore to understand how it can be contended that the application is barred by the Limitation Law. The ground of the contention is that there is no legal proof of any previous payments having been made under the decree which was passed in April, 1866; and that, as the decree-holder was empowered by the terms of the decree to realise the whole amount at once in the event of two instalments not being duly paid, and failed to do so within three years from Bhadon 1868, he is now precluded from recovering the instalments of 1875 and 1876. This contention appears to me to be quite untenable. The decree-holder's omission in 1868, 1869, and 1870 to avail himself of his right to realise at once the entire amount of the judgment-debt may possibly preclude him from now enforcing that right; but he is not seeking to do so. By foregoing or forfeiting that right he has not lost his right to the instalments annually falling due. It seems to me to be immaterial whether former instalments have been paid or not; but I observe that it was not seriously pleaded in the lower Courts that they had not been paid. What the judgment-debtors pleaded was that payments out of Court do not save limitation; and the Court of first instance held that the payments having been made out of Court could not be recognised. The non-recognition of those payments does not, however, exclude the present application from the operation of the clause above-quoted of art. 167, sch. ii, Act IX of 1871. The pleas in appeal are worthless in my opinion and I would dismiss the appeal with costs.

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SPANKIE, J.—On the facts found by the lower appellate Court that there had been no such default as that referred to in the decree in the payment of instalments, I do not think that I could interfere in second appeal, and this appears to be the more proper course, because the judgment-debtor does not really seem to have denied the payments out of Court allowed by the decree-holder to have been made to him in accordance with the terms of the decree. I would dismiss the appeal and affirm the order with costs.

Appeal dismissed.

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April 29.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

HAR SAHAI MAL AND OTHERS (DEFENDANTS) v. MAHARAJ SINGH
(PLAINTIFF)*

Determination of Title—Act XIX of 1863, ss. 8, 9—Res judicata.

Where *M*, the recorded proprietor of an estate, applied to have his share of such estate separated, and an objection was made to such separation by *H*, another recorded proprietor of the estate, which raised the question of *M*'s proprietary right to a portion of his share, and the Collector proceeded under s. 8 of Act XIX of 1863 to inquire into the merits of such objection and decided that *M*'s interest in such portion of his share was that of a mortgagee and not a proprietor, and *M* did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by *M* against *H* in which he claimed a declaration of his proprietary right to such portion, that a fresh adjudication of his right was barred.

THIS was a suit brought in May, 1877, in which the plaintiff, who was in possession of a share of nineteen biswas and sixteen biswansis and a half in a certain village, claimed a declaration of his right as proprietor to four biswas and ten biswansis of this share. The defendants set up as a defence to the suit that they were the proprietors of the property in suit, and the plaintiff was only in possession of it as a mortgagee and not as a proprietor. The Court of first instance gave the plaintiff a decree, holding on the issue whether the plaintiff was the proprietor or the mortgagee of the property in suit that he was the proprietor of it.

The defendants appealed to the High Court, contending, with reference to certain partition proceedings under Act XIX of 1863 which are set forth in the judgment of the High Court, that the Col-

* First Appeal, No. 127 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 28th June, 1878.