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had decided that the decree of 1882 was absolutely incapable of execution. Under Art. 178 the respondents' application now under consideration is within time, for it was made, although on the last day of limitation, within three years from the time when the right to apply to execute the decree accrued on the amendment of the decree. No doubt with regard to any future application paragraph 4 of the third column of Art. 179 contains the limitation which will be applicable. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Burkitt.

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KISHAN SINGH AND OTHERS (DECREE-HOLDERS) v. AMAN SINGH (JUDGMENT-DEBTOR).*

Civil Procedure Code, s. 258—Execution of decree—Limitation—Uncertified payment of part of decretal amount—Decree-holder entitled to give evidence of such uncertified payment in answer to a plea of limitation against execution of the decree.

Section 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. *Takir Chand Bose v. Madan Mohan Ghose* (1), *Purmananddas Jiwandas v. Vallabdas Wallji* (2), *Sham Lal v. Kanahia Lal* (3), *Zahur Khan v. Bakhtawar* (4) and *Hurri Pershad Chowdhry v. Nasib Singh* (5) referred to.

THIS was an appeal arising out of an application by the present appellants to execute a decree dated the 10th of September 1885. The decretal debt was to be paid in twenty instalments. The first instalment was payable in Phagun, Sambat 1942, and the subsequent instalments in the months of Baisakh and Katik in each year. The decree-holders came into Court alleging that the first eight instalments had been paid at the stipulated dates, but that the

* Second Appeal No. 485 of 1894, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Mainpuri, dated the 26th February 1894, reversing a decree of Maulvi Syed Muhammad Abbas Ali, Munsif of Etah, dated the 17th December 1892.

(1) 4 B. L. R., (F. B.) 130.

(3) I. L. R., 4 All., 316.

(2) I. L. R., 11 Bom., 506.

(4) I. L. R., 7 All., 327.

(5) I. L. R., 21 Calc., 542.

judgment-debtor had made default in payment of the ninth instalment, which was payable in Katik, Sambat 1946, the last day of which corresponded to the 7th of November 1889. The application for execution was made on the 2nd of November 1892.

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The judgment-debtor objected to this application that he had not paid any of the instalments as agreed, and that the execution of the decree was time-barred.

The Court of first instance (Munsif of Etah) found that, even if default was made in payment of the instalments, execution of the decree was not barred, because, in case of default in payment of any of the instalments, the decree-holder was given an option to execute the decree for the realization of the whole sum remaining due, but that it was not necessary for him to do so, and it accordingly disallowed the judgment-debtor's objection.

The judgment-debtor appealed, and the lower appellate Court (Additional Subordinate Judge of Mainpuri) decreed the appeal, on the grounds, first, that inasmuch as the payments pleaded by the decree-holder had admittedly not been certified under s. 258 of the Code of Civil Procedure, they could not be taken cognizance of by the Court, and, secondly, that the decree-holder was by the terms of the decree bound to take out execution of the decree for the whole amount due thereunder within three years from the happening of the first default.

The decree-holders thereupon appealed to the High Court.

Mr. *J. N. Pogose*, for the appellants.

Muñshi *Madho Prasad*, for the respondent.

BURKITT, J.—This is an appeal in an execution of decree case. The decree was one which directed the payment of the decretal amount by twenty half-yearly instalments on certain fixed dates, and it gave the decree-holders a power to execute the whole decree, or so much of it as was unpaid, on the occurrence of default in the payment of any instalment. The decree-holders have now applied, in pursuance of the power reserved to them, for execution in respect of the amount remaining due after the payment of the eighth

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instalment. Their allegation is that the judgment-debtor paid eight instalments regularly and then ceased paying, and they apply for execution for the whole sum remaining due under the decree. The judgment-debtor in reply denies that he paid any of the first eight instalments and sets up limitation as a bar. The lower Court has rejected the application for execution, chiefly on the ground that payment of the eight instalments alleged by the decree-holders to have been paid was not certified to the Court as required by s. 258 of the Code of Civil Procedure. The decree-holders appeal, contending that they were entitled to give proof of the payment of the eight instalments, even though those payments were made out of Court. For the respondent the last clause of s. 253 is relied on. On this point there is a long line of decisions, commencing with the Full Bench decision of the Calcutta High Court, reported in IV, Bengal Law Reports, Full Bench, page 130. It is true that that decision was passed under Act No. VIII of 1859, but, as remarked recently by the Bombay High Court, in the case of *Purmananddas Jiwanddas v. Vallabdas Wallji* (1)—“it is a distinct decision of a Full Bench of the Calcutta Court presided over by Sir Barnes Peacock that a judgment-creditor, seeking to enforce his decree, may avail himself of uncertified payments made by the judgment-debtor as an answer to a plea of limitation, and we are not aware that it has ever been questioned, nor has any change been introduced into the present Civil Procedure Code which militates against the grounds of the decision. We must therefore hold that effect may be given to the payments which have been admittedly made to the applicant for the purpose of evading the plea of the limitation.” The Calcutta Full Bench case has also been followed by this Court in *Sham Lal v. Kanahis Lal* (2) and in *Zahur Khan v. Bakhtawar* (3) and still more recently by the Calcutta High Court in the case of *Hurri Pershad Chowdhry v. Nasib Singh* (4), where the same view is expressed as by the Bombay High Court in the case above cited. This is a very strong current of authority, and, sitting as a single Judge of this Court, I think I am bound to follow it. Indeed, it seems to me

(1) I. L. R., 11 Bom., 506.

(3) I. L. R., 7 All., 327.

(2) I. L. R., 4 All. 316.

(4) I. L. R., 21 Calc. 542, at p. 549.

that the object of the prohibition in the last clause of s. 258 is to compel the *judgment-debtor* to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree if he desire that such payment should be recognised by the execution Court as against the decree-holder executing the decree. That prohibition does not, in my opinion, apply to a case like the present. For these reasons I am of opinion that the decree-holders ought to have been allowed to prove payment. There was on that point a distinct issue before the lower Court, as the decree-holders had asserted and the judgment-debtor had denied the payments. That issue ought to have been tried and decided. I remand the following issue under s. 566 to the lower appellate Court, *viz.* :—

Did the judgment-debtor pay all or any, and if so which, of the first eight instalments due on the decree, dated the 10th September 1885 ?

The lower Court will allow the parties to produce evidence on this point. After receipt of the finding ten days will be allowed for objections.

Issue referred under s. 566 of the Code of Civil Procedure.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

HAIIDRI BEGAM (PLAINTIFF) v. NATHU (DEFENDANT) *

Act No. IV of 1882 (Transfer of Property Act), s. 106—Landlord and tenant—Suit in ejectment—Notice to quit—Denial of landlord's title by defendant before suit.

In a suit by a landlord for ejectment of a tenant, no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unhanna Deri v. Vaikunta Hegde* (1) and *Dodhu v. Madhavrao Narayan Gadre* (2) referred to.

• THE facts of this case are as follows :—

The plaintiff sued for the ejectment of the defendant from a house and for rent, alleging that the defendant had taken the house

* Second Appeal No. 417 of 1894, from a decree of Maulvi Jabar Husain, Subordinate Judge of Bareilly, dated the 19th February 1891, confirming a decree of Maulvi Ahmed Ali, Munsif of Bareilly, dated the 25th January 1892.

(1) I. L. R., 17 Mad., 218.

(2) I. L. R., 18 Bom., 110.

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