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see no reason to depart from the ruling in the latter case, which we believe to be sound and in accordance with the drift of the decisions of this Court. The result is that we find that the plaintiffs in this case are representatives of the judgment-debtor, and as such are bound to seek their remedy by application under section 244, and not by separate suit. The result is, that we allow the preliminary objection taken to the hearing of this appeal, and it follows therefore that the decrees of both the lower Courts are set aside and the suit of the plaintiffs is dismissed *ab initio*, but, under the circumstances, without costs. We regret that it is impossible for us to take what we believe to be the equitable course of allowing the plaintiffs to turn their plaint into an application under section 244, the Court in which the suit was filed not being one in which the execution proceedings could be carried on. The appeal is dismissed.

Appeal dismissed.

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August 5.

Before Mr. Justice Aikman.

MUHAMMAD HUSEN (DEFENDANT) *v.* MUZAFFAR HUSEN AND ANOTHER (PLAINTIFFS).*

Act No XII of 1881 *(N.-W. P. Rent Act), sections* 93 *(h)*, 203—*Suit for profits—Limitation—Act No. XV of* 1877 *(Indian Limitation Act) section* 5—*Act No.* 1 *of* 1887 *(General Clauses Act), section* 7.

Held, that a suit for profits under section 93 *(h)* of Act No. XII of 1881, the period of limitation for the filing of which expired in respect of a portion of the claim on a day when the Court was closed, could not be brought on the day when the Court reopened, but, so far as that portion was concerned, was barred by limitation.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondents.

AIKMAN, J.—This is an appeal by the defendant in a suit brought against him as lambardar by the plaintiffs under the

* Second Appeal No. 805 of 1897, from a decree of C. Rustamji, Esq., District Judge of Moradabad, dated the 7th July 1897, modifying a decree of Muhammad Nur-ul-hasan Khan, Assistant Collector of Moradabad, dated the 30th March 1897.

provisions of section 93, clause (*h*) of the Rent Act, to recover their share of profits for the years 1301, 1302 and 1303 Fasli, and for the profits of the kharif harvest of 1304 Fasli. In the Court of first instance the defendant pleaded that the claim as regards the profits for the kharif of 1301 Fasli was barred by limitation. These profits fell due on the 1st February 1894. The suit was filed one day beyond the three years allowed for such a suit by section 94 of the Act. The Assistant Collector overruled the defendant's plea on the ground that the Court was closed on the last day of the period of three years, and that the suit was within time, having been instituted on the day on which the Court reopened. The Assistant Collector, however, found that no profits were due for that year, and gave the plaintiffs a decree for the profits of the remaining years claimed, calculated on actual realizations. The plaintiffs appealed to the District Judge, who modified the decree of the Assistant Collector, and gave a decree for profits for all the years in suit, finding that there had been gross negligence on the part of the lambardar, and that the rental, all but a small amount, might have been collected had due diligence been used. The defendant comes here in second appeal.

In the first ground of appeal he renews his plea that the claim for the profits of 1301 Fasli was barred by limitation. Nothing appears to have been said on the plea of limitation in the lower appellate Court, and it is contended on behalf of the respondents that the appellant should not be allowed to raise it now. I am of opinion, however, that it is open to me to entertain it even at this late stage, and I do so. In my opinion the claim for the profits for that year was barred. It is true that the last day of the period of the three years was a Sunday, but that does not, under the Rent Act, entitle the plaintiffs to an additional day's grace. Section 203 of the Rent Act provides that whenever a Court is closed on the last day of any period provided in this Act for the presentation of any memorandum of appeal or for the deposit or for the payment of any money

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in or into Court, the day on which the court reopens shall be deemed to be such last day. It is noticeable that nothing is said in this section in regard to the presentation of plaints. Consequently the provisions of that section do not apply to the present case. There is no other section in the Rent Act which would help the plaintiffs. The provisions of Act No. XV of 1877 do not affect special or local laws which specially prescribe periods of limitation; consequently the plaintiffs are not entitled to take advantage of the general provisions contained in section 5 of that Act. Nor will section 7 of the General Clauses Act of 1887 help the plaintiffs, for by section 2 the application of part I of the Act, in which that section occurs, is limited to the Act itself and to all Acts made by the Governor-General in Council after the passing of the Act. The former General Clauses Act contained no provisions similar to section 7 of the present Act. For these reasons I am of opinion that the first ground in the memorandum of appeal must be sustained, and that that portion of the decree of the lower appellate Court which awarded profits to the plaintiffs on account of the kharif harvest of 1301 Fasli must be set aside. In the remaining grounds of appeal it is contended that the lower Court was wrong in allowing the plaintiff's additional profits owing to rents remaining uncollected through the gross negligence of the defendant. Although the reasons given by the learned District Judge do not appear to me in all cases valid, yet there was, in my opinion, evidence upon which he could come to the conclusion at which he arrived. He found on a consideration of the evidence that the lambardar had been unable to collect a sum of Rs. 55-4-8 owing to the poverty of the tenants. With regard to the balance uncollected, his finding appears to me to be one of fact which I cannot disturb in second appeal.

For the above reasons I so far allow the appeal as to set aside that portion of the decree of the lower appellate Court which awarded Rs. 14-0-11 to the plaintiffs on account of the profits of 1301 Fasli. *Quoad ultra* the appeal is dimissed.

The parties will pay and receive costs throughout in proportion to their failure and success.

Decree modified.

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REVISIONAL CRIMINAL.

1898 *August* 6.

Before Mr Justice Banerji.

QUEEN-EMPRESS *v.* RAM BARAN SINGH.*

Criminal Procedure Code, section 395—*Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.*

Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict. *Queen-Empress* v. *Sheodin* (1) referred to.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Benares. The facts of the case sufficiently appear from the order of the Court.

BANERJI, J.—In this case one Ram Baran Singh was convicted by a Magistrate of the first class under sections 454 and 75 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment and to receive 30 stripes. He was medically certified not to be in a fit state of health to undergo the sentence of whipping. The Magistrate thereupon sentenced him to 6 months' additional rigorous imprisonment in lieu of whipping. The Magistrate was evidently acting under the powers conferred on him by section 395 of the Code of Criminal Procedure. Under that section, upon the offender being found not to be in a fit state of health to undergo the sentence of whipping, the Court may either remit the sentence of whipping, or may, in lieu of whipping, sentence him to imprisonment for a term not exceeding twelve months, which may be in addition to any term of imprisonment to which he may have been sentenced for the same offence. But this term of imprisonment, as held in *Queen-Empress* v. *Sheodin* (1)

* Criminal Revision No. 398 of 1898.

(1) I. L. R., 11 All, 308.