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the time being to forego and make on the representation that they were included in the mortgage security, and that this security was binding on the mortgagor. Whether the case be viewed according to the terms of the Contract Act or according to the terms of the Limitation Act, we think on the principle laid down in the case to which we have referred, the respondents cannot successfully resist the plaintiff's appeal.

For the foregoing reasons above stated, there appears to us to be no force in the objection filed on behalf of the respondents. We therefore allow the appeal, modify the decree of the Court below, and give a decree to the plaintiff-appellant for the principal sum of Rs. 3,403-11-6 to be recovered from the property of Farzand Ali with interest thereon at the rate of 6 per cent. per annum from the 4th of February, 1898, to the date of payment, in addition to the sum already decreed. We give the plaintiff-appellant as against all the defendants-respondents the costs of this appeal, also the costs in the Court below. We dismiss the objection with costs.

Decree modified.

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March 13.

REVISIONAL CIVIL.

Before Mr. Justice Banarji and Mr. Justice Richards.

JAGAN NATH (DEFENDANT) v. CHET RAM (PLAINTIFF).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Application to set aside an ex parte decree—Necessity of depositing amount of decree or giving security.

Section 17 of the Provincial Small Cause Courts Act, 1887, requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section; so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. *Jogi Abir v. Bishen Dayal Singh* (1) followed. *Ramasami v. Karisu* (2), and *Muhammad Fazl Ali v. Karim Khan* (3), dissented from.

In this case a suit for money was brought against one Jagan Nath in the Court of the Munsif of Tilhar exercising the powers of a Small Cause Court Judge, and was decreed *ex parte*

* Civil Revision No. 38 of 1905.

(1) (1890) I. L. R., 18 Cal., 83.

(2) (1890) I. L. R., 13 Mad., 178

(3) Punj. Rec., 1894, p. 410.

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in 1902. On the 8th of February, 1905, certain property of the defendant was attached in execution of this *ex parte* decree. On the 18th March, 1905, the defendant presented a petition under section 108 of the Code of Civil Procedure asking to have the *ex parte* decree set aside. The 25th of March was fixed for the hearing of this application, whereupon the decree-holder objected that the applicant had neither paid into Court the amount of the decree, nor given security as required by section 17 of the Provincial Small Cause Court Act, 1887. On this, on the same day, namely, the 25th March, 1905, the applicant deposited in Court the amount of the decree. The Court, however, dismissed the application, holding that the making of the deposit or the giving of security was an act which must accompany the filing of the application, and that consequently the application was barred by limitation. Against this order the applicant applied in revision to the High Court.

Munshi *Lakshmi Narayan*, for the applicant.

Mr. *S. B. Sarbadhicary*, for the opposite party.

BANERJI and RICHARDS, JJ.—This is an application for the revision of an order made by the Munsif of Tilhar in the exercise of his powers as a Judge of a Court of Small Causes, refusing the application of the applicant before us for an order to set aside a decree passed *ex parte* against him. It appears that a suit was brought against the applicant for money and was decreed *ex parte* in 1902. On the 8th of February, 1905, the property of the applicant-defendant was attached in execution of the decree. On the 18th of March, 1905, he presented a petition under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside, but at the time of presenting the application he did not, as required by section 17 of the Provincial Small Cause Courts Act, 1887, either deposit in Court the amount due from him under the decree, or give security for the performance of the decree. The 25th of March was fixed for the hearing of the application. On that date the plaintiff, opposite party, objected to the hearing of the application on the ground that the applicant had not complied with the requirements of the second paragraph of section 17 of the Small Cause Courts Act. Thereupon on the same date, namely, the 25th of March, 1905, the

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applicant deposited the amount of the decree. The Court, however, dismissed his application holding that on the date on which the deposit was made the application was beyond time. The question which we have to consider in this case is whether the provisions of section 17 of the Provincial Small Cause Courts Acts are mandatory or merely directory, and whether it was necessary to deposit the amount of the decree at the time of presentation of the application to set aside the *ex parte* decree. We are of opinion that the provisions of the section are mandatory. The section runs thus:—“An application for an order to set aside a decree passed *ex parte* shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree . . . or give security to the satisfaction of the Court for the performance of the decree . . . as the Court may direct.” We think that the meaning of the section is that the applicant has the option either to deposit the amount of the decree in cash or give security. But if he elects to adopt the latter course, the security must be to the satisfaction of the Court and subject to the Court’s directions. In either case it is incumbent upon him at the time of presenting his application either to deposit the amount of the decree or give security for its due performance in manner provided by the section. We should be ignoring the clear intention of the Legislature as expressed in the section were we to hold that it is optional with the applicant to deposit the amount of the decree or give security at any subsequent stage. This view of the section was taken by the Calcutta High Court in *Jogi Ahir v. Bishen Dayal Singh* (1). An opposite view was expressed by the Madras High Court in *Ramasami v. Kurisu* (2), but the learned Judges give no reasons for their opinion. Our attention has been drawn to the decision of the Punjab Chief Court in *Muhammad Fazl Ali v. Karim Khan* (3), in which it was held that the words “at the time of presenting his application” in section 17 are merely directory and not mandatory. We are unable to accept the reasons given by the learned Judges for that opinion. We hold that section 17 requires that at the time of presenting his application the

(1) (1890) I. L. R., 18 Cal., 83.

(2) (1890) I. L. R., 13 Mad., 178.

(3) Punj. Rec., 1894, p. 410.

applicant must either deposit in Court the amount of the decree or give security as provided for by the section, so that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an *ex parte* decree. As this condition was not fulfilled in the present case, the application was rightly dismissed, and we dismiss this application for revision with costs.

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APPELLATE CIVIL.

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March 14.

Before Mr. Justice Banerji.

BAGESHRI DAYAL (PLAINTIFF). v. PANCHO AND ANOTHER (DEFENDANTS). *
Act No. 1 of 1872 (Indian Evidence Act), sections 92, 99—Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.

The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. *Held* that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. *Rahiman v. Elahi Bakhsh* (1) dissented from; *Jagat Mohini Dasi v. Rakehal Das Bisazi* (2) and *Pathammal v. Syed Kalai Ravuthar* (3) followed.

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

Dr. Satish Chandra Banerji, for the appellant.

Hon'ble Pandit Madan Mohan Malaviya and Mr. M. L. Sandal, for the respondents.

BANERJI, J.—The suit out of which this appeal has arisen was brought by the appellant to recover one-fourth of the amount alleged to have been paid by the second defendant to the first defendant as consideration for the sale of a house. The plaintiff based his claim upon a custom prevailing in the locality. The document by which the property was conveyed by the first defendant to the second defendant purported to be a deed of

* Second Appeal No. 632 of 1904, from a decree of F. J. Pert, Esq., District Judge, Benares, dated the 14th April, 1904, confirming a decree of Babu Bhairo Dial Singh, Munsif, Benares, dated the 30th January, 1904.

(1) (1900) I. L. R., 28 Calc., 70. (2) (1905) 2 Calcutta Law Journal, p. 385.
(3) (1903) I. L. R., 27 Mad., 329