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appellant raised further objections as well as the objection as to limitation; but they were disallowed. The appellant has come up in appeal to this Court.

A preliminary objection is taken that notice under section 169 of the Act has not been given and that therefore the appeal cannot be heard. It is argued on behalf of the appellant that the order which he seeks to have upset on appeal is not an order which was made in the matter of the winding up of the Company. With this we cannot agree. It is clearly and distinctly an order which was given in the matter of the winding up of the Company. If it is not, we do not know under what law he comes to this Court on appeal. Under the last clause of section 169 it was obligatory on him to give notice within three weeks, which he has failed to do. Therefore we cannot hear the appeal. On behalf of the appellant Mr. *Chaudhri* asked for an extension of time. The order of the court below was passed on the 28th of June, 1912, and this appeal was filed on the 7th of August, 1912. No good cause is shown why we should extend the time, and we see no reason to accede to the request. The preliminary objection prevails and this appeal is dismissed with costs.

Appeal dismissed.

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February, 4.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BADRI NARAIN (DEFENDANT) *v.* KUNJ BIHARI LAL (PLAINTIFF) *

Execution of decree—Limitation—Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code (1882), *section* 258—*Civil Procedure Code* (1908), *order XXI, rule* 2; *order XXXIV, rule* 5—*Act No. IX of* 1908 (*Indian Limitation Act,*) *schedule* 1, *article* 181.

On a compromise in a suit for sale on a mortgage a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year, beginning with Jeth 1957 Fasli (June 1900) and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgement-debtor paid up all that was

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* Second Appeal No. 634 of 1911 from a decree of H. Dupernex, District Judge of Mainpuri, dated the 22nd of February, 1911, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 10th of September, 1910.

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due on account of the first three years. He made no payment in 1903, but in *June 1904 he paid up all that was due up to the end of Jeth 1960* Fasli (June 1903.) No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). This payment was covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909.

Held that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holder's application was in time applying article 181 of the first schedule to the Indian Limitation Act, 1908.

The following cases were referred to:—*Oudh Behari Lal* v. *Nageshar Lal* (1), *Kishan Singh* v. *Aman Singh* (2), *Roshan Singh* v. *Mata Din* (3), *Chunni Lal* v. *Harnam Das* (4), *Shankar Prasad* v. *Jalpa Prasad* (5), *Ajudhia* v. *Kunjal* (6), *Mon Mohun Roy* v. *Durga Churn Gooee* (7) and *Kashiram* v. *Pandu* (8).

THE facts of this case were as follows:—

A decree on a compromise was passed on the 11th of September, 1899, to the following effect:—" Rs. 1,374 with interest at As. 10 per cent. per mensem shall be paid by instalments of Rs. 100 a year. *Agar mutawattir tin sal tak ada na ho ya kuch baqi rahe to digridar ko ikhtiar hai* etc., etc". The first instalment was due in June, 1900. In June, 1902, Rs. 605 were paid on account of the instalments, principal and interest, due for 1900, 1901, and 1902. No payment was made in 1903. In June, 1904, Rs. 181 were paid, which were credited by the decree-holder towards principal and interest of the instalment for 1903. The decree-holder alleged a further payment of Rs. 173-1-0 in June, 1906, which the decree-holder credited towards the instalment due for 1904. This payment was not admitted by the opposite party, who was a representative of the judgement-debtor. The present application for the preparation of a final decree was made on the 3rd of August, 1909, and the opposite party objected that the application was barred by limitation. The court below held that the alleged payment of June, 1906, was proved to have been made by the opposite party but that it had not been certified to the court. Both the courts below disallowed the objection as to limitation. The judgement-debtor's representative appealed.

(1) (1890) I.L.R., 13 All., 278.
(2) (1894) I.L.R., 17 All., 42.
(3) (1903) I.L.R., 26 All., 36.
(4) (1898) I.L.R., 20 All., 302.
(5) (1894) I.L.R., 16 All., 371.
(6) (1908) I.L.R., 30 All., 123.
(7) (1888) I.L.R., 15 Calc., 502.
(8) (1902) I.L.R. 27 Bom., 1.

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Babu *Piari Lal Banerji*, for the appellant:—

The payment of 1906 should not be recognized at all as it was not certified to the court executing the decree. Under order XXI, rule 2, of the Code of Civil Procedure the alleged payment could not be inquired into even for the purpose of seeing whether the present application was barred by limitation. Under the old Code an uncertified payment could be recognized for the purpose of such inquiry; *Roshan Singh* v. *Mata Din* (1). The change in the law has been noticed and given effect to in the case of *Kutab-ullah Sarkar* v. *Durga Charan Rudra* (2) The fact that the alleged payment was made while the old Act was in force will not make the old Act applicable. The court has now to decide the question with reference to the procedure now applicable. It cannot be said that by the alleged payment any substantive right was acquired. The decree-holder could not say that by the payment he acquired any right which was not affected by the repeal of the old Act. It is true that this Court has held that the new Code of Civil Procedure would not affect any right acquired under the old Code; *Kaunsilla* v. *Ishri Singh* (3). But that was a very different case. Under the law as it stood in the old Code a decree-holder who had obtained a decree on foot of a mortgage was not fettered by the twelve years' rule of limitation and he therefore did acquire this substantive right: to quote the words of KNOX, J.:—"the decree-holder had the remedy to enforce his right so to speak till the end of time" and it was held therefore that section 48 of the new Code would not affect mortgage decrees passed before the new Code came into force. No such consideration arose in the present case, as the question was merely one of procedure, in which no one had a vested right. If the payment of 1906 was not recognized, the application was obviously time-barred, because there were three consecutive defaults in 1904, 1905 and 1906 and therefore the right to apply accrued in June, 1906, and the application should have been made in June, 1909. Even if the payment of June, 1906, were recognized, still the application was time-barred, because the payment made in June, 1906, had not the effect of paying in full the instalment due for June, 1906, and did not prevent the year 1906 from being a

(1) (1904) I.L.R., 26 All., 36. (2) (1912) 16 C. W. N., 396.

(3) (1910) I.L.R., 32 All., 499.

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year of default, and therefore there were three consecutive defaults in 1904, 1905 and 1906. No payment made in 1906 could wipe away the default of 1904 and 1905 which had already occurred, but if the payment had been made in full for the instalment due in 1906 it might have prevented a third consecutive default and thus have prevented the accrual of the right to apply.

Dr. *Satish Chandra Banerji*, for the respondent :—

The first point to be considered is whether the application made for a final decree for sale under order XXXIV, rule 5, of the Code of Civil Procedure is an application for execution or an application in the suit itself. If it is an application in the suit itself then the provisions of order XXI, rule 2, will not apply. Under the new Code an application under order XXXIV, rule 2, is not an application in the suit itself; *Sita Ram* v. *Sheo Raj Singh* (1). Even if the matter is treated as a matter in execution order XXI, rule 2, of the new Code would not apply, as the payments were made while the old Code was in force and uncertified payments could under that Code be recognized for the purpose of saving limitation; *Kaunsilla* v. *Ishri Singh* (2). Whether, therefore, the old Code applies or the new, order XXI, rule 2, has no application. As regards the proper construction of the decree as the payment was made in 1906 and was accepted by the decree-holder, the right to apply was waived. It was for the decree-holder to insist or not on punctual payments and if he chose to show favour to the judgement-debtor and accepted an overdue instalment, the judgement-debtor could not complain. The three consecutive defaults were made in 1905, 1906 and 1907. The application was made within time in 1909. He cited *Shankar Prasad* v. *Jalpa Prasad* (3), *Bhagwan Das* v. *Janki* (4), *Ajudhia* v. *Kunjal* (5), *Maharaja of Benares* v. *Nand Ram* (6).

Babu *Piari Lal Banerji*, in reply :—

The present matter is one in execution, as after the decree *nisi* had been passed under the old Code, the suit came to an end and therefore it could not be said, that by the new Code a suit which

(1) (1910) 7 A.L.J., (Notes) 65.
(2) (1910) I.L.R., 32 All., 499.
(3) (1894) I.L.R., 16 All., 371.
(4) (1905) I.L.R., 28 All., 249.
(5) (1908) I.L.R., 30 All., 123.
(6) (1907) I.L.R., 29 All., 431.

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had terminated was revived. He discussed *Gunga Singh* v. *Banwari Lal* (1) and *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee* (2).

GRIFFIN and CHAMIER, JJ. :—The only question in this appeal is whether the respondent's application for a decree absolute for the sale of mortgaged property was made within time. The decree *nisi*, which was passed in 1899 upon a compromise between the parties, provided that Rs. 1,374-0-0 with interest at a certain rate should be paid by instalments of Rs. 100 a year along with the interest then due. Payments were to be made by the end of Jeth in each year beginning with Jeth 1957 Fasli (June 1900), and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, i.e., to apply for an order absolute for sale of the property and execute the same.

No payment was made in 1900 or in 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the appellant paid up all that was due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903). No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). It has been found that this payment is covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909 which has no bearing upon the question which we have to decide.

The appellant contends that the payment made in June 1906 not having been certified cannot be recognized by the court in view of the provisions of order XXI, rule 2. To this the respondent replies that that rule is not applicable, inasmuch as the application for a decree absolute is not an application for execution and the court is not being asked to execute a decree but only to continue the suit. The payment in question was made before the passing of the new Code of Civil Procedure. Under the old Code it was, no doubt, held by this Court that an application for an order absolute was a proceeding in execution of a decree—see *Oudh*

(1) (1911) 8 A.L.J., 1229. (2) (1911) I.L.R., 38 Calc., 913.

Behari Lal v. *Nageshar Lal* (1)—but it was held also in several cases that although an uncertified payment could not be recognized as a payment or adjustment of a decree by a court executing a decree, it was available to a decree-holder for the purpose of meeting a plea of limitation—see for example *Kishan Singh* v. *Aman Singh* (2) and *Roshan Singh* v. *Mata Din* (3). These rulings are binding upon us. The right which the respondent had before the passing of the new Code of Civil Procedure, to use the payment made in 1906 for this purpose, cannot have been taken away from him by the passing of the Code. We are therefore bound to recognize the payment when dealing with the question of limitation.

We have to ascertain what article of the Limitation Act is applicable and when time began to run against the respondent. In *Chunni Lal* v. *Harnam Das* (4) article 179, schedule II, to the Limitation Act of 1877 (article 182 of schedule I to the present Act) was held to govern an application for an order absolute for sale of mortgaged property. But the decree *nisi* in that case was in the common form, whereas in the present case we have an instalment decree containing a provision that the whole amount of the decree may be demanded on the occurrence of three consecutive defaults, and it is difficult to see how any of the provisions of the third column of article 182 of the present Act can be applied to such a case. It would appear that the article applicable is No. 181. This article corresponds with article 178 of the Act of 1877, which has been held in many cases to govern applications in execution proceedings to which for one reason or another article 179 of that Act could not be applied. If, as we think, article 181 of the present Act is applicable, the right to apply for an order absolute accrued to the appellant on the occurrence of the third consecutive default.

The respondent relies upon the decisions in *Shankar Prasad* v. *Jalpa Prasad* (5), *Ajudhia* v. *Kunjal* (6) and other like cases as authority for the proposition that the respondent was not bound to take out excution, i.e., apply for an order absolute, on the happening of the third consecutive default, though he was at

(1) (1890) I.L.R., 13 All., 278.
(2) (1894) I.L.R., 17 All., 42.
(3) (1903) I.L.R., 26 All., 36.
(4) (1898) I.L.R., 20 All., 302.
(5) (1894) I.L.R., 16 All., 371.
(6) (1908) I.L.R., 30 All., 123.

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liberty to do so if he pleased, and therefore time did not necessarily begin to run against him from the date of the third consecutive default. We need not discuss these cases, two of which were governed by article 75, for it cannot be denied that if article 181 is applicable the right to apply for an order absolute accrued to the appellant on the happening of the third consecutive default. The question is when did that occur? The defaults in 1900 and 1901 were wiped out by the payment made in June 1902. There was a default in 1903, another in 1904 and a third in 1905. The respondent contends that those defaults were wiped out by the payments made and accepted in 1904 and 1906. There is a consensus of opinion among the High Courts that the subsequent payment and acceptance of overdue instalments must be taken into consideration for the purpose of applying the rules of limitation to an instalment decree, although the articles applicable contain no such provision as that to be be found in article 75. The Calcutta High Court seem to treat it as a case of waiver and as an exception to the rule that limitation runs from the date of default—*Mon Mohun Roy* v. *Durga Churn Gooee* (1)—and the same view seems to have been accepted by this Court and by the Madras High Court. The Bombay High Court treat it as a kind of estoppel—*Kashiram* v. *Pandu* (2). Whatever may be the true reason for the rule, it seems to be well settled that after defaults have occurred, which according to the decree set time running against the decree-holder, the payment and acceptance of the overdue instalments may have the effect of preventing him from saying that the payments were not made regularly and in satisfaction of the decree, and remitting the parties to the rights which they would have had if no default had occurred. In the present case there can be no doubt that the respondent accepted the payment made in June, 1904, in satisfaction of the instalments and interest payable in June, 1903. Similarly he accepted the payment made in June, 1906, in satisfaction of the instalments and interest payable in June, 1904, and if he had applied for an order absolute for sale at any time before July, 1907, it would certainly have been held by this Court that his action was premature.

On the authorities we feel bound to hold that the first three consecutive defaults of which the respondent can take advantage

(1) (1888) I.L.R., 15 Calc., 502. (2) (1902) I.L.R., 27 Bom., 1.

are those which occurred in 1905, 1906 and 1907. Consequently his application for a decree absolute made in August, 1909, must be held to have been made within time. We dismiss this appeal with costs.

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Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier

1913 February, 7.

SHIDA ALI (PLAINTIFF) v. PHULLO AND ANOTHER (DEFENDANTS.)*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 132—*Limitation*—Malikana—*Suit for* malikana—*Decree asked for against property charged.*

Where a plaintiff sued for the recovery of *malikana* for 11 years and claimed a decree against the property on which the *malikana* was charged, it was *held* that the suit was within time having regard to article 132 of the first schedule to the Indian Limitation Act, 1908. *Kallar Roy* v. *Ganga Pershad Singh* (1) distinguished.

THE facts of this case were as follows :—

The plaintiff sued on the allegations that in mauza Razzakpur the owners of *muafi* rights were bound to pay to the owners of zamindari rights Rs. 12-8-0 per cent. of cash rental, 2¾ seer per maund of the grain rental, and Rs. 17-3-0 a year as *bhent* (present); that these dues were a charge on the *muafi* rights; that in mahal *safed* of that mauza there was a *patti* of 5 biswas; that the defendant was a *muafidar* of the whole of that and a zamindar of 3 biswa 2 biswansis 10 kachwansis of it; that the plaintiff was a zamindar of one biswa 17 biswansis 10 kachwansis and entitled to recover the aforesaid dues in respect of that; that the defendant had not paid him any thing for the years 1305 *fasli* to 1316 *fasli*; hence this suit for Rs. 625-6-4 as principal, and Rs. 498-9-0 as interest, to be realized from the defendant's 85 biswas. The defendants pleaded that the suit was not cognizable by the Civil Court; that the amount of *bhent* was not Rs. 17-8-0 per annum; that the dues payable were not a charge on the land; that the dues in question were payable by the holder of the whole 20 biswa zamindari rights jointly to the holders of the whole 20 biswa *muafi* rights, therefore the suit against the defendants alone was not maintainable and was bad for non-joinder of parties; that the plaintiff himself owned *muafi* right over five biswas till the

*First Appeal No. 218 of 1911 from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 18th of March, 1911.

(1) (1905) I. L. R., 33 Calc., 998.