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the only accounts which could be examined were those which fell within the period of six years prior to the suit. Our attention has been called to certain other rulings, some of this Court. The facts of those cases do not coincide with the facts of the case before us, and those decisions, in our opinion, are not applicable. There remains the question of the method in which the court below has taken the accounts. In view of the evidence of the plaintiff's own witness, his own brother, Jagannath Saran, it is quite clear that the court below is justified in making calculations on the basis of the *nikasi kham*.

This being so, there is no error in the accounts, and we think there is no force in this appeal. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Tudball.

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February, 2.

LACHMAN DAS (DECREE-HOLDER) *v.* AHMAD HASAN (JUDGMENT-DEBTOR.)*

Act No. IX of 1887 *(Provincial Small Cause Courts Act), section* 35—*Decree passed by Small Cause Court—Small Cause Court abolished and execution transferred to a Munsif—Jurisdiction—Appeal—Act No. IX of* 1908 *(Indian Limitation Act), section* 19—*Acknowledgement.*

Where a Court of Small Causes had passed a decree and was then abolished and the execution proceedings were taken in the court of a Munsif, it was *held* that the Munsif's orders in execution were not the orders of a Court of Small Causes and were therefore open to appeal. *Sarju Prasad* v. *Mahadeo Pande* (1) followed. *Mangal Sen* v. *Rup Chand* (2) dissented from.

Held also that an objection filed in answer to an application for execution of decree by the arrest of the judgement-debtor, upon which a warrant of arrest had been issued, to the effect that the judgement-debtor was a poor man and that warrant should not be executed, could not be construed into an acknowledgement of the decretal-debt within the meaning of section 19 of the Indian Limitation Act, 1908. *Ramkit Rai* v. *Satgur Rai* (3) distinguished.

THE facts of this case were as follows :—

One Lachman Das obtained a decree on the 9th of April, 1911, in the Court of Small Causes. On the 21st of December, 1911,

* Civil Revision No. 103 of 1916.

(1) (1915) I. L. R., 37 All., 450. (2) (1891) I. L. R., 13 All., 324.

(3) (1880) I. L. R., 3 All., 247.

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an application for execution by the arrest of the judgement-debtor was made. On the 24th of January, 1912, the application was dismissed on the request of the decree-holder. The warrant of arrest had, however, been issued, and on the 5th of February, 1912, the judgement-debtor filed a petition through his pleader in which he said that he was poor man, that he was practically starving, and that the warrant of arrest should not be executed. The petition was not signed by the jugdement-debtor himself but was signed by his pleader. On the 5th of January, 1915, a fresh application for execution was filed in the court of the Munsif. The Small Cause Court in the meantime had ceased to exist. Objection was taken that the application was time-barred. The decree-holder pleaded that the petition of the 5th of February, 1912, contained an acknowledgement of the existence of the debt and therefore the application for execution was within time. The Munsif held that the application was not time-barred on the ground that the petition of the 5th of February, 1912, did contain an acknowledgement. An appeal was preferred to the District Judge, who held that the application was barred by time, inasmuch as the petition of the 5th of February, 1912, not having been signed by the judgement-debtor himself could not be deemed to be an acknowledgement within the meaning of section 19 of the Limitation Act. He therefore set aside the order of the first court and dismissed the application for execution. The decree-holder applied to the High Court in revision.

Munshi *Baleshwari Prasad* (for Munshi *Benode Behari*), for the applicants :—

The District Judge had no jurisdiction to entertain the appeal, as no appeal lay from the order of the Munsif. The Court of Small Causes which passed the decree having ceased to exist, the application for execution was, in accordance with the provisions of section 35, clause (1), of the Provincial Small Cause Courts Act, instituted in the court of the Munsif. The "case" referred to in that section is a Small Cause Court suit. The execution proceedings in the Munsif's court are, therefore, to be regarded as proceedings held by a Small Cause Court, and hence the Munsif's order was not appealable. Section 35, clause(1), has been

interpreted in this sense in the cases of *Mangal Sen* v. *Rup Chand* (1) and *Atwari* v. *Maiku Lal* (2). A different interpretation would result in this, that the decree itself was not appealable whereas orders in execution thereof would be appealable. Secondly, the judgement-debtor's petition of the 5th of February, 1912, operated as a sufficient acknowledgement within the meaning of section 19 of the Limitation Act. Explanation II of section 19 has been overlooked by the Judge. The pleader was the person authorized to make the statements contained in the petition and the petition was signed by the pleader. The petition was effective as an acknowledgement under section 19; case of *Ramhit Rai* v. *Satgur Rai* (3).

Maulvi *Iqbal Ahmad* (for Dr. *S. M. Sulaiman*), for the opposite party:—

Section 35, clause (1), of the Provincial Small Cause Courts Act only provides a forum for the continuance of proceedings in cases which have been commenced in a Court of Small Causes but which by reason of the abolition of that court cannot be continued in it. The section says nothing as to whether the court in which the subsequent proceedings are held is to be deemed to be a Court of Small Causes for the purposes of those cases. There is nothing in the section which expressly bars the applicability of section 96 of the Code of Civil Procedure in such cases. The authorities relied on by the applicant were *obiter dicta*, which have been dissented from in later cases; *Sarju Prasad* v. *Mahadeo Pande* (4). As to section 19 of the Limitation Act, the petition which is relied on does not contain any admission of liability. Such an admission may possibly be inferred from the fact that it was not stated that the decree was discharged or satisfied, but an admission by silence or inference is not such an acknowledgement as is contemplated by section 19. The facts of the case in *Ramhi Rai* v. *Satgur Rai* (3) relied on by the applicant, were different. Moreover, a question of limitation is not a ground for entertaining a revision.

Munshi *Baleshwari Prasad*, in reply:—

The petition amounts to an acknowledgement in respect of a right, namely, the right of the decree-holder to put his decree

(1) (1891) I. L. R., 13 All., 324.
(2) (1909) I. L. R., 31 All., 1.
(3) (1880) I. L. R., 3 All., 247.
(4) (1915) I. L. R., 37 All., 460.

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in immediate execution. The acknowledgement in the case *Ramhit Rai* v. *Satgur Rai* (1) was not more express than in the present case. The point was not considered at all by the lower court.

TUDBALL, J.—[After setting out the facts as stated above: —]

Two points are taken:—(1) that no appeal lay to the District Judge; (2) that even if it did, the petition of the 5th of February, 1912, did contain an acknowledgement, and that under explanation II of section 19 of the Limitation Act the pleader was an agent duly authorized by the judgement-debtor to make the statement in that petition. In regard to the question of jurisdiction the decisions of this Court perhaps are a bit conflicting. The later decisions are all against the applicant. In *Mangal Sen* v. *Rup Chand* (2) a Bench of this Court held as follows:—"In other words, whatever the intention of the Legislature was, we read section 35 of Act IX of 1887, in the same sense that we read the concluding paragraph of section 25 of the Code of Civil Procedure." If this view be correct, then the Munsif in the present case acted as a Small Cause Court and no appeal lay. But this decision has not been accepted in *Sarju Prasad* v. *Mahadeo Pande* (3). In fact it was distinctly dissented from, and it was also pointed out that in the case of *Shiam Behari Lal* v. *Kali* (4) one of the Judges who was a party to the decision in *Mangal Sen* v. *Rup Chand* (2) had himself decided the question of section 35 of Act IX of 1887 in the opposite way. In *Sarju Prasad* v. *Mahadeo Pande* (3) it was pointed out that in the Calcutta and Bombay High Courts the opposite view had also been taken and their view had been followed in the Court in Oudh. It seems to me personally that *primâ facie* the order of the Munsif was passed by him *qua* Munsif, and, unless there is some express provision of law taking away the right of appeal, it must be held that an appeal did lie. Section 35 of Act IX of 1887, nowhere in clear terms takes away the right of appeal from an order passed under circumstances such as prevailed in the present case. All that it lays down is that "where a Court of Small Causes, or a court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to

(1) (1880) I. L. R., 3 All., 247.
(2) (1891) I. L. R., 13 All., 324.
(3) (1915) I. L. R., 37 All., 450.
(4) (1914) 12 A. L. J., 109.

any case, any proceeding in relation to the case whether before or after decree, which, if the court had not ceased to have jurisdiction, might have been had therein, may be had in the court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit." In the present case the Court of Small Causes having ceased to exist, the decree-holder was bound to apply for the execution of his decree to the court of the Munsif. Section 24 of the Code of Civil Procedure relates to suits transferred or withdrawn. In the present case no suit has in fact been transferred or withdrawn, and section 24 of the Code Civil Procedure cannot be read into section 35 of Act IX of 1887, so as to destroy a right of appeal without some express language in the Act. The current of decisions being in my opinion against the applicant, including the latest decisions of this Court, I must hold that an appeal did lie.

In regard to section 19 of the Limitation Act, it is quite clear that the District Judge overlooked Explanation II of that section. If in the petition of the 5th of February, 1912, there is an acknowledgement of the debt, it is clear that that petition was signed by an agent duly authorized by the judgement-debtor to file it and put into it all that it contained. If that document contains an acknowledgement, there can be no doubt that it was an acknowledgement by the judgement-debtor and would save time in favour of the decree-holder. But it seems to me difficult to hold that the language of the petition contains an acknowledgement of a debt due. My attention has been called to a Full Bench ruling in *Ramhit Rai* v. *Satgur Rai* (1). The petition in that case was of a very different nature. In that case the petitioner stated that he had asked the decree-holder to allow him time to make some arrangement for paying off the debt, and in consideration of the property being ancestral the decree-holder had agreed to allow time. There was a clear and distinct acknowledgement of the debt. In the present case all that the judgement-debtor said in his petition of the 5th of February, 1912, was that he objected to being arrested because he was a poor man and he asked that the warrant of arrest should not be executed until his objection had

(1) (1880) I. L. R., 3 All., 247.

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been decided; in other words, it was merely an objection to the execution of the decree in the manner sought by the decree-holder. It may be said that if he had paid off the debt, or if he had meant that the debt was not due, he would have said so in plain language, and that the natural inference from what he had said was that the debt was due. It seems to me that an acknowledgement must be a clear acknowledgement and not be left only to sheer inference. In the Full Bench case there was language the meaning of which beyond all doubt was that the debt was due. In the present case there is simply the bare fact that the man did not say that he had paid off the money. Such omission cannot be taken as an admission that the debt was due. In my opinion the petition of the 5th of February, 1912, did not contain an acknowledgement at all, and therefore the application was barred by time. The result is that the application is dismissed with costs.

Application dismissed.

Before Justice Sir Pramada Charan Banerji.

1917

February, 2.

VICTORIA MILLS COMPANY, LIMITED, (DEFENDANTS) *v.* BRIJ MOHAN LAL (PLAINTIFF).*

Civil Procedure Code (1908), *order VIII, rule* 6—*Set-off*—*Suit by clerk who had left employment without notice for arrears of wages*—*Counter-claim for damages in lieu of notice.*

Held, in a suit by a clerk, who had left his employment without notice, to recover arrears of wages from his employers, that it was not competent to the defendants to counter-claim against the plaintiff for damages in lieu of notice.

THE plaintiff in this case was a clerk in the service of a company. On the 4th of April, 1916, he left his employment without notice, and then brought a suit against the company to recover his wages for March and for the four days of April. He also claimed pay for the month of May. The defendants filed a written statement, in which they claimed that they were entitled to Rs. 14 " by way of damages in lieu of notice." The court gave the plaintiff a decree for his wages for the month of March, and dismissed the remainder of the claim. It also disallowed the defendants' claim to a set-off. The defendants came to the High Court in revision urging that their claim for damages should have been allowed.

* Civil Revision No. 130 of 1916.