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creditor; the court had examined the applicant and had taken certain evidence offered by the objecting creditor. The hearing was then adjourned for reasons which need not be discussed, and it continued to be adjourned over a number of successive dates fixed for the hearing. Finally, on the 31st of October, 1917, the case being called on, it was found that the applicant did not appear. The court, thereupon, passed the following order:—

“Applicant is absent. The application is dismissed for want of prosecution.”

It seems to us that this order is not justified either by the circumstances of the case or by the provisions of the Provincial Insolvency Act, No. III of 1907. The debtor's petition had alleged facts sufficient, if established, to entitle him to present his petition under section 6, clause 3, of the said Act. After completing the necessary inquiries, the duty laid upon the court was to come to a decision in respect of the various matters spoken of in section 15 of the said Act and then either to dismiss the petition under the provisions of that section, or else to make an order of adjudication. On this point the words of section 16 (1) of the Act are clear and mandatory. We, therefore, allow this appeal and set aside the order of the court below. We return the record to that court with orders to re-admit it on to its file of pending applications and to dispose of it according to law. The appeal is not opposed and there is no necessity for us to make any order as to costs.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

SUKH LAL (DEFENDANT) v. NANNU PRASAD (PLAINTIFF). *

Act No. IX of 1887 (Provincial Small Courts Act), schedule II, article (31)—Small Cause Court—Jurisdiction—Suit by joint owner to recover rent of a house received by the other joint owner—Money had and received—Revision—Objection to jurisdiction not raised in court below.

Seems that a suit by one of two joint owners to recover from the other a share of the rent of a house received in the first instance by the defendant with the plaintiff's consent, is a suit for money had and received, and as such within the jurisdiction of a Court of Small Causes.

* Civil Revision, No. 77 of 1918.

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But in any case, the question of jurisdiction not having been raised in the court below and the case having apparently been correctly decided, the High Court was not bound to interfere in revision. *Ram Lal v. Kabul Singh* (1) followed.

IN this case plaintiff and defendant, nephew and uncle respectively, were joint owners of a house. The house was let to a tenant, and for some years the uncle had been in the habit of receiving the rent. The nephew instituted the present suit in a Court of Small Causes claiming a sum of Rs. 130, as his half share of the rent received by his uncle. The court tried the case, and the defendant took no objection to the jurisdiction. Ultimately a decree was given in favour of the plaintiff. The defendant came in revision to the High Court urging that the suit was not within the jurisdiction of a Court of Small Causes.

The Hon'ble *Munshi Narayan Prasad Ashthana*, for the applicant.

Pandit Shiam Krishna Dar, for the opposite party.

RYVES, J. :—This application arises out of a suit brought by a nephew against his uncle and a tenant. It appears that a house which jointly belonged to the nephew and uncle had for many years been rented by defendant No. 2 and the whole rent used to be collected by the uncle. No doubt, the nephew was entitled to a half share. This suit was brought to recover Rs. 130, being half of Rs. 260, which the uncle had been paid by the tenant. The suit was filed in a Court of Small Causes. Not only was no objection taken to the jurisdiction of that court, but in paragraph 8 of the written statement the uncle specifically stated that he raised no objection to the court trying the suit. Of course it is not open to parties to waive a question of jurisdiction, but for reasons to be stated later, I think this matter is of some importance. The court, from the judgment which it has recorded, tried the case apparently very fully, and came to what seems to me a very just decision. Having lost the suit in that court, the uncle applies to this Court for revision and for the first time raises the objection that the court below had no jurisdiction to try the suit, and he relies on article (31) of the schedule to the Act (Act No. IX of 1887). It is only the second part of that article which could apply, that is to say, "a suit for the profits of immovable property belonging to the

(1) (1902) I. L. R., 25 All., 135.

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plaintiff which has been wrongfully received by the defendant " is barred from the cognizance of a Court of Small Causes. Reliance has been placed on *Rameshar Singh v. Durga Das* (1), *Uzir v. Hari Charan Pal* (2) and *Nand Rani v. Swashwanewar Mukerji* (3). It seems to me that it is by no means clear that this case comes within the scope of those rulings. It appears (in this particular case that the rent had been paid for many years by the tenant to the uncle. I therefore do not see how it can be said that the uncle " had wrongfully received " the rent, the subject-matter of this suit. It seems to me to be an ordinary suit for money had and received. In any case, I feel that substantial justice has been done and the only result of this application would be further litigation, and that between an uncle and a nephew, and I would hesitate to re-open the matter unless I am forced to. There is the authority of this Court in *Ram Lal v. Kabul Singh* (4), and I would refer also to the cases reported (in 37 Indian Cases, page 991 and 29 Indian Cases, 566) which give me a discretion. As I have already stated, I doubt as to whether article (31) strictly applies, and having also, I think, a discretion in the matter, I decline to interfere. The result is that the application is rejected with costs.

Application dismissed.

APPELLATE CIVIL.

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Before Mr. Justice Tudball and Mr. Justice Abdul Raof.

TAMIZ-UN-NISSA BIBI AND ANOTHER (JUDGMENT-DEBTORS) v. NAJJU KHAN AND ANOTHER (DEGREE-HOLDERS)*.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182 (5)—Execution of decree—Limitation—Step in aid of execution.

An application to the court executing a decree asking that certain objections to the execution of the decree be rejected is a step in aid of execution within the meaning of article 182(5) of the first schedule to the Indian Limitation Act, 1908.

* Second Appeal No. 459 of 1917, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 25th of January, 1917, confirming a decree of Kshirod Gopal Banerji, Subordinate Judge of Budaun, dated the 16th of September, 1916.

(1) (1901) I. L. R., 29 All., 437. (3) (1910) 8 Indian Cases, 270.
(2) (1916) 37 Indian Cases, 671. (4) (1902) I. L. R., 25 All., 185.