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applications, so that if the case is one clearly within section 5 of the Limitation Act the court may rule that that is sufficient cause. But I do not think that that provision confines the sufficient cause mentioned in sub-section (2) to the circumstances given in section 5 of the Limitation Act.

[His Lordship then considered the merits of the case and made an order for substitution conditional upon the applicants depositing security for costs.]

*Application allowed.*

## APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.*

RAM NATH (PLAINTIFF) v HUB NATH AND ANOTHER (DEFENDANTS).\*

*General Rules (Civil) of the High Court, 1911, Chapter XXI, rule 1—Fee certificate—Date for filing certificate—Civil Procedure Code (1908), order XVIII, rule 2.*

*Held* on a construction of Chapter XXI, rule 1, clause (1), of the general rules (civil) of the High Court, 1911, that a fee certificate which is not filed on or before the day fixed for the hearing of the suit referred to in order XVIII, rule 2 (1), of the Code of Civil Procedure is not within time and cannot be taken into consideration in assessing the costs of the suit.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

MEARS, C. J., and PIGGOTT, J.:—The question in these appeals is whether the certificates for the pleader's fees were tendered to the officer of the court within the time prescribed by the General Rules (Civil) of 1911 for Subordinate Courts.

The date fixed for the commencement of the hearing of the suit No. 62 of 1918 (Original Suit No. 70 of 1916) was the 24th of November, 1916.

On the 17th of November, an application was made that suit No. 103 of 1916 (afterwards First Appeal No. 362 of 1917) should be put up with no. 70 of 1916 and decided at the same time, as the two actions covered the same ground. No order was made on the 17th but the matter was ordered to be put up on the 24th of November, the day which had been fixed for the hearing. On

\*First Appeal No. 362 of 1917, from a decree of Ganga Sahai, Subordinate Judge of Benares, dated the 25th of July, 1917.

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that day an order was made that the two cases should be put up on the 2nd of January, 1917, and the witness who were in attendance went away without giving evidence. On the 2nd of January, 1917, the cases were not reached and it was not until the 11th of April, 1917, that the hearing actually commenced.

On the 11th of April, and before the cases were opened the pleader for the appellants, tendered to the proper officer of the court certificates duly signed, certifying the amount of the fees actually paid to him together with the affidavits prescribed by Chapter XXI, rule 1 (1) of the General Civil Rules.

The officer of the court declined to receive them on the ground that they ought to have been presented on the 24th of November, 1916, and in doing so relied on the "explanation" of the word "hearing" appended to the section and what he believed to be the general practice of the subordinate courts. The lower court declined to include the pleader's fees in the decrees. The explanation specifically refers to order XVIII, rule 2 (1), and order XLI, rule 12, and states that "hearing" is not to mean the day to which such hearing is adjourned.

In view of the "explanation" it would seem that we are bound to hold that the certificate and affidavit must be tendered to the officer of the court on the day first fixed for the hearing, whether in fact on that day the case is reached or adjourned. The effect of the explanation in Chapter XXI, rule 1 (1), is to leave in order XVIII, rule 2 (1), only the words "on the day fixed for the hearing of the suit" and that day was the 24th of November, 1916. Order XLI, rule 12, is not applicable, as that rule is confined to the hearing of appeals. As far, however, as this point is concerned the result would be the same, namely, that the certificate and affidavit must be delivered to the officer of the court on the day fixed for the hearing. Had we not been bound by the express words of the explanation, we should have thought it a more convenient course to prescribe that the certificate and affidavit should be tendered to the officer of the court at or before the commencement of the hearing of the suit that is to say, at or before the time when such suit is actually called on in order that it may be opened and the matters in issue decided by evidence and argument. In view, however, of the

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explanation, we are of opinion that the court below was right in not including the fees in the decrees and we therefore dismiss both appeals with costs.

*Appeal dismissed.*

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*Before Mr. Justice Tudball and Mr. Justice Sulaiman.*

SARJU KUMAR MUKERJI (DECREE-HOLDER) v. THAKUR PRASAD  
(JUDGMENT-DEBTOR).\*

*Civil Procedure Code (1908), section 47—Mortgage—Execution of decree—Effect of purchase of a decree for sale by a person who has already purchased part of the mortgaged property at a sale in execution of the same decree.*

At a sale in execution of a final decree upon a mortgage part of the mortgaged property was purchased by M. Subsequently to this purchase M. also obtained from the mortgagee an assignment of the mortgage decree itself.

*Held*, on application being made for further execution of the decree, that the effect of M's purchase was to discharge the mortgage debt *pro tanto*, that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged, and the decree could only be executed for the balance. *Bisheshur Dial v. Ram Sarup* (1) and *Kudhai v. Sheo Dayal* (2) referred to.

THIS was an appeal arising out of an application for the execution of a decree for sale on a mortgage. The facts of the case are set forth in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Munshi *Gokul Prasad*, for the respondent.

TUDBALL and SULAIMAN, JJ.:—This appeal arises out of an application for execution of a mortgage decree. It appears that on the 2nd of January, 1918, one Kanhya Lal obtained a final decree for sale of two villages, Pasi and Amilia, and one house, against Thakur Prasad, the present respondent. In execution of a simple money decree against the latter, half of Pasi and the whole of Amilia and the house were sold at auction and purchased in the name of Hem Chandra on the 20th of March, 1918. Subsequently on the 7th of April, 1918, Dr. Mukerji, the father of Hem Chandra, purchased the whole of the mortgage decree from Kanhya Lal. Dr. Mukerji having got his name substituted in place of the original decree-holder under an order,

\* First Appeal No. 103 of 1919, from a decree of Gauri Shankar Tiwari, Subordinate Judge of Allahabad, dated the 19th of February, 1919.

(1), (1900) I. L. R., 22 All., 284. (2) (1898) I. L. R., 10 All. 570.