

entire claim of the plaintiff is to be decreed against one set of the defendants without any set off while the claim of another set of the defendants is to be decreed in its entirety against the plaintiff. It is not a case in which the decree in favour of the defendant is in respect of the excess left after the set off. As my learned brother is inclined to take the view that order VIII, rule 6, applies, and as his view leads to substantial justice between the parties. I do not consider it desirable to record my dissent from his well considered decision. In this view I agree in decreeing the cross-objection in terms proposed by my learned brother.

BY THE COURT:—We dismiss this appeal with costs, and we decree the cross-objection with costs throughout.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Justice Sir Lal Gopal Mukerji*

RAM PRASAD RAM AND ANOTHER (JUDGMENT-DEBTORS) *v.* JADUNANDAN UPADHIA (DECREE-HOLDER)*

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January, 10

Limitation Act (IX of 1908), articles 181, 182(7)—Instalment decree—Instalments payable on specified dates—Default clause—On default of two successive instalments whole of the balance realisable—Option of decree-holder—Whether option recurrent or once for all—Starting point of limitation—Effects of failure to exercise such option—Civil Procedure Code, order XXI, rule 2—Uncertified payment out of court—Statement by decree-holder after filing application for execution.

A decree was made payable in annual instalments, beginning in 1925 and ending with 1932, on a specified date in June of each year. It was further provided that in case of default in payment of two consecutive instalments the decree-holder would be entitled to recover the whole of the balance in a lump sum. An application for execution was made in May, 1931, seeking to recover the last five instalments, namely those for 1928 to 1932; it did not mention whether the previous three instalments, for 1925 to 1927, had been paid or not. The judgment-debtors pleaded in reply that none of the instalments had been paid

*Second Appeal No. 92 of 1932, from a decree of Shiva Harakh Lal, Additional Subordinate Judge of Ballia, dated the 10th of November, 1931, confirming a decree of Shah Wali Alam, Munsif of Ballia, dated the 22nd of August, 1931.

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and that the application for execution was barred by time. Thereupon the decree-holder filed an application stating that he had been paid the first three instalments. The execution court took evidence on the question and found as a fact that those instalments had been paid; and the application for execution was allowed. *Held*—

If a statement purporting to certify a payment out of court is made by the decree-holder not in his application for execution but after the controversy has arisen upon the application, the statement can not have the force of a certificate within the meaning of order XXI, rule 2 of the Civil Procedure Code, and therefore the execution court can not take cognizance of or inquire into any such alleged payment, and it must be taken that no such payment was in fact made.

Under the terms of the decree the decree-holder had two distinct rights, one being to recover the instalments as and when they fell due, the other being to recover the whole of the balance on the occurrence of the default specified. Where such an option is given to the decree-holder it is open to him to waive his right to recover the whole amount on the happening of the default; and the fact that his right to enforce the default clause has become barred by limitation does not necessarily mean that his remedy to recover the instalments as and when they fall due is also equally barred. So far as the instalments of 1928, 1929 and 1930 were concerned, they had already fallen due on dates specified for them by the decree, and they were governed by article 182(7) of the Limitation Act; and they having fallen due within three years of the application for execution were recoverable, in spite of the default clause.

The words "at a certain date" in article 182(7) meant a specified date and were not wide enough to include any date of default, not specified. The right to enforce the default clause was not, therefore, governed by article 182(7) but by article 181. For the purpose of article 181 the right to apply would accrue when for the first time there was default in two successive instalments, i.e. in June, 1926, and the decree-holder could have enforced the default clause within three years of that date. There would not be successive accruals of such a right; and after the expiry of three years from June, 1926, it was no longer open to the decree-holder to claim the recovery of instalments not already due, merely because in some future years there might again be a default in two successive instalments. *Joti Prasad v. Sri Chand*, I. L. R., 51 All., 237, explained on this point.

The application for recovery of the instalments of 1931 and 1932 could not, therefore, succeed as an application to enforce the default clause; and as an application to recover instalments as and when they fell due it was premature.

Messrs. *K. Verma* and *V. D. Bhargava*, for the appellants.

Messrs. *A. P. Pandey* and *K. N. Pandey*, for the respondent.

SULAIMAN, C.J.:—This is an execution appeal by judgment-debtors. A compromise decree fixing the payments of certain instalments on specified dates was passed. The decree further provided that in case of default of two consecutive instalments the decree-holder would have the right to recover the whole amount by execution. The dates fixed for payment were 6th June, 1925, 13th June, 1926, 15th June, 1927, 3rd June, 1928, 22nd June, 1929, 11th June, 1930, 31st May, 1931, and 18th June, 1932. The decree-holder filed the present application on the 21st of May, 1931, in which he mentioned all the instalments but separated the first three from the rest by means of cross-marks. He did not indicate in his application that it was his case that these instalments were barred by time or that they had been paid, but it is a fact that he did not ask for recovery of these instalments. The judgment-debtors took objection that the application was barred by time because the right to apply accrued when the second default was made in 1926. The decree-holder replied by filing an application alleging that he had received payment of the first three instalments. The courts below have found that the first three instalments were in fact paid and that there was no default. The lower appellate court has accordingly allowed the appeal for execution for all the instalments except the last one as to which the application was not pressed by the decree-holder.

The judgment-debtors have come up in appeal and reiterate their plea of limitation and further urge that

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