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therefore come to any decision in this matter "against the defendant" in the sense of s. 561 of the Civil Procedure Code. Indeed the decree is clearly and explicitly limited to dismissing the plaintiff's claim for the price of certain fruit removed, on the single ground that the fruit had not been removed. The defendant then as respondent before the lower appellate Court was not qualified to take an objection to the decree on a ground outside of and foreign to the decree, which clearly could not have been taken by way of appeal. The Judge therefore assumed jurisdiction not warranted by law when he proceeded to try and determine the respondent's objection in this case. We set aside the portion of the lower appellate Court's decree allowing this objection with costs, and limit the same to a decree dismissing the appeal of the plaintiff with costs. This application is allowed with costs.

Application allowed.

APPELLATE CIVIL.

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June 16.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

BHOJRAJ AND ANOTHER (DEFENDANTS) *v.* GULSHAN ALI AND ANOTHER (PLAINTIFFS)*

Breach of contract—"Continuing breach"—Act XV of 1877 (Limitation Act), s. 23 and sch. ii, No. 143—Act IX. of 1871 (Limitation Act), s. 23.

The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land and that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid such fees, and more than twelve years after the first default the vendors sued them for possession of such quantity of such land. *Held* that there had not been a "continuing breach of contract," within the meaning of s. 23 of Act XV of 1877, and therefore the provisions of that section were not applicable to the suit; and further that the suit, being governed by No. 143, sch. ii of Act XV of 1877, and more than twelve years having expired from the first breach of such agreement, was barred by limitation.

The difference between s. 23 of Act IX of 1871 and Act XV of 1877 pointed out.

* Second Appeal, No. 1478 of 1881, from a decree of H. F. Evans, Esq., Judge of Moradabad, dated the 14th September, 1881, reversing a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 16th April, 1881.

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ON the 8th May, 1844, Bhojraj, one of the defendants in this suit, and Kewal Ram, who was represented by the remaining defendants Parshadi and Salik Ram, executed an "*ikrar-nama*" in favour of Aman Ali, Ali Muhammad, and Sultan Muhammad, who were represented by the plaintiffs. Under the terms of this instrument the executants were liable to pay certain annual fees, called "*kasrat-i-dami*," in respect of a 1 biswa 10½ biswansis share in certain muafi lands purchased by them. These fees, which amounted to Rs. 3-13-0 per annum, were payable to the obligors of the *ikrar-nama*, the terms of which, so far as they are material to this case, were as follows:—"Should there be any objection to the payment of Rs. 3-13-0 per annum, then 45 bighas and 11 biswas *kham* land shall be separated out of the 1 biswa 10½ biswansis muafi for Aman Ali, Ali Muhammad, and Sultan Muhammad aforesaid, and we or our representatives have and shall have no objection at all to the terms of this agreement." The plaintiffs in this suit alleged that, under the terms of the *ikrar-nama*, the defendants continued to pay the fees up to 1285 fasli, "when they ceased to do so, and preferred a complaint in the Settlement Court, and they (plaintiffs) were directed on the 31st July, 1877, to sue in the Civil Court." The plaintiffs accordingly commenced the present suit on the 22nd December, 1880, for recovery of possession of 45 bighas and 11 biswas of the land mentioned in the *ikrar-nama*, and for Rs. 11-0-6 mesne profits, on the ground that the defendants had failed to pay the fees, and the plaintiffs, as the representatives of Aman Ali, Ali Muhammad and Sultan Muhammad therefore became entitled to proprietary possession of the land under the terms of the *ikrar-nama*.

The Court of first instance dismissed the suit on the ground that the *ikrar-nama* had never been acted upon; that the fees "were never realized by the plaintiffs from the time the *ikrar-nama* was executed"; and that the suit was therefore barred by limitation." On appeal by the plaintiffs, the lower appellate Court, while agreeing with the Court of first instance in its findings of fact, held, as regards the question of limitation, that "each failure on the part of the defendants to pay the annual sum of Rs. 3-13-0 was a new breach giving a new right to eject, and the suit was therefore

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within time, although no payment had been made within the last twelve years." For this view of the case it relied upon the case of *Sadha* v. *Bhagwani* (1), which was decided when the Limitation Act IX of 1871 was in force. The lower appellate Court accordingly gave the plaintiffs a decree.

On second appeal by the defendants it was contended on their behalf that, on the facts found by the lower Courts, the suit was barred by limitation.

Pandit *Bishambhar Nath* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Shah *Asad Ali*, for the respondents.

The High Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgments :—

MAHMOOD, J. (After stating the facts, continued) :—Bearing in mind the provisions of the last paragraph of s. 2 of the present Limitation Act, there can be no doubt that the present case is governed by the provisions of Act XV of 1877, and not by those of Act IX of 1871. Whether the present suit would have been within limitation if brought whilst the latter Act was in force is therefore a question with which we are not concerned. But the Judge, in following the ruling of this Court in the case of *Sadha* (1), does not appear to me to have considered that that case was decided under s. 23, Act IX of 1871, and that the provisions of that section have undergone a considerable change in the corresponding s. 23 of the present Act. For the purposes of this case, it is not necessary to discuss minutely all the alterations in the law which s. 23 of the present Act has introduced. It will be sufficient to confine my observations to the point on the determination of which the decision of the appeal depends. The rule contained in s. 23 is a rule for computation of the period of limitation. The section of Act IX of 1871 gave the benefit of the rule to suits "for the breach of a contract, where there are *successive* breaches," and also to suits "where the breach is a continuing breach." The corresponding s. 23 of Act XV of 1877 confines that benefit to the latter class of

(1) N.-W. P. H. C. Rep., 1875, p. 53.

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cases only (*viz.*, cases of "a *continuing* breach of contract,") and provides that in such cases "a fresh period of limitation begins to run at every moment of the time during which the breach continues." But I have no hesitation in holding that the present is not a case of "a continuing breach" of contract at all. The obligation created by the *ikrar-nama* of the 8th May, 1844, was not of such a continuing nature as is contemplated by the Act, and there could therefore have been no "*continuing* breach" such as would entitle a suit based thereon to the benefit of s. 23 of the present Act. That section contemplates cases like the covenant by a tenant to keep the tenanted building in repair; cases in which the obligation created by the contract is *ex necessitate* of a continuing nature; and the right of action therefore naturally arises every moment of the time during which the breach continues. In the present case the obligation created by the *ikrar-nama* was of a recurring kind, and could admit only of a series of "*successive* breaches," such as were provided for by s. 23, Act IX of 1871, but are not within the purview of s. 23 of the present Act. The precedent which the Judge has relied on is therefore wholly inapplicable to the present case, which is governed by Act XV of 1877.

Such being my view as to the inapplicability of the above-mentioned rule of computation of the period of limitation to the facts of this case, I am further of opinion that the suit falls under No. 143 of the present Limitation Act, and the defendants, having been proved to have broken the conditions of the *ikrar-nama* more than twelve years ago, the suit was rightly dismissed by the Court of first instance as barred by limitation. The Judge in his anxiety to follow a ruling appears to me to have lost sight of the express words of the law, and to have omitted to consider the change which the Legislature has introduced since the precedent relied upon by him was made. I would decree the appeal, and setting aside the decree of the lower appellate Court, restore the decree of the Court of first instance; the plaintiffs-respondents paying all costs in this Court and in the Courts below.

BRODHURST, J.—I concur in decreeing the appeal with costs on the ground that the suit is, for the reasons stated by my learned colleague, barred by limitation.