

1882

PHUL CHAND
v.
MAN SINGH.

putting aside ordinary principles of law and procedure, we are bound to hold the adult sons as being in neither better nor worse position than the minors.

Such being the case, we think that the Judge wrongly decided in favour of the plaintiff. This appeal must therefore be allowed with costs, the decree of the Judge set aside, and the plaintiff-respondent's suit dismissed.

Appeal allowed.

1882
March 7.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SHAM LAL AND ANOTHER (DECREE-HOLDERS) v. KANAHA LAL
(JUDGMENT-DEBTOR),*

Decree payable by instalments—Execution of whole decree—Payments out of Court—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (6)—Act X of 1877 (Civil Procedure Code), s. 253.

A decree payable by instalments provided that, in default in payment of two instalments, the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of the third and fourth instalments. The judgment-debtor objected that the application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that these instalments had been paid out of court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation, notwithstanding such payments had not been certified. *Fakir Chand Bhowe v. Madan Mohan Ghose* (1) followed.

THE decree in this case, which was dated the 5th July, 1875, was a decree for the payment of Rs. 450, by instalments of Rs. 40, and provided that, in the event of default in the payment of two instalments, the whole decree should be executed. The 1st, 2nd, 3rd, 4th, and 5th instalments were severally payable on the 9th June, 1876, 27th June, 1877, 16th June, 1878, 6th June, 1879, and 24th June, 1880. On the 2nd February, 1881, the decree-holders applied for execution of the whole decree on the ground that the judgment-debtor had made default in the payment of the 3rd and 4th instalments. The judgment-debtor alleged that he had made default in the payment of the first and second instalments, and the application having been made after the expiration of three years

* Second Appeal, No. 52 of 1881, from an order of R. M. King, Esq., Judge of Saharanpur, dated the 28th April, 1881, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 12th March, 1881.

(1) 4 B. L. R. 130.

from the date of such default was barred by limitation. The decree-holders alleged that the first and second instalments had been paid by the judgment-debtor out of court, the first on the 3rd June, 1877, and the second on the 20th June, 1878; and they offered to prove such payments. The lower Courts held that the application was barred by limitation, as it had not been made within three years from the 27th June, 1877, when the judgment-debtor made default in the payment of two instalments; the lower appellate Court holding that, under the provisions of s. 253 of the Civil Procedure Code, the payment of the first and second instalments by the judgment-debtor could not be recognized, even if they had been made, as they had not been certified.

In second appeal by the decree-holders to the High Court it was contended that, in order to show that the application was within time, they were entitled to prove that the first and second instalments had been paid.

Lala Lalta Prasad and *Maulvi Obaidul Rajman*, for the appellants.

Munshi Hanuman Prasad, for the respondent.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—We are of opinion that it is allowable for the decree-holders to give proof of the fact of payment out of Court of the two first instalments, so as to defeat the judgment-debtor's plea of limitation. This view accords with the Full Bench ruling of the Calcutta Court—*Fakir Chand Bose v. Madan Mohan Ghose* (1).

We reverse the order of the lower appellate Court and remand the case for disposal. Costs to follow the result.

Cause remanded.

(1) 4 B. L. R. 130.