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or enforced. [See *Beni Madhab* v. *Lalmati* (1) and *Manindra Chandra Nandi* v. *Srimati Durga Sundari* (2)]. Evidence of conduct is also admissible to prove an estoppel or waiver [*Lakshman* v. *Gobind*(3)]. Now in the present case it appears that the plaintiff's gomashta accepted rent at the lower rate for two or three years and granted receipts for the same but without specifying the amount of jama in the appropriate column in the printed rent receipts. All that the receipts would show is that the plaintiff's gomashta realized rent which works at the lower rate. This cannot by any stretch be taken as amounting to a legal estoppel or waiver of the plaintiff's rights. The facts that the amount of rental was not mentioned in the printed receipts and no rent has since been realized contra-indicate the theory that this particular term in the kabuliyat was not intended to be acted upon. Then, the landlord is not deprived of his right to claim rent at the rate stipulated in the kabuliyat by a mere acceptance of rent at the reduced rate [see *Baidyanath* v. *Raghu Nath* (4) and *Kailash* v. *Darbaria* (5)]. I do not think I can profitably add anything else to the elaborate judgment of my learned brother.

Decree varied.

APPELLATE CIVIL.

Before Wort and Rowland, JJ.

BIBI WAKILAN

v.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 22, *proviso*—"*last order against the party*",

*Appeal from Appellate Order no. 258 of 1928, from an order of Babu Radha Krishna Prasad, Additional Subordinate Judge of Patna, dated the 9th July, 1928, affirming an order of Maulvi Md. Khalil, Munsif of Patna, dated the 13th August, 1927.

(1) (1901-02) 6 Cal. W. N. 242. (3) (1880) I. L. R. 4 Bom. 594.
(2) (1915-16) 20 Cal. W. N. 680. (4) (1911-12) 16 Cal. W. N. 496.
(5) (1915-16) 20 Cal. W. N. 347.

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significance of—whether includes order which has been vacated.

Order XXI, rule 22, Code of Civil Procedure, 1908, lays down :

" (1) Where an application for execution is made—(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause........... why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution..........."

Held, that " the last order against the party " referred to in the proviso to rule 22 of Order XXI includes an order which has been vacated and is no more subsisting.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Wort, J.

Hasan Jan, for the appellant.

B. C. Sinha (with him *Sambhu Barmeshwar Prasad*), for the respondent.

WORT, J.—This is an appeal against an order of the Subordinate Judge of Patna dated the 9th July, 1928, confirming the decision of the Munsif and dismissing the application of the appellant under section 47 of the Civil Procedure Code.

A number of objections were taken before the Court below but in this Court two objections were taken to the execution by the appellant, the first being that the decree in its present form is incapable of execution, the second that the application for execution having been made one year after the date of the decree and no notice having been served under Order XXI, rule 22 of the Code, the Courts below had no jurisdiction to execute the decree.

The decree of the Appellate Court which was dated the 21st August, 1924, in its operative portion states—

"It is ordered that the appeal is decreed with costs in both Courts,"

and then there are other provisions relating to costs. It is obvious, on a perusal of the decree, that it does not comply with Order XLI, rule 35 of the Code. In setting out the details which are demanded by that rule, and particularly as regards the provisions of that rule, it is stated that there should be a clear specification of the relief granted or other adjudication made. It appears that the suit related to certain plots of land and on the 20th December, 1926, it appears that an application was made to the Court of the Subordinate Judge under which an amendment of the decree was made by the inclusion of the numbers of the plots of land which were the subject-matter of the suit; but still there was no provision in the decree as to what relief was granted, whether it was a question of declaration of title or possession or otherwise. In those circumstances Mr. Hasan Jan on behalf of the appellant argues that this was the decree which was in course of execution and the only procedure which the judgment-creditor could take would be a further application to the Court pronouncing the decree for a further amendment. On the other hand, it is suggested by the respondent that this was a case in which although the decree did not state the relief granted, yet the judgment and the plaint could be looked to for the purpose of ascertaining that fact. This question came before this Court in the case of *Baijnath Sahay* v. *Gajadhar Prasad* (1), and Jwala Prasad, J., in pronouncing the judgment of the Court, stated that although it was clear that an executing Court had no right to go behind the decree and in any way to add or amend the terms

(1) (1920) 1 Pat. L. T. 471.

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thereof, its duty was to execute it as it was and that an amendment could only be made under the provisions of the Civil Procedure Code, yet an executing Court could give a fuller and more complete description of the property described in the decree on a proper construction of the decree read with the judgment and the pleadings.

Two considerations arise in this connection. First of all the one which is indicated by the case I have quoted, namely, that this is a case in which the Court could look to the judgment and the pleadings in order to interpret the decree. But the second consideration seems to me to be of even greater weight. In this case it is stated by the respondent, and certainly not explicitly denied by the appellant, that so far as these plots of land are concerned, that is to say, so far as the decree relates to these plots of land, execution has already taken place. It would be somewhat anomalous to say in a case of that kind, where execution had already taken place, that the decree was incapable of execution, and in this connection I think it is correct to state that those authorities upon which Mr. Hasan Jan on behalf of the appellant relies are in respect to cases which have arisen in an application for execution and before execution has taken place. It is perhaps unnecessary to say so, but if in fact the decree-holder in this case has been given possession of plots which are not the subject-matter of the suit and therefore to which she has no right, then the client of Mr. Hasan Jan certainly has a remedy apart from section 47 of the Civil Procedure Code. In my judgment the point which is argued on behalf of the appellant, so far as the question of whether the decree is capable of execution is concerned, cannot be sustained for the reasons which I have stated.

The next point which was argued on behalf of the appellant is that by reason of the non-compliance with Order XXI, rule 22, this execution was bad in law and that the Court proceeding with it was acting

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ultra vires. The provisions of Order XXI, rule 22, are well-known, the proviso to the rule stating that

"no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for."

Although this point does not seem to have been argued in the Courts below, yet from a perusal of the order-sheet it is clear that on the 17th April, 1926, in an application by the decree-holder there was an order against the judgment-debtor for delivery of possession. It is true, as Mr. Hasan Jan states, that subsequently that application in execution was dismissed; the grounds for its dismissal are immaterial, the fact remains, and it is argued therefore, that when the proviso to rule 22 of Order XXI uses the expression "the last order against the party", the proviso means a subsisting order and not an order, to use the language of Mr. Hasan Jan, which had been vacated. That argument, I must say, at first sight appeared somewhat attractive but, on a careful consideration of the proviso, I think it must be stated as quite clear that when the expression "the last order against the party" is read as given in the proviso, the order is not characterised in any way, and it does not certainly state, that it must be an order which is subsisting against the party. It seems clear from the proviso and from the order generally that what was intended was that the judgment-debtor should not be taken by surprise and that in the event of his having had notice by an order being made against him, whatever its character, within the period of one year, then the notice under the main part of Order XXI, rule 22, became unnecessary.

In my opinion, therefore, both the objections taken by Mr. Hasan Jan are invalid and consequently the appeal should be dismissed with costs.

ROWLAND, J.—I agree.

Appeal dismissed.