

1929.

SHAIKH  
FAKIR  
MUHAMMAD  
v.  
MUSAMMAT  
SAKINA.  
MACPHER-  
SON, J.

The lower appellate Court rejected the second plea on the ground that a portion of the land covered by the kabuliyat was within the jurisdiction of the Munsif. There is also nothing to show that the plaintiff, though in the absence of the kebala, which absence was explained, she had not satisfactorily proved her title to the land situated in the Jamui Munsifi, had not a bona fide claim to the land and also was not in possession. Appellant did not take actual possession because it was not worth while. It has not been shown that his lack of possession of part of the tenancy demised is due to laches on plaintiff's part. The plea, if pressed, would have failed.

In my opinion this appeal fails and I would dismiss it with costs.

DHAVLE, J.—I agree.

*Appeal dismissed.*

S.A.K.

## APPELLATE CIVIL.

*Before Terrel, C. J. and James, J.*

SYED JAHAR ALI

v.

MUSAMMAT MUSHARATAN NISSABIBI.\*

*Provincial Insolvency Act, 1920 (Act V of 1920)—adjudication, conditional order of—insolvent directed to pay certain sum out of salary as a condition precedent—Code of Civil Procedure, 1908 (Act V of 1908), section 60 (1).*

A conditional order of adjudication whereby an insolvent is directed to pay a sum of Rs. 6 a month out of his salary as a condition precedent to his being adjudicated an insolvent, is illegal by reason of the provisions of section 60 (1), Code of Civil Procedure, 1908.

The fact of the case material to this report is stated in the judgment of James, J.

\* *Circuit Court, Cuttack.* Miscellaneous Appeal no. 20 of 1928, from an order of H. R. Meredith, Esq., i.c.s., District Judge of Cuttack, dated the 7th May, 1928.

*S. C. Bose* (with him *S. N. Sen Gupta*), for the appellant.

*S. N. Ray* (with him *K. Khan*), for the respondent.

JAMES, J.—By the order under appeal the appellant was directed, as a condition of his being adjudicated insolvent, to pay into Court six rupees monthly out of his salary and to place at the disposal of the Court his share in ancestral property. If the petitioner did not obey these directions within one month his application for adjudication was to stand dismissed.

It is argued on behalf of the appellant that there is nothing in the Provincial Insolvency Act which warrants a conditional order of adjudication of this nature, and that that part of the order was illegal which directed the applicant to pay to the Court Rs. 6 a month out of his salary. In the first place, it is to be observed that it was unnecessary to order that the petitioner should place at the disposal of the Court his share of ancestral property to be sold for the benefit of the creditors, because as soon as the petitioner was adjudged insolvent, whatever share he may have possessed in ancestral property would vest in the insolvency Court or in the Receiver. The direction that the petitioner shall pay Rs. 6 a month out of his salary is illegal by virtue of the provisions of sub-section (i) of section 60 of the Code of Civil Procedure. The proper course in this case, since the petitioner's indebtedness was proved, was to pronounce an order of adjudication, and then subsequently when the time came for realisation of his assets, should it be discovered that he had other assets than those stated in his petition in insolvency, to take steps to realise them for the benefit of his creditors, and also if necessary, to take steps against the insolvent under section 69 of the Insolvency Act.

The appeal is accordingly allowed and the order of the lower Court is set aside. The petitioner is

1929.

SYED JAHAR  
ALI  
v.  
MUSAMMAT  
MUSHA-  
RATAN  
NISSABIBI.

1929. adjudicated insolvent with directions that he must  
 SYED JAHAR apply for his discharge within one year. The record  
 ALI will be returned to the District Judge in order that  
 v. action may be duly taken in the ordinary course under  
 MUSAMMAT the Provincial Insolvency Act. There will be no order  
 MUSA- as to costs.  
 RATAN  
 NISSABIEL.

JAMES, J. COURTNEY TERRELL, C.J.—I agree.

*Appeal allowed.*

### APPELLATE CIVIL.

1929.  
 April, 26.

*Before Terrell, C. J. and James, J.*

ATUL KRISHNA GHOSH

v.

BRINDABAN NAIK.\*

*Execution of decree—decree barred by limitation—subsequent execution proceedings—objection taken at a late stage, whether maintainable—judgment-debtor, when precluded from raising the point—duty of the court—Limitation Act, 1908 (Act IX of 1908), section 3.*

It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to raise the question of limitation in a subsequent execution of the decree. But, so long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred and the court will have to dismiss the application under section 3 of the Limitation Act, 1908.

*Maharaja Kesho Prasad Singh Bahadur v. Harbans Lal (1), followed.*

*Mungul Pershad Dichit v. Girja Kant Lahiri (2) and Raja of Ramnad v. Velusami Tevar (3), referred to.*

\* Miscellaneous Appeal no. 15 of 1928, from an order of H. R. Meredith, Esq., i.c.s., District Judge of Cuttack, dated the 19th July 1928, confirming an order of Babu N. C. Choudhury, Munsif of Bhadrak, dated the 22nd March, 1928.

(1) (1920) Cal. W. N. (Pat.) 109.

(2) (1882) I. L. R. 8 Cal. 51.

(3) (1920-21) 25 Cal. W. N. 581.