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that two sums were left in deposit with the purchaser, one sum to pay off what was due on the mortgage and one sum to pay off what was due on the hand-note.

HARRIES, C. J.

What the assignor assigned was the sum left with the purchaser to pay off the hand-note dues together with interest thereon. The assignment was not an assignment of part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. This is sufficient to dispose of the appeal, and the point whether part of a debt is assignable does not strictly arise. In these circumstances, I prefer to express no opinion in this judgment upon the very difficult point as to whether a part of a debt is assignable.

S.A.K.

Appeal dismissed.

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LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

MANGTU LAL BAGARIA

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Cess Act, 1880 (*Beng. Act IX of* 1880), *section* 45—"*recovered*", *meaning of—decision by Revenue Court that cess was recoverable and was not barred by limitation—suit to set aside the decision, whether maintainable.*

Section 45 of the Cess Act, 1880, provides:—

"If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it becomes due, with interest....."

* Letters Patent Appeal no. 15 of 1939, from a decision of Mr. Justice Varma, dated the 23rd January, 1939.

Held, that the word "recovered", occurring in the section, means "sued for" or "recovered by means of an action".

Held, further, that the question whether cess is recoverable in a particular case under section 45 is one to be decided by the Revenue Court which issues the certificate, and if that Court decides, rightly or wrongly, that the cess is recoverable and the claim made for the recovery is not barred by limitation, a suit to set aside that decision is not maintainable.

Appeal by the plaintiff under clause 10 of the Letters Patent.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

S. K. Mitra, for the appellant.

The Government Pleader, for the respondent.

FAZL ALI, J.—This is an appeal under the Letters Patent from a decision of Varma, J. in a second appeal.

It appears that plaintiff is the receiver of an estate which owns certain coal-mines in Dhanbad. In 1929-30 a certificate was issued under the Public Demands Recovery Act to recover certain arrears of cess payable by the estate and a sum of Rs. 52 was realised in May, 1930. In 1934-35 a fresh proceeding was started to realise the balance, and the plaintiff was obliged to deposit a sum of Rs. 438-2-3. Thereafter he brought the present suit to recover this amount on the allegation that the assessment of cess was wholly illegal and the proceeding by which the sum of Rs. 438-2-3 was realised from him was without jurisdiction.

The suit was resisted by the Secretary of State on various grounds and the trial Court as well as the first Court of appeal held that the suit could not succeed. The plaintiff thereupon preferred a second appeal which was heard by Varma, J. In this

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appeal the points raised by him were—first, that the proceedings of 1934-35 were without jurisdiction inasmuch as two certificates could not be issued in respect of the same demand; and, secondly, that the certificate Court could not under section 45 of the Cess Act recover the said amount more than three years after it became due. Both these points have been decided against the plaintiff by Varma, J., and hence this appeal under the Letters Patent.

FAZL ALI, J.

As to the point that two certificates were issued in regard to the same demand, Varma, J. observed as follows:—

"Now, with regard to the first part of the argument I must say at once that in spite of the strenuous efforts of Mr. Mitra he has not been able to refer to any materials on the record which could satisfy me that two certificates were actually issued, and although I agree with the proposition of law that two certificates could not be issued for the same period, on the question of fact this part of his contention must fail."

Notwithstanding these observations, it was contended on behalf of the appellant that in fact two certificates were issued, and learned Counsel for the appellant pressed us to allow him an opportunity to produce certain papers as additional evidence to establish his contention.

Now, the judgments of the first two Courts clearly show that the contention raised on behalf of the appellant is an entirely new one. From the judgment of the learned Munsif it appears that one of the issues framed in the suit was—

"whether the certificate proceedings of 1934-35 were illegal, without jurisdiction and barred by limitation."

In discussing this issue, the learned Munsif has set out the case put forward before him on behalf of the plaintiff in these words:—

"His next contention is that there was certificate of non-payment issued against him which was put into execution in certificate

execution Case no. 107-R.C. 1929-30, that case was struck off in 1930 and then more than three years after in 1934 a fresh execution of recovery of the unpaid amount was instituted by the certificate officer of Dhanbad, against him under case no. 171/R.C. of 1934-35; that this latter case was clearly time-barred....."

From this it is quite clear that what the appellant contended before the Munsif was not that a second certificate had been issued in 1934-35 but that the execution proceedings of that year were time-barred inasmuch as they were instituted more than three years after the first execution proceeding. The learned District Judge also states in his judgment that the proceedings of 1934-35 were attacked before him on the ground that they were time-barred and the plea of limitation was

"based on an assertion of fact, viz., that the previous certificate case of 1929-30 was struck off in May, 1930, so that more than three years elapsed between the disposal of that certificate case and the filing of the next."

Thus it seems to me that neither before the Munsif nor before the District Judge it was seriously contended by the plaintiff that there were two successive certificates for the same dues. On the other hand, it appears that one of the main points urged on behalf of the plaintiff was that the proceedings of 1934-35 were execution proceedings and they were barred by limitation inasmuch as they were started more than three years after the termination of the first execution proceedings. In my view, the plaintiff cannot be allowed to abandon the case put forward by him before the Munsif and the District Judge and set up a new case in this Court. I am also of the opinion that the plaintiff cannot be allowed to produce any additional evidence at this stage. The power of this Court to admit additional evidence is limited by the provisions of Order XLI, rule 27, of the Code of Civil Procedure. This rule provides, amongst other things, first, that additional evidence shall be allowed only when the appellate Court requires any such evidence to be produced to enable it to pronounce judgment, or for any other

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ALI, J.

substantial cause; and, secondly, that additional evidence shall not be allowed to be adduced unless the party who wishes to adduce it satisfies the appellate Court that such evidence, notwithstanding exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. The present case does not satisfy any of these conditions. On the other hand, it appears to me that the plaintiff could have very well produced the documents which he is trying to produce now in the Courts which had to deal with the facts of the case. It is not the case of the plaintiff that these documents, notwithstanding exercise of due diligence, were not within his knowledge or could not be produced by him when the matter was before the trial Court or the lower appellate Court. The first point raised by the appellant must fail.

The next point urged on behalf of the appellant is that the proceeding of 1934-35 was without jurisdiction inasmuch as under section 45 of the Cess Act, the arrears of cess cannot be recovered more than three years after they became due. Section 45 of the Cess Act runs as follows:—

"If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, the amount of such instalment or part thereof may be recovered at any time within three years after it became due, with interest, etc., etc....."

I entirely agree with the view expressed by Varma, J. that the word "recovered" in the section, means "sued for" or "recovered by means of an action". In my opinion, this is the only reasonable meaning which can be attributed to the expression. The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. If the meaning attributed by the plaintiff to the expression is the meaning which the expression was intended to convey, it follows that in many cases cess will become