1895.

PARSHOTAM v. PEMA HARJI.

death-bed offerings, fees and presents of subsequent days, amounting to the above-mentioned sum, were given to defendant No. 3.

A question having arisen as to whether the Subordinate Judge could take cognizance of the suit against defendants Nos. 1 and 2 in his Small Cause jurisdiction, though there was no doubt that he could do so against defendants Nos. 3, 4 and 5, the suit as against them being one for money had and received by them for plaintiff's use, he submitted the following questions :—

"1. Whether a suit by a Hindu hereditary office-holder against an intruder for disturbance of office, or else for money had and received, can lie in the Small Cause Court ?"

"2. If yes, what should be done about the defendants in this suit who are sued for not giving those fees ?"

The Subordinate Judge was of opinion that if he could not try the suit against defendants Nos. 1 and 2 in his Small Cause jurisdiction, he could entertain it as against all the defendants in his ordinary jurisdiction.

N. M. Samarth (*amicus curiæ*) for the plaintiff.

Vásudeo R. Joglekar (*amicus curiæ*) for the defendants.

FARRAN, C. J. :—As the suit against defendants Nos. 1 and 2 is not cognizable by a Small Cause Court, the whole suit is not cognizable by a Small Cause Court, and the Subordinate Judge must try it in his original jurisdiction. It is unnecessary to answer the first question.

Order accordingly.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895. *October* 11.

TUKA'RA'M (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'BA'JI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (*Act XIV of* 1882), *Sec.* 258, *as amended by Act VII of* 1888—*Payment out of Court—Payment not certified to Court—Proof of such payment for the purpose of determining the question of limitation.*

Under section 258 of the Code of Civil Procedure (as amended by Act VII of 1888) as there is no time fixed within which the decree-holder is bound to certify a pay-

* Second Appeal, No. 362 of 1895.

ment made out of Court. Such payment may be certified at any time. And although such payment, until certified, cannot be recognized by a Court executing a decree as a payment or adjustment of the decree, it is still open to the Court to take evidence about the payment in order to determine whether an application for execution is barred by limitation.

Hurri Pershád v. *Nasib Singh*(1) followed.

SECOND appeal from the decision of S. Tágore, District Judge of Sátára, in Appeal No. 147 of 1894.

By a consent decree dated 29th July, 1884, it was provided that, in consideration of the defendants paying into Court Rs. 600 by yearly instalments of Rs. 50 each, plaintiff should give up his right to the land in dispute which he had agreed to purchase from the defendants, and that if the defendants failed to pay any one of the instalments, the plaintiffs should be entitled to take possession of the land after the expiration of four months from the date of the default.

In 1892 the plaintiff made an application for execution of the decree, alleging that he had been paid out of Court the instalments due up to 1891, that the instalment due in 1892 had not been paid, and that as four months had elapsed since the date of the default he was entitled to recover possession of the property in dispute.

The defendants pleaded that the application was time-barred, that they had not paid the instalments as they fell due, but had paid a lump sum of Rs. 350 in Shake 1807 (1885 A.D.), and that they were willing to pay the balance of Rs. 250 which was due.

The Court of first instance dismissed the application as time-barred, holding that the alleged payments not having been certified to the Court, could not be recognized as payments under the decree, and that, consequently, evidence to prove those payments could not be received.

The District Court in appeal upheld this decision. The following is an extract from the judgment:—

"The point for decision is whether evidence is admissible to prove the alleged payments out of Court?

"My finding is in the negative.

(1) I. L. R., 21 Cal., 542.

1895.

TUKÁRÁM v. BÁBÁJI.

"Mr. Karándikar (plaintiff-appellant's pleader) refers to *Háji Abdul* v. *Khoja Kháki*(1) and *Hurri Pershad* v. *Nasib*(2) and other cases, as showing that although under the porvisions of section 258, Civil Procedure Code, an uncertified payment made to a decree-holder could not be recognized as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred by limitation. It is also urged that the decree-holder is not subject to any limitation, and may certify after any lapse of time, and that the statement in the darkhást itself should be taken as a certificate of the payment.

"I am, however, of opinion that the cases cited are distinguishable from the present, in as much as there is an express provision in the decree in the present case that the payments in question should be made into Court. It is not open to the judgment-creditor applying for execution to extend the terms of the decree or to consent to take satisfaction otherwise than as provided therein. I think, therefore, that the lower Court rightly held that no evidence could be admitted to prove the alleged payment made out of Court. No effect could be given to any such payment under the terms of the decree."

Against this decision the plaintiff preferred a second appeal to the High Court.

Inverarity (with him *Bálaji A. Bhágvat*) for appellant.

Branson (with him *Ganpat Sadáshiv Ráo*) for respondent.

The judgment of the Court was delivered by

FARRAN, C. J.:—Under section 258 of the Code of Civil Procedure no time is fixed within which the decree-holder is bound to certify a payment made out of Court, and it has been held that it may be certified at any time (*Háji Abdul Rahiman* v. *Khoja Kháki Aruth*(1)). Nor is any particular form prescribed for the certificate. When, therefore, the decree-holder in the present case mentioned in his application for execution that he had been paid the instalments due in 1891, and that default had occurred in making payment of the instalments due in 1892, and asked for relief on that ground only, we fail to see why the Court did not treat the payments as certified. (*Cf. Bhika Devji Pátil* v. *Mahádu valad Satwáji Pátil*(3).) If it thought it necessary for its own satisfaction, it might have called on the decree-holder to formally certify the payments by a separate application before it proceeded further. The judgment-debtors, however, in the present case did not admit having made the payments certified by plaintiff; they stated that they had paid

(1) I. L. R., 11 Bom., 34. (2) I. L. R., 21 Cal., 542.

(3) P. J. for 1892, p. 430.

Rs. 550 in Shake 1807, and pleaded that execution was time-barred. At the same time they expressed their willingness to pay the plaintiff Rs. 250, which sum only they admitted to be due. It was open, we think, on the plea of limitation for the Court to have taken evidence about the payments mentioned by the plaintiff in his darkhást, and to have determined whether the application for execution was time-barred or not. Section 258 provides that such payment shall not be recognised as a payment or adjustment of the decree *by any Court executing the decree*. The italicised words added to the section by Act VII of 1888, section 27, do not appear to us to affect the question. They were added *alio intuitu* and have the effect of removing the doubts caused by the conflict of decisions pointed out in and emphasised by *Háji Abdul Rahiman* v. *Khoja Kháki Aruth*[1] as to the Courts which could recognise uncertified payments, but do not alter the meaning of the expression "shall not be recognised *as a payment or adjustment of the decree.*" We concur in the ruling of the Calcutta High Court in *Hurri Pershád* v. *Nasib Singh*[2], which dissents from the ruling of Tyrell, J., in *Mitthu Lál* v. *Khairati Lál*[3].

The decision in *Purmánandás Jivandás* v. *Vallabdás Walljí*[4] is, therefore, in our judgment still binding as an authority. It is in accordance with the rulings in the other High Courts. We do not think that there is any weight in the opinion of the District Judge that because the decree ordered payment to be made into Court the decree-holder was prohibited from taking payment out of Court. We notice that this provision is made in only one place in the decree, *viz.*, where it provides for the manner in which payment is to be made by the several judgment-debtors. Elsewhere the decree speaks of payment only, and where it gives the decree-holder relief in the case of payment not being made, no restriction is placed on the mode of payment. We must, therefore, reverse the order in execution of the lower Appellate Court, and remand the application for disposal with reference to the above remarks. Costs to be costs in the cause.

Order reversed and case sent back.

(1) I. L. R., 11 Bom., 6.
(2) I. L. R., 21 Cal., 542.
(3) I. L. R., 12 All., 569.
(4) I. L. R., 11 Bom., 503.