

1869
 NABIN CHAN- and it appears to me that even if his allegation had been that the defendant
 DRA MITTAR had erected the *challa* upon common land, without the express permission of
 him, the plaintiff, he would not have been entitled to the decree he sought
 for.

MAHES CHAN- The respondent has argued that this was not a ground taken in the written
 DRA MITTAR grounds of appeal. We thought however that it was a fair and reasonable
 ground to take; and if the fact of its not being contained in the petition of
 appeal had been brought to our notice, we certainly should have allowed it
 to be taken. I think this objection therefore has no weight whatever.

We are also asked to remand the case in order that it may be tried whether
 the *challa*, of which the plaintiff complains, interferes with the joint enjoy-
 ment of the premises by the members of the family. No allegation of this
 sort was made in the plaint, and I do not consider that the plaintiff is enti-
 tled to any enquiry of the sort, even if the result of such enquiry could entitle
 the plaintiff a decree. I think therefore that the appeal must be allowed and
 the judgment reversed with costs.

MARKBY, J.—I am of the same opinion. Even if the allegation had been
 made in the plaint that the act complained of was an injury to the common
 enjoyment of the property, still, I have some doubt whether we could have
 remanded the case for an enquiry on that point, because I have difficulty in
 seeing how far, and under what circumstances if at all, a Court can, at the
 instance of one member of the family, interfere in the mode of dealing with
 the family property by one of the members of an undivided family. But it is
 unnecessary to express any final opinion upon that point, because the allega-
 tion not being contained in the plaint there could be no enquiry upon it.

Before Mr Justice Kemp and Mr Justice Glover.

MUSSAMAT KHEDU AND OTHERS (DECREE-HOLDERS,) v. KALU SAHU
 (JUDGMENT-DEBTOR)*

1869
 June 22.

*Suit for realization of Money under a Decree—Interest of Kistibandi—
 Limitation.*

When an agreement is entered into to pay off money due under a decree
 by monthly instalments, each monthly instalment becomes a separate cause of
 action, and limitation applies to each instalment separately.

Messrs. R. E. Twiddle and C. Gregory for appellant.

Baboo Nilmadhab Sen for respondent.

THE facts of the case sufficiently appear in the judgment of

GLOVER, J.—The appellant in this case got a decree against one Ka'u
 Sahu on the 31st of May 1859, and took out execution in October 1860, and

* Miscellaneous Special Appeal, No. 70 of 1869, from a decree of the
 Judge of Gya, dated 20th November 1868, affirming a decree of the Principal
 Sudder Ameen of that district, dated the 18th July 1867.

in the same month came to an arrangement with his debtor by which a kistibandi was executed by the latter. This kistibandi covenanted to pay the decree-holder 11 rupees monthly from Aswin 1263 (1855) to Kartik 1277 (1870), and there was a provision inserted in it that if at any time within that period five consecutive monthly kists remained unpaid, the judgment-creditor should have the power to call upon the debtor to pay up the whole amount due under the kistibandi, and to proceed against any of his property in satisfaction thereof. On the 26th of March 1867, the decree-holder petitioned the Court, stating that of the whole sum due to him under the kistibandi he had only realized 55 rupees, and that he now prayed to take out execution against his judgment-debtor for the balance of the sum due, minus a sum of 451 rupees, which he admitted to be barred by limitation as representing instalments for a period anterior to three years before the institution of the suit. Both the lower Courts held the decree-holder to be barred by limitation. The Judge says that the conditions of the kistibandi not having been complied with, the arrangement made between the parties came to an end, and that the decree then became an ordinary unconditional decree, execution of which, as such, should have been taken out within three years from the date of the last proceeding for its enforcement, that is to say from the date of realization of the last kist, and as that had admittedly not been done, the Judge held the decree-holder to be barred by limitation.

We do not precisely understand how, if the Judge supposes that the arrangement made between the parties had come to an end, and if the original decree became the only instrument under which the decree-holder could proceed the last proceeding could date from the last kist paid, as that kist was not paid under the original decree but under the arrangement entered into under the kistibandi. With reference however to his finding we do not think that this suit can be barred by limitation. The words of the kistibandi are not imperative but permissive: they do not say that supposing five consecutive instalments not to be paid, the decree-holder should recover his money there and there from the judgment-debtor. It does not say that he is restricted to this particular remedy and does not take away from him the right of receiving, if he chose so to receive it, the amount of his debt month by month. It appears to us that under the terms of this kistibandi the decree-holder had a perfect right to elect which of the two courses he should pursue; that he might, if he had chosen, sold up his judgment-debtor at once or kept to the terms of the deed and received payment month by month, and if this be so, it is clear that the non-payment of the instalment under the kistibandi was a constantly recurring cause of action; that every month the decree-holder would have a fresh claim on his debtor for the instalment due, and that he can now in execution recover so many of these instalments as come within the period of three years preceding his application. The same principle is laid down in a judgment of this Court in *Girdhari Singh v. Lala Kunwar* (1).

(1) Mis. App. No. 248 of 1865; July 28th, 1866.

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MUSSAMAT,
KHEDU
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MUSAMAT
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v.
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It is contended by the pleader for the respondent that the Courts below had no jurisdiction in this case, and that before execution could have been taken out upon the kistibandi, it was necessary to bring a suit on the kistibandi, and that without such a suit the decree-holder had no right to recover. We do not feel inclined to allow this objection to be taken, inasmuch as it was never a part of the judgment-debtor's case at any stage of the proceedings in either of the Courts below. On the contrary, the judgment-debtor's case was that, assuming the kistibandi to be a proper ground on which to bring an application for execution of decree, the decree-holder's remedy was barred, he not having brought it within proper time; and we are the less inclined to allow this objection now, inasmuch as all the equities in the case are in favour of the decree-holder. The judgment-debtor has had great indulgence shown him; instead of having his property sold up at once in satisfaction of the debt, he has had time and opportunities given him for paying it off, and has moreover received, in consequence of the neglect of the decree-holder in bringing his suit before, the advantage of being released from payment of a sum of 451 rupees which he was clearly bound to pay, but which he cannot now be made to pay by reason of the Statute of Limitation.

The case of *Harro Nath Roy v. Maherulloh Mollah* (1), which has been brought to our notice by the pleader for the special respondent, appears to us to have nothing in common with this suit. In that case there was no fresh agreement, and the suit was on the original instalment-bond whilst in this case the kistibandi was a fresh arrangement making fresh terms and creating fresh liabilities.

We think therefore that the decree of the lower Court is erroneous, and should be reversed with costs, and that the decree-holder should be allowed to take out execution in the usual way.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

1869
June 28.

SRIMATI SAUDAMINI DASI, MOTHER AND GUARDIAN OF SHAMA CHARAN MITTER (ONE OF THE DEFENDANTS) v. SRIMATI THAKOMANI DEBI (PLAINTIFF).*

Suit for Money paid as Rent—Jurisdiction of Civil Court.

The plaintiff sued to recover money, which she had paid as rent to the zemindar under a decree of the Revenue Court, after she had already paid her rent to his Gomasta.

Held, that the suit was not cognizable by the Civil Court.

Baboos *Ashutash Chatterjee* and *Ashutosh Dhar* for appellant.

Baboos *Gopinath Mookerjee* and *Hem Chandra Banerjee* for respondent.

* Special Appeal, No. 3325 of 1868, from a decree of the 1st Subordinate Judge of Hooghly, dated the 27th November 1868, reversing the decree of the Moonsiff of that district, dated the 23rd of July 1868.

(1) Reference from the Small Cause Court of Kooshtea, January 8th, 1867.