1877.

NA'NA' BIN LAKSHMAN v. ANANT BA'BA'JI.

noticed in the mortgage, be taken into account more than any subsequent interest receivable by the mortgagee? If the mortgagee be not entitled to interest under the mortgage, and the stipulation be that, in lieu thereof, he is to enter into occupation of the land and to cultivate it, and retain the profits arising from the cultivation, how, at the date of the contract, could the actual value of the mortgage to the mortgagee be ascertained? These are amongst the grounds upon which rests the practice, which has uniformly prevailed here, of estimating the value of a mortgage as well under Act XVI. of 1864, Act XX. of 1866, and Act VIII. of 1871 by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. Had we put a different construction on section 13 of Act XVI. of 1864, section 17 of Act XX. of 1866, or section 17 of Act VIII. of 1871, we should, we think, have converted those enactments into so many traps for the unwary, which could not have been the intention of the Indian Legislature. The words "or in future," which occur in the two last-mentioned enactments, have reference, as we think, to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property. For these reasons we must affirm the decree of the District Judge.

Decree affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

October 2.

DULSOOK RATTANCHAND (PLAINTIFF) *v.* CHUGON NARRUN AND ANOTHER (DEFENDANTS).*

Limitation Act IX. of 1871, *Schedule II., Articles* 75 *and* 167—*Decrees payable by instalments—Limitation Act XV. of* 1877, *Schedule II., Article* 179, *Clause* 6.

A decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

* Small Cause Court Reference No. 101 of 1877.

1877.

DULSOOK RATTAN-CHAND v. CHUGON NARRUN.

The payment of instalments subsequent to default in payment of the first instalment at the date specified, does not give the judgment-creditor a fresh starting point.

THIS case was referred for the opinion of the High Court by Cursetji Manekji, Judge of the Court of Small Causes at Ahmedabad, with the following observations :—

"In the above suit a decree was made in favor of the plaintiff, on the 14th June 1873, for Rs. 123, including costs, and payable by yearly instalments of Rs. 20-8, with a proviso that in case default were made in the payment of any one instalment then the whole amount of the decree should become payable at once.

"The first instalment fell due on the 14th June 1874, but default was made in payment of the same. The second instalment was, however, paid into Court on the 2nd April 1875, and the third instalment on 13th March 1876. Plaintiff has now applied for execution of the whole decree. His application is dated 23rd June 1877, and the question is—whether this application is not barred ?

"My opinion is, that it is barred, as not having been made within three years from the 14th June 1874. On that date the first instalment fell due, and default being made in payment of the same, the entire liability under the decree, by its express terms, became enforceable on that day. The decree became as one no longer payable by instalments. That was the intended effect of the proviso as to default, and the 14th June 1874 must thus be deemed to be the date within three years of which the judgment-creditor was clearly bound to have applied for execution. The time began to run against him from the above date ; and his present application, not made till the 23rd June 1877, must be held as barred. (See *Tiluck Chunder Gooho* v. *Gour Monee Debee*.[1])

"The head-note of the case, just quoted, does not correctly state the point decided. The decree there (as in this case) was made payable by instalments, with the usual proviso as to default. The Judges decided that the right to recover on the whole decree accrued to the judgment-creditor on the day that the instalment became due and default was made in payment of the same. The

(1) 6 Calc. W. R. 92 Misc. Rul.

1877.

DULSOOK RATTAN-CHAND v. CHUGON NARRUN

Judges appear to have gone further, and to have decided, that, even if there had been no condition in the decree that execution might issue for the whole sum on failure to pay any one instalment, the latter instalments that were within time, could not have been realized. This case has been dissented from by Tucker and Gibbs, JJ., in *Utámrám Mánikrám* v. *Girdharlál Motirám*; (1) but I respectfully submit that it is the latter portion of that judgment that has been dissented from and not the former.

"The provisions of section 23, Indian Limitation Act, 1871, apply to decrees such as the one in question here. (See *Rughoonáth Doss Cookman* v. *Rúnee Shiromonee.*(2))

"The payment of the subsequent instalment, I submit, does not operate to take the case out of the provisions of article 167, schedule II., Act IX. of 1871. Part payment on account of a decree does not give it any fresh starting point, unless the same has been recovered by some process of execution. The Limitation Act of 1871 is silent on the point. Section 21 of the same clearly does not apply to decrees. Article 167, whilst it provides a fresh starting point in certain cases, does not provide for the case of part payments made either through the Court or otherwise, and the rule *expressio unius exclusio alterius* would accordingly apply. The new Limitation Act (XV. of 1877), which comes into force from the 1st October next, makes no difference on this point.

"The judgment creditor's vakil contends that the proviso as to default was conceded in favour of his client, and that he was at liberty to waive the benefit of it. I am unable to concur in this view, and have not been able to find any authority in support of it. Though this may be so in case of contract, the case of a decree is not analogous. I would submit that a decree once made, leaves the judgment-creditor applying for execution, no option to extend its terms, or to consent to take satisfaction otherwise than as provided therein. (See judgment of Peacock, C.J., in *Kristo Komul Singh* v. *Huree Sirdár.*(3))

(1) 6 Bom. H. C. Rep. 45 A. C. J. (2) 24 Calc. W. R. 20 Civ. Rul.
(3) 13 Calc. W. R 44 F. B.

1877.

DULSOOK RATTAN-CHAND v. CHUGON NARRUN.

"For these reasons I have rejected the application as barred; but as the question is a novel one, and of frequent occurrence, I think it desirable to refer the same for the opinion of the Honorable the High Court."

No counsel or pleader appeared on either side.

WESTROPP, C.J.:—A decree of the 14th June 1873 for Rs. 123 was made payable by annual instalments of Rs. 20-8, with a proviso that, on default of payment of any one instalment, the whole amount of the decree should become payable forthwith. The first instalment fell due, but was not paid until subsequently to the 14th June 1874. The second instalment was paid into Court on the 2nd April 1875, and the third instalment on the 13th March 1876. The plaintiff on the 23rd June 1877, applied for execution for the whole of the residue of the amount decreed. The Judge of the Court of Small Causes at Ahmedabad has referred to this Court the question whether the right to such execution is barred by the law of limitation (Act IX. of 1871), and has expressed his own opinion to be in the affirmative. In that opinion we concur. We think that the whole amount decreed, became due on the first default in payment of the instalments, viz. on the 14th June 1874, so that three years and nine days had elapsed when the plaintiff made his present application for execution. The Full Bench case of *Gumná Dambershet* v. *Bhiku Haribá*[1] was decided upon the Limitation Act XIV. of 1859. The principles, however, on which that case was decided, apply in this case. There is not in the last clause of article 167 of schedule II. of Act IX. of 1871, which clause relates to decrees payable by instalments, any provision similar to that in article 75 of the same schedule with respect to promissory notes or bonds payable by instalments; where such notes or bonds provide that, if default be made in payment of one instalment, the whole shall be due, fixing that the period of limitation shall begin to run from the time of the first default, unless where the obligee waives the benefit of the provision, and then when fresh default is made. Nor does there appear to be in the new Limitation Act XV. of 1877, schedule II., article 179, clause 6, relating to decrees payable by instalments, any such provision.

(1) I. L. R. 1 Bom. 125.

1877.

DULSOOK RATTAN-CHAND v. CHUGON NARRUN

The first question of the learned Judge—viz. whether a decree, payable by instalments with proviso as aforesaid, is barred, if application for execution of the same be not made within three years from the date on which any one instalment fell due and was not paid—must be answered in the affirmative; and his second question, as to whether the payment of instalments subsequent to default in payment of the first instalment at the date specified, gives to the judgment-creditor a fresh starting point, must be answered in the negative.

Order affirmed.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.

November 21. KABIR VALAD RA'MJAN (ORIGINAL PLAINTIFF), APPELLANT *v.* MA'HA'DU VALAD SHIWA'JI, A MINOR, BY HIS ADMINISTRATOR PURSHOTUM NA'RA'YEN (ORIGINAL DEFENDANT), RESPONDNET.*

Suit to recover costs of proceedings under Act XX. of 1864.

An action brought to recover costs of proceedings held under Act XX. of 1864 is not maintainable when the Court, before which such proceedings were taken, has made no order as to the payment of such costs.

THE following question was submitted for the opinion of the High Court, by Prabhákar Vithal Gupté, Second Class Subordinate Judge at Jalgaon, in the district of Khandesh, under the provision of section 22 of Act XI. of 1865:—

"Whether, or not, an action for the recovery of costs incurred in obtaining a certificate of administration to the estate of a minor, under Act XX. of 1864, is maintainable, when the Court granting the certificate has passed no order as to the payment of such costs.

"It appeared that the plaintiff, in 1873, brought a suit against the minor defendant on a bond which had been executed to him (plaintiff) by deceased Rámji; and that there being then no administrator to the minor's estate, which was worth more than Rs. 250, the plaintiff, in order that he might proceed with the suit, applied to the District Judge at Dhulia to appoint an admi-

* Small Cause Court Reference No. 100 of 1877.