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portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplate that when a set-back is determined upon compensation shall be paid to the owner. The case is very similar to *Queen-Empress v. Veeramimal*⁽¹⁾. We think that the plaintiff is entitled to the relief which she prays, namely, an injunction restraining the defendants from pulling down the building, or any portion thereof, or from putting in force their notice of the 12th of September 1911. The defendants must pay the costs throughout. The decree of the lower appellate Court is set aside.

Decree set aside.

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⁽¹⁾ (1892) 16 Mad. 230.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

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March 6.

MANILAL POPATLAL HEIR OF DECEASED SHAH CHHAGANLAL (ORIGINAL PETITIONER AND DECREE-HOLDER), APPELLANT, v. KHODABHAI SARTANSANG AND ANOTHER (ORIGINAL OPPONENTS AND JUDGMENT-DEBTORS), RESPONDENTS.*

The Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), section 29 and section 29B (1), (2), (3) and 29E†—Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants

* Second Appeal No. 342 of 1912.

† Section 29 and section 29B (1), (2), (3) and 29E of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) are as follows :—

29. (1) When any talukdari estate is taken under management by Government officers under any of the three last preceding sections, the provisions of section 160 of the Bombay Land Revenue Code, 1879, shall be applicable thereto.

(2)	*	*	*	*	*	*
(3)	*	*	*	*	*	*

—Proceedings up to second appeal—Intermediate notification by the said Officer calling upon claimants to submit their claims within six months—Plaintiff's non-compliance with the notification—Plaintiff's application to the said Officer for a certificate to execute the decree—Refusal of the application—Inability to comply with the notice—The word "inability" not confined to physical inability of the claimant.

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29B. (1) Where any talukdari estate has been taken under management by Government officers under section 26 or 28, the managing officer may publish in the *Bombay Government Gazette*, and in such other manner as the Governor in Council may by general or special order direct, a notice, in English and also in the vernacular, calling upon all persons having claims against such talukdar or his property to submit the same in writing to him within six months from the date of the publication of the notice.

(2) Where the managing officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein; but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission.

(3) Every claim against such talukdar or his property (other than a claim on the part of Government) not submitted to the managing officer in compliance with the notice published under sub-section (1), or allowed to be submitted under sub-section (2), shall, save in the cases provided for by section 29E, sub-section (2), clause (c), and by sections 7 and 13 of the Indian Limitation Act, 1877, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged, unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1).

29E. (1) On the publication of a notice under section 29B, sub-section (1), no proceeding in execution of any decree against the talukdar whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted, or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree.

(2) Any person holding a decree against such talukdar or his property shall be entitled to receive from the managing officer, free of cost, the certificate required by sub-section (1).

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In 1904 the plaintiff sued the defendants, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. The first Court held the mortgage to be invalid under the provisions of the Gujarát Talukdars' Act (Bom. Act VI of 1888) and granted to the plaintiff a personal decree. On the 27th September 1905 the plaintiff appealed to the District Court against the said decree and a notice of the appeal was issued to the Talukdari Settlement Officer. On the 21st November following the Talukdari Settlement Officer took over the management of the defendants' estate. The notice of the appeal was served on that Officer on the 24th of the same month. On the 28th December 1905 the Talukdari Settlement Officer issued a notification under section 29B of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) calling upon claimants to submit their claims within six months of the date of the notification. On the 14th March 1906 the District Court decided the plaintiff's appeal and modified the decree of the first Court by holding that the plaintiff had a valid mortgage upon the property of the defendants. On the 16th of the same month a copy of the appellate decree was sent to the Talukdari Settlement Officer on the application of his office. In July 1906, that is, after the expiry of the period of six months given under the notification of the 28th December 1905, the Talukdari Settlement Officer as representing the defendants preferred a second appeal to the High Court against the District Court's decree. The second appeal having failed in August 1907, the plaintiff applied to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree and he was informed in reply on the 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of the said notification, his claim was deemed to have been duly discharged and no certificate could be granted to him. One month after the date of the receipt of the said reply, the plaintiff applied for execution and both the lower Courts dismissed his application for execution on the ground that the want of a certificate under section 29E of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was a valid bar to the execution.

On second appeal by the plaintiff,

Held, that the word "unable" in section 29B of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was not confined to physical inability on the part of the claimant, that the plaintiff was unable to put forward his real claim at the date of the notification and at the date of the notice he was unable to comply with it within the meaning of section 29B (3) of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), and that the inability of the plaintiff having continued during the period of the six months from the date of the notification, the plaintiff was not barred by section 29B from prosecuting the proceedings in Court.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the order passed by P. C. Desai, Subordinate Judge of Dhandhuka, in an execution proceeding.

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The facts were as follows :—

Chudasa Sartansang Bawabhai, a Garasia of Gujarat, had a mortgage lien over a certain field which was the property of Bhimji Sajabhai and others. He mortgaged the said lien to Shah Chhaganlal Kishordas for Rs. 1,400 under a registered deed dated the 27th October 1898. In the year 1904 Shah Chhaganlal brought a suit, No. 284 of 1904, in the Court of the Subordinate Judge of Dhandhuka against the legal representatives of his mortgagor Sartansang, deceased, to recover Rs. 2,360 due under the mortgage. Some of the defendants being minors, they were represented in the suit by the Talukdari Settlement Officer of Gujarat. The Subordinate Judge found that the mortgage was invalid under the provisions of the Gujarat Talukdars' Act and on the 24th August 1905 passed a decree against the defendants personally.

On the 27th September 1905 the plaintiff appealed to the District Court. Notice of the appeal was served on the Talukdari Settlement Officer on the 24th November following as that Officer had, on the 21st November, taken over the management of the defendants' estate under the Gujarat Talukdars' Act.

On the 28th November 1905 the Talukdari Settlement Officer issued a notification under section 29B of the Gujarat Talukdars' Act Amendment Act, calling upon the claimants to submit their claims to him within six months of the date of the said notification.

The plaintiff's appeal to the District Court was decided by that Court on the 16th March 1906. The District Court modified the decree of the first Court and

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held that the plaintiff had a valid mortgage on the defendants' property.

The Talukdari Settlement Officer preferred a second appeal to the High Court and the said second appeal failed on the 7th August 1907 : see *Khodabhai v. Chaganlal*⁽¹⁾.

The plaintiff subsequently applied to the Talukdari Settlement Officer for a certificate under section 29E of the Act in order that he may proceed to execute the decree, but that Officer declined to give him the certificate on the ground that as the plaintiff (claimant) did not submit his claim within six months of the date of the notification, the claim was deemed to have been fully discharged.

The plaintiff, thereupon, applied to the Court to execute the decree.

The Subordinate Judge dismissed the application holding that the want of a certificate under section 29E of the Act was a valid bar to execution.

On appeal by the plaintiff the District Judge confirmed the decree on the following ground :—

As I understand the law notice of all claims is to be given within six months. If those claims have not yet been decided on by a tribunal but are then under trial a certified copy of the plaint is to be submitted to the Talukdari Settlement Officer. When the litigation ultimately emerges into a decree the decree-holder cannot execute it during management until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted or until one month from the date of receipt by the managing officer of a written application for such a certificate. If this latter part applies to decrees passed pending management the decree claim can only refer to the claim made under section 29C. Otherwise in view of the length of time which litigation ordinarily takes it would be impossible for the claimant to submit his decree claim within six months of the notification. The word "unable" in section 29B would as the lower Court thinks be not very apt if it was intended to cover the impossibility of making a non-existent^a claim.

(1) (1907) 9 Bom. L. R. 1122.

Plaintiff preferred a second appeal, and having died pending the appeal his heir was brought on the record.

Inverarity with *M. K. Mehta* and *N. K. Mehta* for the appellant (heir-plaintiff):—Our first point is that we were “unable” to submit our claim within six months of the notice within the meaning of section 29B (3) of the Gujarat Talukdars’ Act under the circumstances of the present case, the “inability” under the section being not confined to “physical inability” only. The Talukdari Settlement Officer had, as guardian of the defendants, denied our mortgage claim and the first Court also had disallowed our claim. So at the time of the notification we could not have submitted our claim.

Secondly, we say that as the Talukdari Settlement Officer had appeared throughout the litigation as guardian of the defendants, he was kept fully informed of our claim and it was not open for him to say that he had no notice of the claim.

But if, even under the circumstances of the case, the submission was necessary, we submit that the notice issued by the appellate Court should be taken as such a submission of the claim : *Purushottam v. Rajbai*⁽¹⁾.

Further, the decree of the appellate Court allowing our claim was passed on the 14th March 1906 and a certified copy of the said decree was sent on to the Talukdari Settlement Officer by the Court on an application on his behalf on the 16th of that month; that is, within six months of the notification. That was a sufficient submission of our claim.

Lastly, we say that if our claim had been duly discharged, why should the Talukdari Settlement Officer as guardian of the defendants have filed a second appeal in the High Court against the decree of the District Court in appeal allowing our claim.

(1) (1909) 34 Bom. 142.

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G. S. Mulgavkar for respondents (defendants) :—The language of the Act is quite explicit. Section 29B requires that all claims must be submitted within six months from the date of the publication of the notice.

The plaintiff had not satisfied the Court that he was unable to submit his claim within six months.

Simply because of the litigation going on between the plaintiff and defendants, it could not be said that the plaintiff was unable to submit his claim under section 29C (2). He could have produced a certified copy of the plaint in support of his claim.

SCOTT, C. J. :—In the year 1904 the plaintiff Chhaganlal Kishordas sued the respondents, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. In 1905 the Subordinate Judge granted him a personal decree only for Rs. 2,360 and costs, but the mortgage was held to be invalid under the provisions of the Gujarat Talukdars' Act. On the 27th of September 1905 the plaintiff filed an appeal. On the 21st November 1905 the Talukdari Settlement Officer took over the management of the estate under the Gujarat Talukdars' Act. On the 24th of the same month notice of the plaintiff's appeal was given to the Talukdari Settlement Officer, and on the 28th of December that Officer issued a notification under section 29B of the Gujarat Talukdars' Act calling upon claimants to submit their claims within six months of the date of the notification. On the 14th of March 1906 the District Court decided the appeal in favour of the plaintiff, holding that he had a valid mortgage upon the property of the defendants, and on the 16th of that month on the application of the office of the Talukdari Settlement Officer a copy of the District Court's decree was sent to him. Then in July after the period of six months from the date of the notification had expired,

the Talukdari Settlement Officer, as representing the defendants, appealed against the District Court's decree. That appeal failed. The plaintiff thereafter applied under section 29E of the Gujarat Talukdars' Act to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree. He received a reply on the 12th of August 1908 that as he had not submitted his claim within six months of the date of the publication of notice under section 29B his claim was deemed to have been fully discharged, and therefore his request for the grant of a certificate would not be complied with. After one month from the date of the receipt of that reply the plaintiff has applied to the Court for execution.

The Talukdari Settlement Officer relies upon the provisions of section 29B (3) that "Every claim . . . not submitted . . . in compliance with the notice . . . shall, save" in certain cases, "be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged". That provision, however, is subject to an exception stated in the same section in these words:—"unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1)."

We have now before us a proceeding in execution instituted by the claimant, and the question is whether he has proved to the satisfaction of the Court that he was unable to comply with the notice of the 28th December 1905? The learned Subordinate Judge was of opinion that the inability must be some physical inability on the part of the claimant. If that is so, it is difficult to understand why physical inability should be an excuse where a suit has been instituted and not an excuse

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where a suit has not been instituted. We are, therefore, of opinion that the word "unable" is not confined to physical inability on the part of the claimant.

Now, at the time of the notice on the 28th December 1905 what was the claimant's position? He had asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property belonging to the defendants, who were represented by the Talukdari Settlement Officer, and whose property on the 21st of November passed under the management of that Officer under the Gujarat Talukdars' Act. His claim had been negatived in the Subordinate Judge's Court, but he had appealed to the District Court and that appeal did not come on for hearing until some months after the notification under section 29B. How then could he advance his real claim at the date of the notification? The first Court had held that the claim, which he contended he was entitled to put forward, was an invalid claim. But he did not accept that decision. But if he had put forward his mortgage claim before the Talukdari Settlement Officer, that Officer would have at once met him by the decree in which he had only been granted a decree for money and costs. We think, therefore, that he was unable to put forward his real claim at the date of the notification, and at the date of the notice he was unable to comply with it within the meaning of section 29B (3). The period allowed to the Talukdari Settlement Officer for appealing against the decree of the District Court enabled that Officer to keep the matter of the finality of the District Court's decree *in dubio* until after the expiration of six months from the date of the notification, and then when that period had elapsed he filed an appeal to the High Court. Under these circumstances we think that the inability of the claimant continued during that six months. We, therefore, decide the case against the Talukdari Settle-

ment Officer without taking into consideration the injustice of the contention that he has received no notice when he was actually a litigating party in the proceeding in which the claim was finally settled. If the claim had been duly discharged under section 29B (3) it is difficult to understand why the Talukdari Settlement Officer took the trouble to appeal to the High Court. The plaintiff must have his costs throughout.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

RAOJI ALIAS BALVANT KESHAV DESHAMUKH AND ANOTHER
(LEGAL REPRESENTATIVES OF ORIGINAL DEFENDANT 1), APPELLANT, v.
KRISHNARAO BIN ANANDRAO AND OTHERS (ORIGINAL PLAINTIFFS AND
DEFENDANT 2).^o

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March 26

Limitation Act (IX of 1908), section 5—Appeal presented beyond time—Provisional admission to file in the absence of respondent—Preliminary objection taken by the respondent at the hearing—Entertainment of the question—Appeal dismissed with all costs—Second appeal.

A time-barred appeal having been provisionally admitted to the file in the absence of the respondent and at the hearing the respondent having taken a preliminary objection that the appeal was presented beyond time, the Court allowed the objection and dismissed the appeal with all costs on the appellant.

On further appeal by the appellant,

Held, that there being no sufficient cause as a matter of law for extending the time under section 5 of the Limitation Act (IX of 1908) there was no objection to the question being entertained after the provisional admission of the appeal to the file in the absence of the respondent.

Held, further, that the appeal against the order dismissing the appeal was a second appeal and not a first appeal because it was an appeal against the decree of an appellate Court.

^o First Appeal No. 184 of 1911.