

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915.

July 19.

MADAPPA GANAPPA HEGDE (ORIGINAL APPLICANT) APPELLANT V.
JAKI GHOSAL GABRI GHOSHAL AND OTHERS (ORIGINAL OPPONENTS)
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, rule 19—Execution of decree—Cross claims under the same decree—Set-off allowed even if one of the claims could not be recovered owing to bar of limitation.

The applicant applied to execute a decree for recovering the amount Rs. 445-8-0 which he was entitled to recover from the opponents as mesne profits. Under the same decree, the opponents were entitled to claim the sum of Rs. 855 as costs from the applicant ; but they were prevented from recovering it as it was barred by limitation. They, however, claimed to set off the amount against the amount sought to be recovered by the applicant. The Subordinate Judge having allowed the set-off, the applicant appealed :—

Held, dismissing the appeal, that the applicant could not be allowed to execute his decree for the smaller sum without reference to the larger sum which the decree awarded to the opponents.

PROCEEDINGS in execution.

The decree under execution was passed on the 31st March 1905. It was a decree for partition.

The interests of plaintiff and defendant No. 1 under the decree were purchased by the applicant, who recovered possession of their shares by partition in June 1912. The decree awarded mesne profits to the applicant's vendors. The applicant applied to recover the mesne profits from November 1900 to July 1912.

The opponents who were the remaining defendants under the decree were entitled to recover Rs. 855-15-1 as costs from the applicant's vendors. But they took no steps to recover the amount in time, and their claim to it became barred by limitation. They, however,

* First Appeal No. 172 of 1914.

sought to set this amount off against the amount claimed by the applicant from them.

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The Subordinate Judge found that the amount of the mesne profits due to the applicant amounted to Rs. 346-2-8. He held that the amount of costs payable to the opponents could be set-off against this amount; and dismissed the applicant's application as there remained nothing due to him under the decree.

The applicant appealed to the High Court.

S. S. Patkar for the appellant:—Under Order VIII, rule 6 of the Civil Procedure Code (Act V of 1908), a person can set off a claim which is “legally recoverable.” Here the claim set off was barred in its recovery by the law of limitation; it was, therefore, not legally recoverable and could not be set off. The right to the amount was extinguished under section 28 of the Limitation Act.

G. S. Mulgaonkar and *Nilkanth Atmaram* for the respondents:—The present case is governed by Order XXI, rule 19. Under the rules the person entitled to the larger amount can apply for execution only in respect of the excess. The word “entitled” in the rule does not mean “capable of execution” or “legally recoverable.” Rule 18 provides for the execution of cross decrees. The fact that a claim is barred does not prevent the claim to be set off: *Zumurudoonissa v. Radha Churn Ghuttuck*.⁽¹⁾ Section 28 of the Limitation Act bars the remedy but does not extinguish the remedy: *Nursing Doyal v. Hurryhur Saha*⁽²⁾; *Mohesh Lal v. Busunt Kumaree*.⁽³⁾ Law recognizes title to barred debts: sections 60 and 61 of the Contract Act. They can form a good consideration to contracts: section 25, clause 3 of the Contract Act.

⁽¹⁾ (1868) 9 W. R. 590.

⁽²⁾ (1880) 5 Cal. 897.

⁽³⁾ (1880) 6 Cal. 340.

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Patkar, in reply.

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BATCHELOR, J. :—This is an appeal in execution and the appellant was the original applicant for execution. He is the purchaser of the interest of the plaintiff and the 2nd defendant in Suit No. 74 of 1902 which was a partition suit. On the 31st March 1905 a decree was made in the suit, and the present application is for mesne profits owing under that decree from the 19th December 1900.

The lower Court has found that the mesne profits due amount to Rs. 346-2-8, but admittedly that calculation is incorrect, and the exact sum due for mesne profits would be Rs. 445-8-0. On the other hand, under the same decree the respondents were entitled to costs which, as has now been ascertained, amounted to Rs. 855.

The case, therefore, appears to be one for the application of the rule enacted in Order XXI, rule 19. For, this application is made for the execution of the decree under which two parties are entitled to recover sums of money from each other. The sums being unequal, clause (b) of the rule provides that "execution may be taken out only by the party entitled to the larger sum, and for so much only as remains after deducting the smaller sum." It would follow from this provision that the appellant, who under the decree is entitled only to the smaller sum, has no right to apply for execution of the decree. But it is answered the appellant has that right, because the respondents' claim to their costs is barred by limitation. It is admitted that if the respondents' claim to their costs is to be considered as a separate claim apart from the other provisions of the decree, then it is barred under article 182 of the Indian Limitation Act. But it is not the fact that the respondents here are seeking to execute

the decree in respect of their claim for costs. They are merely using those provisions of the decree to resist the application made by the other side, and I am of opinion that they are entitled to rely upon the decree for that purpose. For, as I read the rule, it contemplates that the decree should be regarded as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined. Though the respondents would be barred by limitation from recovering the larger sum awarded to them under the decree, that circumstance cannot, I think, avail to enable the appellant to take out execution in a manner expressly forbidden by the Rule. On this ground, I think, that the appellant's attempt to execute his decree for the smaller sum, without reference to the larger sum which the decree awards to his adversary, must fail.

This is the only point involved in the appeal, though it was suggested by the appellant that there should be a direction to the Court to take further evidence as to the profits of the higher level *Badiaverg* land. In my opinion, however, no case has been made out which would justify us in allowing the appellant, who was the original applicant, to reinforce the evidence which he elected to give before the lower Court.

The appeal should, therefore, in my judgment, be dismissed with costs.

HAYWARD, J. :—I concur. The appellants were entitled to mesne profits which were found upon calculation to be the smaller sum recoverable by either of the parties. that sum must, therefore, be taken to have been entered as satisfied under the provision "satisfac-

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tion for the smaller sum shall be entered on the decree" contained in Order XXI, rule 19 (b). The respondents were entitled, on the other hand, to the larger sum, consisting of their costs, but were only entitled to recover "so much only as remains after deducting the smaller sum" as prescribed in the said order. The respondents, therefore, were the only parties entitled to take out execution at all and that execution could only be for the balance "after deducting the smaller sum." It cannot, therefore, be said that recovery of the part of their costs set off against that smaller sum was time-barred, because no application could have been made in respect of that part at all. But it can be said that recovery of the balance would be time-barred under the ordinary rule of limitation applicable to the execution of decrees. In fact it has been admitted that recovery of the balance would be time-barred under article 182 of the schedule to the Indian Limitation Act.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

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NAZARALLI SAYAD IMAM (ORIGINAL PLAINTIFF) APPELLANT v
BABAMIYA DUREYATIMSHA (ORIGINAL DEFENDANT) RESPONDENT.^o

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*Indian Contract Act (IX of 1872), section 23—Forest Act (VII of 1873)—
License—Agreement to enter into partnership contravening the terms of
the license—Agreement not unlawful.*

^o Second Appeal No. 836 of 1914.