

of the two mortgages. That is not the case here. We have before us a usufructuary mortgage which does not give the mortgagee a right to sell. So long as that mortgage exists, the property included in the subsequent mortgages, which is also comprised in the prior mortgage, cannot be sold subject to that mortgage. It might be sold free from that mortgage if the mortgage had been abandoned. But it cannot be sold, as we have already said, for the realization of the amount of the prior mortgage or subject to that mortgage. Consequently it cannot be sold, as has been rightly held by the Court below, for the recovery of the amount of the subsequent mortgages also. We think there is no force in this appeal, and accordingly dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

KASUMRI (JUDGMENT-DEBTOR) v. BENI PRASAD AND ANOTHER
(DECREE-HOLDERS).*

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Civil Procedure Code, section 37—Execution of decree—Limitation—Application to certify payment out of Court—Application signed by general attorney, decree-holder being within the jurisdiction—"Recognized agent."

Held that an application under section 253 of the Code of Civil Procedure to certify an adjustment of a decree made out of Court, although an application to the Court to take a step in aid of execution of the decree, is not an application made in accordance with law, if it is made by the general attorney of the decree-holder at a time when the decree-holder himself is residing within the jurisdiction of the Court executing the decree. *Murari Lal v. Umrao Singh* (1) referred to. *Lachman Bibi v. Patni Ram* (2) distinguished.

THIS was an appeal arising out of proceedings in execution of a decree. The decree was obtained on the 5th of February 1896. The decree-holders applied for execution on the following day, but their application was dismissed for default on the 23rd of May 1896. On the 3rd of February 1899, an application was made to the executing Court purporting to be under the first clause of section 253 of the Code of Civil Procedure certifying a payment made by the judgment-debtor towards satisfaction

* Second Appeal No. 1010 of 1901, from a decree of Pandit Girraj Kishore Datt, Officiating Subordinate Judge of Saharanpur, dated the 31st of July, 1901, confirming an order of Babu Krishn Sewak Lal, Munsif of Deoband, dated the 16th of March, 1901.

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of the decree. This payment was not certified by either of the decree-holders, but by one Dalip Singh, describing himself as Mukhtar-am and brother of one of the decree-holders, Mulraj. After this, on the 1st of February 1901, another application for execution was filed. The judgment-debtor pleaded that this application was time-barred, but the Court of first instance (Munsif of Deoband) held that limitation was saved by the application of the 3rd of February 1899, and on appeal by the decree-holders the lower appellate Court (Officiating Subordinate Judge) upheld the order of the Munsif. The judgment-debtor thereupon appealed to the High Court, urging that the application of the 3rd of February 1899 was not an application according to law, not having been signed by a person who was a "recognised agent" of the decree-holders within the meaning of section 37 of the Code of Civil Procedure.

Babu *Satish Chandra Banerji*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondents.

AIKMAN, J.—This is a judgment-debtor's appeal. On the 5th of February, 1896, a decree was passed in favour of the respondents. They applied for execution on the following day, but their application was dismissed for default on the 23rd of May, 1896. The present application to execute was filed on the 1st of February, 1901. The judgment-debtor pleaded that it had become time-barred. The Courts below have held that limitation in this case was saved by an application made on the 3rd of February, 1899, purporting to be under the first clause of section 258 of the Code of Civil Procedure certifying a payment by the judgment-debtor towards the decree. This payment was certified, not by either of the decree-holders, but by one Dalip Singh, describing himself as a mukhtar-am and brother of the decree-holder, Mulraj. For the appellant it is contended that this was not an application according to law.

This Court, following the Calcutta High Court, has held that an application by a decree-holder under the first paragraph of section 258 certifying whole or partial adjustment of the decree is a step in aid of execution. But it must be noted that the paragraph provides that it is the decree-holder who has to certify the adjustment.

Section 36 of the Code of Civil Procedure provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or duly appointed pleader. Section 37 defines who are to be considered the recognised agents of parties for the purpose of section 36. Amongst those recognised agents are persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court. In this case it is admitted that Mulraj, decree-holder, was residing within the local limits of the Court's jurisdiction, and Dalip Singh consequently was not a recognised agent within the meaning of clause (a) of section 37. It is not contended that he comes within any of the other clauses. The learned vakil for the appellant contends, therefore, that the application which is relied on by the Courts below as saving limitation was not an application in accordance with law, and in support of this contention he relies on the decision of this Court in *Murari Lal v. Umrao Singh* (1). In my opinion that decision fully supports the appellant's contention. The learned vakil who appears for the respondent relies on the decision in *Lachman Bibi v. Patni Ram* (2). In my opinion the facts set forth in that case differentiate it from the present case. I allow the appeal, and, setting aside the order of the lower Courts, dismiss the application for execution as barred by time. The appellant will have his costs in all Courts.

Appeal decreed.

(1) (1901) I. L. R., 23 All., 499.

(2) (1877) I. L. R., 1 All., 510.