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January, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

CHATTAR SINGH (DECREE-HOLDER) *v.* AMIR SINGH (JUDGEMENT-DEBTOR).*

Civil Procedure Code (1908), *order XXI, rule 2—Execution of decree—Decree payable by instalments—Payment of instalments not certified—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 182 (7).

The effect of order XXI, rule 2, is that a payment made on account of a decree and not certified to the court executing the decree cannot be recognized by that court for any purpose. Where, therefore, payments had been made towards liquidation of an instalment decree, but such payments were not certified to the court executing the decree, it was *held* that limitation ran against the decree-holder from the date upon which the first instalment was due.

"Certified and recorded" within the meaning of order XXI, rule 2, signify that the executing court being satisfied by either the decree-holder or the judgement-debtors that a certain payment has been made in respect of "decree has recorded the fact on the execution file. *Gokul Chand* v. *Bhika* (1) and *Bhajan Lal* v. *Cheda Lal* (2) referred to. *Lakhi Narain Ganguli* v. *Felamani Dasi* (3) dissented from.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows:—

"This appeal arises out of an application made on the 12th of November, 1913, for execution of a decree, dated the 10th of May, 1909. The decree was for a considerable sum of money to be paid in certain instalments. The first instalment amounting to Rs. 124 was to be paid at the end of *Aghan*, Sambat 1966, corresponding with the 26th of December, 1909. The second instalment amounting to Rs. 62 was to be paid at the end of *Jeth*, Sambat 1967. Subsequent instalments of Rs. 62 each were to be paid at the end of *Aghan* and at the end of *Jeth*, till the whole decree was satisfied. In case of default the whole was to become payable at once. The decree-holders in their application of the 12th of November, 1913, stated that they had received the first four instalments, but that there had been a default in payment of the instalment due at the end of *Aghan*, Sambat 1968, and they therefore claimed the whole amount remaining due under the decree. Payment of the first four instalments was not certified to the court or recorded by the court and therefore cannot be recognized by any court executing the decree. The learned vakil for the decree-holders relies upon a decision of this Court based upon section 258 of the Code of Civil Procedure, 1882, but the words relied upon by the Court as justifying the view that a court might recognize an uncertified payment for some purposes have now disappeared from the Code, with the result that an uncertified payment cannot

* Appeal No. 65 of 1915, under section 10 of the Letters Patent.

(1) (1914) 12 A. L. J., 387. (2) (1914) 12 A. L. J., 825.

(3) (1914) 20 C. L. J., 131.

be recognized for any purpose, certainly not for the purpose of saving limitation. The decree in question provides in plain terms that if there is default in payment of any instalment, the whole amount of the decree shall become payable. It has been held in a large number of cases that clause (7) in the third column of article 182 of schedule I to the Limitation Act applies to such a provision as this. The only point on which there is any room for doubt is whether the decree directed payment to be made on a certain date. The decree directs that instalments are to be paid on or before the last day of *Aghan* and *Jeth*, and that if there is default, the whole amount shall become payable at once. This appears to me to bring the case within clause (7), and I hold that the application for execution should have been made within three years of the first default. The decree-holders being unable to prove that any instalments have been paid, I must take it that the first default occurred at the end of *Aghan*, Sambat 1966. Therefore the present application for execution made more than three years after that time is barred by limitation and should have been dismissed. I was referred to a judgement of the Bombay High Court in a case in which the effect of subsequent payment and acceptance of over-due instalments was discussed. It appears to have no bearing on the present case, as it is not suggested that there was acceptance of an over-due instalment or anything in the shape of waiver which would affect the period prescribed by the Limitation Act. I allow this appeal, set aside the order of the court below and dismiss the respondent's application for execution with costs throughout."

The decree-holder appealed.

Babu *Sital Prasad Ghose*, for the appellant:—

Article 182, clause (7), of the Limitation Act does not apply, as the decree under execution did not itself provide for payment of money *on a certain date*. The present case was governed by article 181, and time would begin to run from the date when the right to apply accrued. It was not obligatory on the decree-holder to take out execution after the first default. He might wait and waive the first and subsequent defaults. The right to apply accrued afresh on the each successive default for the amount then due on the decree; *Muhammad Islam* v. *Muhammad Ahsan* (1) and *Shankar Prasad* v. *Jalpa Prasad* (2). Then, again, according to the decree-holder, certain instalments had been paid out of court by the judgement-debtor. It was true that such payments had not been recorded as certified by the court. But an uncertified payment can be proved and given effect to for the purpose of saving limitation. Under the old Code of Civil Procedure this was the settled rule so far as this

(1) (1894) I. L. R., 16 All., 237. (2) (1894) I. L. R., 16 All., 371.

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Court was concerned; *Roshan Singh* v. *Mata Din* (1) and *Badri Narain* v. *Kunj Behari Lal* (2). The altered language of order XXI, rule 2, clause (3), of the Code of Civil Procedure did not touch the point; and could not be taken to nullify the effect of section 20 of the Limitation Act; *Lakhi Narain Ganguli* v. *Felamani Dasi* (3) and *Rajam Aiyar* v. *Anantharatnam Aiyar* (4). Moreover, the statement in the decree-holder's application for execution of decree as to the payment out of court of certain instalments was in substance a sufficient certificate, within the meaning of order XXI, rule 2, clause (1) of the Code of Civil Procedure, of such payment and should have been acted upon by the court. The decree-holder was at liberty to certify after any lapse of time. There was no time limit fixed for the purpose. Article 174 of the Limitation Act only applied to judgement-debtors and not to decree-holders; *Tukaram* v. *Babaji* (5).

Pandit Mohan Lal Sandal, for the respondent, was not called upon.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.—This appeal arises out of an application made by a decree-holder to execute a decree. In the application for execution the decree-holder stated that the decree was payable by instalments and the first four instalments had been paid, but default had been made in the fifth instalment. He accordingly asked for execution of the decree in respect of the balance still remaining due. The decree was an instalment decree, but provided that if default was made in the payment of the instalments the full amount should become due. The judgement-debtor opposed the application on the ground that the application for execution was barred by time. He denied that payments had been made of any instalments. The court of first instance, after setting forth the facts, states as follows:—"The judgement-debtor contests that the application is time-barred inasmuch as under present Act the court cannot recognize any uncertified payments. The decree-holder, on the other hand, says that the terms of the decree are not imperative and that the decree would be within time assuming the payments referred to were not recognized."

(1) (1903) I. L. R., 26 All., 36.
(2) (1913) I. L. R., 35 All., 178.
(3) (1914) 20 C. L. J., 131.
(4) (1915) 29 M. L. J., 669.
(5) (1897) I. L. R., 21 Bom., 122.

The court accepted the contention of the decree-holder and disallowed the objection. On first appeal to the District Judge the decision of the court of first instance was upheld. On second appeal to this Court a learned Judge reversed the decision of the lower courts and dismissed the application as barred by time.

The first question for consideration is whether on the assumption that no payments were ever made the decree-holder is entitled to have execution for the remaining instalments. If the first four instalments had been paid, it is quite clear that the application for execution in respect of the remaining instalments would be well within time. The contention, however, of the judgement-debtor is that assuming default was made in respect of the first instalment, the full amount of the decree became payable and that under the provisions of article 182 (clause 7) the application is barred. The decree-holder, on the other hand, contends that he was entitled, if he so pleased, to waive his claim to the earlier instalments and that he was entitled to get execution in respect of the remaining instalments. This was his contention in the court of first instance, which was accepted by the Munsif. It seems to us that this contention is not sound. Undoubtedly (on the face of the decree) it was directed that payment of the full amount should be made when default was made in the payment of any instalment. Therefore under clause (7) of article 182 time began to run from the date when the first instalment became due (we are dealing now with the case upon the assumption that default was made on that date).

It is next contended that the decree-holder ought to have been allowed to go into evidence to show that the first four instalments had been paid out of court. He says that he had his witnesses ready which could and would have been produced if the Munsif had not expressed an opinion that this was unnecessary and that the judgement-dedtor's objection was bad for other reasons. It is quite possible that the witnesses were present and that the decree-holder might have given evidence as to the payments of the first four instalments. There is, however, nothing on the record to show that the witnesses were present in court. However this may be, the judgement-debtor's objection has still to be considered.

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He relies on the provisions of order XXI, rule 2, which is as follows :—

"Where any money payable under a decree of any kind is paid out of court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly."

Clause (3) is as follows :—

"Payment or adjustment which has not been certified or recorded as aforesaid shall not be recognized by any court executing the decree."

The judgement-debtor contends that, even if the witnesses were present in court ready to give evidence, the court could not hear them, inasmuch as the only way in which a payment towards the decree could have been proved was by its being "certified and recorded" according to the rule. As against this contention the decree-holder says that there is no period prescribed by law within which he could certify the payment made on foot of the decree out of court, and that his application for execution in which he says that payments had been made should have been treated as "certifying." The appellant relies upon the case of *Lakhi Narain Ganguli* v. *Felmani Dasi* (1) and upon the case of *Rajam Aiyar* v. *Anantharatnam Aiyar* (2). In the first of these cases the learned Judges say :—

"The decree was obtained so long ago as the 5th of April, 1909, and the application for execution was made on the 17th of December, 1913. Between these two dates on three occasions, as found by the learned Judge of the court below, the judgement-debtor made part payments to the decree-holder, namely, on the 6th of March, 1911, 18th of March, 1912, and 21st of February, 1913. Receipt of each of these payments was endorsed on the back of an office copy of the decree, and thereupon the decree-holders applied on the 17th of December, 1913, for execution for the balance remaining due under the decree."

Later on the learned Judges say :—

"There is no definition of what "certifying" or "recording" is, but it is quite clear that the practice in this country is that

(1) (1914) 20 C. L. J., 131. (2) (1915) 29 M. L. J., 669.

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the decree-holder certified the part payments in the application for execution and thereupon the court having recorded the whole of the petition directs execution to issue for the balance."

We are not prepared to accept this as the practice in these provinces. In our opinion the practice is that when payments are made in court or out of court there is a record on the execution file showing that the payments have been certified and recorded. It would obviously not be within the spirit of order XXI, rule 2, that "certifying" of the payments on foot of a decree should rest entirely with the decree-holder. He might often be tempted to record on his private copy of the decree a part payment which had in fact never been made. We may assume for the purposes of argument that a decree-holder may at any time come in with an application to the court that he should be at liberty to certify a payment and have it recorded, but in the present case there was no such application made by the decree-holder. He merely came in with an application for execution alleging that certain payments had been made. As to what has been the practice of "certifying" payments, we may refer to the case of *Gokul Chand* v. *Bhika* (1), and also to the case of *Bhajan Lal* v. *Cheda Lal* (2). In our opinion no payment on foot of the decree having been "certified and recorded" within the meaning of order XXI, rule 2, the court was bound to assume that no such payments had been made and it was not entitled to go into evidence as to payment on an application for execution of the decree. In this view the decree of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

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January, 24.

JAMNA DAS (PLAINTIFF) *v.* RAM AUTAR PANDE (DEFENDANT).*

Mortgage—Sale of mortgaged property—Purchase money "left with the purchaser for payment to the mortgagee"—Nature of the transaction—Trust.

Where a mortgagor sells the mortgaged property and, as it is commonly expressed, leaves part of the price with the purchaser for payment to the mortgagee, the transaction is merely one of sale subject to the mortgage. No

* First Appeal No. 12 of 1914, from a decree of I. B. Mundle, Subordinate Judge of Mirzapur, dated the 30th of August, 1913.

(1) (1914) 12 A. L. J., 387. (2) (1914) 12 A. L. J., 825.