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under the conveyance of 1881 and has retained possession ever since in the character of an owner.

On these grounds our answer to the question referred to us for decision is in the affirmative.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.*

1926 *October*, 4.

RAJA SHRI PRAKASH SINGH (JUDGMENT-DEBTOR-APPELLANT) *v.* ALLAHABAD BANK, LIMITED, LUCKNOW BRANCH (DECREE-HOLDER-RESPONDENT).*

*Civil Procedure Code, order XXI, rule 2—Limitation Act (IX of 1908), article 181—Certification of payment by decree-holder under order XXI, rule 2(1) of the Code of Civil Procedure, limitation for—Application, whether necessary with a certificate for payment—Certification by decree-holder under order XXI, rule 2(1), whether an application under article 181 of the Limitation Act.*

*Held*, that neither under the Code of Civil Procedure nor under the Limitation Act (IX of 1908) is there any limitation which compels a decree-holder to certify a payment of adjustment under the provisions of order XXI, rule 2(1) of the Code of Civil Procedure, within any particular time.

*Held*, that under order XXI, rule 2 of the Code of Civil Procedure the position of a decree-holder differs essentially from the position of a judgment-debtor. Under that rule the decree-holder has the right himself to certify the payment or adjustment and the court is obliged to record his certificate and is not permitted to question that certificate and so in recording the certificate the court cannot be said to perform a judicial act. The judgment-debtor on the other hand is directed under the rule to apply to the court to issue a notice to the decree-holder to show cause why the payment or adjust-

* Execution of Decree Appeal No. 31 of 1926, against the order of Mahmud Hasan Khan, Subordinate Judge of Sitapur, dated the 15th of May, 1926.

ment should not be recorded as certified and the court after service of such notice is either to record or not to record the payment, as certified. So the judgment-debtor has to make an application and the court certifies by a judicial act.

*Held further*, that the word "application" when used in article 181 of the Limitation Act means an application *ejusdem generis* in other words an application on which the court has to decide judicially. And as a certification by a decree-holder under order XXI, rule 2(1) of the Code of Civil Procedure, does not raise any point on which a court has to decide judicially that certification is not, in any circumstances, an application within the meaning of article 181. Further, while order XXI, rule 2, part II of the Code of Civil Procedure provides specifically for an application by the judgment-debtor, order XXI, rule 2(1), does not provide for an application by the decree-holder; and rule 168 of the Oudh Civil Digest also provides that a decree-holder may present the certificate without a formal application. Therefore such a certificate cannot be an application within the meaning of article 181. [I.L.R., 46 Calc., 22; I.L.R., 46 All., 635; 21 A.L.J., pp. 387 and 825; I.L.R., 38 All., 204; I.L.R., 47 All., 873; 11 O.L.J., 329; I.L.R., 11 Bom., 6; I.L.R., 21 Bom., 122; I.L.R., 45 Bom., 91 and 21 O.C., 161, referred to.]

Messrs. *P. L. Banerji*, *K. F. Rustomji* and *Niamatullah*, for the appellant.

Messrs. *Bisheshwar Nath Srivastava*, *Chhail Behari Lal* and *Bishambhar Nath Srivastava*, for the respondent.

STUART, C. J., and RAZA, J.:—The Allahabad Bank, Limited, Lucknow Branch, obtained on the 9th of December, 1916, in a suit on a mortgage-deed in the Court of the Subordinate Judge of Sitapur, a consent decree against Raja Debi Bakhsh Singh and his son Shri Prakash Singh. Raja Debi Bakhsh Singh has since died and has been succeeded by Raja Shri Prakash Snigh who is the sole judgment-debtor under the decree. On the 14th of March, 1917, the Bank

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decree-holder certified to the court under the provisions of order XXI, rule 2(1) a partial satisfaction by the judgment-debtor of the decretal amount to the extent of Rs. 40,000. This certificate was recorded by the court. It has not been proved on the record of this appeal but is admitted by the parties.

On the 8th of December, 1924, the Bank decree-holder certified to the court under the provisions of order XXI, rule 2(1) a partial satisfaction by the judgment-debtor of the decretal amount to the extent of Rs. 8,30.316-8. The certificate is proved (exhibit D65). The court recorded the certificate on the same date—the 8th of December, 1924. Its record is proved (exhibit D64). On the 14th of February, 1925, the Bank decree-holder applied for the satisfaction of the balance due under the decree by sale of the property mortgaged. Notice was issued to Raja Shri Prakash Singh, who, on the 23rd of May, 1925, objected to the execution on three grounds: (1) that the application for execution was beyond time and as such must be rejected; (2) that the amount alleged to be due on the decree was not correct, and (3) that the amounts declared in the application to have been paid by the judgment-detor to the decree-holder were not admitted, and could not be taken into account as not being certified.

The learned Subordinate Judge decided the application on the 15th of May, 1926, after taking evidence. He found that the amounts stated by the Bank decree-holder to have been paid in partial satisfaction of the decretal aomunt by the judgment-debtor had been correctly stated, that the amount stated to be due on the decree had been correctly stated by the decree-holder, that the application for execution was within time, and that the amounts previously stated by the decree-holder to have been paid in partial

satisfaction of the decretal amount had been duly certified and recorded. He found that the certification being a good certification the application was within time; but apart from that he found that, even if the certification were not a good certification, limitation was saved by reason of acknowledgements in writing by the judgment-debtor.

Against his decision an appeal was filed in this Court on the 24th of July, 1926. Neither in the trial court nor in appeal has the judgment-detor contested the application on the ground that if it is otherwise within time and correct, execution should not take place by the sale of the mortgaged property. In this Court the judgment-debtor has abandoned the plea that the payments, which the decree-holder has stated were made by the judgment-debtor in partial satisfaction of the decree, have not been correctly stated in the application, and he has further abandoned the plea that the amount stated to be due on the decree has been incorrectly stated. The Bank decree-holder produced in the trial court the Bank's books of account and oral evidence, which established, to the satisfaction of the trial court and which establishes to our satisfaction, that the payments alleged to have been made by the judgment-debtor were actually made, and that the amount due on the decree at the time of the application of the 14th of February, 1925, had been correctly calculated. As the appellant has abandoned contest upon these points, nothing further need be stated in respect of them. We are thus in a position to state our conclusion as to the nature of the decree upon the evidence of fact, which was accepted by the trial court and which is not now disputed. The decree was for Rs. 16,63,293-12-6 and Rs. 3,754 costs. Costs were to be paid within a short period They were so paid. The principal amount carrying

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interest under the terms of the decree was to be paid first by half-yearly instalments falling due on the 30th of April and the 31st of October of each year, Rs. 60,000 in the April instalment and Rs. 80,000 in the October instalment. The judgment-debtors were to pay these instalments half-yearly up to the 30th of April, 1922. On the 31st of October, 1922, the whole of the balance due on the decree was to become realizable, and, if the balance were not paid upon that date, the decree-holder became entitled under the terms of the decree to realize the balance by bringing certain mortgaged property to sale without obtaining a special decree for the purpose. It was enacted, that, so long as the payment of the amounts due on the instalments did not fall into a total arrear of Rs. 60,000, the Bank should be precluded from taking out execution until the 31st of October, 1922, but if the total amount due in respect of payment of instalments came to an arrear of Rs. 60,000, the decree-holder could at once proceed to take out execution by bringing the mortgaged property to sale. In the certificate (exhibit D65) the amounts of realizations from the judgment-debtors are correctly entered, and an examination of the figures therein will show that the learned trial Judge has arrived at a correct conclusion in his finding that the judgment-debtor had not fallen into arrears of as much as Rs. 60,000 on the 31st of October, 1922, and that, therefore, the Bank was not competent to apply to the court for execution until the 31st of October, 1922. As has been already stated the Bank applied for execution upon the 14th of February, 1925. That date is within less than three years from the date upon which the decree-holder's right to execute the decree had commenced.

The position thus taken up by the appellant judgment-debtor is to the effect that, although the

Bank applied for execution within three years of the first date when execution was permitted under the terms of the decree, in view of the circumstance that the judgment-debtor had made sufficient payments in satisfaction of the instalments, the application for the execution is nevertheless time-barred, and the decree-holder is left without remedy in respect of the balance due. His learned Counsel has argued in support of this proposition upon three main points. He has argued that in the first place the court cannot recognize any payments or adjustments after the 14th of March, 1917, on the plea that no certification can be accepted by a court unless it has been made within three years of the date of satisfaction. His second point is that on the date of the second certification—the 8th of December, 1924—the decree had automatically become time-barred, inasmuch as there had been no certification between the 14th of March, 1917, and the 8th of December, 1924. His third point is that the decision of the trial court to the effect, that there had been acknowledgements in writing by the judgment-debtor which saved limitation is incorrect. Upon the first point he relies upon the provisions of article 181 of the first schedule of Act IX of 1908. This article states that the period of limitation for an application for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908, is three years from the date when the right to apply accrues. His argument is that a certification under order XXI, rule 2(1) is an application of the nature described in the article. He contends that it has been found in authoritative decisions that article 181 governs the matter. He referred the court to certain decisions of the Calcutta High Court, the Allahabad High Court, the Rangoon High Court, and the Court of the late

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Judicial Commissioner of Oudh. In *Jatindra Kumar Das* v. *Ganga Chandra Pal* (1) a Bench of the Calcutta High Court found that, where a decree-holder had certified payments within three years of the date of the payments, the certification operated, to save limitation. The Bench did not decide directly that article 181 had operation, but it had been previously decided in the Calcutta High Court that article 181 had application in the matter.

In 1924 a Bench of the Allahabad High Court decided in *Baij Nath* v. *Panna Lal* (2) that a court could not consider, in order to save limitation in favour of the decree-holder, payments made by a judgment-debtor which had not been certified previous to the application for execution of the decree in a separate proceeding by the decree-holder. The Bench was not called upon directly to decide what was the period of limitation, if any, allowed to the decree-holder within which to certify such payments. It was asked to decide, whether a statement in an application for execution of a decree could be considered as such certification. Upon that point the Bench, accepting the view taken by a single Judge of the Allahabad High Court in *Gokul Chand* v. *Bhikha* (3) and the view taken by another single Judge of the Allahabad High Court in *Bhajan Lal* v. *Chheda Lal* (4) and the view taken by a Bench of the Allahabad High Court in *Chatter Singh* v. *Amir Singh* (5) decided that there must be a separate certificate by the decree-holder, before the payments could be regarded as certified, and that a statement in an application for execution to the effect that certain payments had been made could not be regarded as a certificate within the meaning of order XXI, rule 2. The views of the Allahabad High Court upon this point

(1) (1919) I.L.R., 46 Calc., 22.
(2) (1924) I.L.R., 46 All., 635.
(3) (1914) 12 A.L.J., 387.
(4) (1914) 12 A.L.J., 825.
(5) (1916) I.L.R., 38 All., 204.

are not accepted universally by High Courts in India, but the point in question is immaterial to the decision of this appeal for here there is on the record the certificate of the 8th of December, 1924 (exhibit D65). The learned Counsel for the appellant, however, relies on the decision in *Baij Nath* v. *Panna Lal* (1) as an authority in support of his view, because it approved the view taken in *Gokul Chand* v. *Bhikha* (2) to the effect that a decree-holder must come forward and in some special well defined speech or writing certify to the court that the money payable under his decree has been paid out of court. From this the learned Counsel argues that a certification under order XXI, rule 2(1) must be treated as an application within the meaning of article 181. It is to be observed that in none of the decisions quoted so far was there any reference to article 181. The argument depends upon the implications to be drawn from the nature of the decisions. In *Amar Singh* v. *Ram Dei* (3) the point was directly raised before the Bench of the Allahabad High Court as to whether article 181 was, or was not, applicable to govern the decision on the point, but the Bench did not decide the point. They said at page 876: "The only possible limitation to be found is in article 181 of the Limitation Act. It is not necessary for the purposes of this case to determine whether, or not, that article is applicable, for, even if it is applicable, the certifying was, in this case, within three years of the payment." This last decision does not help the appellant in any way.

The learned Counsel for the appellant has in addition referred us to a decision of a single Judge of the Rangoon High Court which does not carry the matter any further, and to a decision of the late

(1) (1924) I.L.R., 46 All., 635. (2) (1914) 12 A.L.J., 387.
(3) (1925) I.L.R., 47 All., 873.

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Judicial Commissioner's Court of Oudh in *Musammat Jamwanti Kunwar* v. *Musamat Mohan Dei* (1) which states the law as follows:—

> "It is quite true that no time is provided within which application for certification must be made, but I agree with the view taken by the Allahabad High Court in *Bhajan Lal* v. *Chheda Lal* (2) (to which a reference has already been made) that such an application cannot be made after the period of limitation for execution has expired."

These are the decisions on which the learned Counsel for the appellant relies.

On the other hand are certain decisions of the Bombay High Court. In *Haji Abdul Rahman* v. *Khoja Khaki Aruth* (3) a Full Bench of the Bombay High Court decided at page 34 that a decree-holder could certify an adjustment at any time he liked, and that there was no limitation to prevent his so doing. This view was subsequently followed in *Tuka Ram* v. *Babaji* (4). There a consent decree was passed in 1884, of a nature somewhat similar to the decree in the present appeal. The judgment-debtor had to pay annual instalments for twelve years. If he made no default in the payment of the instalments a piece of land, which was the subject of the decree, was to remain in his possession. If he made default in payment of any instalment, the piece of land in question was to pass into the possession of the decree-holder. The decree-holder certified no payments, and in 1892 for the first time applied for execution stating that he had been paid all instalments up to the end of 1891, and that there had been a subsequent default. A Bench of the Bombay High Court found that there was no time fixed

(1) (1924) 11 O.L.J., 879.
(2) (1914) 12 A.L.J., 825.
(3) (1887) I.L.R., 11 Bom., 6.
(4) (1897) I.L.R., 21 Bom., 122.

within which a decree-holder was bound to certify a payment made out of court, and that the statement of satisfaction in the application for execution could be considered as a certification. (Here it will be seen that the Bombay High Court differs from the Allahabad High Court.) They considered, however, that, while these payments should be taken as certified, it was open to the judgment-debtor to contest the fact that such payments had actually been made, and if he was able to show that limitation had not been saved by the making of such payments the application for execution would fail. These decisions were under the old Code of Civil Procedure. They have been followed under the new Code by a decision in 1920 in *Pandurang Balkrishna Golvankar* v. *Jagya Bhau Bhagat* (1). In 1918, the Judicial Commissioner of Oudh accepted the view taken in *Tuka Ram* v. *Babaji* (2). His decision will be found in *Haider Mirza* v. *Kailash Narain Dar* (3). It is to be noted that in the above cases also, no reference was made to article 181.

There cannot thus be said to be anything authoritative upon the point. There has been a marked difference of opinion in High Courts upon it, and we have not been able to find that anywhere the point has been argued in the manner in which it has been argued here before us. In order to decide the point, we must first examine closely the provisions of order XXI. rule 2. This rule is as follows :—

> "2. (1) 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

(1) (1921) I.L.R., 45 Bom., 91. (2) (1897) I.L.R., 21 Bom., 122.
(3) (1918) 21 O.C., 161.

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*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.

(2) The judgment-debtor also may *inform* the court of such payment or adjustment, and *apply* to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should *not be* recorded *as certified;* and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree."

Now it is to be noted that the position of a decree-holder under this rule differs essentially from the position of a judgment-debtor. A decree-holder has the right himself to certify the payment or adjustment. The rule does not say, that he must apply to the court to certify the payment or adjustment. It says, that he has the right to certify it, and the court is obliged to record his certificate. The court is not permitted under the rule to question the certificate, and in recording the certificate the court cannot be said, in our opinion, to perform a judicial act. The judgment-debtor on the other hand is directed to apply to the court (that is directed to make an application) to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified, and the court after service of such a notice is

either to record, or not to record, the payment as certified. Here the judgment-debtor makes an application, and the court certifies by a judicial act.

We now direct our attention to article 181. The third division of the first schedule of Act IX of 1908 from the 158th to the 183rd articles is concerned with "applications." Every application in articles 158 to 180 and 182 to 183 is an application on which the court has to perform a judicial act. It has to decide some point judicially. From this circumstance we infer that the word "application" when used in article 181 means an application *ejusdem generis*. in other words an application on which the court has to decide judicially. As a certification by a decree-holder under order XXI, rule 2(1) does not raise any point on which a court has to decide judicially, we are of opinion that a certification is not in any circumstances, an application within the meaning of article 181.

But apart from this, it is to be noted that, while order XXI, rule 2, part II, provides specifically for an application by the judgment-debtor, order XXI, rule 2(1) does not provide for an application by the decree-holder; and under the rules which are still in force governing the supplementary procedure of subordinate Courts in Oudh, contained in the Oudh Civil Digest, it is specifically laid down in rule 168 that, although a decree-holder may, if he wishes, file an application with his certification under order XXI, rule 2(1) he may present the certificate without a formal application, and that should he present a formal application, the costs of the stamp thereon should not be charged against the judgment-debtor. This is an additional reason in favour of a decision that article 181 has no application. Such a certificate is not an

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application. *A fortiori* it cannot be an application within the meaning of article 181.

The case then stands that, in our opinion, neither under the Code of Civil Procedure nor under Act IX of 1908 is there any limitation which compels a decree-holder to certify a payment or adjustment under the provisions of order XXI, rule 2(1) within any particular time, and thus the certificate of the decree-holder of the 8th of December, 1924, is a good certificate within the law. We decide the first point accordingly.

Our decision upon the first point governs the decision upon the second point. As soon as the certificate of the 8th of December, 1924, had been recorded, the court was in a position to know that the execution of the decree was not time-barred. Execution was clearly not time-barred. This certificate established that the judgment-debtor had conformed to the terms of the decree in such a manner as to render himself not liable to have execution taken out against the mortgaged property until after the 31st of October, 1922. On these findings the appeal must fail.

We need not decide the third point. This might have presented difficulty, if the appeal had succeeded upon the first two points, for we should have found it somewhat difficult to find whether there was, or was not, any acknowledgement in writing within the meaning of section 19 of Act IX of 1908 which could have saved limitation.

The conclusion at which we arrive is similar to the conclusion at which the Bench of the High Court of Bombay arrived in *Tuka Ram* v. *Babaji* (1), except for the fact that here there is a good certification prior to the application for execution. The trial court has examined the plea of the judgment-debtor to the effect

(1) (1897) I.L.R., 21 Bom., 122.

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that the payments alleged were not genuine payments upon its merits, and has decided rightly upon its merits that these payments were genuine payments. We, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

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*Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.*

BARJOR SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* SIDH NATH AND OTHERS (DEFENDANTS-RESPONDENTS).*

1926 *October, 4.*

*Adverse possession, essential elements of.*

Where the plaintiffs, who were the owners of the plots in suit, were dispossessed by the defendants and they brought a suit for recovery of possession within twelve years of the date of dispossession, *held*, that the defendants, in order to establish their title by adverse possession, ought to prove that their possession was actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation. It was not necessary for them to exercise overt acts of ownership as they were evidently in possession as owners. [I.L.R., 35 Calc., 96, followed.]

Mr. *St. G. Jackson*, for the appellant.

Mr. *Ishri Prasad*, for the respondent.

STUART, C. J., and RAZA, J. :—We are unable to agree with the view taken by the learned Judge of this Court who decided the appeal. Upon the facts it is clear to us that the plaintiffs-appellants have been dispossessed from the numbers in suit; but in no case did their dispossession take place at a period of more than twelve years before the date of suit. Up to that period they were clearly in constructive possession of

* Appeal No. 3 of 1926, under section 12(2) of the Oudh Courts Acts, from the decree of ASHWORTH, J., passed in Second Civil Appeal No. 339 of 1924, dated the 30th of January, 1926, setting aside the decree of Ganga Shanker, Subordinate Judge of Unao, dated the 10th of May, 1924 and upholding the decree of Partap Shanker, Munsif of Purwa, dated the 26th of May, 1923.