FULL BENCH.

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

1932 January, 25.

RAM BHAROSE AND OTHERS, DECREE-HOLDERS-APPELLANTS. *v.* RAMMAN LAL JUDGMENT-DEBTOR-RESPONDENT.*

Limitation Act (IX of 1908), article 182, clause (5)—Civil Procedure Code (Act V of 1908), order XXI, rule 2— Certification of payment by decree-holder, when a step-in-aid of execution within the meaning of article 182(5) of the Limitation Act—Application for execution or to take a step-in aid of execution, essentials of.

Held, that the mere certification of itself by the decree-holder of a payment of money under the decree is not an application to take some step-in-aid of execution within the meaning of sub-clause (5) of article 182 of the Indian Limitation Act. *Prakash Singh* v. *Allahabad Bank, Limited* (1), *Maung Tun Hlaing* v. *U. Aung Gyaw* (2) and *Amar Krishna Chowdhury* v. *Jagat Bandhu Biswas* (3), relied on.

Held further, that to make clause (5) of article 182 of the Limitation as amended by Act (IX of 1927) applicable, the necessary conditions which must be satisfied, whether the application is one for execution or to take some step-in-aid of execution of the decree or order are that in either case (1) the application must be in accordance with law, (2) it must be made to the proper court and (3) there must be a final order passed on the application.

It is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution.

*Execution of Decree Appeal No. 55 of 1931, against the order of S. Shaukat Husain, Subordinate Judge of Hardoi, dated the 11th of September, 1931, reversing the order of Babu Avadh Bihari Lal, Munsif of Bilgram district Hardoi, dated the 11th of July, 1931.

(1) (1928) I.L.R., 3 Luck., 684 (P.C.): L.R., 56 I.A., 30.
(2) (1930) A.I.R., Rang., 64. (3) (1931) 35 C.W.N., 1192.

The recording of payment by the court under order XXI, rule 2(1) cannot be regarded as a final order within the meaning of article 182, clause (5).

This case was originally heard by KISCH, J., who referred some questions of law for decision to a Full Bench. His order of reference is as follows :—

KISCH, J. :—The matters for decision in these two cases were identical and they have been dealt with in a single judgment by both the courts below.

The decree-holders-appellants are the same in both cases.

On the 31st of July, 1923, they obtained decrees absolute in respect of mortgages created in their favour by the respective judgment-debtors-respondents.

On the 25th of August, 1926, applications for execution made in both cases were consigned to the records in part satisfaction of the decree.

On the 29th of July, 1929, the decree-holders certified to the court under order XXI, rule 2, sub-clause (1) of the Code of Civil Procedure the payment of Rs. 85 in the one case and Rs. 5 in the other case towards the balance due under the respective decrees and these payments were duly recorded by the court on that date.

On the 18th of February, 1931, the applications for execution out of which these appeals arise were made.

A number of pleas were taken by the decree-holders, but the only one with which this court is concerned in these appeals is the plea that the present applications, having been made more than three years after the final order on the last application for execution, are time-barred under article 182, sub-clause (5) of the First Schedule to the Indian Limitation Act (IX of 1908).

The contention of the decree-holders was that the certification and recording by the Court on the 29th of July, 1929, of the part payments made by the judgment-debtors out of court constituted a step-in-aid of execution of the decree within the meaning of sub-clause (5) of Article 182 and that, therefore, a fresh period of three years' limitation started from that date, making the present applications within time.

The sole question therefore that this Court is called upon to decide is whether the certification by a decree-holder of a payment made by the judgment-debtor out of court and the

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recording of the same by the court is a step-in-aid of execution of the decree which will give rise to a fresh period of limitation under article 182, sub-clause (5) of the Indian Limitation Act.

In the present state of the authorities to give an answer to this question is not such a simple matter as it might appear at first sight. There is apparently no decision by this Court which is directly in point. Undoubtedly the general trend of the decisions in several other High Courts up to recent years has been that such certification of a payment made out of court is a step-in-aid of execution within the meaning of article 182, sub-clause (5). This was the view taken by a Full Bench of five Judges of the Allahabad High Court in *Sujan Singh* v. *Hira Singh* (1) which was followed in *Chote Singh* v. *Ishwari* (2) and *Colonel Lecky* v. *Bank of Upper India, Limited* (3). It was also the view taken by the Calcutta High Court in *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukopadaya* (4), by the Bombay High Court in *Bacharaj Nyahalchand Marwadi* v. *Babaji Tukaram Avati* (5) and by the Madras High Court in *Narayan Nair* v. *Kunhi Raman Nair* (6). The matter might appear to have been concluded by such a concensus of authority had it not been for a later decision of their Lordships of the Judicial Committte in *Parkash Singh* v. *Allahabad Bank, Limited* (7).

It will be observed that the first essential condition in order to bring a case under sub-clause (5) of article 182 of the Limitation Act is that there must be an "application" in accordance with law. In *Parkash Singh* v. *Allahabad Bank, Limited* (7) their Lordships were called upon to decide whether the certification of payment by the decree-holder under sub-rule (1) of rule 2 of order XXI should be treated as an "application" for the purposes of article 181 of the Indian Limitation Act, and they held that such certification was not an "application" for the purposes of this article They further held that even if the certification by the decree-holder was cast in the form of an application, it could not alter the real nature of the procedure and convert what was no more than a certificate of payment into an "application" within the meaning of article 181. In the present case there was no written application other than the actual certificate of payment. It appears that a number of cases dealing with

(1) (1889) I.L.R., 12 All., 399.
(2) (1910) I.L.R., 32 All., 257.
(3) (1911) I.L.R., 33 All., 529.
(4) (1886) I.L.R., 12 Calc., 608.
(5) 1913) I.L.R., 38 Bom., 47.
(6) (1925) A.I.R., Mad., 131.
(7) (1928) L.R., 56 I.A., 30.

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matters which were held to be steps-in-aid of execution of a decree (which probably included some of the cases cited above) were cited before their Lordships, but their Lordships expressly stated that they did not think it necessary for the purposes of the appeal before them to express any opinion with reference to such cases. The Calcutta and Rangoon High Courts, however, have had occasion to consider whether the word "application" appearing in sub-clause (5) of article 182 must be given the same meaning as has been given to the word "application" by their Lordships of the Judicial Committee where it occurs in article 181, and they have held that the same interpretation must be given to the word "application" in both articles. These cases are *Maung Tun Hlaing* v. *U. Aung Gyaw* (1) and *Amar Krishan Chaudhury* v. *Jagat Bandhu Biswas* (2). The latter is a decision by a Full Bench of five Judges and it expressly overrules *Tarini Das Bandyopadhya* v. *Bishtoo Lal Mukhopadaya* (3) which has been referred to above.

It may be observed that in *Parkash Singh* v. *Allahabad Bank, Limited* (4) as well as *Maung Tun Hlaing* v. *U. Aung Gyaw* (1), and *Amar Krishan Chaudhury* v. *Jagat Bandhu Biswas* (2) the actual certification on which the decree-holder relied in each case was made more than three years from the date of the decree or the decision of the previous application for execution, as the case may be, whereas in the present case the certification was made less than three years from the date of the decision of the previous application for execution.

The questions to be determined in these appeals are pure questions of law and they appear to be questions on which, in the circumstances set out above, it is desirable to have an authoritative decision by a Full Bench of this Court.

I accordingly under rule 14 (1) of the Oudh Courts Act, 1925, refer for decision of a Full Bench the following questions :—

1. Whether the certification to the court under sub-rule (1) of rule 2 of Order XXI of the Code of Civil Procedure of payment of money payable under a decree is an application to take some step-in-aid of execution of the decree within the meaning of sub-clause (5) of article 182 of the Indian Limitation Act?

(1) (1930) A.I.R., Rang., 64.
(2) (1931) A.I.R., Calc., 719.
(3) (1886) I.L.R., 12 Calc., 608.
(4) (1928) L.R., 56 I.A., 80.

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2. If so, whether the order of the Court under sub-rule (1) of rule 2 of Order XXI recording such payment is a final order on such application within the meaning of sub-clause (5) of Article 182?

3. If the answer to the above two questions be in the affirmative, whether any distinction is to be drawn between such certification and recording if it takes place within three years of the date of the decree, or the decision of the previous application for execution, and if it takes place more than three years from such date?

Mr. *Hyder Husain* for the appellants.

Mr. *Radha Krishna* for the respondent.

HASAN, C.J., RAZA and SRIVASTAVA, JJ.—The facts of the two cases which have given rise to this reference are briefly these :—

The decree-holders who are the appellants, obtained two decrees for sale which were made absolute on the 31st of July, 1923. The last application for execution of the decrees in both the cases was consigned to the records after part satisfaction of the decrees on the 25th of August, 1926. On the 29th of July, 1929, the decree-holders filed certificates of payments of a sum of Rs. 85 in one case and Rs. 5 in the other case under Order XXI, rule 2, Schedule I of the Code of Civil Procedure and the payments were recorded by Court on the same day. The applications for execution which have given rise to these appeals were made on the 28th of February, 1931. The judgment-debtors contested the applications, amongst others, on the grounds that the alleged payments were never made and that the present applications were barred by time under Article 182, clause 5, First Schedule of the Indian Limitation Act.

Both the lower courts found that the decree-holders' allegation about the payments made towards part satisfaction of the two decrees was correct. The Munsif was of opinion that the certification of these payments was a step-in-aid of execution and saved limitation.

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The lower appellate court, on the other hand, held that the application was not a step-in-aid of execution of the decrees and that the applications were therefore barred by time. When the case came in second appeal before our learned brother, KISCH, J., he referred the following questions for decision by a Full Bench :—

1. Whether the certification to the Court under sub-rule (1) of rule 2 of Order XXI of the Code of Civil Procedure of a payment of money payable under a decree is an application to take some step-in-aid of execution of the decree within the meaning of sub-clause (5) of Article 182 of the Indian Limitation Act?

2. If so, whether the order of the Court under sub-rule (1) of rule 2 of Order XXI recording such payment is a final order on such application within the meaning of sub-clause (5) of Article 182?

3. If the answer to the above two questions are in the affirmative, whether any distinction is to be drawn between such certification and recording if it takes place within three years of the date of the decree or the decision of the previous application for execution and if it takes place more than three years from such date?

The answer to these questions depends upon the interpretation to be placed on clause (5) of Article 182 of the Limitation Act. This clause as amended by Act IX of 1927 runs as follows :—

5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper court for execution, or to take some step-in-aid of execution of the decree or order.

It is to be noted that whereas under the Limitation Act IX of 1908, limitation runs from the date of applying in accordance with law to the proper Court

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for execution or to take some step-in-aid of execution of the decree or order, the amending Act IX of 1927 makes the period of limitation to begin not from the date of the previous application but from the date of the final order passed on it. To make this clause applicable, the necessary conditions which must be satisfied, whether the application is one for execution or to take some step-in-aid of execution of the decree or order are that in either case (1) the application must be in accordance with law, (2) it must be made to the proper court and (3) there must be a final order passed on the application. On the plain grammatical construction of the clause, these conditions are adjectival both to the application for execution and to the application to take some step-in-aid of execution of the decree or order. In this case we are not concerned with an application for execution nor is there any question about the alleged application not being in accordance with law or not having been made to the proper Court. The question therefore reduces itself to this, whether there was an application to take some step-in-aid of execution of the decree and whether there was a final order passed on the application within the meaning of this clause.

It is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution. Thus to take the concrete case of certification for an example, it will be seen that Order XXI, rule 2, clause (3) of the Code of Civil Procedure provides that an uncertified payment shall not

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be recognized by any Court executing the decree. If for instance a decree-holder claims an extension of limitation under section 20 of the Limitation Act by reason of payment of interest as such or of part payment of principal, the payment must be certified before it can be recognized by the court executing the decree. In such a case the certification of payment, being a step in furtherance of execution, can be regarded as a step-in-aid of execution. It is not necessary for us to multiply examples or to pursue this matter further because whether the proceeding for certification in the present case is or is not regarded as a step-in-aid of execution, it can be of no avail to the decree-holders in saving limitation, for reasons to be presently stated.

Order XXI, rule 2, clause (1) provides that where any money payable under a decree is paid out of Court the decree-holder shall certify such payment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. In *Prakash Singh* v. *The Allahabad Bank Limited* (1) the decree-holder made an application to the Court certifying certain payments made by the judgment-debtor in partial satisfaction of the decree. One of the pleas raised by the judgment-debtor was that the payments could not be recognized as the certification had not been made within three years of the date of payment, and reliance was placed on article 181 of the first schedule of the Limitation Act in support of the plea. A Bench of this Court held that as a certification by a decree-holder under Order XXI, rule 2, sub-clause (1) does not raise any point on which a Court has to decide judicially, the certification is not in any circumstances an application within the meaning of article 181. This decision was affirmed by their Lordships of the Judicial Committee in *Prakash Singh* v. *Allahabad Bank Limited* (1). Dealing with the provisions

(1) (1926) I.L.R., 1 Luck., 428.

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of Order XXI, rule 2, sub-clause (1), their Lordships held that the rule imposed a duty on the decree-holder to certify the payment and a duty on the Court on such certificate being given, to record such payment. Their Lordships further observed "that the mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under Order XXI, rule 2 (1) is not an application within the meaning of article 181 of Schedule I of the Indian Limitation Act. . .the mere fact that the document was called an 'application' and was in the form of a petition cannot, in their Lordships' opinion, alter the real nature of the procedure and convert what was really no more than a certificate of certain payments into an 'application' within the meaning of article 181." It is no doubt true that it was argued before their Lordships that in some cases in India it had been held that proceedings for certification constituted a step-in-aid of execution within the meaning of article 182, clause (5) of the Indian Limitation Act. Their Lordships did not think it necessary to express any opinion with reference to the cited cases dealing with matters which were held to be steps-in-aid of execution of a decree or order. So the precise question arising in this case was left open by their Lordships. However, we have to see whether in view of the observations of their Lordships as regards the nature of certification proceedings, it can be possible to treat them as an application within the meaning of article 182. Even though the certification in the case before their Lordships was made by means of a document which was in the form of an application and also described as such, yet their Lordships held that it was really no more than a certificate which could not be regarded as an application within the meaning of article 181. The decision of their Lordships is conclusive on the question that the terms of Order XXI. rule 1, clause (1) involve no application and that certification under that clause is not an application within the meaning of article 181. It

may be mentioned that the certificates filed in the present case were exactly in the form prescribed for a certificate by rule 177 of the Oudh Civil Rules which makes a distinction between a certificate and an application. They were not in the form of an application and did not contain any request to the Court. The documents as they stand cannot therefore in any sense be regarded as applications.

It was also argued on behalf of the appellants that it might be presumed that the written certificate was coupled with an oral application which should be effective as a step-in-aid of execution. The presumption of an oral application can arise only when there is necessity for an application. As according to the decision in *Prakash Singh* v. *Allahabad Bank Limited* (1) no necessity for an application arises in the case of a certification under Order XXI, rule 2, sub-clause (1) of the Code of Civil Procedure, there is no room for any such presumption. If by any stretch of reasoning it were possible to accede to the appellants' argument and treat mere certification as an application to take some step-in-aid of execution, it would lead to awkward results. The law has now been settled by the decision of their Lordships of the Judicial Committee in *Prakash Singh* v. *Allahabad Bank Limited* (1) that a decree-holder can certify payment at any time. There is nothing to prevent his certifying a payment, more than three years after the order passed on the last application for execution. If he does so and if the certification is regarded as an application constituting a step-in-aid of execution, there is nothing in the terms of article 182, clause (5), to prevent his seeking execution at any time within three years of the certification. In other words he would be able to certify payment after any length of time and then use the certification as giving a fresh start to limitation for executing the

(1) (1928) L.R., 56 I.A., 30 : I.L.R., 3 Luck., 684. (P.C.).

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decree. It might be possible to meet such an application by calling in the aid of the general principle that once a decree has become barred by limitation, it cannot be revived but the fact remains that there is nothing in the language of article 182, clause 5, to prevent the decree-holder maintaining the application. The conclusion therefore reached by us is that the mere certification of itself by the decree-holder of a payment of money under the decree is not an application to take some step-in-aid of execution within the meaning of sub-clause (5) of article 182 of the Indian Limitation Act. It may be noted that the same view has been taken by a Bench of the Rangoon High Court in *Maung Tun Hlaing* v. *U Aung Gyaw* (1) and by a Full Bench of the Calcutta High Court in *Amar Krishna Chowdhury* v. *Jagat Bandhu Biśwas* (2).

Another reason for our holding that the decree-holders are not entitled to save limitation under clause 5 of article 182 is that there is no final order such as is contemplated by that clause. All that Order XXI, rule 2, sub-clause (1) requires the Court to do and all that was actually done in this case was to record payment. This, as was held in *Prakash Singh* v. *Allahabad Bank Limited* (3) the Court was in duty bound to do. Thus it is clear that the law does not allow to the Court any discretion in the matter. The Court in recording the payment, does merely a ministerial act and does not exercise any judicial function. The words "final order" imply that it should be final as far as the Court passing the order is concerned. It should be an order which if not reversed or modified by a Court of appeal would be binding between the parties. In the case of a certification by the decree-holder and the recording of payment by the Court, the law does not require any notice being sent to the

(1) (1930) A.I.R., Rang., 64. (2) (1931) 35 C.W.N., 1192.
(3) (1928) L.R., 56 I.A., 30: I.L.R., 3 Luck., 684. (P.C.).

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judgment-debtor and it is always open to the judgment debtor to question the alleged payment. We are therefore of opinion that the recording of payment by the Court under Order XXI, rule 2(1) cannot be regarded as a final order within the meaning of article 182, clause (5).

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For the above reasons we would answer questions 1 and 2 in the negative. As in the present case the certification and recording took place within three years of the decision of the previous application, the third question does not arise and we do not consider it necessary to answer it.

FULL BENCH.

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

MOHAMMAD BAQAR AND ANOTHER (APPLICANTS) *v.* MOHAMMAD QASIM AND OTHERS, (OPPOSITE PARTY).*

1932 *February*, 15.

Musalman Waqf Act (XLII of 1923), section 10—Waqf not admitted or denied by mutawalli—District Judge, whether has jurisdictoin to take proceeding under the Act—Determination of the question, whether a waqf falls within the scope of the Act—Court, if can make inquiry as to the existence of a questioned waqf—Origin, nature and objects of a waqf, inquiry about—Inquiry contemplated by section 10 of Act XLII of 1923, nature of—Interpretation, rules of —Interpretation of statutes, guiding principles of—Intention of legislature, if to be considered in the interpretation of statutes.

Per HASAN, C. J. and RAZA, J. (SRIVASTAVA, J. dissenting) The court of the District Judge has jurisdiction under the

*Section 115 Application No. 22 of 1931, against the order of M. Mahmud Hasan, Additional District Judge of Lucknow, dated the 2nd of February, 1931.