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DAS, J.

Now occupancy holdings are *prima facie* not transferable unless a custom to the contrary is established; and it is difficult to see how any argument can be advanced in favour of the transferee since it is not even alleged in the written statement that there is a custom of transferability of occupancy holdings.

In my opinion the decision of the Court below must be affirmed. I would dismiss this appeal with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

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June, 27.

Before Jwala Prasad and Dhavle, JJ.

CHANDI CHARAN CHAKRAVARTI

v.

PANCHANAN PANDIT.*

Execution—judgment-debtor's objection on ground of payment made within ninety days—petition of objection, whether can be treated as an application under Order XXI, rule 2(2), Code of Civil Procedure, 1908 (*Act V of* 1908).

Where a judgment-debtor contests an application for execution on the ground of a payment which had been made less than ninety days previously, it is not only permissible but incumbent upon the court to treat the petition of objection as an application under Order XXI, rule 2(2), Code of Civil Procedure, 1908, and, if the application succeeds, the bar imposed by sub-rule (3) will not come into operation.

Radhakant Lal v. *Mussammat Parbati Kuer*(1) and *Mehbunnissa Begum* v. *Mehdunnissa Begum*(2), referred to.

*Appeal from Appellate Order no. 1 of 1929, from a decision of Rai Bahadur A. N. Mitter, District Judge of Manbhum, dated the 24th of July, 1928, reversing an order of Babu Manindra Nath Mitra, Munsif of Raghunathpur, dated the 20th of September, 1927.

(1) (1921) 6 Pat. L. J. 337.

(2) (1925) I. L. R. 49 Bom. 548 (553).

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Appeal by the decree-holder.

The facts of this case material to this report are stated in the judgment of Dhavle, J.

A. K. Roy (with him *S. S. Prasad Singh*), for the appellant.

No one for the respondent.

DHAVLE, J.—In this case the District Judge has held in appeal that the payment set up by the judgment-debtor was true, and he has accordingly set aside the order of the Munsif allowing the execution to proceed. The decree under execution was an instalment decree providing that on the judgment debtor defaulting in the payment of an instalment, the whole of the unpaid balance was to be due at once.

It is now contended that though there is no getting round the District Judge's finding of fact as regards the payment, it is not open to any Court executing the decree to recognize the payment which has been found by the lower Court of appeal but which has not been certified or recorded, and reference is made to sub-rule (*3*) of Order XXI, rule 2 of the Code of Civil Procedure. Now, this payment is dated the 28th of Chait, 1333 F., corresponding to the 11th of April, 1927, and it was on the 16th of June, 1927, that the judgment-debtor set it up as a bar to the execution for which the decree-holder had applied on the 18th of May. The judgment-debtor thus informed the executing Court within ninety days of the payment of the Chait instalment on the 28th of that month. Sub-rule (*2*) of Order XXI, rule 2, however, requires a judgment-debtor not only to inform the Court of the payment but also to apply for the issue of a notice to the decree-holder to show cause why such payment should not be recorded as certified. But in the present case such an application, it seems to me, was a matter more of form than of substance. The decree-holder was already there

with his application for execution, and the judgment-debtor was opposing him on the ground of a payment made recently enough to admit of an application under the rule. On what principle can it be held that even if such a payment is believed (and it has been believed by the lower appellate Court), the execution must still be allowed to continue because the judgment-debtor did not in so many words apply for the issue of a notice under sub-rule (*2*)? It is not as if the law had left the decree-holder free from any obligation in the matter. Sub-rule (*1*) imperatively required him to certify the payment, and if no specific period of limitation is prescribed for this—as there is under article 174 of the Limitation Act for the judgment-debtor's application for the issue of a notice to the decree-holder—the decree-holder was required under sub-rule (*2*)—item (*e*)—of Order XXI, rule 11, to mention the payment in his application for execution. The decree-holder, therefore, acted contrary to law in omitting to mention the payment in his application for execution. It is the duty of a Court to oppose a fraud, so far as it can do so within the law, and there are observations in such cases as those of *Radhakant Lal* v. *Musammat Parbati Kuer*(1), by my learned brother, and *Mehbunnissa Begum* v. *Mehmedunnissa Begum*(2) suggesting that where a judgment-debtor contests an application for execution on the ground of a payment which had been made less than ninety days previously, it would be permissible to treat the petition of objection as an application under Order XXI, rule 2, sub-rule (*2*). The learned Advocate appearing for the appellant in this ex parte appeal has fairly placed these rulings before us. The matter is also lucidly dealt with in *P. R. P. L. Chetty* v. *G. Lon Pow*(3). The object of Order XXI, rule 2, is to prevent execution proceedings from being unduly prolonged by the judgment-debtor setting up old payments: sub-rule (*2*) enables

(1) (1921) 6 Pat. L. J. 337.
(2) (1925) I. L. R. 49 Bom. 548 (553).
(3) (1922) 68 Ind. Cas. 924.

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the judgment-debtor by applying within the prescribed period of limitation to ensure that his payments out of Court are taken into account in those proceedings. It could not have been intended that in circumstances like those of the present case the Court, though free to believe the payment, should be unable to recognize it for the purpose of stopping the execution which an honest decree-holder would not even have applied for. It seems to me that in such circumstances it is not only open to the Court, but also incumbent upon it, to treat the judgment-debtor's petition of objection as an application under sub-rule (*2*); if this is done, the bar under sub-rule (*3*) cannot come into operation. The order of the learned District Judge must, I think, be read in this light, for he reversed the order of the Munsif that the execution was to proceed.

The appeal is thus without merit, and I would dismiss it. As the respondent has not entered appearance, there will be no order for costs.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1929.

July, 10.

Before Das and James, JJ.

RAI SAHIB KHARAG NARAYAN

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Cess Act, 1880 (*Beng. Act IX of* 1880), *sections* 26, 41(2) *and* 102—*cess, assessment of, by Collector—section* 41(2)—*appeal to Commissioner dismissed—suit for declaration that assessment wrong, whether maintainable—Civil Court, jurisdiction of.*

*Appeal from Appellate Decree no. 1477 of 1926, from a decision of Babu Ram Chandra Chowdhury, Subordinate Judge of Monghyr, dated the 1st September, 1926, confirming a decision of Babu Badri Narayan Ray, Munsif of Begusarai, dated the 6th July, 1928.