in which an oral lease can be registered. The demand for registration applies purely to a written lease. The learned Judge who heard this case was I think misled by the case of *Bishop of Bath*(1) but if it is carefully read, it will be seen that the words " term of years " are used there in the sense of the actual expression used in the lease, whereas in section 116 the words " a term of years " are merely a classificatory term and mean nothing more than any definite term and any definite term of time may be measured in years though not necessarily an even number of years.

For these reasons in my opinion the judgment of Rowland, J. must be reversed and the judgment of the District Judge must be restored. The respondents must pay the costs of this appeal throughout.

JAMES, J.—I agree.

J. K.

Appeal allowed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

SHAIKH MOHAMMAD ANAS

v.

BHUPENDRA PRASAD SHUKUL.*

Limitation Act, 1908 (*Act IX of* 1908), *Article* 182—*application for execution by the real assignee of a decree whether is an application in accordance with law—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rules* 15 *and* 16—*transferee of decree, meaning of—application under rule* 15, *requisites of.*

A obtained a decree for possession and mesne profits in 1920 and thereafter he assigned 7-annas interest in the same in favour of *N*, who took the assignment in the name of *M*. The amount of mesne profits was ascertained and a final decree

(1) 6 Co. Rep. 34(*b*); 77 Eng. Rep. 303.

*Appeal from Original Order no. 42 of 1936, from an order of Babu Dwarika Prasad, Subordinate Judge of Muzaffarpur, dated the 13th of January, 1936.

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was passed in 1923. In 1925, *A* and *N* applied for execution of the decree, but the execution was struck off as *M* claimed that he was the real assignee and the parties were referred to get the matter determined by a suit. *N* got the declaration that he was the real transferee, and thereafter in 1935, an application was filed for execution and the judgment-debtor asserted that the application for execution of the year 1925, was not in accordance with law and therefore the present application for execution of 1935 was barred by limitation.

Held, that the transferee under a deed of assignment referred to in rule 16 of Order XXI, was the person named in the deed and not the real transferee.

Abdul Kareem v. *Chukhun*(1), *Denonath Chuckerbutty* v. *Lallit Coomar Gangopadhya*(2), *Gour Sundar Lahiri* v. *Hem Chander Chowdhury*(3), *Nilkanta Ghosal* v. *Ramcharan Ray*(4), *Balkishan Das* v. *Bedmati Koer*(5), *Manikkam* v. *Tatayya*(6) and *Palaniappa Chettiar* v. *Subramania Chettiar*(7), reviewed.

Ram Sewak Lal v. *Satruhan Deo Sahai* (8), followed.

Gur Narayan v. *Sheo Lal Singh* (9) and *Bilas Kunwar* v. *Dasraj Ranjit Singh*(10), referred to.

Held, also that in view of the express provision of the law, Order XXI, rule 16, the mere fact that a declaration was made that *N* was the real transferee did not entitle him to levy execution.

Held, also, that the application for execution made in 1925, could not be taken as an application under Order XXI, rule 15, as it was not stated therein that it was for the benefit of the applicant and the other persons entitled to the decree.

Appeal by the decree-holders.

The facts of the case material to this report are set out in the judgment of Wort, J.

(1) (1879) 5 Cal. L. R. 253.
(2) (1882) I. L. R. 9 Cal. 633.
(3) (1889) I. L. R. 16 Cal. 355.
(4) (1928) 55 Cal. L. J. 82.
(5) (1892) I. L. R. 20 Cal. 288.
(6) (1898) I. L. R. 21 Mad. 388.
(7) (1924) I. L. R. 48 Mad. 553.
(8) (1927) 8 Pat. L. T. 168.
(9) (1918) I. L. R. 46 Cal. 566; L. R. 46 Ind. App. 1.
(10) (1915) I. L. R. 37 All. 557; L. R. 42 Ind. App. 202.

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Dr. D. N. Mitter (with him *Hasan Jan*, S. K. *Mitter*, *Syed Ali Khan*, *A. H. Fakhruddin*, *Syed Hasan* and *J. N. Sahay*), for the appellants.

Manuk (with him *Yasin*, *Yunus*, *S. M. Mullick* and *K. P. Varma*), for the respondents.

WORT, J.—The only point in this case is whether the application for execution which was the subject matter of the case in the Court below was barred by limitation. That depends entirely upon the question whether a previous application dated the 14th of July, 1925, was an application in accordance with law. But for the fact that there are certain authorities supporting the view of the appellants in this Court I should have entertained no doubt as to what the proper decision should be. In any event the view I hold is supported by a decision of this Court which is binding upon us unless the matter were referred to a larger Bench. The reason for such reference, however, does not in my judgment appear to exist in this case.

One or two facts are necessary for the purpose of deciding the point which, as I have said, arises in this case for determination. A decree was obtained on the 6th of March, 1923, for a sum of Rs. 30,000 by one Mohammad Anas. I had better state in advance that there were various defendants to this case and that there has been a devolution since the original decree was obtained but no question arises with regard to that matter. The original decree was obtained on the 20th December 1920, for recovery of possession and mesne profits by one Mohammad Anas. On the 24th of August of the same year the decree-holder assigned 7-annas interest in the decree to Mohammad Nazir Ahmad in the *farzi* name of one Mohammad Akhtar. Then the matter proceeded to the ascertainment of mesne profits, the decree of 6th March, 1923, being obtained by these two persons—the original decree-holder and the assignee. On the 14th of July, 1925, an application was made for execution. This

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application was made by Mohammad Anas who held 9-annas interest in the decree and by what I may describe as the real assignee, that is to say, Nazir Ahmad, and not by Mohammad Akhtar the benamidar. In course of time this application was struck off; it was struck off for this reason. The Judge before whom that application came declined to decide the question between the so called benamidar and Nazir Ahmad, Mohammad Akhtar, the benamidar, contending that the decree was his and not that of his principal Nazir Ahmad. The parties were referred to the Court to have the matter determined in an action. Ultimately it was held by the trial court—a decision which came to this Court eventually—that Nazir Ahmad was in fact the assignee.

On the 10th of April, 1926, a second application for execution was made. On that occasion the benamidar alone made application for execution complying with Order XXI, rule 15, of the Code of Civil Procedure. Perhaps it might be inferred from what I have said, at any rate it is the fact, that the decision in the suit had not been given at the time of the second application, and I suppose it was for that reason that Mohammad Akhtar made the attempt to execute the decree for mesne profits on behalf of himself and the 9-annas proprietor. On the 14th of March, 1927, again this application was struck off pending the decision of the suit to which I have just referred.

A third application was made on the 20th of December, 1928 and on the 24th of June of the following year the execution case was dismissed as being infructuous.

On the 5th of March, 1935, a fourth application for execution, which was the subject-matter of this appeal, was made. The application was made by Mohammad Anas who was the owner of the 9-annas interest and by Nazir Ahmad the real assignee as he has been described in the deed of assignment by Mohammad Anas.

It will be seen that the only question for decision—whether the last application of the 5th of March, 1935, is barred by limitation—depends upon the validity of the application of the 14th of July, 1925, being the first application for execution. If for any reason it is held, as the Judge in the Court below has held, that the first application of the 14th of July, 1925, was not in accordance with law within the meaning of Article 182 of the Limitation Act, then it is clear that all the subsequent applications must necessarily go, on one ground alone that they would be barred by limitation.

Now, the point can be stated in this way. It has been stated by the Judge in the Court below that the application by what I may describe as the 9-annas proprietor and by Nazir Ahmad (not the benamidar Mohammad Akhtar) who was an assignee under the deed of assignment was not in accordance with law, as the correct view was that the person named in the deed of assignment should make the application as 'assignee' and not what has been described as the real assignee. Order XXI, rule 16, provides:

"Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it."

It is the contention of Dr. Mitter before us that the expression 'transferee' at least includes the real transferee, i.e., the beneficiary under the deed of assignment and does not necessarily refer to the person named in the deed of assignment. As I have already said, I should have entertained no doubt about the matter but for certain authorities upon which Dr. Mitter relies.

The first of those is the case of *Abdul Kureem* v. *Chukhun*(1). There the question arose whether an earlier application was in accordance with law and Mitter, J. in delivering the judgment of the Court

(1) (1879) 5 Cal. L. R. 253.

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made this statement: "We are of opinion that this contention (that is to say, the contention that under section 232 of the Code of 1877, the Court executing the decree should not recognize benami transfers) is not valid. The section says that where a decree is transferred by an assignment in writing, the transferee may apply. The benamee system is recognized in this country, and a benamidar is not a transferee of the decree. The section only authorises the Court to allow the transferee of the decree to apply for execution".

The next decision of the Calcutta High Court on this point is the case of *Denonath Chuckerbutty* v. *Lallit Kumar Gangopadhya*(1). I merely mention this decision in passing.

The next case is *Gour Sundar Lahiri* v. *Hem Chander Chowdhury*(2) a decision of Prinsep, J. and Ghose, J.—to the same effect. A later decision to some extent bearing out the same view of law is the case of *Nilkanta Ghosal* v. *Ramcharan Roy*(3). I would also refer to the case of *Balkishen Das* v. *Bedmati Koer*(4) a decision of Macpherson, J. and Banerjee, J., which appears to be a decision holding the opposite view. But there the learned judges pointed out a distinction which they thought to exist in the two cases to which I have just referred, *Denonath Chuckerbutty* v. *Lallit Kumar Gangopadhya*(1) and *Gour Sundar Lahiri* v. *Hem Chander Chowdhurry*(2).

Then there are decisions of the Madras High Court. The first is the case of *Manikkam* v. *Tatayya*(5). Shortly stated the decision in that case was that the actual purchaser of a decree may apply for execution of the decree under section 232 of the then Civil Procedure Code being the Code of 1877; and I would observe in passing that section 232 of the

(1) (1882) I. L. R. 9 Cal. 633.
(2) (1889) I. L. R. 16 Cal. 355.
(3) (1928) 55 Cal. L. J. 82.
(4) (1892) I. L. R. 20 Cal. 388.
(5) (1898) I. L. R. 21 Mad. 388.

Code of 1877 is in the same terms as Order XXI, rule 16, of the present Code—that is to say, by an assignment in writing or by operation of law. The earlier Code of 1859 did not require an assignment to be in writing. Now, the Madras Court has departed from that view in *Palaniappa Chattiar* v. *Subramania Chettiar*(1) decided by Sir Murray Coutts Trotter, C. J. and Srinivasa Ayyanger, J. The question whether the real assignee in contradistinction to the benamidar was entitled to apply in execution was dealt with by the learned Chief Justice in these words: "The rule of law that, where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless he comes within the words of Order XXI, rule 16, of the Code of Civil Procedure and there has been an assignment in his favour either in writing or by operation of law, seems to me to be no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree was not his." The learned Chief Justice then refers to the decision in *Manikkam* v. *Tatayya*(2) to which I have just referred and proceeds to say: "but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from, and an extension of the words of, the statute". The other learned Judge sitting with the Chief Justice delivered judgment to the same effect. I make no comment upon the fact apart from mentioning that a Bench of two Judges appears to overrule the decision of a Bench of other two Judges. But in this particular matter, as I have stated at the commencement of my observation, I am supported by an authority of this Court.

The decision to which I refer is in the case of *Ram Sewak Lal* v. *Satrukan Deo Sahai*(3). In that

(1) (1924) I. L. R. 48 Mad. 553.
(2) (1898) I. L. R. 21 Mad. 388.
(3) (1927) 8 Pat. L. T. 163.

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case Adami, J. and Allanson, J. had two questions to decide: first, whether a deed of release could create title; and, secondly, whether a person other than the beneficiary (not the benamidar) could sue in execution. As regards the first, Allanson, J. is reported to have said this: "It is well-established that title cannot pass by admission when the law requires a deed. It was argued on behalf of the respondent that as either the real owner or the benamidar has the right to sue, so the real owner has the right to execute a decree obtained by the benamidar. No authority in support of this proposition was placed before us. A decree can only be transferred by assignment in writing or by operation of law". Then the learned Judge proceeded to deal with the question of the deed of release. Dr. Mitter seems to criticise that decision by saying that none of the authorities to which reference has been made in this case have been referred to in the argument or in the judgment which I have just read. But that in no way detracts from the authority of the decision, and it is a decision which is binding upon us unless there be reason for referring the matter to a larger Bench which would be in a position to deal with the case. But holding the view that I do, there appears to be no such reason for that procedure. Now it seems to me quite clear on the plain reading of the rule itself that the view that should be taken appears on the face of the rule itself. If the interest of any decree-holder in a decree "was transferred by an assignment in writing", etc., the transferee under a deed of assignment is the person who is named as a transferee. There can be no doubt about that—it is trite. But Dr. Mitter says that we should have regard to the universal practice in India of carrying out transactions in the benami names and he refers us to the decision of the Privy Council in the case of *Gur Narayan v. Sheo Lal Singh*(1). There Mr. Ameer Ali, in delivering the judgment of the Board, makes reference to this practice in these words:

(1) (1918) I. L. R. 46 Cal. 566; L. R. 46 Ind. App. 1.

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"The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. There is nothing inherently wrong in it and it accords, within its legitimate scope, with the ideas and habits of the people". Then his Lordship refers to the opinion of their Lordships of the Judicial Committee as stated by Sir George Farwell in *Bilas Kunwar* v. *Dasraj Ranjit Singh*(1), where Sir George Farwell states "It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results—to the man who pays the purchase-money". Then Mr. Ameer Ali proceeds to say: "As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him". I must say that I fail to understand the argument of Dr. Mitter on this point. It is of course obvious to any one even with the least experience in this country that this practice of carrying out what is described as benami transaction exists, but it cannot alter the law. If every transaction was carried out in the benami name of another and that custom was universal and there was no departure from it in one single instance, then such custom might be proved and it might perhaps be said that 'you have established a custom, the effect of which would be to establish the proposition that where the word 'transferee' is used in a document in India it means the real transferee and not the benamidar'. It is only in that extreme case that the argument can avail the appellants in my judgment. The transferee under the deed of assignment we are dealing with was Mohammad Akhtar and no other; what rights a real transferee, the beneficiary under the deed, may have for the purposes of this case are neither here nor there.

(1) (1915) I. L. R. 37 All. 557; L. R. 42 Ind. App. 202.

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Indeed so far as Order XXI, rule 16, is concerned, it seems to me that the alteration of law which appeared first of all in the Code of 1877, that is to say, the requirement that an assignment of the decree should be in writing, was a provision which the legislature enacted for the very purpose of preventing difficulties of the kind, we have to deal with here. It was unsuitable, as their Lordships of the Privy Council point out in one of their decisions in this matter, that questions of this kind should be determined in execution; and that leads me to the other branch of the argument in connection with this part of the case addressed to us by Dr. Mitter.

Whilst these various applications were being made in execution as we have seen the action for a declaration that Nazir Ahmad was the beneficiary under the deed was pending in the Court and was ultimately decided. It was contended that this Court gave a declaration in favour of Nazir Ahmad and that, as his right dated back to the application of the 14th of July, 1925, therefore it was shown that he was the person who was entitled to take out the application for execution. That argument begs the question. All that the High Court decided was that Nazir Ahmad was the real owner of the 7-annas interest of the decree if I may put it in that language. The question whether he was entitled to sue out execution was not decided by any of the Courts in that case and necessarily could not be decided. But it is further contended in this regard that the Subordinate Judge in referring the parties to a properly constituted suit by inference decided that if the plaintiff succeeded in getting this declared then he was entitled to apply for execution of the decree. That in my judgment is an argument which cannot be supported. The learned Judge did not commit himself in that way and indeed we know that that application was eventually struck off. The question was never decided and furthermore there can be no inference drawn from

what actually took place because it may very well be that the learned Judge was of the opinion that the beneficiary Nazir Ahmad might have joined with the benamidar in making the application and indeed there is no knowing what the ultimate decision of the Subordinate Judge in the execution proceedings would have been had the question come to be determined by him.

Now the other branch of the case relates to Order XXI, rule 15, of the Code of Civil Procedure. The application which is the subject-matter of this appeal is, as I have said, the fourth application of the 5th of March, 1935. Dr. Mitter would have us disregard the fact that the application was made by the 9-annas proprietor of the decree and by the real owner of the 7-annas of the decree. He would argue that it can be treated as the application of the 9-annas proprietor on behalf of himself and on behalf of the assignee of the 7-annas interest, but the authorities of this Court are against that contention. Atkinson, J. and Jwala Prasad, J. in *A. J. Meik* v. *The Midnapur Zamindary Company, Limited*(1), decided that in order to comply with Order XXI, rule 15, of the Code of Civil Procedure it was necessary to state that the application was taken on behalf of the applicant and for the benefit and on behalf of other persons entitled to the decree. That was not done in the application of the 5th of March, 1935, and therefore that argument fails.

Indeed the question comes back to the first point, namely, whether the real owner or the benamidar is the assignee within the meaning of Order XXI, rule 15. Two further cases have been referred to—one a decision of Kulwant Sahay, J. and Mullick J. in *Jogendra Prasad Narayan Singh* v. *Mangal Prasad*(2), Kulwant Sahay, J. delivering the judgment of the Court, and the matter which was before them was this. There were two brothers who were entitled to

(1) (1919) 4 Pat. L. J. 575.
(2) (1925) 7 Pat. L. T. 330.

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a decree and it was contended by the applicant that there had been a partition between the two brothers and that the applicant was entitled to the whole of the decree. It is unnecessary to state the facts of that case, but the question which came to be determined was whether a certain application upon which the other applications in execution rested was in accordance with law; and Mr. Justice Kulwant Sahay made this statement: "It has been held in *Bhagwat Prashad Singh* v. *Dwarka Prasad Singh*(1) that under Article 182 clause (5) of the Limitation Act an application is one in accordance with law if the particulars required by Order XXI, rules 11 to 14, of the Civil Procedure Code are applied. In the present case we find that all the particulars required to be stated in an application for execution by rules 11 to 14 of Order XXI, had been given in the first application" and he decided accordingly. From one point of view there is an apparent conflict between the case in *Jogendra Prasad Narayan Singh* v. *Mangal Prasad*(2), and the case which I am now referring to. It was held in the earlier case that in the application to comply with Order XXI, rule 15, it was necessary to state that the application was made on behalf of other persons entitled to the decree; but it seems to me that the facts in the two cases are not the same and in any event it will clearly appear that the decision of Kulwant Sahay, J. depended almost entirely upon the view that he held that Order XXI, rules 11 to 14, had been complied with. Now it is the contention of Dr. Mitter that whatever may be thought of the other points in the case the application of the 14th of July, 1925, was in accordance with law within the meaning of the case to which I have just referred and, therefore, if in accordance with law, can form a valid basis for the subsequent applications. Now, Order XXI, rule 11, makes provision for the particulars which are to be given in an application in execution: the particulars are (*a*) number of

(1) (1923) 4 Pat. L. T. 513.
(2) (1925) 7 Pat. L. T. 930.

the suit, (*b*) names of the parties, (*c*) date of the decree, etc., etc. The second particular is 'names of the parties'. Now, it will be seen that this point does not assist the appellants here if the first point is decided against them. It comes back again, as I stated earlier in my judgment, to the question whether the proper parties have been made, in other words, whether the assignee and the 9-annas proprietor took out the application for execution being the first application. If that question is answered in the affirmative then, of course it is quite clear that Order XXI, rule 11, sub-clause (*2*) (*b*), has been complied with, namely, the names of parties have been given. But here the contention is that the real assignee, not being the person named in the deed of assignment, is not the party who ought to have taken out execution. It seems to me that that concludes the matter. The decree-holder *A* in taking out execution, which is stated to be barred by limitation, cannot rely upon an earlier application taken out by *B*, another person, and in no circumstance could it be said that the earlier application taken out by another person (which is substantially the case here) was an application in accordance with law; and as I have said and repeat the question, therefore, comes back to the old point—whether the assignee named in the deed or the real assignee, as he has been called in the argument, is the proper person who could take out execution. I have no doubt as I have said what should be decision on that point. It seems to me that it would be doing violence to Order XXI, rule 16, of the Code of Civil Procedure to hold otherwise, viz., that the benamidar the person named in the deed of assignment, must be the person to apply in execution. For those reasons it seems to me that the judgment of the learned Judge in the Court below was right and the appeal fails and must be dismissed with costs.

VARMA, J.—I agree.

Appeal dismissed.

J. K.