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 PYI
 AND ONE
 v.
 AUNG MO
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not seem to me that the plaintiffs had any right to an order to evict him at the time of filing the suit. In this view of the case their suit should have been dismissed. I therefore set aside the decree of the District Court and restore that of the Trial Court dismissing the plaintiff's suit. But in the circumstances of the case the parties will bear their own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Carr.

1924
 Jan. 10.

MAUNG CHIT PE AND TWO
 v.
 P.N.L. NARAYAN CHETTIAR.*

Civil Procedure Code (V of 1908), Order XXI, rule 2 (2)—Failure of decree-holder to appear and contest application for certification of payment—Judgment-debtor not entitled to certification unless satisfactory proof of payment produced.

Where on an application by the judgment-debtor for certification of payment towards the decree, the decree-holder did not appear to show cause against certification, it was urged that the Court was bound to certify the payment without requiring proof of it.

Held, that the Court is not bound, whether the decree-holder appeared or not to show cause, to record payment unless it is satisfied that such payment has been made.

Ba Han and *Ba Maw* for the appellants.

CARR, J.—The facts in this case are that P.N.L. Chettyar obtained a decree in the Rangoon Small Cause Court against the present appellants and a number of other persons. This decree was transferred to the Subdivisional Court of Nyaunglebin for execution. There, one Maung Tha Din applied to

* Civil Second Appeal No. 308 of 1927.

execute the decree claiming that he was the assignee of it. This application was opposed by the judgment-debtors, who raised an objection under Order XXI, rule 16, which ultimately resulted in Maung Tha Din withdrawing his application for execution.

Before that was withdrawn, the present appellants filed an application, in which, among other things they alleged that the decree had been fully satisfied by payment to the original decree-holder, and they asked that this satisfaction should be recorded as certified under Order XXI, sub-rule (2). Notice was given of this application to Maung Tha Din, who put in a written objection saying that so far as he knew, the decree had not been satisfied. After that he withdraw his application for execution, and he did not further appear in the case. After that, notice was issued to the original decree-holder who was not found, and then the Court ordered issue of notice by substituted service. I note that only 14 days were allowed in this notice, which was obviously inadequate. In all cases where notice is issued by substituted service, ample time should be allowed for the notice to come to the knowledge of the person concerned and to give him a sufficient opportunity of appearing. The decree-holder did not appear after this notice had been declared duly served; and the Subdivisional Court then called upon the appellants to prove the payments alleged by them. After hearing their evidence the Subdivisional Judge was not satisfied and held that the claim had not been proved and he accordingly dismissed their application. On appeal that order was confirmed by the District Judge, and the appellants now appeal to this Court. The only possible ground of second appeal is based on the

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wording of Order XXI, rule 2 (2), in which it is said: "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." It is contended that under the terms of that sub-rule, since the decree-holder did not appear to show cause, the Court was bound to certify the payment without requiring proof of it.

The wording of the rule certainly does lend some support to this contention; but I am not prepared to accept it. It seems to me that although the word "shall" is used, the Court is not bound to record a payment when it is not satisfied that such payment has been made. In all *ex parte* cases in which the burden of proof is on the applicant, the principle is that, before a decree or order can be passed in his favour, the applicant must adduce sufficient evidence to prove his claim; and I think that the same principle holds good in a case such as this. It was more especially necessary for the Court to require proof in the particular circumstances of this case, in which the original decree-holder could not be found, and there was a person claiming to be an assignee of the decree. It may be also noted that the assignee, Maung Tha Din, did to a certain extent show cause by denying all knowledge of the payment alleged. The fact that he failed to appear afterwards, would not absolve the appellants from the necessity of proving their case.

I see, therefore, no sufficient reason for interference and dismiss this appeal. As it has been heard *ex parte*, there will be no order for costs.