that the mortgagor was carrying on a family business. He must show that the money was required for that business. It follows that the appeal must be allowed, and that the interest of the 2nd defendant in the suit property must be excepted from the sale.

The 3rd defendant Kashinath was made a party to the suit and although the suit was dismissed against him, he was ordered to pay his own costs. In his appeal No. 93 of 1921, it has been argued for the respondents that no appeal lies on the question of costs. In this particular case we think a principle is involved. But apart from the question whether any principle is involved, since the 2nd defendant has appealed, the whole decree of the lower Court is before us, and we can make any alterations we think fit in it. The principle involved is due to the rule that costs follow the event, and that the successful party is entitled to get his costs, unless it has been shown that there is some very good reason why he should bear his own costs. This has not been done. The plaintiffs, therefore, will have to pay the costs of the 2nd and 3rd defendants in the Court below and of their respective appeals.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump

RAGHUNATH GOVIND MAYEKAR (ORIGINAL DEFENDANT No. 1), APPLICANT *v.* GANGARAM YESU MAYEKAR (ASSIGNEE OF ORIGINAL DECREE-HOLDER), RESPONDENT*.

1923. *January* 9.

Civil Procedure Code (Act V of 1908), Order XXI, Rules 2 and 16—Decree —Satisfaction—Not certified to Court—Assignment of decree.

*Civil Extraordinary Application No. 310 of 1921.

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The assignee of a decree cannot continue execution proceedings previously commenced, nor can he institute fresh proceedings without first making an application under Order XXI, Rule 16, to the Court which passed the decree.

Such an application is made to the Court as a Court which passed the decree and not as a Court which is executing the decree and it is open to the judgment-debtor to plead that the claim has already been satisfied even though the formalities prescribed by Order XXI, Rule 2, sub rules (1) and (2) of the Code have not been followed.

THIS was an application under the extraordinary jurisdiction against an order passed by S. A. Naik, Subordinate Judge at Malvan.

Execution proceedings.

A money decree was passed against the applicant in the Court of the Subordinate Judge at Malvan. The applicant paid off the decretal amount which was noted by the decree-holder on the decree. The payment was not certified to the Court.

The decree-holder next applied to the Malvan Court to execute the decree. Pending the proceedings he transferred the decree to the opponent. The opponent then applied to execute the decree; the applicant appeared and pleaded satisfaction of the decree.

The Court held that the satisfaction, not having been certified to the Court, could not be recognised in execution and ordered execution to proceed.

The applicant applied to the High Court.

K. N. Koyajee, for the applicant.—Order XXI, Rule 2 does not apply, as the special provisions of Order XXI, Rule 16, are applicable here. Order XXI, Rule 2 applies only between decree-holders and judgment-debtors, but not between assignees of decree-holders and judgment-debtors.

[CRUMP J.:—Why should the assignment of decree make any difference ?]

If I may suggest a reason, it may be this, that if a judgment-debtor settles or comes to terms, with his decree-holder, he knows best whether to certify the satisfaction or the terms to the Court or not, but in the case of an assignee of a decree-holder, the judgment-debtor does not know him and must be given an opportunity to dispute his right to execute the decree. But leaving speculation on one side, Rule 16 is quite clear, and imperatively requires that the assignee of a decree must apply for execution thereof to the " Court which passed the decree", and not to " the executing Court", and provides further that notice of the application shall be given to the assignor and the judgment-debtor whose objections shall be heard before ordering execution. Thus "the Court which passed the decree" is bound to hear all objections including those on the ground of satisfaction or adjustment. If the decree is transferred to another Court for execution, even then "the Court which passed the decree" must first grant or refuse the assignee's application for execution. If the decree is adjusted or satisfied, the decree-holder has no rights or interests left in him to assign.

[CRUMP J. pointed out *Ponnusami Nadar* v. *Letchmanan Chettiar*[1], and *Ramayya* v. *Krishnamurti*[2]. These cases support my contention.

A. G. Desai, for the opponent.—Order XXI, Rule 16 does not do away with the provisions of Rule 2 in the case of assignments. An application under Rule 16, though to be made to " the Court which passed the decree", is still one for " execution", and the provisions of Rule 2 will therefore apply to it. Different considerations cannot apply to decree-holders and their assignees. Judgment-debtors ought not to be allowed to collude with the decree-holders after assignment.

[1] (1911) 35 Mad. 659. [2] (1916) 40 Mad. 296.

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The judgment-debtor had notice and his objections have been heard and dealt with.

MACLEOD, C. J.:—One Vithal Hari Kochrekar obtained a money-decree against the present petitioner in Suit No. 84 of 1918 in the Court of the Subordinate Judge at Malvan on the 22nd March 1918. The petitioner alleges that he paid the whole amount of the decree to the plaintiff on the 28th October 1918 in full satisfaction; that the decree-holder recorded the payment on his copy of the decree, but the satisfaction of the decree was not certified to the Court, as it should have been, under Order XXI, Rule 2 of the Civil Procedure Code. It would appear that thereafter the decree-holder made an application for execution. Before the application was dealt with by the Court, the decree-holder transferred the decree to the present opponent on the 13th May 1921. The opponent then applied for execution of the decree.

The Court on the hearing of the application raised three issues: (1) Can the alleged satisfaction which was not certified to the Court be recognized in execution? (2) If so, is the said satisfaction proved? (3) Is the assignment relied on by Gangaram proved?

The findings of the Court on these issues were: (1) in the negative; (2) unnecessary; and (3) in the affirmative. Accordingly the Court directed a warrant to issue against the judgment-debtor under Order XXI, Rules 30 and 43 of the Code.

The petitioner has applied to this Court under section 115 of the Code to revise that order. It seems to me quite clear that the lower Court had failed entirely to recognise what is the proper procedure to be followed in the case of an application being made to the Court by the transferee of a decree. Whether attachment proceedings are already commenced at the

instance of the decree-holder or not, the assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree, unless he makes an application under Order XXI, Rule 16 to the Court which passed the decree. That application will be heard by the Court, not as a Court executing the decree, but as a Court which passed the decree, and it seems clear to me that until an order is made by the Court which passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. That this must be the right view can be shown by the instance of a Court after having passed a decree transferring it to another Court for execution. In such a case the application under Order XXI, Rule 16, must be made to the Court which passed the decree, and the Court then is certainly not the Court executing the decree. The provisions then of Order XXI, Rule 2, sub-rule (3), would not be applicable as that only enacts that a payment or adjustment, which has not been certified or recorded as aforesaid, should not be recognised by any Court executing the decree. That sub-rule lays down an exception to the ordinary law that a party against whom a claim is made, may plead as a defence that the claim has been satisfied.

In my opinion, therefore, when an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under Order XXI, Rule 16, the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied even although the

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formalities prescribed by Order XXI, Rule 2, sub-rules (1) and (2), have not been followed.

There is authority for this opinion in the decisions of the Madras High Court in *Ponnusami Nadar* v. *Letchmanan Chettiar*[1] and in *Ramayya* v. *Krishnamurti*[2].

In the first case A held a decree against C. It was arranged between C and B that B should advance the decretal amount to C as a loan and that an assignment of the decree should be obtained in the name of B for the benefit of C. The decree was accordingly assigned to B who applied for execution. C set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under Order XXI, Rule 2, of the Civil Procedure Code. There was a difference of opinion, Mr. Justice Abdur Rahim holding that the arrangement amounted to an adjustment of the decree, and not being certified, could not be pleaded as a bar to execution, Mr. Justice Sundara Ayyar holding that Order XXI, Rule 2, did not make an uncertified adjustment invalid but merely forbade effect being given to such an adjustment when it was set up as a defence to the execution of a decree by one entitled to do so. The section did not disentitle the judgment-debtor to prove facts which would show that the applicant was not the real transferee, even if the facts he relied upon showed that the decree had been adjusted.

The facts in the second case were very similar. The learned Judges following the opinion of Mr. Justice Sundara Ayyar in the previous case held that Order XXI, rule 2, sub-rule (3), of the Civil Procedure Code, did not

(1) (1911) 35 Mad. 659. (2) (1916) 40 Mad. 296.

debar the judgment-debtor from proving facts which showed that the transferee of the decree applying for execution was merely a Benamidar of another judgment-debtor, even if the facts on which he relied showed that there had been a payment which had not been certified, and that when the transferee was found to be such a Benamidar, the Court was bound by Order XXI, Rule 16, to refuse execution in his favour.

It seems to me, therefore, that the ordinary law applies when an application is made under Order XXI, Rule 16. The judgment-debtor asserting that he has paid the decretal amount, even although it has not been certified, is entitled to prove it. It cannot be suggested that the judgment-debtor is not entitled to pay the decretal amount to the creditor, nor can such a payment be treated as a nullity because it is not certified. Therefore if the decretal amount is as a matter of fact paid, then the decree in the eye of law becomes satisfied, and any attempt to execute it on a demand for payment made is unconscionable conduct on the part of the decree-holder. It is true that the decree-holder may be allowed, under Order XXI, Rule 2, sub-rule 3, to take advantage of the fact that the payment was not certified, to contend that it cannot be recognised by the Court executing the decree. But the fact remains, assuming that the payment has been made, that the decree has been satisfied and there is nothing to transfer, so that when a transferee comes to the Court which passed the decree and asks the Court to recognise him as a decree-holder, it is open to the judgment-debtor to say "I have satisfied the debt which was merged in the decree." In my opinion, therefore, the Rule must be made absolute, the order made by the lower Court set aside, and the case remanded to that Court to be tried on the footing that notice under Order XXI, Rule 16, had been

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issued and is being heard, and that on the hearing of that notice, it will be open to the judgment-debtor to prove that he satisfied the decree. All costs will be costs in the notice under Order XXI, Rule 16. Both parties to be allowed to adduce evidence.

CRUMP, J. :—The question which arises in the present matter is whether, where the assignee of a decree applies to execute the decree, the Court which has to consider such application is precluded from considering any objection to the validity of the assignment, if such objection involves proof of facts showing that there had been a payment or adjustment of the decree.

Now under Order XXI, Rule 16, where the transferee of a decree applies for execution, it is necessary that notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution. The first paragraph of that rule clearly lays down that the application for execution must be made to the Court which passed the decree, and it is plain enough that the Court which passed the decree is not necessarily the Court executing the decree. The Court which passed the decree may have transferred it for execution to another Court, and had the Legislature intended to indicate the Court which executed the decree for the purposes of Order XXI, Rule 16, no doubt it would have used apt words for that purpose.

Therefore, so far as the wording of the section goes, there seems no reason for extending to the consideration of an application under Order XXI, Rule 16, the bar introduced by the 3rd paragraph of Order XXI, Rule 2. In that paragraph the words used are "the Court executing the decree", and, in my opinion, that restriction should be confined strictly to those cases

where it really applies. It seems to me that where a Court has to deal with an application on the notice under Order XXI, Rule 16, the question which arises is a preliminary question, that is to say, whether the person who comes forward as assignee is or is not entitled to execute the decree, and until that question has been disposed of, no question of execution can arise, and, therefore, there is no Court at that stage which can be termed " the Court executing the decree ". If that is the correct view, and it finds support from the decisions which my Lord the Chief Justice has discussed, it follows that the Court which has to deal with objections to the validity of an assignment is not precluded from considering those objections which are only excluded from the consideration of the Court executing the decree. It follows, therefore, that if satisfaction anterior to the date of the assignment is made out, the Court could consider that matter before allowing the assignee or so-called assignee to proceed with execution, and it seems to me abundantly clear that if the decree has, as a matter of fact, been satisfied before the date of the assignment, there is nothing which can compel the Court which passed the decree, to allow the alleged assignee to proceed with execution. Indeed it would be wrong to allow anything of the kind to be done. Therefore in the present case the point which has not been determined must, in my opinion, be determined, that is to say, whether the decree was as a matter of fact discharged before the date of the assignment on which the opponent applying for leave to execute bases his title. I agree, therefore, with the order proposed.

Rule made absolute.

R. R.