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mortgage. It is difficult, therefore, to see how the heirs of Agashe could acquire a title by adverse possession and as between Parchure and the heirs of Ramrao the matter is concluded by the suits of 1912. As regards the suggestion that there was adverse possession of the equity of redemption it is clear that Agashe's heirs could not hold that equity adversely when they were never in physical possession of the property. As matters stood Hanmantrao's heirs could not at any time have sued the heirs of Agashe alone as holders of the mere right to redeem.

Appeal dismissed.

J. G. R.

FULL BENCH.
APPELLATE CIVIL.

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

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December 19.

MEHBUNISSA BEGUM *alias* SADLIBEGUM AND OTHERS (HEIRS OF ORIGINAL DEFENDANT NO. 1), APPELLANTS, *v.* MEHMEDUNNISA BEGUM (ORIGINAL PLAINTIFF), RESPONDENT*.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 2 (3)—Execution of decree—Payment out of Court—Uncertified by Court—Such payment not recognized by executing Court.

Under Order XXI, Rule 2 (3), of the Civil Procedure Code, 1908, the Court executing a decree cannot recognize payments not certified by the Court.

Gharry v. *Gowrya*[1] and *Ganesh* v. *Yeshwant*[2], followed.

Hansa Godhaji v. Bhawa Jogaji[3] and *Trimbak Ramkrishna v. Hari Laxman*[4], overruled.

THIS was an appeal against the decision of V. P. Raverkar, First Class Subordinate Judge of Surat, in Darkhast No. 289 of 1921.

Execution proceedings.

*Appeal No. 194 of 1923 from Original Decree.

(1) (1921) 46 Bom. 226.
(2) (1922) 25 Bom. L. R. 247.
(3) (1915) 40 Bom. 333.
(4) (1910) 34 Bom. 575.

On June 28, 1916, the plaintiff obtained a decree against twenty-seven defendants for the payment of Rs. 4,886-1-11 with interest, in respect of the arrears of the Moglai Hak of the village of Abhava and an annual payment of Rs. 854-13-7, in perpetuity, in respect of the same Hak.

The plaintiff applied in 1916 and again in 1918 to recover the decretal amount from all the defendants except defendant No. 1, and recovered an aggregate sum of Rs. 7,293-6-4. These payments were not certified by the Court as required by Order XXI, Rule 2 (*3*), of the Civil Procedure Code, 1908.

The plaintiff filed the present Darkhast in 1921, against defendant No. 1 alone, to recover payments for the years 1917-18 to 1920-21. After the Court had passed an order for notice under Order XXI, Rule 22, defendant No. 1 died and his heirs were placed on the record. Notices were issued to them under Order XXI, Rule 22. They put in a written statement contending, that since the plaintiff had already recovered the monies due from the other judgment-debtors for their share of the overdue instalments, the present Darkhast for the whole amount cannot lie and that the plaintiff should be compelled to give credit for the payments.

The executing Court held that the payments set up by the legal representatives of defendant No. 1 could not be recognised in execution proceedings as more than three months had elasped since they were made.

The legal representatives of defendant No. 1 appealed to the High Court.

G. N. Thakor, with *H. V. Divatia*, for the appellants:— Order XXI, Rule 2, of the Civil Procedure Code, 1908, provides a special procedure enabling the decree-holder or the judgment-debtor to apply to the Court to record a payment or satisfaction made out of Court. It does

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not modify or control the operation of section 47 of the Code. Clause (3) of Order XXI, Rule 2, must, therefore, be read in the light of this object. If the judgment-debtor fails to inform the Court within ninety days of the payment his right to have the payment certified is gone but his right to take defences under section 47 still subsists. It has in fact repeatedly been held that the question relating to proof of satisfaction or payment is still a question falling within the scope of section 47 and that no separate suit will lie to recover the amount so paid. These decisions could be consistent only if Order XXI, Rule 2, clause (3), is read as it is read in *Hansa Godhaji* v. *Bhawa Jogaji*[1] and in *Trimbak Ramkrishna* v. *Hari Laxman*[2].

Secondly, a decree-holder who does not inform the Court executing the decree of the fact of payment or adjustment is guilty of fraud. In our written statement the facts relating to fraud are substantially mentioned. The lower Court ought to have allowed or required us to amend our written statement, if necessary, instead of refusing to go into the question of fraud. The judgment of Heaton J. in *Trimbak Ramkrishna* v. *Hari Laxman*[2] gives cogent reasons why the Court should not shut out a case of fraud under cover of Order XXI, Rule 2, clause (3).

S. S. Patkar, for the respondent, was not called upon.

MACLEOD, C. J. :—The plaintiff applied for execution of a decree passed on June 28, 1916, claiming against defendant No. 1 only, the four instalments which had become payable for the years 1917-18 to 1920-21. After the Darkhast was issued defendant No. 1 died and his representatives were placed on the record. They put in a written statement in which they pleaded that, though the plaintiff had recovered the amount to the

(1) (1915) 40 Bom. 333. (2) (1910) 34 Bom. 575.

extent of the shares of all the defendants except the deceased defendant No. 1, he had presented the Darkhast for the recovery of the whole of the amount due under the instalments fixed by the decree without giving credit for the amount recovered therein, that the plaintiff had dishonestly presented the Darkhast for the whole of the amount and had made a false affirmation and so sanction should be granted for instituting legal proceedings against him, and that he should be made to give credit in the suit for the amount recovered by him.

It is admitted that these payments had not been certified according to the provisions of Order XXI, Rule 2 (*1*) and (*2*). Accordingly the learned Judge held, following the decision of this Court in *Gharry* v. *Gourya* [1] and *Ganesh* v. *Yeshwant*[2], that such payments could not be recognized.

The appellants have relied on the decision in *Hansa Godhaji* v. *Bhawa Jogaji*[3] where it was held that a Court executing a decree could deal with the question whether uncertified payments had, as a matter of fact, been made or not. Judgment was given in accordance with the opinion expressed by Heaton J. in *Trimbak Ramkrishna* v. *Hari Laxman*[4], which was obiter for the purposes of the decision in that case, as the executing Court had held that the party executing the decree was estopped from disputing that payments had been made, and the High Court in appeal held that the decision was wrong.

I am of opinion that the decision in *Hansa Godhaji* v. *Bhawa Jogaji*[3] cannot be supported.

The words in Order XXI, Rule 2 (*3*), are too plain to admit of any other construction than that the Court

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executing a decree is barred *in limine* from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the Court executing the decree.

On the question whether the written statement of the legal representatives of the deceased 1st defendant can be treated as an application to record the alleged payments, I agree with the remarks of my brother Shah.

The appeal, therefore, must be dismissed with costs.

SHAH, J.:—After a consideration of the arguments and the conflicting rulings, I am of opinion that in view of the provisions of Order XXI, Rule 2, sub-rule (*3*), the executing Court cannot recognize any payment not certified or recorded as provided in sub-rules (*1*) and (*2*) of the same rule. The wording of sub-rule (*3*) is quite clear and admits of no escape therefrom on such general considerations as have been referred to by Heaton J. in *Trimbak Ramkrishna* v. *Hari Laxman*[1] and accepted in *Hansa Godhaji* v. *Bhawa Jogaji*[2]. Such considerations may afford a sufficient ground to modify the provisions of sub-rule (*3*) or to repeal Article 174 of the Indian Limitation Act so as to make it permissible to the judgment-debtor to apply at any time to have the payment recorded. But they cannot afford any sufficient ground for refusing to give effect to the plain and unambiguous words of the sub-rule in question.

With great respect, I think that the view taken by the Court in the later decision referred to in the referring judgment is correct.

As regards the question whether the written statement of the legal representatives of defendant No. 1

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can be treated as an application to record the alleged payments the difficulty is that even treating it as an application for that purpose it is beyond time: and there is no ground of exemption mentioned in the application. The only ground suggested by the learned counsel for the appellants is that under section 18 of the Indian Limitation Act, on the ground of fraud exemption could be claimed. It is difficult to deal with a suggestion of this nature in the absence of any specific allegation of fraud and to decide whether section 18 can help the appellants. It may be possible for the appellants on a proper application to have the alleged payments recorded by the Court under Rule 2 of Order XXI. I express no opinion on that point.

I am satisfied that having regard to the allegations in the written statement, it is not reasonably possible to allow the appellants' contention as to exemption from limitation on the special ground that by means of fraud they were kept away from the knowledge of their right to make an application to have the payments certified.

I agree, therefore, that the appeal should be dismissed with costs

CRUMP, J. :—I agree that there is no doubt or difficulty about the point referred to the Full Bench and that the answer must be that the Court executing the decree cannot in any case recognize an uncertified payment. I also agree that in this case it is not possible to treat the written statement of the judgment-debtor as an application to certify the payment made within the period allowed by law.

Appeal dismissed.

R. R.