Privy Council Appeal No. 21 *of* 1928.

Oudh Appeal No. 19 *of* 1926.

Raja Shri Prakash Singh - - - - - - *Appellant*

v.

The Allahabad Bank, Limited (Lucknow Branch) - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH, AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER, 1928.

Present at the Hearing:

LORD PHILLIMORE.
LORD ATKIN.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

By an Order of His Majesty in Council dated the 22nd April, 1927, special leave was granted to the appellant Raja Shri Prakash Singh to appeal against the decree of the Chief Court of Oudh dated the 4th of October, 1926.

The facts relevant to the appeal are as follows:

By two mortgage deeds, one dated the 24th March, 1911, to secure the sum of Rs. 3,50,000 and interest and the other, dated the 20th March, 1913, to secure the sum of Rs. 12,00,000 and interest, certain property now belonging to the appellant was mortgaged to the respondents. In the year 1916 the respondents brought a suit in the Court of the Subordinate Judge of Sitapur to recover the amount due on these two mortgages and future interest against Raja Debi Prakash Singh (the father of the appellant since deceased) and the appellant; and on the 4th December, 1916, a decree was passed in the terms of a compromise made between the parties.

By the said compromise it was agreed that a sum of Rs. 16,67,049-12-6 was due under the said mortgages

including interest and costs and it was provided that out of the aforesaid sum the sum of Rs. 3,754-0-0 for costs was to be paid within a week (and this was done) and that the sum of Rs. 16,63,295-12-6 which after payment of costs would remain due was to be paid by instalments of Rs. 60,000 (to be paid on each 30th April, of the years 1917 to 1922 inclusive) and of Rs. 80,000 (to be paid on each 31st October of the years 1917 to 1921 inclusive) and that the whole of the balance with interest as therein provided was to be paid on the 31st October, 1922 and that the respondents should be entitled to take out execution for the whole amount as might then be due under the decree by annulment of instalments and to recover the same by sale of the mortgaged property in three cases, one of which was stated as follows :—

> "If the instalments are only partly paid and the total shortage in the payment of any instalment or instalments owing to such part payment amount to Rs. 60,000 or in other words, so long as the total unpaid amount of instalment or instalments is below Rs. 60,000 the Bank" (that is the Respondents) "will not acquire right to execute the decree but it will acquire right to execute as soon as the arrears amount to Rs. 60,000."

It was also provided that in the event of the respondents having to execute their decree under the contingencies therein above mentioned, it should be open to the respondents to execute the decree without applying for and obtaining a decree absolute or final decree for the sale of the mortgaged properties.

On the 14th March, 1917, the respondents certified to the Court of the learned Subordinate Judge, payments by the judgment-debtors, *i.e.*, by the appellant and his father amounting to Rs. 40,000 and such payments were duly recorded.

Further payments were made from time to time bythe judgment-debtors to the respondents out of Court, the date of the last payment being 26th October, 1923. It was agreed by the learned counsel for the appellant that the total amount of unpaid instalments was below Rs. 60,000 until April, 1922 ; in other words that the arrears of instalments for the first time amounted to Rs. 60,000 in April, 1922.

With the exception of the Rs. 40,000 already mentioned, the respondents did not certify to the Court any of the aforesaid payments until the 8th of December, 1924.

On that date a document was filed on behalf of the respondents in the Court of the learned Subordinate Judge.

It was headed "Application under Order 21, Rule 2 C.P.C." and was as follows :

> The humble petition of Allahabad Bank Limited, Lucknow Branch, plaintiff decree-holder most respectfully showeth :—
>
> 1. That on the 4th December 1916 a decree for Rs. 16,63,295-12-6 was passed against defendant No. 1 now dead and represented by defendant No. 2 and defendant No. 2 Kunwar Sri Prakash Singh to be paid according to the instalments mentioned in Paragraph 3 of the compromise filed on behalf of the defendants and accepted by the plaintiff's pleader and agent on 10th November 1916 with interest at Rs. 7-8 per cent. per annum.

2. That under the compromise and the decree, it was provided that the decree shall stand as a decree for sale of the mortgaged property specified in the Schedule A and B attached to the decree and the compromise.

3. That the Bank decree-holder has received Rs. 8,30,316-8 in part satisfaction of the aforesaid decree on different dates as per statement of decree account attached to this application.

4. That the Bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order 21, Rule 2 (1) of the C.P.C.

The statement of decree account which was attached to the said document, set out the various payments, the last payment, as already stated, being under date October 26th, 1923.

The learned Subordinate Judge on the 8th of December, 1924, recorded the said payments; no notice of this proceeding was given to the appellant, who at that time was the sole judgment-debtor, his father having died.

On the 14th February, 1925, the respondents applied to the Court of the learned Subordinate Judge for execution of the decree, praying that Rs. 17,39,110-1-1 with interest as mentioned in the application should be realised by sale of the mortgaged property.

The appellant filed written objections on the 23rd May, 1925, and raised further objections at the hearing.

The learned Subordinate Judge framed the following issues :—

(1) Is the execution application within time ?

(2) Whether the certification and the recording of payments are invalid and barred by time ?

(3) Whether amount claimed is correct ?

On the 15th May, 1926, the learned Subordinate Judge dismissed the appellant's objections, his findings on the issues being against the appellant except in respect of certain sums wrongly claimed in respect of interest, which he directed should be rectified.

The appellant appealed to the Chief Court of Oudh at Lucknow against the order of the learned Subordinate Judge, and on the 4th October, 1926, the learned Judges of the Chief Court dismissed the appeal. The learned Judges, in their judgment, stated that the position taken up by the appellant was to the effect that—

"Although the Bank applied for execution within three years of the first date when execution was permitted under the terms of the decree, in view of the circumstance that the judgment-debtor had made sufficient payments in satisfaction of the instalments, the application for the execution is nevertheless time-barred, and the decree-holder is left without remedy in respect of the balance due. His learned Counsel has argued in support of this proposition upon three main points. He has argued that in the first place the Court cannot recognise any payments or adjustments after the 14th March, 1917, on the plea that no certification can be accepted by a Court unless it has been made within three years of the date of satisfaction. His second point is that on the date of the second certification, the 8th December, 1924, the decree had automatically become time-barred, inasmuch as there had been no certification between the 14th March, 1917, and the 8th December, 1924. His third point is that the decision of the trial Court to the effect that there had been acknowledgements in writing by the judgment-debtor which saved limitation, is incorrect.

The learned Judges held that a certification of payments by the decree-holder under the provision of Order 21, Rule 2 (1) of the first schedule to the Code of Civil Procedure of 1908 was not an application within the meaning of Article 181 of the Indian Limitation Act of 1908, on which the appellant had based his argument, and consequently, that the application for execution was not time-barred.

The learned Judges, relying on these findings, dismissed the appeal and did not decide the third point which related to the alleged acknowledgments in writing by the judgment-debtor.

The argument presented to the Board on behalf of the appellant was to the effect that a document filed by the decree-holder certifying a payment made out of Court under the provisions of Order 21, Rule 2 (1) aforesaid, is an application within the meaning of Article 181 of the Indian Limitation Act, and that it must be presented to the Court within three years of the date when the payment, which it is desired to certify, was made.

It was further argued that an application by the decree-holder under the aforesaid rule cannot be made at a time when, but for the payments sought to be recorded, the statute would have run and the right to execute the decree would be time-barred.

On this basis it was argued that in this case the Court ought not to have recognised any payments made after the 14th March, 1917, on which date the payment of Rs. 40,000 was certified and recorded, and that on the 8th December, 1924, the decree, dated the 4th December, 1916, had become time-barred as there was no certification of payments by the decree-holder between the 14th March, 1917, and the 8th December, 1924.

On the other hand, it was argued on behalf of the respondents that it was not necessary for the decree-holder to make a formal application when certifying a payment out of Court under Order 21, Rule 2 (1), that the certification of payments made by the respondents under the said rule was not an application within Article 181 of the Indian Limitation Act, and that there is no statutory period within which the decree-holder must certify to the Court a payment made to him by the judgment-debtor out of Court.

Reliance was placed upon Rule 168 of the Oudh Civil Digest and the form referred to in the said rule, and it was contended that the terms of the said rule showed that the contention of the respondents was correct.

It was further argued on behalf of the respondents that they had no right to apply for execution until April, 1922, by reason of the payments made by the judgment debtor, that such payments had been certified by them to the Court, that the Court had recorded the payments, and therefore that the application for execution of the decree was made within time.

Many decisions of the Courts in India were cited to their Lordships, and it is apparent from a consideration thereof that at one time there was a difference of opinion among the learned Judges who dealt with the matter. Their Lordships do not think it necessary to refer in detail to the cited cases; it is sufficient to say that in their opinion the weight of authority, especially in the later decisions, seems to be in favour of the contention of the respondents—as, for instance, *Pandurang* v. *Jagya*, I.L.R. 45, Bomb. 91; *Jalim Chand Patwari* v. *Yusuf Ali Chowdhuri*, I.L.R. 54, Cal. 143; and *Joti Prasad* v. *Srichand*, 26 All. L.J. 966.

It is necessary, therefore, to consider whether the document filed by the respondents in the Court of the learned Subordinate Judge on the 8th December, 1924, was an application within the meaning of Article 181 :—

Order 21, Rule 1 (1) is as follows :—

"(1) All money payable under a decree shall be paid as follows, namely :—

(*a*) into the Court whose duty it is to execute the decree; or

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs."

Order 21, Rule 2, has three sub-rules, and they provide as follows :—

"(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

"(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and 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.

"(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

The terms of Rule 2 (1) do not provide for any application being made by the decree-holder.

The provision is that where money payable under a decree is paid out of Court to the satisfaction of the decree-holder, the decree-holder shall certify the payment to the Court, and the Court shall record the same accordingly.

The rule contemplates a simple procedure, viz., a certification of payment by the decree-holder to the Court and a record by the Court of the payment; it does not provide for any notice being given to the judgment-debtor.

Order 21, Rule 2 (2) provides an opportunity for the judgment debtor to inform the Court of a payment made by him out of Court, and the procedure specified by this sub-rule is very different from the procedure referred to in sub-rule 1.

The judgment-debtor may inform the Court of the payment and apply to the Court to issue a notice to the decree-holder to show cause why such payment should not be recorded.

Sub-rule 2 therefore does contemplate an application by the judgment-debtor; further, it provides for notice being given to the decree-holder, it affords an opportunity for the decree-holder to appear, and it involves a judicial decision by the Court whether the payment should be recorded.

It is to be noted that in the case where an application under Order 21, Rule 2 (2) is made by the judgment-debtor for the issue of a notice to the decree-holder to show cause why a payment made out of Court of any money payable under a decree should not be recorded as certified, it is provided by Article 174 of the Schedule of the Indian Limitation Act that such application shall be made with 90 days of the time when the payment was made.

There is no express article of the Limitation Act applicable to the certification by the decree-holder of a payment made out of Court to him.

It is difficult to understand why the Legislature should have prescribed a specified time for the application under Order 21, Rule 2 (2) and should have made no specific provision of limitation with regard to the procedure of certifying by the decree-holder under Order 21, Rule 2 (1) if such procedure were regarded as an " application " within the meaning of the Limitation Act.

It is also difficult to understand why the Legislature, according to the contention of the appellant, should have prescribed a period of three years from the date of payment within which the decree-holder might certify the payment, and at the same time provide that the judgment-debtor must make his application under Order 21, Rule 2 (2) within 90 days of the payment.

The terms of Order 21, Rule 2 (1), in their ordinary meaning do not involve any application by the decree-holder : the decree-holder would comply with the terms of the rule if he were to certify to the Court that money payable under the decree had been paid to him out of Court, and it would then rest with the Court to record the payment in accordance with the provisions of the rule.

The rule imposes a duty upon the decree-holder to certify the payment, and a duty upon the Court upon such certificate being given to record such payment.

Rule 2 (3) provides that a payment which has not been certified as recorded as aforesaid shall not be recognised by any Court executing the decree.

The provision in Rule 2 (3) no doubt was inserted for good reasons known to the Legislature, and it is obvious that the provision must tend to simplify and expedite the proceedings in the Court executing the decree. There is nothing, however, in sub-rule 3 to indicate that the Legislature intended that the certification of a payment by the decree-holder under sub-rule 1 should be treated as an " application."

The above-mentioned rules contemplate that the decree-holder, to whom a payment has been made by the judgment-debtor out of Court, should certify such payment to the Court within a reasonable time in order that it might be recorded by the Court, and the judgment-debtor is protected by the provision that in the event of the decree-holder failing to certify the payment to the Court, the judgment-debtor may apply to the Court for a notice to issue to the judgment-creditor to show cause why the payment should not be recorded as certified, provision being made by Article 174 of the Limitation Act that such application by the judgment-debtor must be made within 90 days of the time when payment was made. In view of these provisions, apparently it was not thought necessary to provide any specific time within which the judgment-creditor must certify the payment under Order 21, Rule 2 (1).

Having regard to the ordinary meaning of the words used in Order 21, Rule 2 (1), the difference between the procedure under Rule 2 (1) and the procedure under Rule 2 (2) and the above-mentioned scheme of the provisions contained in the said rules, their Lordships are of opinion that the mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under Order 21, Rule 2 (1) is not an application within the meaning of Article 181 of the Schedule of the Indian Limitation Act.

It was, however, argued on behalf of the appellant that in this case the respondents had not confined themselves to certifying the payments in question, but that they had, in fact, made an " application " within the meaning of Article 181, and reference was made to the document filed by the respondents on the 8th December, 1924.

It is true that the document is headed " Application under Order 21, Rule 2 C.P.C.," and it is in the form of a petition wherein the facts relied upon are set out.

In paragraph 4, however, it is stated that the bank decree-holder certifies the said payments made to it and prays that the Court may be pleased to record the same accordingly under Order 21, Rule 2 (1) of the C.P.C.

This paragraph contains the certificate which is required by Order 21, Rule 2 (1), and the prayer is no more than a request that the Court will carry out the provisions of the rule and record the payments. It is clear that the respondents intended to certify and did certify in accordance with the above-mentioned rule, and the mere fact that the document was called an " application " and was in the form of a petition cannot, in their Lordships' opinion, alter the real nature of the procedure and convert what was really no more than a certificate of certain payments into an " application " within the meaning of Article 181.

It was further argued that in some cases in India it had been held that where a decree-holder had proceeded to certify a payment which had been made out of Court in satisfaction of a

decree, he had taken a step in aid of execution of the decree within the meaning of Article 182 (5), of the Indian Limitation Act, and that if such procedure were held to be an application for the purpose of Article 182 (5), it must also be an application within the meaning of Article 181.

Their Lordships do not think it necessary in this appeal to express any opinion with reference to the cited cases dealing with matters which were held to be steps in aid of execution of a decree or order.

Each case must depend upon the facts relating thereto, and it is sufficient for the disposal of this appeal for their Lordships to hold that the document of the 8th December, 1924, was in effect no more than a certification of payments by the respondents, and that such certification was not an application within the meaning of Article 181 of the Indian Limitation Act.

Consequently, the application for execution of the decree by reason of the payments certified and recorded was not time-barred.

The above-mentioned conclusion renders it unnecessary for their Lordships to consider the question relating to the alleged acknowledgments in writing, and it should be noted that the learned counsel were not called upon to present their arguments in respect of that question.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

RAJA SHRI PRAKASH SINGH

v.

THE ALLAHABAD BANK, LIMITED (LUCKNOW BRANCH).

DELIVERED BY SIR LANCELOT SANDERSON.

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