

(1912) 01 CAL CK 0034**Calcutta High Court****Case No:** None

Kutbullah Sarkar

APPELLANT

Vs

Durga Charan Rudra

RESPONDENT

Date of Decision: Jan. 4, 1912**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 2, 47
- Limitation Act, 1963 - Article 173A

Citation: 13 Ind. Cas. 424**Hon'ble Judges:** D. Chatterjee, J; Caspersz, J**Bench:** Division Bench**Judgement**

1. This is an appeal by the judgment-debtor, from an order of the District Judge permitting the decree-holder to execute his decree of the 14th August 1901. The first execution proceedings began on the 5th September 1904; the second on the 4th January 1908; while the third and present application was made by the decree-holder on the 11th August 1909. On these facts it is urged for the judgment-debtor that the first and second applications to execute the decree were clearly barred. This contention, however, cannot be considered in the absence of findings of fact, and the omission is due to the altitude of the judgment-debtor who refrained from pressing any such objection in the lower Courts. There must have been various proceeding on the successive applications, and certain action taken on the second application has been mentioned at the Bar. If that application was in time, the case with which we are now concerned was properly instituted and can continue.

2. The next contention is that there was an adjustment of the decree sometime in the year 1901; that the decree-holder fraudulently omitted to certify the same to the Court, and that the question is one that should have been decided u/s 47 of the Code of Civil Procedure, 1908.

3. Order XXT, Rule 2 of the Code, as now amended, provides that a payment or adjustment, which has not been certified or recorded in the manner provided by the foregoing part of the section, shall not be recognised by any Court executing the decree. The omission of the words "as payment or adjustment of the decree" makes it clear that the Court cannot recognise a payment or adjustment, which has not been certified, for any purpose whatsoever, as, for example, to prolong the period of limitation for applying for execution. The judgment debtor has his remedy under the second Clause of Rule 2; he is at liberty to inform the Court, and so to protect himself from any fraud of the decree-holder. The appellant, however, seeks, to obtain another remedy, and to have his objecting to execution tried out, u/s 47 of the Code, But he cannot be permitted to evade the provisions of Article 173A of the Limitation Act, and to obtain a decision in a matter which does not, strictly come within the scope of Section 47 because it is a matter which has been specifically provided for in Order XXI, Rule 2. If the contrary view were adopted, it would be open to the judgment-debtor in any similar case to allege fraud on the part of the decree-holder and to have an inquiry made under the general section, for every omission to certify payment may involve either negligence or fraud which in such a case would be an aggravated form of negligence. In the same order the legislature has enacted that applications to set aside sales on the ground of fraud come within the scope of Rule 99, and so the operation of Section 47 is excluded by necessary implication.

4. The view we take in this matter receives support from the decision of Mookerjee and Carnduff, JJ., in *Mort Mohan Karmakar v. Dwarka Nath Karmakar* 12 C.L.J. 312 at P. 317 : 7 Ind. Cas. 55. The judgmentdebtor may have his remedy by suit on a plaint properly framed.

5. The appeal is dismissed with costs. We assess the hearing fee at two gold mohours.