

APPELLATE CIVIL.

Before Sir W. Morgan, C.J. and Mr. Justice Innes.

KUNHI MOIDIN KUTTI (PLAINTIFF), SPECIAL APPELLANT,
v. RAMEN UNNI (DEFENDANT), SPECIAL RESPONDENT (1).

1876.
November 24.
1877.
February 15.

Suit—Money paid out of Court—Adjustment of decree.

N. having obtained a decree in a suit against K, requested him to discharge certain sums due on outstanding bonds which N. had given to third parties, promising to credit the sums so paid to the amount due under the aforesaid decree. K. paid as requested, but N. took out execution in full of the decree and the Court refused to recognise the payments made by K. out of Court.

In a suit by K. for the money paid as aforesaid, *Held* that the payments not having been made directly in adjustment of a decree the suit was not barred within the rule laid down in *Arunthella Pillai v. Appavu Pillai* (2).

THE plaintiff brought this suit to recover Rupees 729-14-1, money paid by one Viran Kutti, his deceased karnavan, on account of Narainan Nambúdiri, the deceased father of the defendant.

The plaintiff's case was that on the 28th February 1862 the defendant's father obtained a decree against the plaintiff for Rs. 355-7-9, with interest; that execution of that decree was not taken out; that in 1872 and 1874 his karnavan (Viran Kutti) paid the amount of three bonds due by the said father of the defendant and at his request, in consideration that the amounts so paid should be set off against the judgment debt due by the plaintiff; that in July 1875 the defendant took out execution in full of the said decree against the present plaintiff, and that the Court refused to recognise the payments made by Viran Kutti out of Court.

The defendant admitted a payment of Rs. 100, but denied the rest. The District Munsif decreed for the plaintiff for the Rupees 100 admitted, but dismissed the claim for the balance.

Both plaintiff and defendant appealed.

The District Judge held on appeal that the suit was for money paid in satisfaction of a decree and was barred by Section 11 of Act XXIII of 1861.

(1) Special Appeal No. 749 of 1876, against the decree of H. Wigram, District Judge of South Malabar, dated 10th February 1876, reversing the decree of C. Sankaran Nayar, District Munsif of Kuttanad, dated 13th December 1875.

(2) 3 Mad. H. C. R., 188.

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He therefore reversed the decree of the Lower Court and dismissed the suit.

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Against this decision the plaintiff preferred a special appeal on the ground that the Lower Appellate Court was in error in holding the suit to be not maintainable.

Mr. *Gould* for Mr. *Handley* for the appellant. This case is distinguishable from that of *Arunáchella Pillai v. Appávu Pillai* (1), and, even if this be not so, the Full Bench decision of the High Court of Bengal in *Gunamani Dasi v. Prankishori Dasi* (2) ought to govern the present case. He also cited *Krishnaji Kesava Pandit v. Subbaráya Tákker* (3).

The *Advocate General* for the respondent. The decisions in the cases of *Arunáchella Pillai v. Appávu Pillai* (1) and *Gunamani Dasi v. Prankishori Dasi* (2) are undoubtedly conflicting, but in such circumstances the decision of this Court should prevail.

The Court delivered the following.

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February 16.

JUDGMENT:—This case is distinguishable from that of *Arunáchella Pillai v. Appávu Pillai*, (1) because there the amount sought to be recovered had been actually paid in adjustment of a decree, and the Code provides that such matters must be settled in execution and not by separate suit. In the present case there was no doubt a promise that the money so paid by plaintiff in discharge of the debts due by defendant's father would be credited by defendant's father in reduction or adjustment of the decree held by defendant's father against plaintiff. But the sums so paid were not carried to credit of the judgment debt, nor can they be said to have been paid in adjustment of that debt, although, no doubt, plaintiff's father may have depended upon the promise of defendant's father being performed, and upon an adjustment being made as the ultimate effect of the payment. The only effect, however, of the payment was to adjust defendant's father's debts and to give plaintiff a right of action against defendant's father for money paid to his use and at his request.

The payment not having been made directly in adjustment of a decree, the suit does not appear to come within the rule of *Arunáchella Pillai v. Appávu Pillai* (1).

(1) 3 Mad. H. C. R. 188.

(2) 5 Ben. L. R. 223.

(3) 7 Mad. H. C. R. 387.

On the merits the District Judge seems to find for plaintiff. We shall, therefore, reverse the decree of the District Judge and restore that of the District Munsif.

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Decree reversed.

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FULL BENCH.

Before Sir W. Morgan, C. J., Mr. Justice Holloway and Mr. Justice Innes.

FAKI'R MUHAMMAD AND SEVEN OTHERS (DEFENDANTS) SPECIAL APPELLANTS, v. TIRUMALA CHARIAR AND SEVEN OTHERS (PLAINTIFFS), SPECIAL RESPONDENTS. (1)

1876.
November 28.

Pattá—Rights of mirásídar—Waste lands.

The plaintiffs, village mirásídar, sued to eject defendants in possession of the waste lands of the village and to obtain a pattá for the same. The facts were that on three several occasions, beginning in Fasli 1269, applications were made by strangers for permission to cultivate waste lands belonging to the village, and that on each occasion the mirásídar successfully intervened, asserting a preferential right to obtain the lands for cultivation. Pattás were accordingly made out in their names. But on no occasion did they either cultivate or pay kist for the lands, and subsequent to the last occasion, in 1867, the lands were put up to auction for arrears of kist. The mirásídar bought them in. But the Collector refused to accept the mirásídar as tenants, cancelled the sale and issued a pattá to the agent of a former applicant. Plaintiffs brought their suit in March 1873, and the District Munsif dismissed it, holding that the conduct of plaintiffs justified the Revenue authorities in the course they had adopted.

The District Judge reversed the decree of the Munsif, on the authority of *Rájagopála Ayyangar v. Collector of Chingleput* (2). On Special Appeal the case was heard before MORGAN, C.J., and INNES, J., and on a difference of opinion was referred to a Full Bench (MORGAN, C.J., HOLLOWAY and INNES, JJ.)

Held by MORGAN, C.J., and HOLLOWAY, J., allowing the Special Appeal, that the Collector's settlement with the mirásídar was in form an annual settlement, and that on the face of the transaction there was nothing which could be regarded as amounting to the creation or recognition of a permanent right in the mirásídar (plaintiffs), such as could be determined only in the manner indicated in the case of *Rájagopála Ayyangar v. Collector of Chingleput* (2).

That it was apparent that the mirásídar had no intention either to cultivate the land or (except on legal compulsion) to pay the assessment, and that in such

(1) Special Appeal No. 487 of 1875, against the decree of C. G. Plumer, District Judge of North Arcot, dated 28th June 1875, reversing the decree of V. Rangasami Ayyangar, District Munsif of Arnea, dated 30th September 1874.

(2) 7 Mad. H. C. R., 98.