

plaintiffs to the defendants, and the defendants must therefore bear the loss arising from the fire. The circumstances of the case in *The South Australian Insurance Co. v. Randell*(1) were somewhat different from those in this case, and the delivery of the property to the miller was made in order that he might sell the same as his own. The property therefore passed and the former was to receive either other grain or the price of the grain. The action was one on a policy of assurance effected by the miller who contended that the property passed to him and was rightly described as property in which he was interested and not trust property. No doubt it was stated in the judgment that there was a sale of the grain to the miller. But it is questionable whether under the Indian Contract Act such circumstances would be held to amount to a sale.

VOLKART
BROTHERS
v.
VETTIVELU
NADAN.

As to the amount claimed, we think the Judge is right in giving a decree for the sum admitted by the defendants, as the plaintiffs have not proved satisfactorily that they are entitled to any greater sum.

We also agree in the Judge's findings on the 3rd and 4th issues.

Unless either party desires a finding on the 5th issue, the appeal must be dismissed with costs. Neither party desires a finding on the 5th issue. We dismiss the appeal with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.*

THIRUMALAI (PLAINTIFF), APPELLANT,
and

SUNDARA (DEFENDANT No. 1), RESPONDENT.*

1888.
April 16, 18.

Civil Procedure Code, s. 258—Mortgage in satisfaction of decree—Adjustment not certified—Mortgage invalid.

In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guar-

(1) L.R., 3 P.C., 101.

* Second Appeal No. 764 of 1887.

NOTE.—Section 258, last clause, as amended is :—

Unless such payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any court executing the decree.

THEIRUMALAI
v.
SUNDARA.

dian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree and the adjustment had not been certified to the Court, the mortgage could not be recognized by virtue of s. 258 of the Code of Civil Procedure :

Held that, as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim—*Haji Abdul Rahiman v. Khoja Khaki Aruth* (I.L.R., 11 Bom., 6) followed and *Mallamma v. Venkappa* (I.L.R., 8 Mad., 277) distinguished.

APPEAL from the decree of J. A. Davies, District Judge of Tanjore, modifying the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 139 of 1886.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Shephard, J.).

Mahadeva Ayyar for appellant.

Rama Rau for respondent.

JUDGMENT.—The plaintiff brought this suit to recover his ancestral property from the defendant No. 1, who claimed to hold it on the strength of a mortgage executed by the plaintiff's mother and guardian. This mortgage is found to have been executed by the plaintiff's mother (defendant No. 5) for the purpose of satisfying a decree obtained by defendant No. 1 against her on a bond executed by the plaintiff's father, and exception is taken by the plaintiff to the mortgage on the ground that it was given in adjustment of a decree, which adjustment was not certified to the Court, and, therefore, in accordance with the provisions of s. 258 of the Civil Procedure Code, ought not to be recognized by any Court. Section 258 declares that if any money payable under a decree is paid out of Court, or the decree is otherwise adjusted to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court which should execute the decree; and, in the last clause, the section provides that no such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid. The question is whether the default on the part of the decree-holder in discharging the duty cast upon him by this section does not compel the Court to refuse recognition to the adjustment and thus render invalid against the plaintiff the mortgage which the defendant has set up. There can be no doubt that, except on the footing that the mortgage was executed in satisfaction of the decree, it would not be enforceable against the plaintiff. In order to relieve the minor's property from the obligation which the decree cast upon it, it was

competent to his guardian to execute a mortgage; but if that object failed and the decree remained unsatisfied and, therefore, enforceable against the minor's property, it seems clear that the mortgage could not be binding on him. THIRUMALAI
v.
SUNDARA.

In a case very similar to the present, except for the circumstance that the decree-holder was the plaintiff endeavouring to enforce the mortgage which had been executed in adjustment of the decree, the Bombay High Court held that; inasmuch as the adjustment had not been certified to the court under s. 258, the suit would not lie. This decision, which is that of a Full Bench, was put on the ground that the uncertified adjustment could not be recognized by any Court and that, therefore, there was no valid consideration for the mortgage (*Haji Abdul Rahiman v. Khoja Khaki Aruth*)(1). It was contended before us that s. 258 appears in a group of sections relating to the execution of decrees and that the "Court" intended in the last clause was the Court executing the decree, and that at any rate the section did not apply when a separate suit was brought on a cause of action founded on the adjustment. For this position the Full Bench decision in *Malamma v. Venkappa*(2) was cited, which decision, it was argued, was in conflict with the above-cited Bombay decision. It must be allowed that Farran, J., when concurring in the latter decision, did think it necessary to disapprove of the decision of this Court. But the other two learned Judges who formed the Full Bench, so far from concurring with him on this point, suggested that the cases might be distinguished. On examining, it seems to us that a clear distinction may be drawn between it and the present case. In that case the defendant, who was the decree-holder, had, under an arrangement made with the plaintiff in adjustment of the decree against the latter, been placed in possession of certain land belonging to the plaintiff, and in her suit the plaintiff alleged that the defendant, while so enjoying the lands, had nevertheless executed the decree, and she sought to recover the loss sustained by her by reason of such enjoyment of the lands by the defendant. It was as though the plaintiff had made a money-payment in satisfaction of the decree and had, on the decree being executed notwithstanding, sought to recover the money on the ground that the consideration had wholly failed. And so in the judgment of the

(1) I.L.R., 11 Bom., 6.

(2) I.L.R., 8 Mad., 277.

THIRUMALAI
v.
SUNDARA.

Full Bench it was said: "The question which we have to consider is whether, when a payment has been made, or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit." This question was answered in the negative, it being held that full effect could be given to those provisions without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify. The precise point decided was that the former suit would lie, viz., the suit to recover the money received by the defendant, the consideration for which had wholly failed. This decision is in no way inconsistent with the decision of the Bombay High Court and does not involve any recognition of the uncertified adjustment as an adjustment of the decree. On the contrary it is because there was no adjustment that the plaintiff was held entitled to recover the money, and, similarly, in the present case, it is because there has been an entire failure of consideration that we think, agreeing with the decision of the Bombay Full Bench, that the mortgage, which in the absence of such adjustment cannot be enforceable, should not prevail against the plaintiff.

We must, therefore, reverse the decree of the District Judge and restore that of the District Munsif. The defendant must pay the costs of this appeal and of the appeal to the District Court.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Parker.

QUEEN-EMPRESS

against

SAMBOJI AND OTHERS.*

Abkari Act (Madras), ss. 9, 11, 55.

Under the Madras Abkari Act, 1886, a permit is not necessary where toddy is carried from the licensee's trees to his shop within the limits of his farm, or

1888.
March 23.
April 26.

* Criminal Revision Case No. 418 of 1887.