APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SELLAMAYYAN (PLAINTIFF), APPELLANT,

and

MUTHAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888. August 7. October 4.

Civil Procedure Code, s. 258.

In 1877, M. executed a mortgage to S. in consideration of a sum paid in cash and a debt due by M. to S. under a decree. S. did not certify satisfaction of the decree to the Court under s. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage :

Held, in a suit to enforce the mortgage, that s. 258 was no bar to the plaintiffs' right to recover.

APPEAL from the decree of G. D. Irvine, District Judge of Trichinopoly, modifying the decree of K. Rangamannar Ayyangar, District Munsif of Kulitalai, in suit No. 148 of 1886.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

S. Subramanya Ayyar and *Sundara Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—In September 1877, respondents mortgaged certain property to appellant for Rs. 450, of which Rs. 60 was paid in cash, Rs. 390 being due to him under the decree in original suit No. 306 of 1874. It is found by the District Judge that appellant failed to certify satisfaction to the Court that passed the decree, but its execution was admittedly barred by limitation at the time of the suit. The Judge disallowed appellant's claim to Rs. 390, observing that, when the judgment-creditor failed to certify satisfaction of the decree adjusted out of Court, the consideration for the contract of adjustment failed, and he was not entitled to enforce it. Hence this second appeal.

The instrument of mortgage recites that Rs. 60 was advanced in cash and that the balance was already due under the decree in question and stipulates for repayment of Rs. 450 with interest on the security of the mortgaged property. It contains no

* Second Appeal No. 1153 of 1887.

SELLAMAYYAN v. MUTHAN.

allusion either to the creditor's obligation to certify satisfaction or the debtor's right to compel him to do so, or to such certificate as the consideration for the contract. The document is susceptible of the construction that certifying satisfaction of the decree was not in the contemplation of the contracting parties, and that an undertaking on the part of the creditor not to execute the decree in his favor was accepted and relied on as the consideration. The question then that arises for decision upon the facts of this case is whether a contract, of which the consideration is in part an undertaking by the creditor not to execute a decree in his favor, is void *pro tanto* by virtue of s. 258. There can be no doubt that apart from that section, the contract would be valid under the rules of substantive law. As to the effect of s. 258 upon the contract, there is a conflict of opinion between the different High Courts, and the words in that section material to our present purpose are, "no such payment or adjustment shall be recognized by *any* Court unless it has been certified as aforesaid." Under the earlier enactment the words were, "by such Court," that is to say, by the Court executing the decree.

That the change must have some significance is not denied; the question is as to its nature and extent. The view adopted by the Full Bench of this Court in *Mallamma* v. *Venkappa*(1) by the Allahabad High Court in *Ramghulam* v. *Janki Rai*(2) and by the Calcutta High Court in *Jhabar Mahomed* v. *Modan Sonahar*(3) was that "any Court" meant any Court dealing with the question of the execution of the decree. The principle on which those decisions proceeded was that s. 258 introduced but a rule of procedure, that the probable intention was that the adjustment of a decree should, like the decree itself, be a matter of record, and that unless it is made a matter of record, no Court having to determine whether the decree has been executed shall recognize it as evidence of a valid adjustment. The construction adopted by the Full Bench of the Bombay High Court is that an uncertified adjustment is valid for no purpose whatever, and even in a separate suit in which the ground of claim is the breach of an otherwise valid contract by which the decree-holder has undertaken not to execute the decree. The Full Bench decision of this Court was founded on the con-

(1) I.L.R., 8 Mad., 277. (2) I.L.R., 7 All., 124.
(3) I.L.R., 11 Cal., 671.

sideration that a rule of procedure should not be taken to repeal a rule of substantive law unless the intention to do so was clearly expressed or must necessarily be implied. The Full Bench of the High Court at Bombay consider that such intention must necessarily be implied from the course of legislation. If the latest modification of the Code of Civil Procedure is any indication of the intention of the Legislature, it lends support to the view taken by the Full Bench of this Court. However this may be, the decision in *Mullamma* v. *Venkappa* is binding upon us as observed in second appeal No. 278 of 1887 until it is set aside by a Full Bench. Though the decision in *Thirumalai* v. *Sundara*(1) seems to follow the Bombay decision, it distinguishes that case from case of *Mallamma* v. *Venkappa*. Again, the creditor may certify the adjustment whenever he likes, and the new contract is not therefore void *ab initio*. We can only refuse to enforce it on the ground that the consideration had failed at the date of this suit, but we are unable to say so in the case before us as the creditor had allowed the decree to become barred by limitation relying on the mortgage. Following the decision of the Full Bench of this Court, we set aside the decree of District Judge and restore that of the District Munsif and direct the respondent to pay the appellant's costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

IBRAHIM (PLAINTIFF), APPELLANT,

and

SYED BIBI (DEFENDANT), RESPONDENT.*

1888. April 13. October 4.

Muhammadan law—Divorce.

Under Muhammadan law no special expressions are necessary to constitute a valid divorce, nor, except when the repudiation is final, need the words be repeated thrice. If the divorce pronounced is liable to be, but is *not*, revoked within the period of iddut, it becomes final.

APPEAL from the decree of G. D. Irvine, District Judge of

(1) I.L.R., 11 Mad., 469. * Second Appeal No. 759 of 1887.