

SETHURAYAR  
v.  
SHANNUGAM  
PILLAI.

The only remaining question is as to the relief to be given. The injunction prayed for cannot be granted under section 56, clause (b) of the Specific Relief Act; but, if the plaintiff's case be true, he is entitled to the declaration granted by the Munsif subject to the plaintiff reimbursing the first defendant the costs incurred by him in obtaining the decree.

It was contended that such declaration would be fruitless and should not be granted, but we do not agree in this view. Such a declaration being binding on the parties would entitle the plaintiff to apply for the execution of the decree under section 232 of the Code of Civil Procedure, which has been held applicable to a case like the present (*Umasondury Dassj v. Brojonath Bhattacharjee*(1)).

The Judge was therefore wrong in holding that this suit was not maintainable. We accordingly reverse his decree and remand the appeal for disposal on the merits in the light of the above observations. Costs will abide and follow the result.

No order is necessary on the memorandum of objections as the Lower Court's decree has been reversed.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Boddam.*

RAMAYYAR (COUNTER-PETITIONER-PLAINTIFF), APPELLANT,

v.

RAMAYYAR (PETITIONER-DEFENDANT), RESPONDENT.\*

*Civil Procedure Code—Act XIV of 1852, ss. 244, 258, 311—Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder.*

An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented: but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside.

*Held*, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.

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(1) I.L.R., 16 Cal., 347.

\* Appeal against Appellate Order No. 23 of 1896.

APPEAL against the order of S. Gopala Chari, Subordinate Judge of Tinnevely, in Appeal Suit No. 95 of 1894, reversing the order of J. Solomon Gnaniyar Nadar, Acting District Munsif of Ambasamudram, in Miscellaneous Petitions Nos. 532 and 458 of 1893.

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These were applications by a judgment-debtor whose property had been attached in execution of the decree and with the leave of the Court purchased by the decree-holder. The first application was preferred under Civil Procedure Code, section 311, and it was therein alleged that the decree had been adjusted by agreement and that it was arranged that the decree-holder should report the adjustment to the Court and it was prayed that the sale be set aside. The second petition was presented under Civil Procedure Code, section 244, and proceeded on the same facts. The first petition under section 311 was disallowed on the ground that the allegations made did not satisfy the requirements of that section. The second petition under section 244 was rejected on the ground that it could not be entertained, as the defendant had omitted to report the adjustment to Court under section 258. The Subordinate Judge, however, on appeal reversed the orders appealed against and set aside the sale, holding that the allegations of the judgment-debtor were proved.

The decree-holder preferred this appeal on the following among other grounds :—

“ 2. No facts have been proved by the defendant to justify the Court in setting aside the sale.

“ 3. No evidence ought to have been admitted by the Judge to prove the alleged agreement, as neither the decree-holder had certified it in Court, nor the judgment-debtor applied to compel the decree-holder to certify within the statutory period.

“ 5. Assuming there was such an agreement and breach, the defendant's remedy is not in execution proceedings.”

*Sankaran Nayar* for appellant.

*Ramakrishna Ayyar* for respondent.

JUDGMENT.—On the 3rd August 1893 there was an adjustment out of Court between the decree-holder and the judgment-debtor. On the 19th August it was falsely represented to the judgment-debtor's brother-in-law who acted for him, that the requisite petition certifying adjustment to the Court had been presented; notwithstanding that, the decree-holder proceeded with the execution and obtained leave to bid at the sale which took place on the 1st

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September. The fact of the sale came to the knowledge of the judgment-debtor on the 3rd September and on the 21st September he put in a petition under section 311 of the Code following it up with another petition of the 15th November under section 244. In these petitions the above facts found by the Subordinate Judge are stated. The District Munsif dismissed the petition holding that, under section 258, the Court could not recognize adjustment made out of Court and not duly certified. We are of opinion that the proviso to section 258 does not absolutely preclude proof of an uncertified adjustment. It only declares that it shall not be recognized as such by the Court executing the decree. However, the judgment-debtor does not rely on the adjustment as an adjustment, but only as a step in proving the fraud committed on himself and on the Court.

We think, therefore, that this proviso does not stand in the way of the judgment-debtor proving the fraud of which he complains. That there has been a fraud on the Court and on the judgment-debtor is found by the Subordinate Judge, and there can be no doubt about it. It is clear that, if the Court had been apprised of the facts, the decree-holder would not have had leave to bid and the sale would never have taken place. It would be monstrous to hold that a Court upon which such fraud as is proved in the present case has been committed is nevertheless bound to confirm the sale (*Subbaji Rau v. Srinivasa Rau* (1)).

We dismiss the appeal with costs.

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## APPELLATE CIVIL—FULL BENCH.

Before *Mr. Justice Shephard, Mr. Justice Subramania Ayyar,*  
*Mr. Justice Davies, and Mr. Justice Boddam.*

### REFERENCE UNDER STAMP ACT, s. 46. \*

1897.  
November 5.

*Stamp Act—Act I of 1879, s. 3, cls. (12), (13)—Lease—Mortgage.*

An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees, and it provided that the party paying that sum should remain in possession of certain land for twelve years but contained no provision for repayment of that sum or for the payment of rent:

*Held*, that the instrument was a usufructuary mortgage and not a lease.

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(1) I.L.R., 2 Mad., 264.

\* Referred Case No. 19 of 1897.