

1883  
 GOPAL  
 CHUNDER  
 MUKERJEE  
 v.  
 JUDDOOLALL  
 MULLICK.

with the original purpose, though inclination, custom, or a change of the law may lead to its more frequent exercise. On these grounds I concur in admitting the appeal with costs throughout.

*Appeal allowed.*

Attorneys for the appellants : *Messrs. Swinhoe & Co.*

Attorneys for the respondent : *Messrs. Beeby & Rutter.*

## APPELLATE CIVIL.

*Before Mr. Justice Prinsep and Mr. Justice Wilson.*

1883  
 February 26.

ISHAN CHUNDER BANDOPADHYA (DEFENDANT) v. INDRO  
 NARAIN GOSSAMI (PLAINTIFF).\*

*Sale in Execution of Decree—Payment not certified to Court—Fraud—  
 Setting aside Sale—Cause of action—Regular suit.*

*A* obtained a money decree against *B* and others jointly for Rs. 112; and in consideration of a payment of Rs. 25 made by *B* agreed to release *B* from all liability under the decree. This payment was not certified to the Court, and *A* afterwards in execution of the decree had certain immovable property belonging to *B* put up for sale, and this property he purchased himself.

*Held*, that a suit would lie by *B* to set aside the sale and to recover the property from *A*.

THE facts of this case are stated as follows by the Judge of the lower Appellate Court :—

“ On the 19th of April 1873 the defendant, Ishan Chunder Bandopadhyaya, obtained a decree against Nuffer Chunder Gossami and four others jointly, by which the debtors were directed to pay to the decree-holder Rs. 112. An application for execution was made on the 28th of February 1876, but without any satisfactory result. The application appears to have been removed from the file in March 1876. The next application for execution was made on the 20th of December 1878. Notice was served on the debtors on the 14th of Magh 1285 (29th January 1879), and returned on the 3rd of February 1879. On the very next day Indro Narain Gossami came in and objected to the execution, saying that he had paid Rs. 25 to the decree-holder, and that the decree-holder

\* Appeal from Appellate Decree No. 1614 of 1881, against the decree of Baboo Brojendro Coomar Seal, Judge of Bankoora, dated the 3rd June 1881, affirming the decree of Baboo Jogendro Nath Bose, Munsiff of Gangajal Ghat, dated the 22nd March 1880.

had absolved him from all liability under the decree. As the fact of payment on the said arrangement had not been certified to the Court, it was not at liberty to enter into the matter in the execution proceedings. The decree-holder, however, was asked as to whether or not he had received the said Rs. 25 and whether he had released Indro Narain from liability under the decree. The decree-holder admitted having received the amount, but denied having expressed his intention of not taking out execution against him. There the matter ended. The order of the Court directing execution to issue against Indro Narain bears date the 25th of February 1879." Under this order the property of Indro Narain was sold and purchased by the decree-holder, Ishan Chunder Bandopadhyaya. The plaintiff then brought the present suit to have the sale set aside on the ground of fraud. The learned Judge of the lower Appellate Court having gone through the evidence said: "I agree with the Court below in finding that the decree-holder had released the plaintiff from all liability under the decree, and that therefore his conduct in taking out execution against him was fraudulent. The sale must, therefore, be set aside." The defendant appealed to the High Court on the grounds (1), that the alleged adjustment having been set up in the execution proceedings could not be again brought forward in a subsequent suit; (2), that the suit was barred by the provisions of s. 244 of the Civil Procedure Code; and (3), that the alleged promise to release the plaintiff was a *nudum pactum*.

Baboo *Rash Behary Ghose* for the appellant.

Baboo *Nil Madhub Sen* for the respondent.

The judgment of the Court (PRINSEP and WILSON, JJ.) was delivered by

PRINSEP, J.—It has been found by the lower Appellate Court that the defendant, who held a decree against the plaintiff and others, agreed to take, and did take, from plaintiff Rs. 25, as representing his liability under this joint decree, and at the same time undertook to abstain from further proceedings, but that notwithstanding he persisted in executing the decree and sold certain property belonging to the plaintiff.

The only question raised before us is, whether under the Code of Civil Procedure now in force, a suit will lie to set aside the

1888  
 ISHAN  
 CHUNDER  
 BANDOPAD-  
 HYA  
 v.  
 INDRO  
 NARAIN  
 GOSSAMI.

1888  
 ISHAN  
 CHUNDER  
 BANDOPAD-  
 HYA.  
 v.  
 INDRO  
 NARAIN  
 GOSSAMI.

sale of plaintiff's property as having been held fraudulently, and in breach of the undertaking on receipt of the money paid out of Court in satisfaction of the liability of the plaintiff judgment-debtor under the decree, whether the law (s. 258) having placed it in the power of a judgment-debtor making such a payment to obtain the assistance of the Court, within a certain specified period, to require the decree-holder to certify that payment, any suit brought practically for the same purpose is not barred.

As an authority that the present suit will not lie, the case of *Patankar v. Devji* (1) has been cited. On the other hand, we find that in the case of *Guni Khan v. Koonjo Behary Sein* (2) it has been held by a Division Bench of this Court that the law is unaltered by the Code of 1877, re-enacted by Act XIV of 1882. In respect of the matter now before us we find no material difference between s. 11, Act XXIII of 1861, now repealed, and s. 244 of the Code of Civil Procedure which has taken its place, and we observe that it was after full consideration of the effect of s. 11, Act XXIII of 1861 on a payment in satisfaction of a decree made out of Court that the judgment of a Full Bench of this Court in the case of *Gunamani Dasi v. Frankishori Dasi* (3), was delivered.

Nor do we think that the terms of the last sentence of s. 258 have altered the law as thus expounded. No doubt it has been declared that "no such payment or adjustment shall be recognized by any Court unless it has been certified" according to s. 258, but in our opinion this refers to any Court of execution, either the Court which itself passed the decree and is executing it, or any Court to which the decree may have been transferred for purposes of execution. It seems to us that whenever the Legislature has intended that any matter shall not be re-opened in any subsequent suit or proceeding, it has indicated that intention by more definite terms by either declaring that no subsequent suit shall lie, or that the particular order shall be final.

In this view on the findings of the lower Appellate Court, the plaintiff is entitled to a decree, and this appeal must be dismissed with costs.

*Appeal dismissed.*

(1) I. L. R., 6 Bom., 146.

(2) 3 C. L. R., 414.

(3) 5 B. L. R., 223; 13 W. R., F. B., 69.