be treated as an adjustment under section 375. They did not however express an adverse opinion and the reasoning of HILL, J. (in which STEVENS, J., concurred) for refusing to accept the agreement in that case as an adjustment applies with equal force to the present case. In *Rukhanbai* v. *Adamji Shaik Rajbhai*(1), BEAMAN, J., took the same view as MACLEAN, C.J., in *Tincowry Dey* v. *Fakir Chand Dey*(2) observing that mere submission to arbitration was not an adjustment of a suit but only a step towards it. We are clearly of opinion that the agreement to refer in this case cannot be treated as an adjustment under Order 23, rule 3.

The order of the District Judge will be set aside with costs in both courts.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

A. BUDRUDEEN AND ANOTHER (RESPONDENTS DEFENDANTS), APPELLANTS,

v.

GULAM MOIDEEN AND ANOTHER (PETITIONERS PLAINTIFFS), RESPONDENTS.*

1911. September 13.

Civil Procedure Code (Act XIV of 1882), sec. 231 [Order XXI, rule 15, Civil Procedure Code (Act V of 1908)]—Execution application by one only of the decree-holders, maintainability of—Section 258, Civil Procedure Code (Act XIV of 1882) [Order XXI, rule 2, Civil Procedure Code (Act V of 1908)]—Uncertified adjustment, not recognizable by court executing the decree—Judgment-debtor's counter-petition, equivalent to application if within time.

Under section 258, Civil Procedure Code (Act XIV of 1882), corresponding to Order XXI, rule 2 of Civil Procedure Code (Act V of 1908), a payment or adjustment of a decree cannot be recognized by any court executing the decree unless the same has been certified in the manner allowed by law. The clause is applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. *Gadadhar Panda* v. *Shyam Churn Naik* [(1908) 12 C.W.N., 485], referred to.

Though a judgment-debtor's counter-petition may be treated as an application to certify, the same cannot be allowed in the absence of any fraud, if it is made beyond 90 days of the adjustment.

Ganapathy Ayyar v. *Chenga Reddi* [(1906) I.L.R., 29 Mad., 312.], *Veerappa Chettiar* v. *Armugam Poosari* [(1907) 17 M.L.J., 527] and *Periatambi Udayan* v. *Vellaya Goundan* [(1898) I.L.R., 21 Mad., 409], followed.

Ramayyar v. *Ramayyar* [(1898) I.L.R., 21 Mad., 356], distinguished and commented on.

(1) (1909) I.L.R., 33 Bom., 69. (2) (1903) I.L.R., 30 Calc., 218.

* Civil Miscellaneous Appeal No. 67 of 1909.

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Gadadhar Panda v. *Shyam Churn Naik* [(1908) 12 C.W.N., 485], distinguished.

HEATON, J.'s judgment in *Trimbak* v. *Hari Laxman* [(1910) 12 Bom. L.R., 686], not followed.

Under section 231, Civil Procedure Code (Act XIV of 1882), corresponding to Order XXI, rule 15, Civil Procedure Code (Act V of 1908), execution in favour of one only of the several decree-holders cannot be allowed unless there is sufficient cause to do so; when so allowed it is the duty of the Court to pass such orders as it deems necessary for protecting the interests of the persons who have not joined in the application.

APPEAL against the order of K. C. MANAVEDAN RAJA, the District Judge of North Arcot, dated 24th March 1909, in Civil Miscellaneous Petition No. 60 of 1907 in Original Suit No. 24 of 1901.

This was an application, dated 28th October 1907, under sections 231 and 235, Civil Procedure Code (Act XIV of 1882), praying that the sum of Rs. 2,122 may be recovered in execution.

The judgment of the District Judge was as follows:—"Following the decisions in *Ganapathy Ayyar* v. *Chenga Reddi*(1) and *Veerappa Chettiar* v. *Arumugam Poosari*(2) I must hold that the alleged adjustment cannot be pleaded in bar in execution. Execution will proceed."

The other facts appear in the following judgment of the High Court. The judgment-debtors appealed.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellants.

T. Anantachariar for the respondents.

SUNDARA AYYAR AND AYLING, JJ.

JUDGMENT.—This is an appeal against the order of the District Court of North Arcot, on an application to execute the decree of that Court in Original Suit No. 24 of 1901. The application was put in by one only of the two plaintiffs in the suit. The judgment-debtors' defendants in their counter-petition contended that a sum of Rs. 3,400 was paid to the two plaintiffs in complete satisfaction of the whole decree, the balance of the amount due to them (plaintiffs) being remitted in defendants' favour. They urged that the two plaintiffs had agreed to certify complete satisfaction of the decree to the Court and subsequently represented to the first defendant that they had done so; that the application for execution of the decree was therefore a fraudulent one and should not be allowed by the Court. They also contended that execution should not be allowed in favour of the

(1) (1906) I.L.R., 29 Mad., 312. (2) (1907) 17 M.L.J., 527.

applicant alone as he was only one of the two decree-holders in the suit. The District Judge was of opinion that he could not recognize the adjustment as it was not certified to the Court. He does not deal in his order with the other objection that execution should not be allowed in favour of one of the decree-holders alone.

The judgment-debtors' vakil has argued two points. First, that notwithstanding the absence of any certificate of satisfaction, the District Judge was bound to enquire whether, as a matter of fact, the decree had been adjusted between the parties or not; and secondly, that the Judge was wrong in allowing execution in favour of the applicant alone and that he had failed to consider the objection. We are of opinion that the first contention cannot be supported. Section 258 of the old Procedure Code corresponding to Order XXI, rule 2 of the present Code lays down that unless such a 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. When an adjustment has been made it is no doubt the duty of the decree-holder to certify the adjustment to the Court; if he fails to certify, it is open to the judgment-debtor to take steps to compel him to do so and the law allows him 90 days within which to take such steps. The adjustment in the present case was in the year 1904. The application for execution was in August 1907. In their counter-petition the judgment-debtors do not state that they were prevented from knowing of the fraudulent conduct of the plaintiffs by any fraud on their part until within 90 days before the date of their application. Section 258, clause 3, is imperative that the executing Court cannot recognize an adjustment which has not been certified. The clause is certainly applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. See *Gadadhar Panda* v. *Shyam Churn Naik*(1). In many cases the failure to certify would be fraudulent, but notwithstanding the fraud the executing Court is bound not to recognize the adjustment. The alleged misrepresentation that it had been certified in this case does not alter the position.

We have been invited by the learned vakil for the appellants to treat the judgment-debtors' counter-petition as an

(1) (1908) 12 C.W.N., 485.

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SUNDARA AYYAR AND AYLING, JJ.

application to compel the judgment-creditors to certify the adjustment. We might be inclined to accede to this request if there was anything before us to show that the counter-petition was put in within the time allowed to the judgment-debtors by the Limitation Act. Their petition was put in more than three years after the date of the adjustment and we cannot assume that they were not aware of the fraud more than 90 days before the date of their application, even if we could assume that they were at first kept from the knowledge of the fraud in not certifying the adjustment by the conduct of the decree-holders. Mr. Krishnaswami Ayyar has relied on certain cases in support of his contention. The first of these is *Ramayyar* v. *Ramayyar*(1). There the adjustment was in August 1893; the sale by the decree-holder in contravention of the terms of the agreement was on the 1st September and the judgment-debtor's petition to set aside the sale was on the 21st September, which was within 90 days of the adjustment. The application, no doubt, was not in form to compel the decree-holder to certify the adjustment, but to set aside the sale in contravention of it. But as the time for putting in an application to compel the certifying of the adjustment had not elapsed the defect in form might be overlooked, and the question of adjustment enquired into. There are no doubt some observations in the judgment of a somewhat comprehensive character. It is stated that the provisions of section 258 do not preclude the Court from enquiring into an adjustment where the decree-holder is guilty of fraud. If the learned Judges intended to say that such an enquiry should be made even after the time for taking proceedings to compel the decree-holder to certify the adjustment has elapsed, then with all deference to them we are unable to concur in that view. On the facts of that case the judgment was perfectly right if we may say so. On the other hand in *Ganapathy Ayyar* v. *Chenga Reddi*(2), and *Veerappa Chettiar* v. *Arumugam Poosari*(3), relied on by the Judge as well as in *Periatambi Udayan* v. *Vellaya Goundan*(4) it was held that the Court could not enquire into an adjustment not certified to the Court according to law. In the last of the cases

(1) (1898) I.L.R., 21 Mad., 356.
(2) (1906) I.L.R., 29 Mad., 312.
(3) (1907) 17 M.L.J., 527.
(4) (1898) I.L.R., 21 Mad., 409.

referred to above, more than two years had elapsed after the adjustment of the decree before it was brought to the notice of the Court, and it was held that in those circumstances the Court could not enquire into the plea of adjustment. The decision in *Ramayyar* v. *Ramayyar*(1), apparently did not commend itself to the learned Judges who decided that case. In *Veerappa Chettiar* v. *Arumugam Poosari*(2) that case was again doubted. One other case was relied on for the appellants, namely *Gadadhar Panda* v. *Shyam Churn Naik*(3). But that case really does not support the appellant. For there the allegation of the judgment-debtor was that he was kept in ignorance of the facts making it necessary for him to take proceedings to compel the certifying of the adjustment until some time within 90 days of his bringing it to the notice of the Court. Reference was also made to the judgment of HEATON, J., in *Trimbak* v. *Hari Laxman*(4). That learned Judge, no doubt, was of opinion that section 258 merely raises a presumption of non-adjustment when it has not been certified to the Court and that it is open to the Court to enquire into a plea of adjustments whenever it might be raised. For the reasons already stated we are unable to concur with the learned Judge. Justice CHANDAVERKAR did not concur in the view taken by HEATON, J., in that case.

We are therefore compelled to refuse to treat the defendant's counter-petition as an application to compel the decree-holder to certify the adjustment and we are unable to hold that the Judge was wrong in refusing to enquire into the judgment-debtor's plea for the purpose of holding that the decree had not been satisfied.

The other contention of the appellants namely that the Judge did not consider his objection that the applicant for execution was not entitled to take out execution solely is in our opinion well founded. Section 231 of the old Code corresponding to Order XXI, rule 15 of the new Code explicitly lays down that execution in favour of one only of several joint decree-holders can be allowed only if the Court sees sufficient cause for allowing the decree to be executed on an application made by one alone of them; and then it is the duty of the Court to pass

(1) (1898) I.L.R., 21 Mad., 356.
(2) (1907) 17 M.L.J., 527.
(3) (1908) 12 C.W.N., 485.
(4) (1910) 12 Bom. L.R., 686.

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such orders as it deems necessary for protecting the interests of the persons who have not joined in the application.

It is contended for the respondents that the second plaintiff did not appear though notice was issued to him on the first plaintiff's application and that we must take it that the Judge did consider his objection and held that this was a fit case for allowing execution in favour of one of the two decree-holders we are unable to uphold this argument. The judgment of the Lower Court does not show that the Judge being aware of the discretion vested in him by section 231 intended to exercise it in favour of the applicant after considering the circumstances of the case.

We must therefore reverse the order of the District Judge and remand the execution petition to him for fresh disposal according to law in the light of the above observations. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1911. September 13.

VEERAIYAN CHETTIAR AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

PONNUSAMI CHETTIAR (DEFENDANT), RESPONDENT.*

Negotiable Instrument in favour of A *as agent of* B—*Endorsement by* A, simpliciter *to* C—*No* primâ facie *title in* C.

If a negotiable instrument executed in favour of "*A*, as the agent of *B*" is endorsed by *A*, *simpliciter* (*i.e.*, without describing himself as the agent of *B*) to *C*, the endorsement cannot, in the absence of any evidence to show that *A* was intended to be the beneficial owner of the note, convey, in this country, any title to *C* so as to enable *C* to sue the person or persons liable on the note.

Muthar Sahib Maraikar v. *Kadir Sahib Maraikar* [(1905) I.L.R., 28 Mad., 544], referred to.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of V. K. DESIKA CHARIAR, the Subordinate Judge of Negapatam, in Small Cause Suit No. 1108 of 1909.

The facts of this case are set out in the judgment.

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* Civil Revision Petition No. 816 of 1909.