

sulting my brother Straight, and I am of opinion that this question must be answered in the negative.

The first part of s. 285 explicitly provides that the assessors shall attend throughout the proceedings, that is to say, that there shall be no break in their attendance, which shall be exactly commensurate with the entire continuance of the trial down to the time when the finding is made. In the case before me the portion of the trial covered by the provisions of s. 290, a very important portion from the point of view of the accused, was conducted without the aid of any assessor, and to that extent the attendance was not continuously complete. I must allow this plea, with the result that I am constrained to find that the trial was before a Court without jurisdiction and must therefore be set aside. The conviction, sentence and all other proceedings before me are annulled, and a new trial must be had according to law.

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QUEEN-  
EMPRESS  
v.  
MUHAMMAD  
MAHMUD  
KHAN.

## APPELLATE CIVIL.

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March 23.

*Before Mr. Justice Mahmood.*

KALYAN SINGH (PLAINTIFF) v. KAMTA PRASAD (DEFENDANT). \*

*Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property—Civil Procedure Code, ss. 258 and 283.*

Where a regular suit under s. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property, on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor,—

*Held* that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above-mentioned relates only to the Court executing the decree.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

\* Second Appeal No. 1222 of 1889 from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 27th August 1889, reversing a decree of Babu Khetter Mohan Ghose, Munsif of Fatehpur, dated the 30th June 1888.

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KALYAN  
SINGH  
v.  
KAMTA  
PRASAD.

Munshi *Ram Prasad* and Munshi *Gobind Prasad*, for the appellant.

Maulvi *Mehdi Hasan* and Munshi *Jokhu Lal*, for the respondent.

MAHMOOD, J.—The facts of this case are the following :—

Kalyan Singh, plaintiff-appellant, obtained a money-decree for arrears of rent against one Bhurwa, who is stated to have been a tenant of the said Kalyan Singh. This decree was for a sum of Rs. 9 as. 15 p. 2, and dated the 11th July 1882. It is then stated that for the money due upon that decree and some other money due by Bhurwa to Kalyan Singh, the former transferred certain trees to the latter.

Against the aforesaid Bhurwa, the defendant-respondent Kamta Prasad also obtained a simple money-decree. This was some time in 1885. In execution of his decree Kamta Prasad attached the trees now in dispute. Thereupon Kalyan Singh objected to the attachment, upon the allegation that he was the owner of the trees and that the aforesaid Bhurwa no longer possessed any attachable or saleable interest in the trees. The Court executing the decree allowed the objections by its order dated the 14th January 1888; but on appeal that order was set aside on the 28th March 1888. The objections were thus disallowed and the attachment maintained.

Kalyan Singh thereupon instituted the present regular suit under s. 283 of the Code of Civil Procedure, suing to set aside the order of the 28th March 1888. This suit was filed on the 9th April 1888, and was decreed by the first Court; but upon appeal the lower appellate Court reversed the first Court's decree on the 27th August 1889, thus dismissing the suit.

By an oversight the learned Judge in delivering his judgment and decree wrongly used the name of Kalyan Singh, the plaintiff-appellant, instead of Kamta Prasad, the defendant-respondent, in whose favor he was passing the judgment. This matter, however, was brought to his notice, and the learned Judge, acting under the provisions of s. 206 of the Code of Civil Procedure, amended the

judgment and the decree by his order dated the 20th November 1889.

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Whilst the matter stood thus, this second appeal was filed by Kalyan Singh to this Court on the 26th November 1889. The appeal was preferred against the decree of the lower appellate Court of the 27th August 1889, and in the grounds of appeal objection was taken to the error the Judge had made and afterwards corrected by the order of the 20th November 1889.

Mr. *Mehdi Hasan* has raised a preliminary objection that the appeal cannot prevail, because it has not been preferred from the final decree of the 20th November 1889. In view of this objection Mr. *Gobind Prasad*, the learned pleader for the appellant, has amended his memorandum of appeal by striking out the first and the fourth grounds of appeal and by inserting reference to the amendment as made by the order of the 20th November 1889. This he has been allowed to do under rule 22 of the rules of this Court. The preliminary objection is thus disposed of.

Upon the merits of the case the learned Judge has held that because the alleged transfer of the trees by Bhurwa to Kalyan Singh was made in satisfaction of the decree of the 11th July 1882, it was necessary, under s. 258 of the Code of Civil Procedure, that the aforesaid transfer and satisfaction should have been certified; that no such certification took place, and that therefore the alleged transfer cannot be taken into account even in the regular suit.

This view of the law is erroneous, and it is enough for me to refer to the case of *Ram Ghulam v. Janki Bai* (1) to show that the prohibition to take cognizance of payments in execution of decrees is limited to the Court which has to deal with the execution of the decrees and does not extend to Courts that have to try the allegations of the parties on the merits. In delivering my judgment in that case I expressed my dissent from some of the Bombay rulings therein referred to.

(1) I. L. B., 7 All. 124.

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In support of my view Mr. *Gobind Prasad* has drawn my attention to the cases noted in the margin. I need not enter into a detailed consideration of these cases, because what I said in the case reported in I. L. R., 7 Allahabad, is enough to show that the prohibition to take cognizance of adjustments and payments referred to in s. 258 of the Code of Civil Procedure relates only to Courts executing the decree and to no others. Such, indeed, is the clear effect of the last few words of the section itself as they now stand.

In my opinion the learned Judge of the lower appellate Court, by reason of his having taken an erroneous view of the law, precluded himself from deciding the case upon its merits. The learned Judge has not considered the nature of the alleged transfer of trees by Bhurwa in favor of Kalyan Singh, nor has he considered whether the transfer is valid with reference to the rules of the Transfer of Property Act and the requirements of the Registration Law. It was further necessary to ascertain whether, notwithstanding such transfer, Bhurwa still possesses rights and interest in the said trees, and the nature and extent of such rights.

A proper adjudication of all these various points would be trial upon the merits. The learned Judge did not do so, having disposed of the case on a preliminary point, and having taken an erroneous view of the provisions of s. 258 of the Code of Civil Procedure.

I think the case should be tried on the merits as indicated above. I decree the appeal, set aside the judgment and decree of the Court below, and remand the case to that Court under s. 562 of the Code of Civil Procedure for disposal upon the merits. Costs to abide the result.

*Cause remanded.*

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(1) I. L. R., 12 Mad. 61.      (2) I. L. R., 14 Calc. 376,  
(3) I. L. R., 8 Mad. 277.