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January 31.

Before Mr. Justice Blair and Mr. Justice Aikman.

JAIKARAN BHARTI (PLAINTIFF) v. RAGHUNATH SINGH (DEPENDANT).  
Civil Procedure Code, sections 244, 258—Execution of decree—Suit to set  
aside a sale on the ground of an adjustment of the decree out of  
Court—Adjustment not certified—Suit not maintainable.

Held that no separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of the decree had been certified in the manner provided by section 258 of the Code of Civil Procedure. *Shodi v. Ganga Sahai* (1) and *Kalyan Singh v. Kamto Prasad* (2) distinguished. *Ishan Chunder Bundapadhye v. Indro Narain Gossami* (3) and *Pat Dasi v. Sharvp Chand Mala* (4) not followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal* (5), *Azizan v. Matuk Lal Sahu* (6) and *Bairagulu v. Bapanna* (7) referred to.

THE facts of this case sufficiently appear from the judgment of Aikman J.

Mr. *Roshan Lal* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

BLAIR, J.—This is a plaintiff's second appeal. His suit has been dismissed by the Court of first instance and also by the lower appellate Court. The suit was brought to set aside an auction-sale which had taken place in execution of a decree in a suit for sale. The point raised in appeal is that the Courts below were wrong in holding that sections 244 and 13 of the Code of Civil Procedure bar the suit.

In the course of the proceedings in execution the parties agreed to refer their differences to arbitration and to abide by the award which should be made. Such an award was made, but it was not certified to the executing Court, as required by section 258 of the Code of Civil Procedure. The execution was proceeded with in spite of objection taken, and the property was sold and bought

\* Second Appeal No. 999 of 1895, from a decree of W. F. Wells, Esq., District Judge of Sháhjahánpur, dated the 11th June 1895, confirming a decree of Rai Banwari Lal, Subordinate Judge of Sháhjahánpur, dated the 21st February 1895.

(1) I. L. R., 3 All., 588. (4) I. L. R., 14 Calc., 376.  
(2) I. L. R., 13 All., 339. (5) I. L. R., 19 Calc., 663.  
(3) I. L. R., 9 Calc., 788. (6) I. L. R., 21 Calc., 437.  
(7) I. L. R., 15 Mad., 302.

in by the decree-holder. The judgment-debtor in that suit is the plaintiff and appellant here.

An argument has been addressed to us on behalf of the appellant based upon the amendment of section 258 of the Code of Civil Procedure made by the Civil Procedure Code Amendment Act of 1888. The words in the Act of 1882 were—"No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." In the amending Act the substituted words are:—"Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any Court executing the decree." The argument was that it was a reasonable inference to draw from the words of limitation imported by the amendment that the Legislature did not intend to exclude the recognition of payments of adjustments by Courts other than those executing the decree in question. My attention has been called to sundry cases, two of which have been the subject of decision in these Provinces. The first is the case of *Shadi v. Ganga Sahai* (1). In that case a payment had been made by a judgment-debtor in satisfaction of a decree, but such payment had not been notified to the executing Court. The Court proceeded to execute the decree on the application of the decree-holder. The judgment-debtor then brought a regular suit to recover the money which he had paid to put an end to the execution proceedings. It was held that the suit could be maintained. But the reliefs asked for in that suit contained no prayer asking that the execution proceedings in the prior suit should be set aside or otherwise interfered with. That case is therefore in a very material particular distinguishable from the one with which we are now dealing. In another case *Kalyan Singh v. Kamta Prasad* (2) it was held by a single Judge that a suit would lie in the following circumstances. Pending the execution of a decree an adjustment by transfer of some trees to the decree-holder had been made, but not certified. In a later suit brought by another plaintiff against the same judgment-debtor,

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(1) I. L. R., 3 All., 538.

(2) I. L. R., 13 All., 339.

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it was sought in execution to attach the trees in question. The decree-holder in the previous suit objected that the trees were his by virtue of the uncertified adjustment. The objection being disallowed, the objector brought a regular suit to establish his right to the trees. It was held that the suit was maintainable. In this case also no setting aside or modification of execution proceedings in the first suit was asked for. Two cases have, however, been cited for the appellant which appear to be authorities in favour of his contention. In the case of *Ishan Chunder Bando-padhya v. Indro Narain Gossami* (1) and in the case of *Pat Dasi v. Sharup Chand Mala* (2), suits to set aside execution proceedings in the course of which adjustments had been made, but not certified, were held maintainable. In my opinion the decisions in those cases cannot now be held to be law. They are disposed of by the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3). The suit in that case was a suit to have set aside a sale in execution proceedings of certain zamindári, on the allegation that the decree-holder had made with certain co-sharers in the zamindári an agreement that their shares should be exempted in execution. The agreement was not notified to the executing Court, and those shares were sold. In appeal in a suit to set aside the sale the Committee of the Privy Council held that section 244 of the Code of Civil Procedure barred the plaintiff's suit, inasmuch as the question which had arisen was a question arising between the parties to the suit in which the decree was passed within the true intent and meaning of section 244 of the Code of Civil Procedure. The decision of their Lordships was followed by a majority of the Judges who decided the case of *Azizan v. Matuk Lal Sahu* (4). In my opinion the ruling of the Judicial Committee of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* governs this case, and is fatal to this appeal. I would dismiss the appeal.

(1) I. L. R., 9 Calc., 288.

(2) I. L. R., 14 Calc., 376.

(3) I. L. R., 19 Calc., 683 : s. c. 19 I. A., 166.

(4) I. L. R., 21 Calc., 437.

AIKMAN, J.—I am of the same opinion. Amrit Gir the father of the plaintiff gave the defendant Raghnath Singh a mortgage over certain property. After the death of Amrit Gir, the mortgagee brought a suit against the plaintiff upon his mortgage-deed, obtained a decree, and in execution thereof brought the hypothecated property to sale. The execution was transferred to the Collector, by whom the property was sold. It was purchased by the mortgagee decree-holder. The plaintiff Jaikaran Gir in the course of the execution proceedings filed an objection based on an alleged adjustment of the decree which had taken place out of Court. His objection was disallowed, and, as stated above, the property was sold and purchased by the decree-holder. The plaintiff has now brought a regular suit to set aside the sale on the ground that the decree had been adjusted out of Court. His suit was dismissed by the Subordinate Judge, whose decree was confirmed on appeal by the District Judge. The Courts below held that the present suit was barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiff comes here in second appeal contending that that section does not bar his suit. By the provisions of that section all questions arising between the parties to the suit in which a decree was passed, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof, must be determined by order of the Court executing the decree, and not by separate suit. Now it cannot be denied that the question which arises in this suit is one between the parties to the former suit in which the decree was passed, and it is clear to me that it is a question relating to the execution of the decree. The cognizance of the suit therefore is barred by the provisions of section 244 unless it can be shown that there is any other provision of law which excepts it from that section. The learned counsel who appears in support of the appeal relies upon the last paragraph of section 258 of the Code of Civil Procedure. In my opinion that paragraph cannot be taken as overriding the clear provisions of section 244. As to this I concur with the learned Judges who decided the case of *Bairagulu v. Bupanna*

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(1) and with the majority of the Bench which decided the case of *Azizan v. Matuk Lal Sahu* (2). The plaintiff in this suit, if any adjustment of the decree took place out of Court, ought to have taken steps to have that adjustment certified to the Court. I do not think that his negligence in failing to take such steps can give the Court a jurisdiction which is clearly barred by the provisions of section 244. It may be that he may have some other relief against his decree-holder, for instance, by a suit for damages, but I do not think that he can maintain a suit which would have the effect of nullifying a decree regularly obtained in a suit between him and the present defendant. For these reasons I would dismiss the appeal with costs.

By THE COURT:—The order of the Court is that the appeal is dismissed.

*Appeal dismissed.*

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February 1.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Burkill.*

BRIJ BHUKHAN (PLAINTIFF) v. DURGA DAT AND OTHERS

(DEFENDANTS).\*

*Jurisdiction—Civil and Revenue Courts—Act No. 1 of 1877 (Specific Relief Act), section 42—Letters Patent, section 10—Appeal—Appellant not entitled to be heard on points not argued before the single Judge—Practice.*

A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property.

*Held* that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share; further that section 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates.

\* Appeal No. 47 of 1897 under section 10 of the Letters Patent.

(1) I. L. R., 15 Mad., 302.

(2) I. L. R., 21 Calc., 437.