

1908
May 16

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GENDO (DEFENDANT) v. NIHAL KUNWAR (PLAINTIFF).

Civil Procedure Code, sections 244, 258—Execution of decree—Uncertified payment out of court—Subsequent execution by decree-holder—Suit to recover sum paid out of court.

A judgment-debtor made a part payment of what was due under the decree against him to the decree-holder, but such payment was not certified in the manner required by section 258 of the Code of Civil Procedure, and the decree-holder in consequence was able to take out execution and get the amount paid twice over. *Held* that a suit by the judgment-debtor to recover the amount paid out of Court to the decree-holder was not barred either by section 244 or by section 258 of the Code. *Shahi v. Ganga Sahai* (1) and *Periatambi Udayan v. Vellaya Goundan* (2) followed.

THE facts of this case are as follows:—

On the 18th of February 1902, Ram Prasad and Tulshi Ram the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present, suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs. 2,375. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders, on the 19th May 1903, obtained an order absolute under section 89. Ram Prasad and Tulshi Ram are dead, and the defendant is their heir. On the 26th of February 1906, the defendant took out execution of the decree, and the plaintiff thereupon filed objections,

* Second Appeal No. 388 of 1907, from a decree of A. Kendall, Additional District Judge of Meerut, dated the 8th of March 1907, reversing a decree of Banke Behari Lal, Munsif of Meerut, dated the 31st of May 1906.

(1) (1881) I. L. R., 3 All., 538. (2) (1897) I. L. R., 21 Mad., 409.

alleging that she had paid the amount due, and stating that she held a receipt for it. This objection was overruled on the ground that the payment had not been certified under section 258 of the Code of Civil Procedure, and on the ground that her application was beyond time. Thereupon the present suit was instituted for the recovery of the sum of Rs. 634-7, paid as above described. The suit was dismissed by the Court of first instance (Munsif of Meerut), but this decision was reversed, and the suit decreed by the Additional District Judge. The defendant appealed to the High Court.

Dr. *Satish Chandra Banerji* and *Babu Lalit Mohan Banerji*, for the appellant.

Mr. *M. L. Agarwala* and *Lala Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI.—This was a suit for the recovery of a sum of Rs. 634-7-0 and interest, which is alleged to have been paid by the plaintiff to the ancestors of the defendant in satisfaction of the balance due on a decree held by them, and which was not so applied. The facts leading up to it are these. On the 18th of February 1902, Ram Prasad and Tulshi Ram, the ancestors of the defendant, brought a suit against the plaintiff for recovery of a sum of Rs. 2,020 due on a mortgage by sale of the mortgaged property. The suit was compromised on the 19th of March 1902, the provisions of the compromise being that on payment of the sum of Rs. 1,750 by the mortgagor without interest, within a year, the suit should not be pressed, but in default of payment of that amount the mortgagees were to be at liberty to obtain an order absolute under section 89 of the Transfer of Property Act. The plaintiff in the present suit deposited a sum of Rs. 1,750 on the 20th of March 1903, which was a day late, and this sum was paid to Ram Prasad and Tulshi Ram. On the 1st of April 1903, Ram Prasad and Tulshi Ram filed an application for an order absolute under section 89 for Rs. 2,375. Again a settlement was come to out of Court on the 4th of May 1903, the plaintiff paying a sum of Rs. 634-7-0 in cash in settlement of the claim and obtaining a receipt therefor. Notwithstanding the receipt of this amount, which represented the balance of the debt, the decree-holders on the 19th May 1903 obtained

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Appeal dismissed.

(1) (1881) I. L. R., 3 All., 258.

(2) (1897) I. L. R., 21 Mad., 402.