Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

MAHBUB ALI (DEFENDANT) *v.* MUHAMMAD HUSAIN AND ANOTHER (PLAINTIFFS).* 1927 *May*, 11.

Civil Procedure Code, order XXI, rule 2—Uncertified payment out of court in respect of mortgage decree—Certification refused—Right of mortgagor to get back money so paid.

Plaintiff paid a sum of money to defendant to be applied by him *pro tanto* in satisfaction of a mortgage decree (preliminary) which defendant held against plaintiff. The payment, however, was made out of court and an application for its certification to the court was resisted and ultimately rejected. *Held*, that, although the payment, not having been certified, could not be taken into account as a part satisfaction of the decree, the plaintiff was entitled, as the consideration for the payment had failed, to claim back the money which he had paid, as money in the hands of the defendant received by him to the use of the plaintiff. *Sital Singh* v. *Baijnath Prasad* (1), referred to.

The facts of this case sufficiently appear from the judgement of the Court.

Munshi *Binod Bihari Lal*, for the appellant.

Maulvi *Muhammad Abdul Aziz*, for the respondents.

WALSH and BANERJI, JJ. :—This case is in a nutshell. The facts are that two sums of Rs. 125 and Rs. 200 have been received by the defendant, under certain special circumstances, with the intention that they should be applied to a mortgage decree which he held against the plaintiff. It is always troublesome in these cases to give an accurate description of such a payment. The Rs. 200 paid is perhaps an illustration. Defendant No. 2 paid that to defendant No. 1 at the request of the plaintiff. If the parties were *ad idem*, and the defendant, being an honest person, was willing to receive that amount

* Second Appeal No. 792 of 1925, from a decree of Bhagwan Das, Subordinate Judge of Bulandshahr, dated the 13th of March, 1925, reversing a decree of Nawab Husain, Munsif of Khurja, dated the 14th of April, 1924.

(1) (1922) I.L.R., 44 All., 668.

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towards his decree, he naturally would agree that that amount should be certified to the court. For good reasons or bad the Code requires that such payment out of court should be certified, otherwise an execution court cannot take notice of it. Probably it was thought that it would be better that the execution court should not have continual suits brought before it as to whether a payment had been made or not. The plaintiff, being advised by a lawyer who thought order XXI, rule 2, applied, made an application to the court for a certificate. The defendant resisted, and the application was eventually rejected. There is therefore no certified payment. There is no payment which any court executing a decree could take into account, and the object with which it was done has failed. The matter is a little complicated in its legal aspect by the decision of our learned brothers in the case of *Sital Singh* v. *Baijnath Prasad* (1), where it was held that where there is a mortgage decree a payment of this kind, made after the preliminary decree and before the final decree, should be brought into account when the final decree is passed. We do not dissent from that ruling, or see why anybody should do so. They do not suggest that if this is not done, money, which admittedly belongs to the mortgagor, becomes the money of the mortgagee. That would be to turn it into a gift, and people do not make gifts in that way, and the courts do not compel people to make gifts against their will. The authorities cited by the learned Judge of the court below, which are very old and which do not appear to have been questioned, show clearly that in spite of there being another remedy, namely, by a certified payment, if that falls to the ground, the plaintiff does not lose his right to the money. We should sum it up according to the broad principles of common law in this way. The payment was made under the instructions of the plaintiff for a particular purpose. Owing to the conduct of the defendant, to whom the payment

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was made, that purpose has failed. He declined to accept it on the terms on which it was offered to him. There has, therefore, been a total failure of consideration and, in accordance with the language of the old pleaders, the money is money in the hands of the defendant received by him to the use of the plaintiff, or, in other words, it is *contra æquum et bonum* that he should retain it. This is a cause of action as old as the hills and is really what the plaintiff was asserting. The decision is obviously right and the appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Lindsay.

NARSINGH DAS (PLAINTIFF) *v.* GOKUL PRASAD AND ANOTHER (DEFENDANTS).*

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Act No. I of 1872 (*Indian Evidence Act*), *section* 33—*Witness—Effect of death of witness before cross-examination is complete.*

If a witness under examination by a court dies before his cross-examination is completed, no part of his evidence can be made use of. *Boisagomoff* v. *The Nahapiet Jute Company* (1), followed.

The facts of this case sufficiently appear from the judgement of the Court.

Mr. *B. E. O'Conor*, for the appellant.

Dr. *Surendra Nath Sen*, Babu *Durga Charan Banerji*, Babu *Piari Lal Banerji* and Munshi *Narain Prasad Ashthana*, for the respondents.

MEARS, C. J. and LINDSAY, J. :—This was a suit originally instituted to recover the value of ornaments alleged to be worth Rs. 5,993 and to recover Rs. 6,007 which was alleged to have been taken out of court by the

* First Appeal No. 49 of 1923, from a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad, dated the 25th of October, 1922.

(1) (1901) 5 C.W.N., (Notes), p. ccxxx.