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In these circumstances I must reject the claim, but as this was a test case, and the litigation was in some measure occasioned by the careless wording of the prospectus, I shall follow the precedent set by the Calcutta High Court and make no order as to costs, excepting that the defendant may get all his costs, charges and expenses properly incurred to be taxed as between attorney and client, including costs (if any) preliminary to suit, out of the fund.

Suit dismissed.

Attorneys for the plaintiffs :—Messrs. *Crawford, Burder and Co.*
Attorneys for the defendant :—Messrs. *Brown and Moir.*

FULL BENCH.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons, Mr. Justice Ranade and Mr. Justice Hosking.

LALDAS NARANDAS (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* KISHORDAS DEVIDAS AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1896.

September 8.

Civil Procedure Code (Act XIV of 1882), Sec. 244—Amending Act VII of 1888—Agreement before decree by the decree-holder not to recover costs which the decree might award—Question to be determined in execution and not by a separate suit.

Devidas and Harilal obtained a decree on an award with costs against Shankarlal and Laldas. When they applied for its execution against Laldas in order to recover his half share of the costs, he pleaded that before the proceedings had commenced, the plaintiffs had entered into an agreement with him that none of the costs which might be awarded by the Court should be recovered from him.

Held, that the existence and validity of such an agreement ought to be determined in execution under the provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) and not in a separate suit.

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thána, in execution of a decree.

*Appeal No. 29 of 1896.

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Harjivandas, Shankarlal and Laldas were three brothers. A disagreement having arisen between them with respect to the division of the family property, they referred the dispute to an arbitrator, who made an award dividing the property. Subsequently, Harjivan having died, his sons Devidas and Harilal sued to enforce the award, the filing of which had been opposed. They obtained a decree which (*inter alia*) ordered the defendants Shankarlal and Laldas to pay the plaintiffs' costs.

Devidas and Harilal both died and their sons applied to execute the decree against Laldas for his half-share of the costs awarded by it. Laldas pleaded that the original plaintiffs to this suit (the fathers of the present applicants) had entered into an agreement with him that he should not be required to pay any of the costs which might be awarded by the decree. The Subordinate Judge held that the alleged agreement could not be set up as a ground for not executing the decree. He, therefore, held Laldas liable for a moiety of the costs, namely, Rs. 900-8-0.

Laldas appealed.

Trimbak R. Kotval, for the appellant (original defendant No. 2, Laldas).

Manekshah J. Taleyarkhan, for the respondents (original plaintiffs).

The appeal was argued before a Division Bench consisting of Farran, C.J., and Hosking, J.

FARRAN C. J.:—This is an appeal from an order passed by the Subordinate Judge, First Class, at Thána, in execution of a decree in a suit in which Devidas and Harilal Harjivandas were the plaintiffs, and Shankarlal and Laldas Narandas were the defendants. The suit was on an award, the filing of which had been opposed. The decree directed the defendants to pay the plaintiffs' costs.

The present application was made by the minor sons of the original plaintiffs (who were placed on the record as representatives of their respective fathers), *inter alia*, for payment by the defendant Laldas Narandas of Rs. 900-8-0, being a moiety of the costs by the decree directed to be paid to the plaintiffs. In answer to the application, the defendant Laldas put in a written statement,

in which he alleged that the award had been filed with his consent, and that before the proceedings for filing it commenced, the present plaintiffs' father and uncle (Devidas and Harilal) had entered into an agreement with him that no such costs as the Court might award should be recovered from him, and that if the whole of the costs which should be incurred for having the award filed should not be recovered from Shankarlal, then as to whatever amount might fall short the same should be borne by the plaintiffs' father and uncle (Devidas and Harilal) and himself half and half; and that in the matter of having the award filed he was really a plaintiff though nominally made a defendant.

The pleader for the defendant Laldas asked the Subordinate Judge to raise an issue on the above allegations as to whether having regard to the agreement (which the Subordinate Judge erroneously calls an oral agreement) the defendant Laldas was liable for the costs of the decree. The Subordinate Judge declined to raise the issue asked for, as to grant it would be to go behind the decree which he could not do. In fact, he decided that the alleged agreement could not be set up as a ground for not executing the decree. He would, we consider, have acted more regularly if he had raised the issue asked for and decided it.

The first question which we have to consider is, whether the existence and effect of such an agreement can be inquired into and decided upon in execution proceedings, or whether they ought to form the subject of a separate suit. Section 244 of the Civil Procedure Code enacts that "the following questions shall be determined by order of the Court executing a decree and not by separate suit." Sub-clauses (*a*) and (*b*) mention specific questions which are to be so determined. Sub-clause (*c*) is more general: "Any other questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." The corresponding section in Act XXIII of 1861 as there worded was considered by West and Nanabhai Haridas, JJ., in *Sakharam* v. *Govind*[1], where West, J., in giving the judgment of the Court says that "the general words 'any other question arising between the parties to the suit in

(1) 10 Bom. H. C. Rep., 361.

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which the decree was passed and relating to the execution of the decree' according to the familiar rule of construction are to be understood of matter *ejusdem generis* with those more particularly specified in the same enactment. The only questions which can properly arise in the execution of a decree are (1) as to the contents of the order made, (2) as to the jurisdiction to make it, and (3) as to how far it has been carried out." That view of the law was adopted and followed in *Mukund* v. *Haridas*[1] by Sargent, C. J., and Telang, J. It has been contended before us that this latter decision cannot now be supported, having regard to the expression of opinion by the Judicial Committee of the Privy Council contained in *Prosunno Coomar* v. *Kasi Das*[2] that the clause in question should not receive a narrow construction. The contention derives support from the decision in *Azizan* v. *Maluk Lal*[3] and especially from the judgment of Pigot, J., at page 458 of the Report. After an exhaustive consideration of decided cases that learned Judge says: "I find myself unable to come to any other conclusion than this, that for reasons of policy, which it is not for a Court to contravene, the Legislature has deliberately so framed section 244 as to prohibit in a separate suit between the parties to a decree any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree. I do not see any escape from that conclusion, nor do I think it should be avoided, because possibly individual cases of inconvenience (not of absolute denial of all remedy) may arise from it." And as to the decision in *Mukund* v. *Haridas* he says (p. 460): "I own that as to the relief by way of injunction granted in that case it does seem to me not to be consistent with the decision of the Privy Council as to the scope of the words 'relating to the execution, &c.' and I think, therefore, that I am bound to conclude that had that decision been before the Court the case of *Mukund Harshet* v. *Haridas Khemji* would have been otherwise decided."

We are ourselves inclined to take the same view. The addition of the words "or to the stay of execution thereof" to clause (*c*), section 244, does not seem to have been brought to the notice of

(1) I. L. R., 17 Bom., 23.
(2) L. R., 19 I. A., 166.
(3) I. L. R., 21 Cal., 437.

the Court in *Mukund* v. *Haridas* when it followed the ruling in *Sakharam* v. *Govind* which was decided before the introduction of these words into the section. We think that the matter ought to be considered by a Full Bench.

We accordingly refer to a Full Bench the question :—

"Whether the existence and validity of such an agreement as the defendant Laldas Narandas relies on, ought to be determined in execution under the provisions of section 244 of the Civil Procedure Code or in a separate suit?"

The question being thus referred, it came on for argument before a Full Bench consisting of Farran, C. J., and Parsons, Ranade and Hosking, JJ.

Trimbak R. Kotval, for the appellant (original defendant No. 2, Laldas) :—Laldas had not opposed the award and he was really a plaintiff, though nominally a defendant. The Judge should have considered the question as to the agreement and should have determined what was the effect of it in the execution proceedings. No separate suit would lie on the agreement—section 214 of the Civil Procedure Code (Act XIV of 1882). The object of the section being to benefit the parties, it should receive a liberal construction. Matters relating to execution must be determined as cheaply and as speedily as possible by the Court executing the decree—*Azizan* v. *Matuk Lal*[1]; *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[2]. A narrow construction was given to the corresponding section of Act XXIII of 1861 in *Sakharam* v. *Govind*[3]. That view of the law was adopted and followed in *Mukund* v. *Haridas*[4]. The words "or to the stay of execution" were added to section 244 later on by the amending Act of 1888 and it seems that these words were not brought to the notice of the Court which decided *Mukund* v. *Haridas*[4]. The Bombay cases are overruled by implication by the ruling of the Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[2].

Manekshah J. Taleyarkhan for the respondents (plaintiffs) :—The defendant cannot rely upon the agreement and seek redress in execution proceedings. To consider the agreement in the execution proceedings would be tantamount to going behind the

(1) I. L. R., 21 Calc., 437.
(2) L. R., 19 I. A., 166.
(3) 10 Bom. H. C. Rep., 364.
(4) I. L. R., 17 Bom., 23.

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decree. The defendant ought either to have appealed or applied for review or applied to the High Court under its extraordinary jurisdiction to get the order as to costs corrected. There would be no finality to decrees if an agreement like the present were allowed to be set up in execution proceedings. The Bombay rulings support our contention and we submit that they were correctly decided. The decision of the Privy Council relied on has no bearing upon the facts of the present case.

FARRAN, C. J. :—After hearing the argument addressed to us in this case, I am confirmed in the view which I was inclined to take when the case came before us as a Division Bench. There appears to me to be no reason for not giving to the wide words of section 244, clause (*c*) of the Civil Procedure Code, their full significance and force. I would, therefore, for the reasons given in the referring judgment, answer the question referred to us by saying that the existence and validity of such an agreement as is referred to in the submitting judgment ought to be determined in execution and not by separate suit.

HOSKING, J. :—I concur with the Chief Justice.

PARSONS, J. :—I concur in the view expressed by the Division Bench which made the reference. Having regard to the language of section 244 of the Code of Civil Procedure and the opinion expressed by the Judicial Committee of the Privy Council in *Prosunno Coomar* v. *Kasi Das* (1) it is clear that clause (*c*) of that section should not be construed narrowly, it follows, therefore, that it ought to be construed as it was in *Azizan* v. *Mutuk Lal* (2) and not as it was in *Mukund* v. *Haridas* (3). In the present case the existence and validity of the agreement set up by the defendant relate to the execution of the decree, that is to say, they have to be inquired into and found upon in order to determine how the decree is to be executed. The inquiry and determination, therefore, ought to be made in execution. I answer the question in the affirmative.

RANADE, J. :—In this case, the appellant Laldas and his brother Shankarlal were co-defendants in a partition proceeding instituted

(1) L. R., 19 I. A., 166. (2) I. L. R., 21 Calc., 437.
(3) I. L. R., 17 Bom., 23.

by Devidas and another, who were the sons of their deceased third brother Harjivandas. The matters in dispute were referred to private arbitration under section 525, and the award made was duly filed in Court, and had then the force of a decree under section 526. The respondents, who are the heirs of Devidas and another, then gave a darkhást for the execution of the award decree and for recovery of costs, and it was in the course of these execution proceedings that appellant Laldas pleaded that there was an agreement, entered into between himself and the deceased respondents before the award was filed, to the effect that they would not hold him responsible for costs, but that they would recover the same from Shankarlal, and if the full sum was not recovered, they would bear the loss half and half with Laldas.

The Court of first instance refused to raise any issue on this point, as in its opinion it was not open to that Court in execution proceedings to go behind the decree. In the present appeal the contention was accordingly raised that the lower Court was in error in not inquiring into the question of this agreement, and the following question has been referred for the consideration of the Full Bench, whether the existence and validity of the agreement relied on by the appellant ought to be determined in execution under section 244, Civil Procedure Code, or in a separate suit.

This reference has become necessary from the apparent conflict of the rulings of this Court in *Sakharam* v. *Govind*[1] and *Mukund* v. *Haridas*[2] with the decisions of the Calcutta High Court, approved by their Lordships of the Privy Council in *Prosunno Coomar* v. *Kasi Das*[3]. As far as the decision in *Sakharam* v. *Govind* is concerned, all that the Court really decided in that case was that an agreement between parties defining the manner in which a decree should be executed, if entered into before the decree was passed, and not pleaded in the course of the hearing of the suit, cannot be set up as a bar against the execution of the decree, which, for its own purposes, is to be held final as to what one party must do or forbear for the benefit of the other. The decision, in other words, was that the agreement ought to have been pleaded in the course of the hearing of the suit, and not being so pleaded, it could not be urged as a plea in bar of the execu-

(1) 10 Bom. H. C. Rep., 361. (2) I. L. R., 17 Bom., 23.

(3) L. R., 19 I. A., 166.

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tion of the decree according to its terms. This case is, therefore, not so much an authority upon the question directly raised in this reference as upon another question, *viz.*, whether a plea which a party might have raised before decree can be set up as a defence in execution proceedings. It is true Mr. Justice West in the course of his remarks gave expression to his view that the only questions which can properly arise (under section 11 of Act XXIII of 1861) in execution of a decree were questions relating to the contents of the decree, the jurisdiction to make it, and the extent of its satisfaction. This enumeration was obviously not meant to be exhaustive, and, as observed above, no great stress was laid on it. Under the law as it now stands, with the final addition made to section 214 by Act VII of 1888, if the agreement relates to the stay of execution, it must be pleaded in execution, and no separate suit can be brought in respect of such an agreement. The case of *Mukund* v. *Haridas* can also be distinguished to some extent from the circumstances of the present case. There the undertaking relied upon was that the plaintiff agreed not to secure a decree against one of the defendants, and even if a decree were passed, he would not execute it. This agreement was made during the pendency of a suit, and after the decree was obtained, plaintiff broke his agreement, and sought to execute the decree. The defendant thereupon brought a separate suit to restrain the plaintiff in the former suit from executing the decree. Sir C. Sargent made a point of this special agreement not to execute the decree at all, and distinguished the case before him on this ground from another case, *Chenviruppa* v. *Pullappa* [1], where the agreement provided, as in *Sakharam* v. *Govind*, for the execution of the decree in a manner inconsistent with its terms. He observed that in these latter cases the agreement could be and ought to be pleaded before the decree was passed. When the agreement is not to execute the decree at all, then by its very nature it could not be pleaded before the decree was passed. This seems to have been the real ground on which Sir C. Sargent held in this case that a separate suit to enforce the agreement and restrain its breach by injunction might be maintained.

(1) I. L. R., 11 Bom. 708.

In the one case, as in the other, the question really turned upon the point whether the prior agreement could or could not be pleaded as defence before the decree was passed. When it could be so pleaded, and was not pleaded in the course of the hearing of the suit, Mr. Justice West held that it could not be so pleaded afterwards in bar of execution. When it could not be pleaded, Sir C. Sargent held that it might furnish a cause of action for a suit to restrain the other party from breaking his agreement. It is true, in arriving at this last conclusion, Sir C. Sargent referred with approval to the restricted interpretation suggested in the previous judgment of Mr. Justice West, but his main point obviously appears to be that when the prior agreement was not to execute the decree at all, it could not be said that such an agreement involved a question relating to the execution of the decree within the terms of section 244. The attention of the Court was not apparently drawn to the addition of the last words in section 244, and it is open to question how far this decision can be regarded as binding in the present case, where the agreement was not to execute the decree at all, but to execute it in respect of costs first against Shankarlal, and next to share the loss half and half.

To come next to the consideration of the Calcutta cases, most of which are reviewed in *Azizan* v. *Maluk Lal* [1], it is to be noted that even Mr. Justice Macpherson admitted in his judgment that, although a separate suit cannot be brought to stop execution on the ground that the judgment-creditor did not give credit for an uncertified adjustment or payment, there may be another form of suit in which plaintiff can claim relief of a different kind. Mr. Justice Pigot also in his judgment admitted the possibility of the relief by injunction being open to parties in certain contingencies. The authority of the decision in *Azizan* v. *Maluk Lal* [1], though it interpretes section 244 more liberally than was done in the two Bombay cases noted in the reference, must in view of these admissions be confined to the point actually decided in that case, *viz.*, that no separate suit can be maintained to recover uncertified payments so as to stop the decree-holder's right to execute his decree according to its terms. Similarly, suits in which it is sought to set aside sales on the ground of the judgment-creditor's fraud in

[1] I. L. R., 21 Cal., 437.

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bringing them about, stand in the same category with those which relate to uncertified adjustments or payments. Both classes of cases refer to transactions after decree, and to disputes which arise in the execution of the decree; and such transactions properly fall within the terms of section 244, and no separate suit will lie. The extension of this prohibition to cases where the auction-purchasers are parties was approved of by their Lordships of the Privy Council in *Prosunno* v. *Kasi Das* (1). On both these points there is now complete agreement in the decisions of all the High Courts—*Sakharam* v. *Damodar* (2); *Kuriyali* v. *Mayan* (3); *Patankar* v. *Devji* (4); *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* (5). In fact, the interpretation placed by this Court on section 258 as it stood at first was stricter than what was placed on it elsewhere.

There is not a similar agreement on the point whether when fraud is practised in obtaining a decree, or in securing its execution, a separate suit to restrain the decree-holder may or may not lie at the instance of the party defrauded. This point, however, does not arise here.

As far as the present case is concerned, I am clearly of opinion that as the agreement relied upon by the appellant was pleaded by him to stay execution of the decree in regard to costs as against him, the inquiry fell within the terms of section 244 as finally amended in 1888. It is not clear if appellant could have urged it before the award was filed, and as it affected the manner of the execution of the decree in regard to costs, the appellant had a right to require the executing Court to investigate the matter, and there was nothing like going behind the decree in such an inquiry. Such an agreement cannot be made the cause of action for a separate suit.

I am, therefore, of opinion that a reply in favour of the first alternative must be given to the question under reference. The existence and validity of the agreement relied upon must be determined in execution under section 244, Civil Procedure Code, and not in a separate suit.

(1) L. R., 19 I. A., 166.
(2) I. L. R., 9 Bom., 468.
(3) I. L. R., 7 Mad., 255.
(4) I. L. R., 6 Bom., 146.
(5) I. L. R., 11 Bom., 6.