

1903
DEC. 18.
ORIGINAL
CIVIL.
31 C. 476.

share in any portion of the properties of her husband, nor does she show any cause of action in respect of her right to maintenance. That being so it seems to me that the suit must be dismissed with costs.

Attorney for plaintiff : A. K. Guha.

Attorney for defendants : O. C. Gangooly.

31 C. 480 (= 8 C. W. N. 395.)

[480] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

DENO BUNDHU NUNDY v. HARI MATI DASSEE.*

[25th February, 1903.]

Civil Procedure Code (Act XIV of 1882) ss. 244 and 258—Separate suit—Uncertified adjustment—Suit for staying execution and declaration of satisfaction—Injunction—Specific Relief Act (I of 1877), s. 56.

Where a decree is alleged to be satisfied by an agreement out of Court, but satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied and for an injunction restraining the decree-holder from executing the decree.

S. 244 of the Civil Procedure Code (Act XIV of 1882) is a bar to such suit ; s. 258 of the Code does not restrict the operation of s. 244.

Prosunno Kumar Sanyal v. Kali Das Sanyal (1), *Azizan v. Matuk Lal Sahu* (2) and *Bairagulu v. Bapanna* (3) followed.

PER HILL, J. The prayer for injunction restraining the defendant from proceeding with the execution of the decree conflicts with the provisions of s. 56 of the Specific Relief Act (I of 1877).

[*Expl.* 12 C. W. N. 485 ; 11 C. L. J. 91 ; 14 C. W. N. 357=4 I. C. 402. *Fol.* 96 I. C. 988 =31 M. L. J. 429. *Ref.* 7 I. C. 55=12 C. L. J. 312 ; 1 U. B. R. 16=31 M. L. J. 422 ; *Not foll.* 5 Pat. L. J. 70=55 I. C. 890. *Dist.* 1921 Pat. 860.]

APPEAL by the plaintiff.

Madhusudan Nundy died some time in 1847, leaving him surviving two widows and two sons—Deno Bundhu Nundy, the plaintiff, and Shama Churn Nundy. Shama Churn died some time in the year 1864 without issue, leaving him surviving the defendant, his widow. According to the plaintiff's case the said Madhusudan Nundy left a will by which his properties were bequeathed to the two sons with a clause by which the surviving [481] son took the whole of the property subject to the duty of maintaining the two widows of the testator and the widow of the predeceased son. The plaintiff contended that, as the only surviving son of Madhusudan Nundy, he was entitled to take the whole of the property subject to the widow's right of maintenance. This view was contested by the defendant, the widow of the predeceased son, who alleged that the will in question was a forgery and claimed a widow's estate in the property left by her deceased husband. In 1878 a suit was brought by her against the present plaintiff, in which she prayed to have the will proved in solemn form and for accounts and partition. The suit was settled, and it was agreed that the will was not to be disputed by the defendant, and certain provisions were made amongst others that she

* Appeal from Original Civil No. 46 of 1903, in Suit No. 470 of 1898.

(1) (1892) I. L. R. 19 Cal. 689.

(3) (1892) I. L. R. 15 Mad. 902.

(2) (1898) I. L. R. 21 Cal. 437.

was to receive a sum of rupees sixty-five thousand in cash down, and that a further sum of rupees ten thousand was to be paid to her for her absolute use and benefit: at the death of Srimati Khama Moyee Dassee, the surviving widow of Madhusudan Nundy, it was provided, that no benefit should accrue to the estate of the defendant in respect of the said sum of rupees ten thousand, if she should predecease Khama Moyee Dassee. These terms were embodied in a consent decree, and it is with reference to that consent decree that the present suit has been brought. The plaintiff's contention is that on the settlement of the suit referred to it was considered that the defendant receiving so large a benefit under the settlement ought to contribute towards the expenses of Srimati Khama Moyee Dassee's *sradh* when her death should take place, and that this sum of rupees ten thousand was to be expended on that ceremony. After Khama Moyee's death, which took place on the 1st of September 1896, the defendant proceeded to execute the decree for the recovery of the said sum of rupees ten thousand. The plaintiff objected on the ground that the decree was satisfied, inasmuch as the said sum was expended with the defendant's consent and at her request on the *sradh* of Khama Moyee. The alleged satisfaction was not certified to the Court according to s. 258 of the Civil Procedure Code, and the executing Court was therefore unable to recognize the satisfaction. The plaintiff therefore brought this suit to have it declared that the decree had been satisfied and to [482] prevent the defendant from proceeding with the execution of the decree; he also asked that the defendant might be ordered to pay such compensation as might be thought fit for her wrongful conduct. The defendant took a preliminary objection that the suit is barred by the provisions of s. 244 of the Civil Procedure Code. It was argued on behalf of the plaintiff that the effect of s. 258 of the Code was to leave out, to be decided in a separate suit the question of satisfaction of a decree, when such satisfaction had not been certified to the Court, because the executing Court could not recognise such satisfaction, and therefore by implication it followed that, notwithstanding s. 244 a separate suit could be brought to determine that question. The plaintiff also contended that the suit ought to have proceeded because there was a claim for damages for the defendant's wrongful conduct, and asked to be allowed to amend the plaint. The lower Court held that the suit was barred by s. 244 of the Code, and that the amendment could not be allowed, because that would alter the character of the suit and dismissed the suit with costs.

Mr. Dunne (Mr. Sinha and Mr. S. R. Dass with him) for the appellant. The lower Court has dismissed the suit on the ground that s. 244 of the Code is a bar to the suit. Except the case of *Azizan v. Matuk Lal Sahu* (1) in no other case in this Court has the point been decided in that way. The effect of s. 253 is to engraft an exception on to s. 244, because that section precludes the Court executing the decree from recognizing any satisfaction, which has not been certified to the Court under that section. It follows by implication that notwithstanding s. 244 a separate suit would lie for determining the question of such satisfaction.

[MACLEAN, C.J.—You have to satisfy the Court that the operation of section 244 is controlled by section 253. If your contention is correct

1903
FEB. 25.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
31 C. 480=8
C. W. N. 396.

(1) (1893) I.L. R. 21 Cal. 437.

1903
FEB. 25.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
31 C. 480=8
C. W.N. 395.

then the position of a judgment-debtor, who has neglected to enter satisfaction under section 258, is better than that of any other person.]

[483] That section does not preclude any Court from granting equitable relief if, as a matter of fact, the decree has been satisfied. I rely upon the judgment of Banerji J. in the case cited by me. The decision of Pigot, J. also involves the admission that the Court other than the executing Court could give relief.

[HILL, J. See the provisions of section 56 of the Specific Relief Act. If the statute gives the right to enforce a decree how can a Court restrain one from doing so?]

That section of the Specific Relief Act does not exclude the power of any other Court to give adequate relief, if the Court executing the decree cannot go into the question of satisfaction.

[MACLEAN, C. J. See *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1) which is a Privy Council case.]

That is a case of a different class altogether. It does not appear from the judgment that the effect of s. 248 on the operation of s. 244 was considered in that case.

If the Court holds that the plaintiff has erred in the relief sought by him, then I ask that, inasmuch as there is a prayer for compensation for the wrongful conduct of the defendant and the arrangement come to with her is stated in the plaint, leave may be granted to the plaintiff to amend the plaint and proceed with the suit as one for compensation for breach of agreement.

See *Nubo Kishen Mookerjee v. Debnath Roy Chowdry* (2), *Gunamani Dasi v. Prankishori Dasi* (3), *Ishan Chunder v. Indro Narain* (4), *Ram Doyal Banerjee v. Ram Hari Pal* (5), and *Iswar Chandra Dutt v. Haris Chandra Dutt* (6).

The Advocate-General (Mr. J. T. Woodroffe), and Mr. Chakrabarti for the respondent were not called upon, but they cited the following cases in support of the defendant's case:—*Haji Abdul Rahiman v. Khoja Khaki Aruth* (7), *Biragulu v. Bapanna* (8), *Lal Das Narandas v. Kishordas Devidas* (9), and *Jaikaran Bharti v. Raghunath Singh* (10).

[484] MACLEAN, C. J. By a consent decree dated the 9th of June 1879, in which the plaintiff in the present suit was the defendant and the defendant in the present suit was the plaintiff, it was ordered and decreed by consent that upon the death of a certain lady named Khama Moyee Dasee, the defendant should pay to the plaintiff, if then alive, which event happened, for her absolute benefit, the sum of rupees ten-thousand in addition to a monthly allowance of rupees one hundred, secured to her by the agreement of Bhadro 1272 B. S. Khama Moyee Dasee died on the 11th of September 1896, and on the 20th of May 1898 the plaintiff in the suit, to which I have just referred, took proceedings to execute the decree for the said 10,000 rupees, and certain arrears of maintenance, as to which there is no dispute. On the 25th of June 1898, the present suit was instituted, and on the 7th of September 1898 an injunction was granted restraining the defendants, their servants and agents, from executing the decree of the first suit, to which I have referred; and it was ordered that the Registrar of this Court do out of

(1) (1892) I. L. R. 19 Cal. 683.
(2) (1874) 22 W. R. 194.
(3) (1870) 5 B. L. R. 223.
(4) (1883) I. L. R. 9 Cal. 788.
(5) (1892) I. L. R. 20 Cal. 93.

(6) (1898) I. L. R. 25 Cal. 718.
(7) (1866) I. L. R. 11 Bom. 6.
(8) (1892) I. L. R. 15 Mad. 302.
(9) (1896) I. L. R. 22 Bom. 463.
(10) (1898) I. L. R. 20 All. 254.

certain Government securities of the nominal value of rupees sixteen thousand, deposited with him by the plaintiff, retain in his hands a portion of the securities of the actual value of rupees ten thousand, and endorse and deliver over the balance to the plaintiff.

By the present suit the plaintiff asked for a declaration that the said sum of rupees ten thousand, payable under the said consent decree of the 9th of June 1879, has been paid and satisfied, and for an injunction to restrain the defendant from executing the said decree for rupees ten thousand and for an *interim* injunction. He also asked that the defendant might be ordered to pay to him such compensation as might be thought fit for her wrongful conduct.

The defence is that the suit will not lie, having regard to section 244 of the Civil Procedure Code. It is urged for the defendant that this is a question relating to the execution, discharge or satisfaction of the decree or to the stay of the execution thereof; and that that must be decided in the execution proceedings and no separate suit would lie. If the matter rested there, I do not suppose there could be any reasonable doubt but that the case ought to have been dealt with under section 244.

[485] It is, however, contended for the plaintiff that section 244 is controlled by section 258. The plaintiff sets up an adjustment of the matters in dispute between the plaintiff and the defendant in the first suit, and that under that adjustment the present defendant agreed that 10,000 rupees should be used in defraying a portion of the expenses of the *shrad* ceremony of Khama Moyee Dassee. That adjustment was not certified in accordance with the provisions of section 258; and he contends that, inasmuch as that adjustment has not been certified, and as the Court executing the decree cannot recognize any such adjustment, the Legislature could not have intended that the matter should be decided under section 244, when it would be impossible for the present plaintiff to show, having regard to section 258, that the adjustment had been made. In other words that justice could not be done him, if the matter be determined under that section.

If the matter had been *res integra*, I should have thought that that argument could not properly prevail; but the matter has been the subject of much judicial decision, and we have been referred to many cases dealing with the question. It is unnecessary for present purposes to review those authorities. In my opinion the view expressed by the majority of the Court in the case of *Azizan v. Matuk Lal Sahu* (1), where all authorities were reviewed, is correct. I may, however, point out that I cannot see how the present contention can successfully prevail, having regard to the view expressed by the Privy Council in the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). In that case it appears from the record that the adjustment had not been certified under section 258, and I can scarcely think, seeing that Sir Richard Couch was a member of the Committee, that if it had been considered that section 258 controlled, in the manner urged by the present appellant, the operation of section 244, so important a point would have been overlooked either by the learned counsel, who argued for the appellant or by their Lordships who decided the case. The point was pithily dealt with in the case of *Bairagulu v. Bapanna* (3). Section 244 is

(1) (1893) I. L. R. 21 Cal. 437.
(2) (1892) I. L. R. 19 Cal. 863.

(3) (1892) I. L. R. 15 Mad. 302.

1903
FEB. 25.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
31 C. 480=8
C. W. N. 395.

therefore a bar to the present suit, so far as relates to the question of whether or [486] not the 10,000 rupees had been paid and satisfied. This being so it is unnecessary to decide whether, having regard to section 56 of the Specific Relief Act, an injunction could have been properly granted.

On the question of damages we are asked to allow an amendment of the plaint. This was refused by the Court below, and it is very late now to ask for it. There is no allegation of any damage in the plaint, and we have felt some difficulty in ascertaining what amendment is really asked for. It is by no means apparent that the plaintiff as yet has sustained any damages: the 10,000 rupees has not been paid to the defendant. To allow the plaintiff now to amend would virtually amount to allowing him at this late stage to make a new case. We therefore refuse this application.

The appeal fails and must be dismissed with costs.

HILL, J. I am of the same opinion. I shall only add that in so far as the suit seeks for an injunction to restrain the defendant from proceeding with the execution of the decree in question, it conflicts in my opinion with the provisions of s. 56 of the Specific Relief Act of 1877.

STEVENS, J. I also concur.

Appeal dismissed.

Attorney for the appellant: *Opoorbo Coomar Gangooly.*

Attorneys for the respondent: *Swinhoe & Co.*

31 C. 487 (=31 L. A. 71=14 M. L. J. 147=8 C. W. N. 442=1 A. L. J. 147=8 Sar. 623.)

[487] PRIVY COUNCIL.

RAJ CHUNDER SEN v. GANGA DAS SEAL AND RAMGATI DHUR v.
RAJ CHUNDER SEN.*

TWO APPEALS CONSOLIDATED.

[11th February and 2nd March, 1904.]

[*On appeal from the High Court at Fort William in Bengal.*]

Appeal, abatement of—Death of respondent pending appeal—Suit for accounts of partnership—Application for substitution of representative made out of time—Limitation Act (XV of 1877), Sch. II, Art. 115 (c)—Civil Procedure Code (Act XIV of 1882) ss. 363, 582—Act VII of 1883, s. 66.

A respondent, to whom a sum of money was due under the decree of the first Court, died, pending an appeal to the High Court, and an application to have a representative substituted for him on the record was not made within six months after his death, and no sufficient cause was shown for the delay.

Held by the Judicial Committee, that, the nature of the suit being such that the cause of action did not survive against the remaining respondents alone, the appeal abated under s. 363 (as amended by s. 66 of Act VII of 1883) and s. 582 of the Civil Procedure Code (Act XIV of 1882) and had been rightly dismissed by the High Court on that ground.

[Expl. 30 Mad. 67=2 M. L. T. 36. Ref. 11 C. W. N. 698=5 C. L. J. 810; 5 C. L. J. 3. 8=11 C. W. N. 501; 32 All. 301; 36 I. C. 77=1 Pat. L. J. 472; 21 M. L. J. 574=9 M. L. T. 275=11 M. W. N. 791=8 I. C. 268. Foll. 1 Lah. 225=57 I. C. 199. Dist. 26 I. C. 523.]

Two consolidated appeals from two decrees (March 20th, 1900) of the High Court at Calcutta dismissing two appeals brought by the appellants from a decree (July 6th, 1896) of the Subordinate Judge of Chittagong.

* *Present*:—Lord Davey, Lord Robertson, and Sir Arthur Wilson.