

any opinion whatsoever upon the other point that was raised, namely, whether the Indian Legislature had power to pass the Regulation XX of 1825.*

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JACKSON.

Rule discharged.

Solicitor for the Crown : *The Government Solicitor.*

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Morris.

RUGHU NUNDUN RAIN (DEFENDANT) v. SUMESSAR PANDAY
AND OTHERS (PLAINTIFFS).†

1874
June 23.

Set-off—Cross-decrees—Assignment of Decree—Act VIII of 1859, ss. 209 & 209—Act XXIII of 1861, s. 11—Jurisdiction—Costs.

The plaintiffs obtained a decree against B. in the Subordinate Judge's Court. Some time afterwards B recovered a decree in the Munsif's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against B. Before attachment, however, B assigned her decree to C. On C trying to execute B's decree against the plaintiffs, they brought the present suit for a declaration of their right to have a set-off made of the two decrees, *Held*, that such a suit would not lie.

On the 25th of December 1866, the three persons who were the original plaintiffs in this suit obtained a decree in the Subordinate Judge's Court against one Mussamat Basgitta for a sum of Rs. 700, by way of compensation for the loss of certain mesne profits. On the 2nd of February 1870, the same Basgitta obtained a decree for Rs. 534 in the Munsif's Court against these three persons, who are hereafter shortly termed the plaintiffs in the suit, although since the date of the first trial, one of them had died and was represented in the present appeal by his widow as guardian of his infant son. A few days after Mussamat Basgitta had obtained this decree in the Munsif's Court, namely, on the

* The prisoner was tried at the ensuing Criminal Sessions of the High Court, convicted, and executed.

† Special Appeal, No. 1992 of 1873, against a decree of the Subordinate Judge of Zilla Saran, dated the 25th July 1873, reversing a decree of the Sudder Munsif of that district, dated the 22nd December 1871.

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25th of February 1870, the present plaintiffs applied to the Subordinate Judge, in whose Court they had the decree for Rs. 700 against the Mussamat, for an attachment of the Mussamat's decree in the Munsif's Court. Some delay took place in obtaining this attachment. In the meanwhile, namely, on the 28th of March, the Mussamat assigned her decree to the present defendant, Rughu Nundun Rain. And it was not till two days after this assignment had been completed that the Mussamat was served with notice of the plaintiffs' application for attachment or the attachment itself was effected. These attachment proceedings were followed by action taken on the part of Rughu Nundun for the purpose of obtaining execution of the Mussamat's decree in the Munsif's Court. And in spite of the attachment of that decree effected by the plaintiffs, and their attempt to get their decree set-off against the Mussamat's decree, the Munsif made an order, on the 19th of September 1870, in favor of Rughu Nundun for the execution of the Mussamat's decree against the plaintiffs to its full extent. The plaintiffs, having thus failed to obtain in the Munsif's Court the relief to which they considered themselves entitled, brought the present suit against the defendant Rughu Nundun for the purpose of obtaining a declaration of their right to have their decree set off against the decree of the Mussamat which Rughu Nundun was proceeding to enforce.

The first Court dismissed the plaintiffs' suit on the ground that they were not entitled to the relief sought. The lower Appellate Court, arriving at the conclusion upon the evidence that the plaintiffs' right was entirely made out, reversed the decision of the first Court, and passed a decree in favor of the plaintiffs for the whole amount of their claim.

The defendant Rughu Nundun appealed to the High Court.

Baboo Kally Kishen Sein (with him Baboo Chunder Madhub Ghose), for the appellant, contended that the plaintiffs sued for a set-off of the nature contemplated under s. 209 of Act VIII of 1859; such a suit was clearly not maintainable, and no set-off could be made as the two decrees were of different Courts. The matter could have been dealt with in the execution department, and in fact has been so dealt with.

Mr. *Twidale* for the respondents.—[PHEAR, J.—Are we not forbidden by s. 11 of Act XXIII of 1861 to take any action in a case arising upon a decree?] I do not think that section refers to decrees of two different Courts. [PHEAR, J.—Would it not have been the proper course to have gone into the Court which issued the decree to enter up satisfaction as it is called in English law, or as it is called in the Code to enter adjustment?] There are several decisions of this Court which tend to show that a set-off by way of adjustment or satisfaction can only be made when the decrees are those of the same Courts, and s. 209, Act VIII of 1859, only contemplates such cross-decrees—*Girish Thandra Lahury v. Fakir Chand* (1). I submit that a suit of this kind will lie when the two decrees are of two different Courts, and that s. 11 of Act XXIII of 1861 does not apply to such a case.

Baboo *Kally Kishen Sein* in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the facts as above, continued) :— Now it seems to us plain that the parties and the Courts below have entirely misapprehended the nature of this suit. When the *Mussamat* assigned her decree to *Rughu Nundun*, he only became entitled to execute the decree under the provisions of s. 208 of the Civil Procedure Code, because he was not the original decree-holder. And the terms of that section are very explicit. They are as follows :—

“If a decree shall be transferred by assignment, or by operation of law, from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred or his pleader ; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.”

The *Munsif's* Court seems to have entertained the question whether *Rughu Nundun* was entitled under this assignment

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which he had obtained from the Mussamat, to execute the decree which she had formerly obtained against the present plaintiff, and to have come to the conclusion that there was sufficient cause within the meaning of this section for allowing him to execute that decree. That being so, he could have only executed it in the manner in which the original decree-holder would have executed it had the assignment not been made and in the matter of the execution he must be subject in all respects to the same considerations as regards the execution, as the original decree-holder would have been. In short, for the purpose of executing this decree, he must be considered and treated in all respects as if he were an original decree-holder, and in that character party to the suit.

Then s. 11, Act XXIII of 1861, enacts that all "questions, arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is therefore plain that the question which was raised by the present plaintiffs upon the application of Rughu Nundun to execute the decree of the Mussamat namely, the question whether they were entitled to have the benefit of a set-off of their decree against the Mussamat in the Subordinate Judge's Court, was a question relating to the execution of the decree. And it was a question which within the meaning of s. 11, Act XXIII of 1861, arose between the parties to the suit, although Rughu Nundun was not the person who had originally obtained the decree, but only became a party to the suit as assignee of the Mussamat and for the purpose of executing the decree. This being so, the present suit cannot lie. It is forbidden by the express words of s. 11, Act XXIII of 1861. On this ground we think that it ought to be dismissed. But as this objection was not put forward in the first Court, or in the second Court, nor was indeed anywhere raised by any of the parties, we think that each party must bear his own costs.

We will add further that it seems to us that the course which the Munsif has taken on the application of Rughu Nundun

for the execution of the Mussamat's decree, has not been a well-considered course, or altogether conformable to the provisions of the Civil Procedure Code. When Rughu Nundun came to the Munsif's Court, and asked under s. 208 to be allowed to execute the Mussamat's decree, because he had obtained an assignment of that decree from her for valuable consideration, the Munsif ought to have given notice of that application to the present plaintiffs. And upon the present plaintiff showing, in answer to that application, that they had a decree in the Subordinate Judge's Court against the Mussamat to a higher amount than her decree against them, the Munsif ought not to have considered it proper to grant the application of Rughu Nundun; he ought not under such circumstances as those to have placed any unnecessary element of complication between the present plaintiffs and Mussamat Basgitta.

The situation of the parties at that time seems to have been as follows:—The debt under the decree of the Munsif's Court, in favor of Mussamat Basgitta, had been attached by the plaintiffs in execution of their decree against Mussamat Basgitta in the Subordinate Judge's Court. Now the effect of an attachment of a debt is to prohibit the debtor from paying it to the creditor, and the creditor from receiving it; and also to found authority in the attaching Court either to sell it, or to appoint a manager to sue for the realization of it. In the case of a judgment-debt, whichever of these alternatives is followed by the attaching Court, the vendee in the one, and the manager in the other, is entitled to claim execution of the attached decree. Moreover, the attachment of a decree-debt, although probably it does not of itself prevent the Court, in which the decree is, from enforcing the execution of it as against the debtor, still obliges that Court, under s. 237 of the Civil Procedure Code, to hold the money which may arise from its execution until the further order of the attaching Court; and perhaps, in the ultimate event, to consider and determine conflicting claims to it.

At the time, therefore, when Rughu Nundun applied to be allowed, as the Mussamat's assignee, to execute her decree against the plaintiffs, the Munsif knew that he could not lawfully execute that decree as it stood, and pay over the pro-

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ceeds thereof to the Mussamat herself, until he should obtain authority so to do from the attaching Court, that is, from the Subordinate Judge; and consequently in the absence of such authority, he ought not to have taken the step of in effect altering the decree by the substitution of Rughu Nundun for the Mussamat, allowing process of execution to issue in his name, which step would almost certainly lead to Rughu Nundun realizing the amount of the attached decree without the attaching creditor being heard in the matter. He ought under these circumstances to have refrained from granting Rughu Nundun's application under s. 208, and have left him to his remedy against his assignor.

But even if he did think it right and proper to allow Rughu Nundun, by virtue of his assignment, to stand in the shoes of the Mussamat for the purpose of executing this decree, he ought even then to have given reasonable effect to the application of the present plaintiffs to have the benefit of their decree in the Subordinate Judge's Court in the shape of a set-off. It is true that s. 209 only applies to cases in which the two decrees are, or have in some mode come to be, as it were, decrees of the same Court, still the Munsif might reasonably have stayed proceedings for a time sufficient to enable the plaintiffs to get a transfer of their decree from the subordinate Judge's Court to his own Court for execution, if the facts admitted of such transfer; or in the alternative to enable the attaching creditors (*i. e.*, the present plaintiffs) to prefer a claim to the proceeds of the attached decree in priority to Rughu Nundun, and to enable this claim to be heard and determined under s. 237 before the money was actually levied. This has not yet been done. The question whether or not the attaching creditor is entitled to the proceeds of the attached decree, supposing it realized, in preference to the judgment-debtor's assignee, notwithstanding that he gave consideration for the assignment, has not yet been entertained and tried; and it obviously ought to be tried before process of execution is issued in favor of Rughu Nundun, because if it is determined in the affirmative, the process ought not to be issued. It would be absurd to levy from the present plaintiffs money, which, when levied must be paid over to them again.

And it seems clear that if, at the time when Mussamat Basgitta made her assignment to Rughu Nundun, the present plaintiffs, or their predecessor, could have effectually pleaded set-off in a suit brought by her against them to recover the amount of her debt (had such a suit been then brought), Rughu Nundun, her assignee, cannot be in a better position; and therefore he must fail on the trial of the question raised under s. 237, which is in effect only a summary suit for the same purpose.

We do not of course intend to say that there can be no circumstances under which it is not right for a Court to execute a decree between the parties while a counter-decree exists between the same parties in another Court. We confine our observations entirely to the facts of the present case.

The decree of the lower Appellate Court is reversed, and the plaintiffs' suit is dismissed for want of jurisdiction. And each party will bear their own costs in all the Courts.

It need hardly be stated that the present decree will not put any obstacle in the way of the parties applying to the Munsif's Court for a review of the order which he has already made.

Appeal allowed.

Before Sir Richard Couch and Mr. Justice Glover

TARA SOONDAREE CHOWDHRAIN (PLAINTIFF) *v.* THE COLLECTOR OF MYMENSING ON BEHALF OF SHAMA SOONDAREE AND ANOTHER (DEFENDANTS).*

1873
Sept. 15.

*Champerty and Maintenance—Operation of Conveyance pendente lite—
Proof of Deed of Permission to adopt—Acquiescence.*

N, claiming to be entitled to certain real and personal property as heir of one J, brought a suit under Act XIX of 1841 to obtain possession thereof; and, in order to provide funds to carry on the litigation, executed an *ikrarnama*, whereby he purported to relinquish and convey to one K a moiety of his right, title and interest in the property, in consideration of the sum of Rs. 50, K agreeing to take all proper steps, and to defray all expenses neces-

See also
14 B.L.R. 308

* Regular appeal, No. 262, of 1871, against a decree of the Subordinate Judge of Zilla Mymensingh, dated the 10th of August 1871,