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in the case of the transfer of a decree, that by the provisions of Sec. 208 of the Code of Civil Procedure, an appeal will lie, under Sec. 11 of Act XXIII. of 1861, on a question between the assignee of the decree and the judgment debtor. Under a similar provision contained in Sec. 204, the Court considers that an appeal lies in a matter between the judgment creditor and the surety of the judgment debtor. The order of the Acting Senior Assistant Judge is, therefore, reversed. He is directed to hear the appeal preferred to him.

Acting Senior Assistant Judge's order reversed.

March 28.

Civil Petition.

CHA'NGO valad DUDHA' MAHA'JAN .....*Petitioner.*
KA'LURA'M NA'RA'YANDA'S .....*Opponent.*

Adjustment of Decree out of Court—Presumption—Civil Proc. Code, Sec. 206—Act XXIII. of 1861, *Sec.* 11.

K., an execution creditor of C., applied to the Court by which the decree was passed, and caused C. to be imprisoned under it. C. then entered into a compromise upon certain terms with K. for the adjustment of the decree, and K. thereupon, *but without certifying the terms of such adjustment to the Court*, petitioned for the release of C., who was accordingly released.

Subsequently K. again applied to the Court to compel satisfaction of the whole amount of the decree against C.

This application was opposed by C., on the ground that an adjustment of the decree had taken place between him and K. The Judge, however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court, under Sec. 206 of the Civil Proc. Code.

Held, on appeal, that the Judge was in error; that it was the duty of K., on applying for the release of C., to certify the adjustment to the Court; that it would be unjust to allow him to take advantage of his own omission to do so, and that, not having done so, the presumption against him was that the decree had been satisfied in full, but that, under the circumstances, it would be the most equitable course to direct the Judge to inquire into the terms of the adjustment.

Case remanded for that purpose.

CHA'NGO presented a petition (*a*) to the High Court, in which he stated that Kálurám Náráyandás, by his agent, Govind Rámchandra Garúd, obtained a decree against

(*a*) See *Yeshvantráv Amritráv Jamín* v. *Ismáil Ali Khán*, 2 Bom. H. C. Rep. 99.

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him for Rs. 6,250, and caused him to be imprisoned in the civil gaol in execution thereof; that thereupon he (the petitioner) requested one Sambháji Ráṇoji Náik to undertake to pay Rs. 8,000 to the plaintiff, who, in consideration of this promise, allowed the petitioner to be discharged from the gaol; that subsequently the petitioner caused one Shivrám Ratanchand to pay Rs. 5,000 to the aforesaid Sambháji Ráṇoji Náik, and also passed a bond for Rs. 3,000, in consideration of his having undertaken to pay Rs. 8,000 to the plaintiff: that notwithstanding this compromise, Krishṇáji, another agent of the plaintiff, presented a petition to the Civil Court at Dhuliá, for the execution of the aforesaid decree and for the recovery of the whole amount; that, in opposing that application, the petitioner presented a petition embodying the allegations stated above, which was rejected, the following order having been made by the Honourable G. A. Hobart, Judge at Dhuliá:—

"You do not state in the petition that the said adjustment was made through the Court, or that it was certified to the Court, nor do you show that such was the case. On considering Sec. 206 of Act VIII. of 1859, and Sec. 11 of Act XXIII. of 1861, there does not appear to me to be any ground for upholding the argument of the defendant. Your petition of objection is therefore rejected, and an order is issued for enforcing the plaintiff's application for execution of the decree."

Chángo's petition against this order came on for hearing this day, before COUCH, C.J., and WARDEN, J.

Dhirajlál Mathurádás, for the petitioner:—Sec. 11 of Act XXIII. of 1861 provides that "all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other 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 a separate suit." Under this provision the District Judge ought to have inquired as to the payment made by the petitioner. It is quite inequitable to call upon the petitioner

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to pay twice over; and it would be but justice to him to allow his allegations to be inquired into, as the petition presented by the opponent, praying for the discharge of the petitioner from arrest, shows clearly that the decree was adjusted. In a case similar in every respect to the one now before the Court, it was decided, in March 1863, that an inquiry ought to have been made, and it was accordingly remitted to the District Judge at Puná for proof and decision as to the allegation of the petitioner.

Ganpatráv Bháskar, for the opponent, argued that the words of Sec. 206 were imperative; and the District Court could not recognise any adjustment made out of court; and that it was so held in several cases reported in the Calcutta Weekly Reporter (*b*); and that there had been no adjustment.

COUCH, C.J.:—Sec. 206 of Act VIII. of 1859 provides that "all moneys payable under a decree shall be paid into the Court, whose duty it is to execute the decree, unless such Court, or the Court which passed the decree, shall otherwise direct. No adjustment of a decree, in part or in whole, shall be recognised by the Court, unless such adjustment be made through the Court, or be certified to the Court, by the person in whose favour the decree has been made, or to whom it has been transferred;" and this, being unrepealed, still remains as law, notwithstanding the provisions of Act XXIII. of 1861, Sec. 11. Both these sections must be read together, and viewed as reconcilable with one another; and it has been so held by the Calcutta High Court in several cases. In addition to the cases cited I may mention a recent one, *Bhya Bhoopnáth Sahee* v. *Kunwan and others* (*c*), where Mr. Justice Macpherson held that "Sec. 11" of Act XXIII. of 1861 must be read along with Sec. 206 of Act VIII. of 1859, which expressly enacts that no adjustment of a decree, in part or in whole, shall be recognised by the Court, unless such adjustment be made through the Court, or be notified to the Court by the person in whose favour the decree has been

(*b*) 4 Calc. W. R., Mis. R. 11, 21; 2 Calc. W. R., Mis. App. 43.
(*c*) 7 Calc. W. R., Civ. R. 134.

made, or to whom it has been transferred. Here the adjustment now pleaded was not made through the Court, or notified, in the manner provided: therefore, it cannot be recognised by the Court (*d*). The lower court says of Sec. 206 of Act VIII. of 1859, that, 'owing to the extreme ignorance of the bulk of the people of the district, this law has never been rigidly enforced, and it has been the custom of our courts to entertain objections of this nature, and to recognise payments not made through or notified to the court in the prescribed manner.' We have only to remark that the provisions of the Code of Civil Procedure are imperative on the point, and that any Court which, from motives of expediency, advisedly adopts and recognises a procedure which is forbidden by the Code, is guilty of a serious breach of duty. It is the business of Courts to administer justice according to the law such as it is, not according to the Judge's idea of what the law ought to be."

I entirely concur with Mr. Justice Macpherson. My brother Judge Warden and the other Judges of this court agree with me. But we have been referred to a case decided by this Court on the 13th of March 1863. The facts of that case, as far as they can be collected from the defendant's petition to the High Court, are, that Bháichand obtained a decree against the defendant's múnim in the late Supreme Court, and applied to the Puná District Judge to have the defendant's property in Puná placed under attachment in execution of that decree. After the property was thus attached, the defendant entered into a compromise with the plaintiff, and paid him Rs. 4,000 in cash, and arranged to pay the remainder by instalments. The attachment was then removed on the application of the plaintiff; and the defendant thereupon paid the first instalment. Before the second instalment was due, the plaintiff again applied to the District Judge to have the property attached again; and, though the defendant pleaded the abovementioned compromise, the District Judge refused to recognise the adjustment as it was made out of court, and was not certified

(*d*) 4 Calc. W. R., Mis. R. 11.

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to the Court by the person in whose favour the decree had been made. This order was reversed by Sausse, C.J., Forbes and Newton, JJ.

I think this decision may be supported upon the ground that when a party who causes a person to be taken in execution of a decree or attaches his property, after the attachment is laid or the person is sent to gaol, applies to have the attachment set aside, or the debtor set at large, without stating why he does so, he must be taken to have had his decree satisfied; and in cases where the decree is partly satisfied, he must so state to the court, and show what the adjustment really was; and if he neglects to do so, and keeps back that information, he must be held to have received satisfaction in full. However, the decision of the 13th of March 1863 does not appear to have gone to that extent.

In the present case the defendant's property was not under attachment, but his person was. The defendant is put into gaol, and then the plaintiff petitions to have his application cancelled and the defendant discharged; but he does not admit that any adjustment was made at the time: and yet I cannot conceive that the plaintiff did all this for nothing. It will be rather a favour to him that we do not put the strictest construction upon his act, but give him an opportunity of proving how far the decree was satisfied.

I think the justice of the case will be met by directing the Judge to inquire what arrangements or adjustments were made, so that the plaintiff may not take advantage of his own omission to do what he ought to have done.

WARDEN, J.:—I concur.

PER CURIAM:—The Judge is ordered to inquire what was the arrangement or adjustment upon which the plaintiff petitioned for the release of the defendant from imprisonment, and the cancelling of his application for the attachment, and to give effect to whatever arrangement or adjustment he may find to have been so made. Costs of this application to follow the result of the inquiry.