

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Námábhái Haridás.

1887.
April 13.

VA'SUDEV GOVIND, (ORIGINAL DEFENDANT), APPELLANT, v. VISHNU
VITHAL, (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec 258—Decree—Execution—Payment made by defendant in satisfaction of decree not certified—Subsequent reversal of decree on appeal—Application by defendant for refund of money paid in satisfaction.

The plaintiff obtained a decree against the defendant for Rs. 60 and costs, Rs. 29-10-1, against which the defendant immediately appealed. Shortly afterwards the defendant sent Rs. 70 to the plaintiff's *vakil*, intimating by a letter that the remittance was in part payment of the decree, and that an arrangement would be made to pay the balance. The plaintiff did not take out execution of the decree, but the part payment was not certified to the Court. On appeal, the decree was reversed, and the defendant applied for the refund of the amount which he had paid to the plaintiff. The Court of first instance granted the application. The plaintiff appealed, and the Appellate Court reversed the order, holding that, under the provisions of section 258 of the Civil Procedure Code, the payment made by the defendant not having been certified could not be recovered.

Held by the High Court that the defendant was entitled to recover the amount paid to the plaintiff. The decree having been reversed on appeal, the payment, whether certified to the Court or not, could only be regarded as made without consideration, and the defendant was entitled to have it restored.

The Court accordingly under section 622 of the Civil Procedure Code discharged the order of the lower Appellate Court, and restored the order of the Court of first instance.

THIS was a second appeal from a decision of E. T. Candy, District Judge of Ratnágiri.

On the 20th September, 1883, the plaintiff obtained a decree against the defendant for Rs. 60 and costs, Rs. 29-10-1. On the 20th October following, the defendant filed an appeal. On the 13th December of the same year, and while the appeal was still pending, the defendant remitted Rs. 70 to the plaintiff's *vakil*, with a letter stating that the remittance was in part payment of the decree, and that an arrangement would be made for the payment of the balance. The plaintiff did not apply for execution of the decree, but the part payment was not certified to the Court.

* Second Appeal, No. 226 of 1885.

On the 8th February, 1884, the decree was reversed, on appeal, with all costs. On the 23rd August, 1884, the defendant applied to recover the Rs. 70 which he had paid.

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The plaintiff contended that, as the payment had not been certified under section 258 of the Civil Procedure Code (XIV of 1882), the defendant could not recover.

The Subordinate Judge of Ratnágiri granted the defendant's application, and ordered repayment of the Rs. 70. In giving his decision he said :—

“ I doubt very much that section 258 of the Civil Procedure Code (Act XIV of 1882) applies to this matter. That section strictly applies to the case of a decree-holder who seeks to execute his decree, but is resisted by his opponent on the ground that the decree has been satisfied out of Court. That section being virtually a penal section, its provisions ought not to be extended by a wider construction. All that the applicant asks in this matter is to be reinstated in the position necessitated by the decree of the Appellate Court—*Nagindás v. Náthá Pitámbar*⁽¹⁾. The opponent seeks to take the benefit of both the decrees. Supposing that section 258 applied, the case of *Vináyek v. Jágoji*⁽²⁾ shows that the opponent having admitted the amount received by him, that admission can be used against him.* * *”

On appeal by the plaintiff the District Judge reversed the order of the lower Court.

The defendant appealed to the High Court.

Máneksháh Jehángirsháh for the appellant (defendant) :— Section 258 of the Civil Procedure Code (Act XIV of 1882) does not forbid the recognition of such a payment as this. That section applies where the plaintiff seeks to recover the amount of a decree which has already been paid out of Court, but has not been certified to the Court, and the defendant sets up satisfaction. Here the decree has been reversed, and the plaintiff wishes to retain what has been paid under it. *Vináyek Vishnu*

(1) 10 Bom. H. C. Rep., 297. (2) Printed Judgments for 1884, p. 202.

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v. *Jágoji*⁽¹⁾ is in point. There is no separate suit under section 244 of the Code, and if the Court is of opinion that no second appeal lies in this case, it will give relief under its extraordinary jurisdiction.

Dáji Abáji Khare, contra :—The present proceeding is in an execution matter, and the payment cannot be recognized under section 258 of the Code. The Full Bench case of *Háji Abdul v. Khojá Kháki*⁽²⁾ has decided that an uncertified payment made out of Court cannot be recognized by any Court. The appellant has voluntarily made a payment, and thus submitted to the order of the Court, and he cannot now ask for its restoration. If he has any remedy, that is by a separate suit, but he cannot recover in execution of the decree. Where a separate suit lies, this Court cannot interfere in its extraordinary jurisdiction.

SARGENT, C.J. :—The District Judge has rejected the defendant's application on the ground that he was debarred, by section 258 of the Code of Civil Procedure, from recognizing the alleged payment of the 70 Rs. by defendant, relying on the decision in *Pátankar v. Devji*⁽³⁾. The proper construction of the above section has been recently considered by a Full Bench of this Court in *Háji Abdul Rahímán v. Khojá Kháki Aruth*⁽⁴⁾, in which the unanimous conclusion was arrived at, as stated by West, J., in his judgment, *viz.*, that "it is such payment or adjustment—that is, the payment or adjustment of the decree as such—that every Court is forbidden to recognize, unless it has been certified; and that the mere passing of the money to the decree-holder it may recognize and deal with as resting on no consideration," and that the decision in *Pátankar v. Devji* could not be sustained. In the present case, the decree having been reversed, the payment, whether certified or not, could only be regarded as made without consideration and entitling the defendant to have it restored. The defendant's claim was not, therefore, barred by section 258, and we think, therefore, that under these circumstances, as no second appeal lies, we ought to exercise the extraordinary jurisdiction vested in this Court by section 622

(1) Printed Judgments for 1884, p. 202.

(3) I. L. R., 6 Bom., 146.

(2) I. L. R., 11 Bom., 6.

(4) I. L. R., 11 Bom., 6 at p. 19.

of the Code of Civil Procedure, and discharge the order of the Court below, and confirm the order of the Subordinate Judge. Parties to pay their own costs in this Court. Plaintiff to pay defendant his costs in the Court below.

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

KHUSHROBHA'I NASARVA'NJI, (ORIGINAL APPLICANT), APPELLANT, v.
HORMAZSHA' PHIROZSHA', (ORIGINAL OPPONENT), RESPONDENT.*

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Civil Procedure Code (Act XIV of 1882), Secs. 232 and 234—Decree—Execution—Transfer of decree—Notice of transfer—Transferee's rights—Legal representative of a deceased judgment-debtor—His liability to satisfy decree—Extent of such liability.

The transferee of a decree stands in the same position for getting execution as the transferor.

If a decree is transferred by assignment after the death of the judgment-debtor, notice of the transfer, as required by section 232 of the Civil Procedure Code (Act XIV of 1882), may be served on the legal representative of the deceased judgment-debtor. The death of the judgment-debtor does not render the transferred decree incapable of execution.

Under section 234 of the Civil Procedure Code, the legal representative of a deceased judgment-debtor is liable summarily only in respect of property *actually* received by him, or taken into his disposition.

On the 27th March, 1878, one Bái Bhicáiji obtained a decree for Rs. 2,100 against one Phirozshá, who died in July of that year, leaving his son Hormazshá his legal representative. Subsequently one Homjibháí sued Hormazshá as the legal representative of Phirozshá upon a mortgage executed by the latter in his life-time, and obtained a decree, in execution of which he sold the mortgaged property by auction, and bought it in himself for Rs. 810. On appeal, this decree was reversed on the 3rd August, 1883. Instead of, thereupon, recovering the property which had been sold in execution, Hormazshá on the 16th November, 1883, agreed with Homjibháí that the latter should retain it on payment of Rs. 240 as costs of the suit. Shortly before this compromise was effected, Bái Bhicáiji sold her decree to the appellant, Khushrobhái, who in 1884 applied for execution against Hormazshá. The Subordinate Judge made an order for execution against Hormazshá personally to the extent of Rs. 810, holding that Hormazshá had fraudulently adjusted the decree in Homjibháí's suit, and that, even if there was no fraud, he, as administrator of Phirozshá's estate, ought to have recovered back the money realised by the sale, instead of accepting a com-

* Second Appeal, No. 101 of 1886.