ORIGINAL CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice West, and Mr. Justice Farran.

1886. *August* 13.

HA'JI ABDUL RAHIMAN, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHOJA' KHA'KI ARUTH, (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), *Sec.* 258—*Decree—Adjustment of decree—Suit to recover instalments due under a mortgage made in adjustment of a decree.*

Under section 258 of the Civil Procedure Code (Act XIV of 1882) no Court can recognize an uncertified adjustment of a decree for any juridical purpose whatever.

Pátankar v. *Devji*(1) overruled.

A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree; as there is, in that case, no consideration which the Court can recognize, and, therefore, no valid consideration for the judgment-debtor's agreement.

The plaintiff was the assignee of a decree obtained by one Háji Oomár Khamesá against the defendants on the 5th May, 1883. By that decree, Háji Oomár Khamesá was declared entitled to recover Rs. 9,961-5-6, with interest at nine per cent. from the defendants; and payment was ordered to be made to him of the said sum by *weekly* instalments of Rs. 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to Háji Oomár Khamesá of certain property, with power to him to sell the same, and to execute the decree for the whole amount, in case of default, for six months. Háji Oomár Khamesá assigned the decree to the plaintiff in the present suit, and subsequently to the assignment (*viz.* on the 21st July, 1883,) the defendants executed to the plaintiff the mortgage on which the present suit was brought.

The mortgage-deed, after reciting the above facts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant, by the defendants, that they would pay Rs. 9,961-5-6, with interest at six per cent., by *monthly* instalments of Rs. 400 from the 21st August, 1883. The mortgage, therefore differed from the decree, both with regard to the instalments and the date of interest. The plaintiff sued to recover the sum of Rs. 4,207, being the amount of instalments due to him under the said mortgage.

Held, that the suit would not lie, as the mortgage was an adjustment of the decree, and had not been certified to the Court, as required by section 258 of the Civil Procedure Code (Act XIV of 1882).

* Suit No. 345 of 1884.

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

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APPEAL from a judgment of Scott, J. The plaintiff appealed from the judgment, and the Court of appeal (Sargent, C. J., and Farran, J.,) referred the case to a Full Bench. For the report of the case before Scott, J., see I. L. R., 10 Bom., p. 155: see p. 160.

The plaintiff sued to recover from the defendants the sum of Rs. 4,207, being the amount of certain instalments alleged to be due to the plaintiff under the provisions of a deed of mortgage dated 21st July, 1883.

The plaintiff was the assignee of a decree obtained by one Háji Oomár Khamesá against the defendants on the 5th May, 1883, in the High Court of Bombay, in Suit No. 146 of 1883. By that decree, Háji Oomár Khamesá was declared entitled to recover Rs. 9,961-5-6, with interest at nine per cent., from the defendants; and payment was ordered to be made to him of the said sum by weekly instalments of Rs. 200 commencing on the 12th May, 1883; and, in order to secure the payment of the said instalments, the defendants were ordered to execute a mortgage to Háji Oomár Khamesá of certain property, with power to him to sell the same and to execute the decree for the whole amount in case of default for six months.

Háji Oomár Khamesá assigned the said decree to the plaintiff in the present suit; and subsequently to the assignment (*viz.*, on 21st July, 1883,) the defendants executed to the plaintiff the mortgage on which the present suit was brought.

The mortgage-deed, after reciting the facts above set forth, stated that the defendants had agreed to satisfy the amount of the said decree to the plaintiff in the manner therein mentioned; and it contained a covenant by the defendants that they would pay Rs. 9,961-5-6, with interest *at six per cent.*, by *monthly* instalments of Rs. 400 from the 21st August, 1883.

The mortgage, therefore, differed from the decree both with regard to the instalments and the rate of interest.

The defendants now contended that the mortgage was an adjustment of the decree; that it had not been certified to the Court; and that the plaintiff's suit would not lie, having regard to section 258 of the Civil Procedure Code (Act XIV of 1882).

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Macpherson and *Inverarity* for the appellant.

Lang and *Telang* for the respondent.

Macpherson:—The decree in Suit No. 146 of 1883 was obtained by Háji Oomár Khamesá against the respondents. By that decree the respondents were directed to execute a mortgage to Háji Oomár Khamesá securing to him the payment of the amount of the decree, *viz.*, Rs. 9,561-5-6, by weekly instalments of Rs. 200. The interest to be paid was at the rate of nine per cent. Háji Oomár Khamesá assigned his rights, under that decree, to the present appellant (plaintiff), and directed the defendants to execute the mortgage to him in execution of the decree. They did so on the 21st July, 1883, but the mortgage then executed differed from the decree in directing instalments of *Rs. 400 a month* instead of *Rs. 200 a week*, and in directing interest to be paid at six per cent. instead of at nine per cent. Both these alterations are in favour of the respondents, who were the judgment-debtors, against whom the decree was passed. The appellant has brought the present suit to enforce his rights under this mortgage, and the respondents contend that the suit will not lie, because the mortgage was an adjustment of the decree in Suit No. 146 of 1883, and was not certified, as required by section 258 of the Code of Civil Procedure.

We contend, first, that the mortgage was not an adjustment of the decree within the meaning of section 258. That section was intended as a protection to the decree-holder, and was not for the benefit of the judgment-debtor. Here, however, it is the judgment-debtor who seeks to take advantage of it. Had the mortgage of the 21st July, 1883, been made between the parties to the Suit No. 146 of 1883, and in exact accordance with the terms of the decree in that suit, it would not have been necessary to certify it, for the mortgage would really have been, not an adjustment, but an execution of the decree which directed it. If the mortgage be an adjustment, it must be so in virtue of the variance, in its terms, from those of the decree. But that variance is in favour of the respondents, and it cannot lie in their mouths to object, and to claim the benefit of the section, which was clearly intended to protect the other party.

Assuming, however, that the mortgage is an adjustment within the meaning of the section, we contend this suit will lie. Section 258 is part of a code merely of procedure, and in the absence of express words prohibiting such a suit as the present, and thus altering the substantive law, the Court ought not to infer that such a change was intended. Further, section 258 is part of Chapter XIX of the Code, which relates merely to the execution of decrees, and in part E of that chapter which deals only with the mode of executing decrees. The section, therefore, ought to be construed as applying only to the execution of decrees. Adequate effect is given to the concluding words of the section by construing them to mean that no Court *executing a decree* or dealing with questions in execution under section 244, shall recognize an uncertified adjustment. If that be so, the inference is that, in regard to any grievance arising out of an uncertified adjustment, a separate suit is the proper remedy. Counsel referred to *Rámghulám* v. *Jánki Rái*[1]; *Pooromanand Khasnabish* v. *Khepoo*[2]; *Gunamani Dási* v. *Prankishori*[3], which was a decision under the corresponding section 206 of the former Code of Civil Procedure (Act VIII of 1859) followed by *Meer Mahomed* v. *Khatoo Bebee*[4]; *Davalatá* v. *Ganesh Shástri*[5]; *Mallamma* v. *Venkáppá*[6]; *Jhábar Máhomed* v. *Modan Sonahar*[7]; see also *Shádi* v. *Gangá Sakái*[8]; *Guni Khán* v. *Koonjo Behary Sein*[9]; *Virarághava* v. *Subbakká*[10], and *Chembrakandi* v. *Themdyal*[11], which were cases on the corresponding section 258 of Act X. of 1877.

The two cases in Bombay are against me—*Pátankar* v. *Devji*[12] and *Pándurang* v. *Náráyan*[13], but in neither case was the point argued. In the following cases the Court have recognized such a contract as the mortgage here either by way of enforcing it or by way of restraining the execution of the decree—*Nubo Kishen*

(1) I. L. R., 7 All., 124.
(2) I. L. R., 10 Calc., 354.
(3) 5 Beng. L. R., 223.
(4) 20 Calc. W. R. Civ. Rul., 150.
(5) I. L. R., 4 Bom., 295.
(6) I. L. R., 8 Mad., 277.
(7) I. L. R., 11 Calc., 671.
(8) I. L. R., 3 All., 538.
(9) 3 Calc. L. R., 414.
(10) I. L. R., 5 Mad., 397.
(11) I. L. R., 6 Mad., 41.
(12) I. L. R., 6 Bom., 146.
(13) I. L. R., 8 Bom., 300.

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Mookerji v. *Debnáth Roy*(1); *Nujeem Mullick* v. *Esfan Mollah*(2); *Dhuronidhur Sen* v. *Agra Bank, Limited*(3).

Telang (with *Lang*) for the respondents:—The suit in this case is brought by the creditor. In nearly all the cases that have been cited, the suits have been brought by the debtors. Such cases are distinguishable. A suit, such as this, by a creditor must necessarily offend against section 258, for the Court must expressly recognize the adjustment. But the Courts, in giving relief to a *debtor* who sues, would not recognize the adjustment or payment. Any payment made by the debtor would be returnable as upon a consideration that had failed.

This is a contract between the parties to Suit No. 146 of 1883, and relating to the execution of the decree in that suit. Under section 244, cl. (*c*), of the Civil Procedure Code (Act XIV of 1882) it can, therefore, only be dealt with in execution proceedings, and not by separate suit. Then comes section 258, which forbids it to be used in execution proceedings unless it has been certified. The object of the rule, which requires such matters to be dealt with in execution only, is to prevent the same question being litigated a second time.

Counsel commented on the cases cited, and further referred to Pollock on Contracts (4th ed.), pp. 167—176; Leake on Contracts, 667.

Macpherson in reply:—It would be to make a subtle distinction to hold that a debtor may sue, and a creditor may not. In both cases there would be equally a recognition of the adjustment. We contend that section 258 only means that the Court, in proceedings under Chapter XIX. of the Code, shall not take cognizance of the adjustment or satisfaction.

September 3. SARGENT, C. J.:—The question in this case turns upon the construction to be placed on the concluding clause of section 258 of the Civil Procedure Code (Act XIV of 1882), which—after providing that "where any money payable under a decree is paid out of Court, or the decree is otherwise adjusted, in whole or in part, to the satisfaction of the decree-holder, the decree-

(1) 22 Calc. W. R. Civ. Rul., 194. (2) 22 Calc. W. R. Civ. Rul., 298.
(3) 4 Calc. L. R., 434.

holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree"—directs that "no such payment or adjustment shall be recognized by *any Court* unless it has been certified as aforesaid." It has been contended for the appellant that by "any Court" must be meant any Court concerned with the question of the execution of the decree. Such would appear to have been the opinion of a division Bench of the Allahabad Court consisting of Duthoit and Mahmood, JJ., in *Rámghulám* v. *Jánki Rái*[1], and which was adopted by the Calcutta High Court in *Jhábar Mahomed* v. *Madan Sonahar*[2]. In the former case, Mr. Justice Mahmood says: "The section occurs in a Code regulating civil procedure, in a chapter which relates to execution of decrees, and the only object it can have in view is to remove the inconvenience which would otherwise arise in connection with the execution of decrees in cases in which adjustment out of Court is pleaded. It cannot affect Courts which are not concerned with the question of execution of decree, but with a separate suit in which the cause of action alleged is the breach of a valid contract by which the decree-holder has bound himself not to execute the decree." I am unable to agree in this view of the section.

It is to be remarked that, in both the corresponding sections of the Codes of 1859 and 1877, the prohibition against the recognition of an uncertified adjustment is distinctly confined to the Court, whose "duty it is to execute the decree." Section 258 of the Code (Act X of 1877), after directing that an adjustment in satisfaction of a decree out of Court should be certified to the Court "whose duty it is to execute the decree," provides that no satisfaction of a decree by such adjustment shall be recognized by "such Court" unless the adjustment be certified as aforesaid. By sections 35 and 36 of the amending Act XII of 1879 an entirely new section, 257A, was introduced, and section 258 was remodelled; and those sections have been adopted in the present Code of 1882. Section 258, as amended, still provides for the adjustment being certified before the Court whose "duty it is to execute the decree," but prohibits any Court from recognizing

(1) I. L. R., 7 All., 124 at p. 128. (2) I. L. R., 11 Calc., 671.

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the adjustment if not certified; and I think that when we look at the language of the present section, which is quite general, at the nature of the change which was effected in the language of the Code of 1877, and, lastly, at the manner in which the change was made, *viz.*, by an Act expressly passed to amend the Act of 1877, the irresistible conclusion is that the substitution of "any Court" for "such Court" was made advisedly by the Legislature with the intention of extending the prohibition to every Civil Court against recognizing an uncertified adjustment for the purpose for which it was intended, *viz.*, as operating in satisfaction of a decree.

It was said that as the section in question is found in a Code of Civil Procedure and in a chapter of that Code relating to execution of decrees, its operation, if not confined to Courts executing the decree, must be at least restricted to questions arising in execution of decrees, as in cases of suits brought for the administration of a judgment-debtor's estate, or the winding up of a company, where it would be necessary to determine whether the decree had been satisfied; and such would appear to have been the view taken by the Madras Court in *Mallamma* v. *Venkappa*[1]; although the expression of it was not necessary for the decision. It appears to me, that we shall be giving better effect to the intention of the Legislature, which presumably must be taken to have been to discourage private arrangements out of Court, as tending to embarrass the execution of decrees, unless subsequently recorded in Court, by holding that, upon the proper construction of the section, no Court can recognize an uncertified adjustment as operating in satisfaction of a decree for any juridical purpose whatever. If such was the intention, convenience certainly required that effect should be given to it on the occasion of passing the amending Act. Assuming this to be the correct view of the section, it follows that a suit will not lie to enforce an uncertified agreement of adjustment against the judgment-debtor; the consideration for which is that it should operate in satisfaction of the decree, as there is in that case no consideration which the Court can recognize, and, therefore, no valid consideration for the judg-

(1) I. L. R., 8 Mad., 277.

ment-debtor's agreement. In the present case the consideration for the defendant's promise to pay Rs. 9,956-1-6 by monthly instalments of Rs. 400 is clearly that it should operate in satisfaction of the decree, the mortgage being intended as a security for the performance of that promise; and, therefore, as the adjustment had not been certified, the division Court was right, in my opinion, in refusing the plaintiff's claim for arrears of instalments, and their realization, in default of payment, from the sale of the mortgaged property. On the same ground I am of opinion that *Pándurang Rámchandra* v. *Náráyan*[1] was rightly decided.

Before concluding I think it right to refer to the class of cases represented by *Gunámani Dási* v. *Prankishori Dási*[2] and *Virarághawa* v. *Subbakka*[3]. Those decisions remain, in my opinion, unaffected by the construction of section 258 of the present Code, now contended for. Although no Civil Court can, in my view of that section, recognize an uncertified payment as a legal satisfaction of a decree for the purpose of giving effect to it, the section does not preclude the Court from recognizing the payment out of Court as a fact, or the intention with which the payment was made, (as attributed by the Court to the parties in those cases,) *viz.*, that the judgment-creditor should certify the payment to the Court, and so make it effectual in execution. Moreover, it is to be remarked, that all such cases as the above, if the plaintiff's statement be true, are cases of fraud; and the Courts, acting on the principle which has influenced Courts of equity in England, in applying the statute of frauds, (see *Lincoln* v. *Wright*[4] and *Haigh* v. *Kaye*[5]), will not, I apprehend, on any possible construction of the section, give effect to it so as to cover fraud.

I am of opinion, therefore, that the decision in *Pátankar* v. *Devji*[6] cannot be supported.

The decree appealed from must, therefore, be confirmed with costs.

WEST, J.:—I concur. Section 258 of Act X of 1877 is thus expressed:—"If the money is paid out of Court, or the decree is

(1) I. L. R., 8 Bom., 300.
(2) 5 Beng. L. R., 223.
(3) I. L. R., 5 Mad., 397.
(4) 4 DeG. & J., 16.
(5) 7 Ch. App., 469.
(6) I. L. R., 6 Bom., 146.

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otherwise adjusted to the satisfaction of the decree-holder, he shall certify the payment or adjustment to the Court whose duty it is to execute the decree; and no satisfaction of a decree, in part or in whole, by such payment or adjustment shall be recognized by such Court unless the payment or adjustment be certified as aforesaid." By the amending Act XII of 1879, the duty of certifying any payment or adjustment of the decree is still cast on the decree-holder. The judgment-debtor, as under the earlier Act, may constrain the decree-holder to certify or adjust the payment or adjustment. But instead of the clause, "and no satisfaction, &c., shall be recognized by *such* Court, &c.," a new and different clause is enacted in these words:—"No such payment or adjustment shall be recognized by *any* Court, unless it has been certified as aforesaid."

The change from "such Court"—*i.e.*, the Court executing the decree—to "any Court" must have some significance. The High Court of Bombay has said it means that the alleged transaction by way of payment or adjustment cannot be, in any way, recognized in any Court, not even in another, as the basis for a claim by either the decree-holder or the judgment-debtor. The other High Courts have held, though not without some reserve, that "any Court" means no more than any Court executing the decree—*Sitárám* v. *Mahipál*[1]; *Mallamma* v. *Venkappa*[2]; *Ishan Chunder Bandopadhya* v. *Indro Náráin Gossami*[3]; *Queen Empress* v. *Bápuji Dayárám*[4]. According to them, the change of phrase implies no substantial change of intention on the part of the Legislature. This seems very unlikely, and most unlikely in the case of an Act concerned chiefly with slight and careful modification of the Code it amends. Section 244 (*c*) in its original form said merely that any questions arising between the parties, and relating to the execution of the decree, should be determined by the Court executing the decree. In its amended form it says:—"Any..... questions arising between the parties.....and relating to the execution, discharge, or satisfaction of the decree..... shall be determined by order of the Court executing a decree and not by separate suit." The change of expression emphasizes

(1) I. L. R., 3 All., 533.
(2) I. L. R., 8 Mad., 277 at pp. 281, 283.
(3) I. L. R., 9 Calc., 788 at p. 790.
(4) I. L. R., 10 Bom., 288.

the purpose of the Legislature to keep the execution of the decree, even when closely connected with other matters, wholly in the hands of the Court charged with it. It not unfrequently happens that a decree-holder has other claims against the judgment-debtor, besides that on which the decree has been obtained, and that a general settlement of all the claims is made by one comprehensive agreement. In such a case, or on the allegation of such a case, the execution of a decree might be indefinitely suspended while suits in the same Court or in the other Courts were pending, but for the provision in question. By means of it the effect on the decree as a command to be executed of any arrangement whatever between the parties is brought within the sole cognizance of the Court charged with the execution. That a fresh agreement may be made—absorbing, so to speak, the obligation under the decree—without any contravention of the present law, is shown by *Jhábar Mahomed* v. *Modan Sonahar*(1). That, except so far as certified, it is not to have any effect on the execution of the decree, is shown by section 258. That, except as recorded in the execution proceedings, it is not, as having affected the decretal obligation, to be recognized in any proceeding whatever, either in the same Court or in any other Court, follows from the last clause of section 258 taken with clause (c) of section 244.

After section 244 follow the sections which provide for the mode of executing decrees. It is in the application of these that the questions arise which are contemplated by section 244. Amongst them are those as to payment and adjustment of the decree which form the subject of section 258. A transaction may have been entered into by which the decree ought to be considered satisfied wholly or in part. This may be the consideration for other terms of the transaction, yet the decision of any controversy as to the effect of the arrangement on the decree is strictly reserved to the Court charged with the execution of it. The policy of this exclusion of collateral litigation is manifest. In pursuance of the same policy, section 258 requires the decree-holder to certify to the Court any payment or ad-

(1) I. L. R., 11 Calc., 671.

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justment of the decree as between himself and the judgment-debtor. In case of his default, the judgment-debtor may get the payment or adjustment placed to his credit. For an application to this effect he is allowed but three weeks. After that time the execution will proceed as if no payment had been made, or terms arranged. "No such payment or adjustment shall be recognized unless it has been certified." Thus complication and delay in the execution of the decree are reduced, as nearly as may be, to a minimum; and questions of satisfaction and adjustment are kept within the sole cognizance of the Court familiar with the case. What rights or obligations arise from transactions intended to operate on the decretal obligation, but abortive for that purpose, is not a matter that section 258 attempts to deal with. They are left to the operation of general principles; the only modification directly introduced is the one intended to guard the execution of the decree; but this involves, in many cases, a different relation of the parties from what would have subsisted without it.

The section, as it formerly stood, forbade the recognition of the payment or adjustment of the decree only by the Court executing it. But it is a common case that the contract by which a decree is adjusted must, in case of dispute as to its general terms, be submitted to the jurisdiction of a different Court from the one executing the decree. The valuation, for instance, of a suit brought on the new contract may be above Rs. 5,000, while the decree adjusted by the contract was in a suit of less than Rs. 5,000, and, therefore, within the jurisdiction both for judgment and execution of a lower Court. Such cases must be frequent under a minute division and distribution of authority according to different principles through which eight or nine jurisdictions may be in exercise side by side in a city like Poona. A new contract embracing a settlement of a decree, which when made would be subject to the jurisdiction of the Court executing the decree, may, when litigation arises out of it, be subject to a quite different jurisdiction in consequence of the establishment or the suppression of a Small Cause Court, of special powers being given to, or withdrawn from, a Subordinate Judge, or of

a change being made in his local jurisdiction. In the changes consequent on Act XIV of 1869 the jurisdiction of several Courts in this Presidency was altered. It was ruled that the execution of their own decrees should not be affected by this change, but an adjustment by a contract for a sum above or below the pecuniary jurisdiction would necessarily, in case of dispute, be taken into a different Court. Now, if the adjustment of a decree, which the Court executing the decree is forbidden to recognize, may be recognized in another Court, it is plain that the intention of the Legislature must, in many cases, be defeated. In dealing with the claim on the composite contract placed before it the Court must, if it is allowed, take cognizance of the payment or adjustment with which the other parts of the transaction are closely connected. In vain did the law say that questions as to adjustment and satisfaction should be dealt with only by the Court executing the decree so long as they could be re-opened under the cover of terms of fresh contracts in other Courts. The mischief is remedied by forbidding "any Court" to recognize an uncertified payment and adjustment. The acceptance of money, the engagement to take something or some promise in place of the right given by the decree, is to be treated by all Courts as non-existent, unless it has been certified in the manner prescribed. The creditor who has not certified, may have acted dishonestly; the judgment-debtor must have acted negligently. Whichever of them is the more to blame, the law refuses to their proposed action on the judgment-debt any recognition, as an element of a new right or obligation, of a claim or a defence.

The importance of the construction of the word "any" consists in this, that if the non-recognition of an uncertified adjustment is incumbent on every Court, it cannot be meant to be confined to the proceedings in execution. It extends to other suits in which the adjustment may come in question, and, therefore, equally to such a suit brought, as in the present instance, even in the same Court.

If it could be made out that the enforcement of section 258 in its literal sense involved occasional hardship to persons, who through ignorance or carelessness had not secured them-

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selves against fraud by the means the section itself affords, that would not be an uncommon case. Omission to register or to use a proper stamp may equally cause irreparable injury. We cannot take the occasional inconvenience as a ground for rejecting the plain construction, which aims at a general benefit. As was said by Lord Blackburn in *Young and Co.* v. *Mayor of Leamington*(1): "It is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship." Apart from the decisions, the words in this instance are "precise and unambiguous"—The *Sussex Peerage*(2); *Becke* v. *Smith*(3); *Price* v. *Woodhouse*(4). The construction of them has been influenced by the judgments on the former law, which, on the face of it, was more limited in its operation. In an analogous case Sir G. *Jessel said*: "*It is the* duty of the Court to find out what the Act of the Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts when considering the construction of a plain statute framed in different words from the former"—*Hack* v. *London Provident Building Society*(5). This principle was expressly approved by Lord Selborne in *Municipal Building Society* v. *Kent*(6), and it seems to apply exactly to the present case. With such decisions before it, as those in *Nubo Kishen Mookerjee* v. *Debnáth Roy Chowdhry*(7) and *Nujeem Mullick* v. *Erfan Mollah*(8), which allowed the alleged adjustment of a decree to be the subject of a fresh suit and the ground of an injunction against executing the decree, the Legislature chose to enact that no question "relating to discharge or satisfaction" should be entertained by any Court but the one charged with execution in the execution proceedings; and that no adjustment, except one duly certified and so placed beyond controversy, should be recognized by any Court. The obvious policy of the Legislature agrees perfectly with the changed expression: its new wine ought not to be put into the old bottles. Were there any room for doubt, "we are (in such a case) to

(1) 8 Ap. Ca., 517, at p. 522.
(2) 11 Cl. & Fin., at p. 143.
(3) 2 M. & W., at p. 195.
(4) 1 Ex. R., at p. 560.
(5) L. R., 23 Ch. Div., at p. 108.
(6) 9 Ap. Ca., at p. 269.
(7) 22 Calc. W. R. Civ. Rul., 194.
(8) 22 Calc. W. R. Civ. Rul., 298

construe the language on an Act .....in that sense that will best effectuate the obvious intention of the Legislature"—Lush, J., in *The Queen* v. *Pearce*[1].

That such questions, as the one now before us, might arise under section 258 in its present shape, could not have escaped the consciousness of the Legislature in 1879. Similar cases had occurred before. As no express provision was made, it must have been supposed that no injustice need be done in dealing with such questions by reference to the terms of the section and to recognized general principles. Nor, in truth, could any clause be very easily framed that would embrace all the cases in which the recognition, in another suit or proceeding, of an alleged adjustment ought to be refused according to the principle of sections 244 and 258. This is the answer to such an objection as that taken in *Ishan Chunder Bandopadhya* v. *Indro Náráin Gossami*[2], that the provision would have been more explicit had it been meant to extend beyond the Court executing the decree. The specification of instances, according to Bacon's aphorism, would have weakened the law for cases not enumerated. If a strict interpretation be put upon the words, general principles will enable us to deal with the logical consequences in a way that will involve no injustice or general inconvenience. 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—*Kanna Pisharodi* v. *Kombi Achen*[3]. The mere passing of the money to the decree-holder, or the making of a promise by the debtor, it may recognize; and it may deal with the one or the other as resting on no consideration, and as, therefore, giving a right to relief to the judgment-debtor who has been cheated or cajoled. From this point of view I think the decision in the *Pátánkar's Case*[4], dissented from by all the other High Courts, is not one that can be sustained. There the intended credit to the judgment-debtor had not been procured by the decree-holder, and, therefore, through his fraud or default there was an entire failure of the proposed consideration or legal cause for the payment. If paid under compulsion of legal

(1) L. R., 5 Q. B., 388.
(2) I. L. R., 9 Calc., 788.
(3) I. L. R., 8 Mad., 381.
(4) I. L. R., 6 Bom., 146.

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process, the money could not be recovered (*Marriott* v. *Hampton*[1]); but such payment the Court was forbidden to recognize in the actual circumstances. It was clearly not intended to be a gift; and could be recovered according to common principles—*Marriott* v. *Hampton*[2], notes; Lord Mansfield in *Moses* v. *Montefiori*. The Court being satisfied that the money had passed, but incapable of recognizing it as such payment or adjustment, should have ordered it to be restored. The precedents were all in favour of this view. Section 206 of Act VIII of 1859 said that the Court—*i. e.* the Court executing the decree—should not recognize any adjustment not certified to it; yet, as is pointed out by Phear, J., in *Meer Mahomed Kazem Jowhurry* v. *Khetoo Bebee*[3], suits were constantly brought and entertained for the recovery of money paid, but not certified as paid to the Court executing the decree. If, then, a judgment-debtor has been imposed on by the decree-holder, and has omitted to apply to the Court within three weeks, he cannot, indeed, stop the execution of the decree; but he has just the same means, as before, for getting his money returned, or his engagement avoided. A similar view was expressed by Birdwood, J., as Judge of the Sadar Court in Sind, in *Gami* v. *Gajgu Murghan and Chater Murghan*, on the 29th February, 1884. The only difference is that, no matter where the judgment-debtor may have to sue, the payment and receipt, as on account of the decree having been left uncertified, cannot now be recognized by any Court as a defence to the claim for restitution.

Suppose, again, that the judgment-debtor seeks to get a conveyance or an agreement set aside, because the decree-holder has not certified the partial satisfaction for which it was executed. The plaintiff cannot, in such a case, enforce the decree-holder's promise after the lapse of twenty days; but he may rest on the ground of a property obtained from him for no consideration, and, therefore, taken by the recipient with a resulting trust in his favour; or of the promise being void for the same reason. In either case the decree-holder is precluded from setting up

(1) 2 Sm. L. Ca., 375. (2) 2 Sm. L. Ca., 375.

(3) 20 Calc. W. R. Civ. Rul., 150.

the truth of the transaction; because, as an adjustment actually made, it has not been certified, and as a promise on his part it cannot be enforced, and cannot form a valid consideration. Such an answer would indeed involve an avowal of fraud. Other more complex cases might be conceived; but in all alike the decree-holder would be prevented from taking the benefit as a consideration of that whereof by his wrongful omission the judgment-debtor had been deprived of the benefit as a release —Indian Contract Act IX of 1872, sec. 25.

In the case of a decree-holder seeking to enforce a contract made by way of discharge or adjustment of the decree, it is equally plain that, if he has not certified the adjustment, he has been guilty of an omission which may fairly be ascribed to fraud. He may certify when he will, and hence the fraudulent purpose may be presumed to continue until he does so. By assigning the decree to one, and the new contract by way of adjustment to another innocent purchaser, he may compel the judgment-debtor to pay twice over, unless the new contract, resting on an adjustment that the Court cannot recognize, is treated as an engagement without consideration, and, therefore, unenforceable—Indian Contract Act IX of 1872, sec. 2 (*d*), (*e*), (*g*), (*i*). This is how the judgment-debtor's bond was viewed in *Pándurang Rámchandra Chowghule* v. *Náráyan*[1]. The adjustment, for which it was given, not having been certified, could not be recognized by the Court, or by any Court as having been made at all. The consideration for the engagement being thus no consideration, no contract was created between the parties—Indian Contract Act, sec. 2 (*g*), (*h*), secs. 10, 28, 25. Nothing was done or promised to be done (*i.e.* by a binding promise) by the plaintiff; and, in the language of the civil law, the obligation was null, being without any cause—*per* Couch, C. J., in *Rustamji Ardesir Dávar* v. *Ratanji Rustamji Wádiá*[2]. The case now before us seems to be identical in principle with the one just referred to, but it shows the necessity of a strict interpretation of section 258 still more clearly. The original decree-holder has assigned to the present plaintiff; but he might have assigned

(1) I. L. R., 8 Bom., 300. (2) 7 Bom. H. C. Rep., at p. 11, O. C. J.

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the mortgage sued on, without assigning the decree. If the mortgage contract could be enforced while the adjustment it was to affect remained (as it does) uncertified, the decree could virtually be executed twice over. The remedy for this is found in adhering to the words of the law, refusing to recognize the adjustment, pronouncing the mortgage, *nudum pactum*, as not resting on any substantial consideration, and dismissing the claim.

The sum of the matter seems to be this, that a decree-holder must not be allowed to rely on an uncertified payment or adjustment, as such, either to resist a return of the money he has received, or to ground a claim on a contract resting on the alleged adjustment; and this rule, it is prescribed, shall be enforced, not only in the Court executing the decree, but in any Court in which the nature of the payment or the reality of the adjustment may come into question. The judgment-debtor, on the other hand, though not left without relief against an unscrupulous creditor, is deprived of that form of it, which he has fairly forfeited by his negligence, and which might, by collusion between him and the creditor, be made a means of defrauding a purchaser of the decree.

In the present case the plaintiff, being assignee of a decree obtained by a third party against the defendant, sues on a mortgage executed by the defendant as an adjustment of the decree. He has not certified this adjustment, nor has the original decree-holder. Could the alleged adjustment be recognized by this Court, the mortgage would rest on a valid consideration; yet the decree could be executed in spite of it, because the adjustment has not been certified. If the plaintiff is acting in good faith, he can certify the adjustment; if not, he may sell, perhaps may already have sold the decree to a purchaser for value, who could not, in any way, be prevented from enforcing it. To recognize the alleged adjustment, and give effect to the contract based on it, would be to encourage fraud by a plain contravention of the term of section 258.

The decree of the Court below ought, therefore, to be affirmed.

FARRAN, J.:—In the argument before us, the mortgage sued upon was treated as an adjustment of the decree in Suit No. 146 of

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1883; and for the purpose of this judgment I shall treat it as such. That adjustment was not certified to the Court, in pursuance of the provisions of section 258 of the Code of Civil Procedure (XIV of 1882); and the question for our consideration is, whether, that adjustment being uncertified, there is a good consideration for the covenant contained in the mortgage, and whether the mortgagee is entitled to a decree for the amount of the unpaid instalments. The answer to that question depends upon the proper construction to be placed upon the concluding para. of section 258 of the Civil Procedure Code (Act XIV of 1882), which is as follows:—"No such payment or adjustment shall be recognized by any Court, unless it has been certified as aforesaid." The payment or adjustment here referred to, is a payment or adjustment made out of Court.

Three alternative constructions may be placed upon the words I have quoted, and they may be open to one of the following three interpretations:—

(1) No such payment or adjustment shall be recognized by any Court, for *any purpose whatever*, unless it has been certified to the Court. Such uncertified payments or adjustments shall be treated by the Courts as though they were not; as though they were incapable of proof.

(2) No such payment or adjustment shall be recognized by any Court *as a payment or adjustment of a decree*, unless it has been certified to the Court. "Any Court" being construed to mean any Court called upon, whether in executing a decree or by separate suit, to recognize the payment or adjustment as a payment or adjustment of a decree. This was the view taken by this Court in the case of *Pándurang Rámchandra Chougule* v. *Náráyan*[1].

(3) No such payment or adjustment shall be recognized by any Court *concerned in executing the decree*, unless it has been certified to the Court. Any other Court, than the Court concerned in executing the decree, may recognize such payment or adjustment as, in effect, operative to satisfy the decree; though the Court executing the decree may not look at it for that pur-

(1) I. L. R., 8 Bom., 300.

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pose. This is the view taken by the High Court at Allahabad in *Rámghulám* v. *Jánki Rái* (1).

In construing an Act of the Legislature the primary object of the Court should be to ascertain the intention of the Legislature from the words they have used, construing them in their ordinary grammatical sense. "If the words used are of a general character, and one sees that, by applying the language to something which is within the mischief contemplated by the Act, it will produce manifest absurdity or inconvenience, then, according to the rule of construction which is well known, it is the duty of the Court so to construe the general term as not to apply it to that which will have such a result"—*per* Cotton, L. J., in *Yates* v. *The Queen* (2). "It must be remembered that, in construing a section, the language of Acts of Parliament is not always precisely accurate, and that words themselves are often but an imperfect vehicle of thought. When words, taken by themselves, are capable of a very wide and of a narrower construction, the question is, which construction it is more reasonable to suppose the Legislature intended, having regard to the subject-matter and the other provisions of the Act"—*per* Cave, J., in *In re Armstrong* (3). See, too, the observations of Lord Selborne in *Caledonian Railway Company* v. *North British Railway Company* (4). Lastly, the language and provisions of expired and repealed Acts on the same subject and the constructions which they have authoritatively received, are to be taken into consideration; for it is presumed that the Legislature uses the same language in the same sense when dealing at different times with the same subject; and also that any change of language is some indication of a change of intention—Maxwell on Statutes, p. 44. The presumption, however, that a change of language indicates a change of intention, ought not to have too great weight assigned to it—*Ibid.*, p. 388. "In this country it is not going too far to say that, just as a Court is bound to take notice of the alterations of the common law effected by statute, so also, for similar reasons, it is bound to take notice of the changes of the law by statutes which alter the specific provisions of earlier enactments *in pari materia*"—*per*

(1) I. L. R., 7 All., 124.
(2) L. R., 14 Q. B. Div., p. 648.
(3) L. R., 17 Q. B. Div., at p. 175.
(4) 7 App. Ca., p. 259.

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Mahmood, J., in *Ajudhia Prasád* v. *Bálmukund* (1). It is necessary, therefore, to consider the state of the law previous to the passing of Act XII of 1879, sec. 36, which has been, in the same words, re-enacted in Act XIV of 1882, sec. 258.

Act VIII of 1859, sec. 206, provided that "all monies 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 recognized 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." The plain and grammatical construction of that section was that "the Court," which was precluded from recognizing the uncertified adjustment, was the Court whose duty it was to execute the decree, or the Court which passed the decree. The expression "the Court", in the latter portion of the section, had reference to the Court mentioned in the earlier portion of the section; and it would be a straining of the language to apply the expression to any other Courts. The same statute contained an enactment, which, as redrawn in Act XX of 1861, sec. 11, provided that "all questions regarding the amount of any mesne profits, &c., as well as 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 separate suit, and the order passed by the Court shall be open to appeal."

Under these sections it was held, by a Full Bench of the Calcutta High Court, that where a judgment-debtor paid to the decree-holder a sum of money, by way of compromise, in full satisfaction of the decree, which the decree-holder failed to certify to the Court, and the decree-holder afterwards executed the decree for the full amount, the judgment-debtor could maintain a suit to recover the money so paid by way of compromise.

(1) I. L. R., 8 All., 354, at p. 359.

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The grounds for the decision, as stated by Couch, C.J., were that the decree-holder, when he obliged the judgment-debtor to pay the amount of the decree in execution, became a trustee, for the judgment-debtor, of the money which had been previously paid by way of compromise—*Gunamani Dási* v. *PránkishoriDási*(1).

It was, I think, doing somewhat of injustice to the common law to hold that it was not sufficiently flexible to meet such a case as the Court had before it, and to consider it necessary to fall back upon doctrines of equity jurisprudence to solve the difficulty; but, whether based upon common law, or equitable principles, there can be no doubt, if I may say so without presumption, of the soundness and justice of the decision. In the same case it was held that section 11 of Act XXIII of 1861 did not prevent the Court in a separate suit from taking cognizance of such a payment, inasmuch as the Court executing the decree was forbidden, by section 206 of the Code of Civil Procedure, from taking notice of payments not made through the Court, or certified to the Court; and it could not be that section 11 of Act XXIII of 1861 applied to payments of which the Court executing the decree by section 206 was forbidden to take cognizance. Upon that case it is to be observed that the money paid in compromise of the decree, was recovered by the payer, not because it was paid in compromise of the decree, but because it was, in fact, not so paid, though the payer intended to pay it for that purpose. The plaintiff, in effect, said: "I paid the money to the defendant, in order that he might apply it in discharging the decree. He has not done so: therefore I am entitled to recover it." The defendant, having executed the decree, was estopped from saying that he had received the money from the plaintiff in discharge of the decree. Not being allowed to make that allegation, he had no pretext for withholding it from the plaintiff. The Court, in ordering that money to be repaid, clearly did not recognize an adjustment of the decree made out of Court, and uncertified. Neither party alleged an adjustment.

That case was followed, in the Calcutta High Court, in the case of *Meer Máhomed* v. *Khetoo Bebee*(2). In the Madras High Court

(1) 5 Beng. L. R. 223, at p. 232. (2) 20 Calc. W. R. Civ. Rul., 150.

the Judges were divided in opinion upon a similar question—the majority of the Judges, sitting as a Full Bench, holding that such a suit was not maintainable, upon the ground that the first payment could not be recovered, because it was due under the decree; and the second could not be recovered, because it was ordered by the Court—*Aruná Chella Pillai* v. *Appávu Pillai*[1] The High Court of Bombay had, previously to the Full Bench decision of the Calcutta High Court above referred to, come to the same conclusion as that Full Bench—*Gulábwad* v. *Rahimtullá*[2].

On the 1st of October, 1877, an Act (X of 1877) came into force to consolidate and amend the law of Civil Procedure. By its 258th section it is provided that "if the money is paid out of Court, or the decree is otherwise adjusted to the satisfaction of the decree-holder, he shall certify the payment or adjustment *to the Court whose duty it is to execute the decree*; and no satisfaction of a decree, in part or in whole, by such payment or adjustment shall be recognized by *such* Court, unless the payment or adjustment shall be certified as aforesaid." Under that section any ambiguity, which may have been thought to exist in the expression "the Court" used in section 206 of the old Code, is removed, and the only Court, which is precluded from recognizing an uncertified adjustment, is the Court whose duty it is to execute the decree.

While that section was in force, the Full Bench decision of the High Court at Calcutta in *Gunamáni Dási* v. *Pránkishori Dási*[3] was followed by all the High Courts in India.

A Full Bench of the Madras High Court adopted in *Virarághava* v. *Subbakka*[4] the view of the minority of the Judges in *Aruná Chella Pillai* v. *Appávu Pillai*[5]. In the latter case the plaintiff had given certain grain to the defendant in satisfaction of the decree, and had executed his decree. The plaintiff sued for damages against the defendant, the decree-holder. Turner, C. J., says: "The suit now pending is not brought to recover money levied under a decree, nor is it a suit to recover money paid and accepted in satisfaction of a debt due. It is a suit to

(1) 3 Mad. H. C. Rep., 188.
(2) 4 Bom. H. C. Rep., A. C. J., 76.
(3) 5 Beng. L. R., 223.
(4) I. L. R., 5 Mad., 397.
(5) 3 Mad. H. C. Rep., 188.

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recover damages for the breach of the implied promise to certify the payment to the Court, and thereby make it effectual in execution. The consideration, for which the delivery was made, has wholly failed, owing to the negligence or misconduct of the decree-holder." That decision was not opposed to the wording of the Code as it then stood. The *ratio decidendi* of the Court certainly involved the recognition of the uncertified payment as a payment made in satisfaction of the decree. The more appropriate remedy of the plaintiff would, I think, have been a suit to recover his grain or its value. There seems a difficulty in implying a promise. It was the law (see p. 258) which imposed a duty on the decree-holder to certify the payment, and not any implied promise made by him to his judgment-debtor. That ruling was followed in *Musutti* v. *Shekhárán* (1). But the remedy sought there was the appropriate one. The Bombay High Court, under exactly similar circumstances, in the case of *Davalatá* v. *Ganesh* (2) followed the Bengal Full Bench ruling and its own decision in *Gulábwad* v. *Ráhimtullá* (3). So did the Allahabad High Court in *Shádi* v. *Gangá Sahai* (4), and the Calcutta High Court in *Guni Khán* v. *Koonjo Behary* (5) adhered to the previous decision of the Full Bench. By a *consensus* of opinion of all the High Courts it was, therefore, held, that where a judgment-creditor, without certifying, had received money or property, in satisfaction of a decree, from his judgment-debtor and then executed his decree, he was liable to restore the money or property so recovered in the first instance. The Madras High Court had gone further, and held that the decree-holder was liable, in damages, to his judgment-debtor for not certifying a payment made by the latter. This ruling, as I have pointed out, though it involved the recognition of an uncertified payment as a payment of the decree, was permissible upon the wording of the law as it then stood.

That the provisions of the law, as to uncertified payments or adjustments of a decree, should not be made the instrument of fraud and oppression, and that a decree-holder should not be

(1) I. L. R., 6 Mad., 41.
(2) I. L. R., 4 Bom., 295.
(3) 4 Bom. H. C. Rep., A. C. J., 76.
(4) I. L. R., 3 All., 538.
(5) 3 Calc. Rep., 414.

allowed to retain what he ought not to have received, unless he intended to apply it in satisfaction of his decree, is a proposition which is in accord with all principles of law and equity; and the giving of effect to it does not appear to me to be opposed to the intention of the Legislature, that questions arising in execution of a decree should be decided by the Court executing the decree, and not by separate suit. It would require very clear and express terms to deprive the Courts of their jurisdiction to adjudicate in cases of fraud of this nature.

There was, however, before Act XII of 1879 came into operation, another class of cases by which it was, in effect, held, that an uncertified adjustment of a decree out of Court, though it could not be recognized by the Court concerned with the execution of the decree, yet might be recognized by the same Court as an adjustment of its decree, if the jurisdiction of that Court were invoked by a separate suit. I refer to the cases of *Nujeem Mullick* v. *Erfan Mollah*(1), where it was held "that a suit to enforce a contract (uncertified) by which a dispute was adjusted between a decreeholder and a judgment-debtor could be maintained;" to *Nubo Kishen Mookerjee* v. *Debnáth Roy*(2), where an injunction was issued to restrain the judgment-creditor from executing his decree, on the ground of an uncertified adjustment; and to *Dhuronidhur Sen* v. *The Agra Bank, Limited*(3). These rulings were, I think, admissible under the wording of the law as it stood when they were passed; but it appears to me to be an anomaly, that in one branch of its jurisdiction a Court should be forbidden to recognize an uncertified adjustment of its decree, and that in another branch of its jurisdiction it should be permitted to recognize the same uncertified adjustment of the same decree and for the same purpose; that in the latter branch it should issue an injunction, in effect, against itself in the former branch, and this, too, in the face of the declared expression of the will of the Legislature, that all questions between the parties to a suit relating to the execution of a decree shall be dealt with by the Court executing the decree, and not by separate suit. The power of the Court,

(1) 2 Calc. W. R. Civ. Rul., 298. (2) 22 Calc. W. R. Civ. Rul., 194.
(3) I. L. R., 4 Calc., 380.

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in each branch of its jurisdiction, to inquire into the alleged adjustment by the examination of witnesses is the same, and in each case its decision is open to appeal. I am unable to discover any ground upon which the anomaly can be defended. It is opposed alike to the wording and spirit of section 56 of the Specific Relief Act I of 1877.

Such was the state of the law when Act XII of 1879 was passed with the declared intention of amending the Code of Civil Procedure; its section 258 is marginally noted as "amendment of section 258" of the Code of 1877; and provides that no such payment or adjustment out of Court shall be recognized by *any* Court, unless it has been certified. Applying to this enactment the principles of construction which I have referred to, I think it would be straining its language, and would be imputing to the Legislature a desire to work injustice, if it were held that it deprived the Courts of their power to give relief to a judgment-debtor, who, after having paid money out of Court to his decree-holder, is compelled by the latter to pay over again execution process. If the Legislature had intended to override that *consensus* of decision to which I have referred, it would, I think, have used clearer and more apt terms. The payment itself would, in that case, have been declared to be void, incapable of proof, or, possibly, illegal. The decision in *Poromanand* v. *Khepoo* (1) is in accordance with this view. That case follows the cases of *Sitárám* v. *Mahipal* (2) and *Ishan Chunder* v. *Indro Náráin* (3), but is opposed to the ruling of this Court in *Pátankar* v. *Devji* (4). The ruling in the latter case cannot, I think, be supported. There was no argument addressed to the Court which decided it, and the learned Judges would seem not to have given sufficient weight to the word "such", preceding the word payment. What the Courts are forbidden to recognize, is the payment of the decree, not the fact that a certain number of rupees passed from the hands of the judgment-debtor to those of the decree-holder. The first alternative construction of section 258, which I have suggested, must therefore, I think, be rejected.

(1) I. L. R., 10 Calc., 354.
(2) I. L. R., 3 All., p. 533.
(3) I. L. R., 9 Calc., p. 788.
(4) I. L. R., 6 Bom., 146.

Notwithstanding the great weight of authority by which the words "any Court" are construed to mean "any Court executing the decree," I am unable to convince myself that the marked change of language in section 258, adopted in 1879, is not to have full effect given to it. I think the correct view of the change of language was taken by this Court in the case of *Pándurang Rámchandra* v. *Náráyan* (1). That change, so interpreted, has the effect of removing the anomaly I have pointed out as existing until the section now under consideration was enacted. It is in accordance with the grammatical sense of the words used, and gives full effect to the intention of the Legislature, as expressed in section 244. I find it impossible to convince myself that, when the Legislature says that any question, arising between the parties to a suit relating to the execution, discharge, or satisfaction of a decree, shall be determined by the Court executing the decree and not by separate suit, it means, that the fact and validity of uncertified adjustments of decrees shall be inquired into in a separate suit; and that too, after the words in the section have been removed, which alone enabled the Courts to hold that such construction was not not opposed to the declared intention of the Legislature.

The reasons assigned by the Judges, who have decided that "any Court," in section 258, means any Court executing a decree, remain to be considered. In *Sitárám* v. *Mahipal*(2), Straight, J., says: "The words 'any Court' in the last para. of section 258 have reference to proceedings in execution, and refer to the Court or Courts executing a decree. They have no application to a Civil Court entertaining a separate suit asking for specific and legitimate relief of the character now prosecuted by the plaintiffs—appellants." The actual decision in that case was that a decree-holder, who had assigned such decree to his judgment-debtor, could not execute it after such assignment. The decision is reconcilable with the broader view of the section, and no reason is assigned for limiting it in the manner suggested in the judgment. In *Ishan Chunder* v. *Indro Náráin*(3), the defendant A had obtained

(1) I. L. R., 8 Bom., 300. (2) I. L. R., 3 All., 533, at p. 534.
(3) I. L. R., 9 Calc., p. 788.

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a decree against B. for Rs. 112, and, in consideration of Rs. 25, agreed to release B. from all liability under the decree. The payment was not certified, and A. afterwards, in execution of his decree, attached and sold, and himself became the purchaser of certain property of B. Afterwards B. sued to set aside the sale and to recover the property from A. It was held that the suit would lie. The Full Bench decision in *Gunamani Dási* v. *Pránkishore Dási*[1] was referred to, which would have been an authority on all fours had B. sought to recover Rs. 25 from A., but was hardly an authority which could be deemed to support the actual decision. The learned Judges say: "Nor do we think that the terms of the last sentence of section 258 have altered the law as then expounded" (in the Full Bench decision). "No doubt it has been declared that 'no such payment or adjustment shall be recognized by any Court, unless it has been certified' according to section 258; but, in our opinion, this refers to any Court of execution, either the Court which itself passed the decree and is executing it, or any Court to which the decree may have been transferred for purposes of execution. It seems to us that whenever the Legislature has intended that any matter shall not be re-opened in any subsequent suit or proceeding, it has indicated that intention by more definite terms, by either declaring that no subsequent suit shall lie, or that the particular order shall be final." The learned Judges, Prinsep and Wilson, JJ., do not refer to section 244, or remark that an order passed under that section is open to appeal. The action before them was, in effect, an action to set aside the execution proceedings. They do not give any reasons for holding that that course was open to them, or for limiting the words "any Court" to any Court executing the decree. The learned Judges, Field and O'Kinealy, JJ., who decided *Poromanand* v. *Khepoo Paramanick*[2], decline to put upon the words "any Court" the limited meaning assigned to them in the two cases last referred to.

The Full Bench decision of the Madras High Court in *Mallamma* v. *Venkappá*[3] demands the most careful consideration. It was there held, that section 258 of the Code of 1882 does not

(1) 5 Beng. L. R., 223. (2) I. L. R., 10 Calc., 354.
(3) I. L. R., 8 Mad., 277.

debar a suit for damages for a breach of a contract to certify the adjustment of a decree. Undoubtedly, the granting of relief, in this particular form, to the defrauded judgment-debtor involves the recognition, by the Court, of the uncertified adjustment. The judgment of the Court places a suit for the recovery of the money paid in discharge of a decree in the first instance, and not certified, in the same category as a suit for the recovery of damages for the breach of a so-called implied promise to certify an uncertified payment or adjustment. The former, however, does not involve, while the latter does involve, the recognition, by the Court, of the uncertified payment or adjustment as a payment or adjustment discharging the decree. A promise founded upon consideration, whether it be implied, or whether it be expressed, not to execute a decree, is, in fact, an adjustment of the decree. The giving effect to such a promise, is a recognition of the adjustment. If such promise can support an action for damages, I see no reason why it should not equally support a suit for its specific performance, or why an injunction should not be obtained upon it, prohibiting the promisor from acting in violation of its terms. If such promise were certified to the Court, the Court could no longer execute the decree. The decree would be legally adjusted. Were the words "or damages for breach of the contract to certify" omitted from the sixth para. of the judgment in this case, I should unhesitatingly adopt the reasoning containing in those paras. The Judges were pressed by the use, by the Legislature, of the expression "any Court," and have suggested an explanation of it; the objection to that explanation is that it still limits the meaning of the unlimited expression. They have not, I think, met the difficulty, that, when a Court gives effect to a contract to certify an adjustment, it does, in fact, recognize the adjustment. It is otherwise when the Court recognizes the act of paying money, or making over property, and does not recognize its result—the satisfaction of an obligation. It does not, in such cases, recognize such payment, or adjustment, as the section contemplates.

All the decisions I have mentioned, since the passing of Act XII of 1879, (and I believe they are all the cases upon the subject, except the case of *Pándurang Rámchandra* v. *Nárayan*[1]) are cases

(1) I. L. R., 8 Bom., 300.

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in which the judgment-debtor has been compelled to pay twice over; and in all of them relief could have been afforded to them in accordance with the decision of the Full Bench of the Calcutta High Court in *Gunamani Dási* v. *Pránkishore Dási*(1), without limiting the words "any Court" to "the Court executing the decree," though in some such cases the relief actually given could not have been afforded consistently with the broader construction I put upon the words, and notably the case of *Ishan Chunder Bandopadhya* v. *Indro Náráin Gossámi*(2). I now consider the cases, like the present, in which the decree-holder seeks to enforce the adjustment of a decree which he has himself omitted to certify to the Court. Upon such decree-holder the law imposes the obligation of certifying his adjustment to the Court. Section 258 enacts that the decree-holder *shall* certify such payment or adjustment to the Court, and that no Court shall recognize such payment or adjustment, unless it has been certified as aforesaid. If, disregarding or construing away, these words, this Court, in a case like the present, uncomplicated by assignment, passes a decree in favour of the plaintiff upon his mortgage, and, for that purpose, recognizes the uncertified adjustment as a good consideration for that mortgage, and the plaintiff afterwards applies to this Court for execution of his original decree, the Court cannot refuse to grant him such execution without recognizing the uncertified adjustment. If it grant such execution, it will itself twice knowingly compel satisfaction of its own decree. I asked how this result was to be avoided; and I was told it could be avoided by a third suit brought by the judgment-debtor to prohibit the decree-holder by injunction from executing his decree. The process seems roundabout. But what if the judgment-debtor does not file such a suit? The judgment-debtor is to be placed in this predicament, because his decree-holder omits to certify the adjustment. On the latter there is no hardship. He can certify the adjustment if he has not already done so, just before he files his suit, and that after any lapse of time: see *Fakir Chund Bose* v. *Mudan Ghose*(3).

A plaintiff, who can certify, if he pleases, and files a suit, like the present, without certifying, can presumably only do so for the

(1) 5 Beng. L. R., p. 223. (2) I. L. R., 9 Calc., 788.
(3) 4 Beng. L. R., p. 130.

purpose of oppression. Is this Court to assist him? Unless compelled by the most cogent arguments, I should feel reluctant to do so.

The arguments pressed upon us are those by which the decision in *Rámghulám* v. *Jánki Rái*(1) are supported. Mahmood, J., after referring to the meaning attached by the learned Judge who decided *Sitárám* v. *Mahipál*(2) to the expression "any Court", says, and I think correctly, that the *ratio decidendi* upon which the Full Bench ruling in *Gunamani Dási* v. *Pránkishori Dási*(3) proceeds, is still applicable under the present Code. He then proceeds to say that "the section in question occurs in a Code regulating Civil Procedure, in a chapter which relates to the execution of decrees, and the only object it can have in view is to remove the inconvenience which would otherwise arise in connection with the execution of decrees in cases in which adjustment out of Court is pleaded. Beyond this it seems the section can have no effect." This reasoning does not seem to me to be conclusive. If it were intended, as I think it is intended, that uncertified adjustments of decrees should not be recognized as adjustments of such decrees, either by the Court executing such decrees, or by a Court whose aid is invoked in a separate suit, where would one expect to find the intention of the Legislature expressed, except in a Code regulating civil procedure, and in a chapter of that Code relating to the execution of decrees? If the plain grammatical construction of section 258 is to be disregarded, and the expression of the will of the Legislature, in section 244 of the Code, is to be set aside, and if uncertified adjustments are to be treated by all Courts, except the Court concerned in executing them, as valid and binding adjustments, then I am free to admit that the general contract law is applicable to such adjustments, and that the adjustment of a decree, though uncertified, is a good consideration for a promise not to execute the decree. Under these circumstances, however, the removal of the last clause of section 258 from the statute book would seem advisable, if multiplicity of suits is regarded as an evil. If, on the other hand, section 258 is to be read in its grammatical sense, and if due effect be given to the declared expression of the will of the Legislature

(1) I. L. R., 7 All., 124, at p. 128. I. L. R., 3 All., 533.

(2) 5 Beng. L. R., 223.

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contained in section 244 of the Code, and if the Indian Courts are debarred from recognizing uncertified adjustments of decrees as such, then a promise founded on, or having for its consideration, an uncertified adjustment of a decree, is void under section 25 of the Contract Act IX of 1872; and the agreement itself, being one not enforceable by law, comes within the definition of void agreements, contained in section 2, clauses (*e*) and (*g*) of the same Act. The Legislature in framing the Civil Procedure Code, as it has done, has not either amended or modified the Indian Contract Act, but has simply added one more agreement to the existing roll of unenforceable contracts. I may add that it seems to me to be immaterial whether the uncertified consideration, moving from the judgment-debtor, for a promise on the part of the decree-holder not to execute a decree, be money or property presently handed over to the decree-holder, or be a promise to pay or do something in the future, the agreement in either case is an adjustment of a decree, and until certified can give birth to no enforceable obligation.

The view of the law, expressed in the case to which I have last referred, has been apparently acquiesced in by Garth, C. J., and Ghose, J., in *Jhábar Mahomed* v. *Modan Sonahar*[1]. The case was not argued, and no reasons are given for the decision. On the other hand, in a case, upon all fours with the present—*Pándurang Rámchandra* v. *Náráyan*[2]—the Chief Justice and Mr. Justice Kemball decided that the holder of a bond, given in satisfaction of a decree, could not sue upon it without certifying its execution to the Court. That case, in my opinion, has been correctly decided; and, therefore, I think that the second alternative construction of section 258, noted above, is the construction which ought to prevail.

I should have been willing to have subordinated my own opinion to the view expressed by the several Judges presiding in the other High Courts, though I have not been convinced by the reasons they have given; but as my views accord with the decision of the Chief Justice and with the opinion expressed by Mr. Justice West, the more proper course is to abide by them, leaving it to the

(1) I. L. R., 11 Calc., 671. (2) I. L. R., 8 Bom., 300.

Legislature, if we have not correctly interpreted its intention, to insert limiting words in the section in question.

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Attorneys for the appellants:—Messrs. *Tyabji and Dayabhai.*

Attorneys for the respondents:—Messrs. *Hore, Conroy and Brown.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

JAGABHA'I LALUBHAI, (ORIGINAL DEFENDANT), APPELLANT, *v.* VIJBHUKANDA'S JAGJIVANDAS AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

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Hindu law—Joint family—Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by a sale effected by the father—Civil Procedure Code (Act XIV of 1882*), Sec.* 266.

Where, in a joint Hindu family, the father disposes of family property, the son's interest is bound, unless the son can show, in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So, also, where family property is sold under proceedings taken against the father alone, the son's interest is bound, unless the son can show that the sale was on account of an obligation to which he was not subject.

The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part.

SECOND appeal from the decision of E. M. H. Fulton, Acting District Judge of Surat, reversing the decree of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat.

The defendant, Jagabhái Lalubhái, obtained a money decree against Jagjivandás Dayárám and Dáyábhái Dayárám. The two judgment-debtors were brothers living in union and doing joint business. Both were in possession of family property as managing members of a joint Hindu family. They had firms at Surat and Baroda, in which they were jointly interested. The business of the firms was the family business, and the dealings with the defendant, which gave rise to his suit, took place in the course of this business. In execution of the decree obtained by the defendant,

* Second Appeal, No. 539 of 1884.