

there can be said to be a "miscarriage or failure of justice," when a party, instead of taking the opinion of the High Court, as he has the means of doing, voluntarily elects to have the law applicable to this case decided by the Small Cause Court. A mistake in law and a miscarriage or failure of justice are not, in my opinion, convertible terms. It is not, however, necessary so to decide in the present circumstance. I merely suggest this question, feeling how excessively inconvenient it is to have nice questions of law argued *ex parte* before us; and entertaining, as I do, a serious doubt whether the Legislature intended to submit us to such an ordeal.

Attorneys for the plaintiffs:—Messrs. *Ardesir, Hormasji and Dinsha.*

1892  
SEP. 2.  
ORIGINAL  
CIVIL.  
17 B. 14.

17 B. 23.

[23] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*

MUKUND HARSHET, DECEASED (*Original Plaintiff*), Appellant v.  
HARIDAS KHEMJI AND ANOTHER (*Original Defendants*),  
*Respondents.\** [11th January, 1892.]

*Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Civil Procedure Code (Act XIV of 1882), s. 244—Res judicata—Agreement not to execute regarded as satisfaction of decree—Civil Procedure Code (Act XIV of 1882), ss. 257a, 258, 373.*

Mukund and Antaji were partners, and, as such, were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas and for the other moiety by the widow of Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied. Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra, who applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The lower appeal Court rejected the plaint, holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, and (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court,

*Held*, that, as between Mukund and Ramchandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed.

*Chenvirappa v. Puttappa* (1) distinguished.

It having been urged that the question was one which could be decided in execution, and that under s. 244 of the Civil Procedure Code (Act XIV of 1882) the present suit would not lie.

*Held*, that the words "relating to execution" in s. 244 must be restricted to "the contents of the order made, or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree.

It being further contended that the agreement raised a question as to the "satisfaction" of the decree, and was, therefore, void without the sanction of the Court.

\* Second Appeal, No. 819 of 1890.

(1) 11 B. 708.

1892  
JAN. 11.  
—  
APPEL-  
LATE  
CIVIL.  
—  
17 B. 23.

[24] Held, that the satisfaction contemplated by s. 244 must have arisen out of some transaction between the parties, subsequent to the decree.

[F., 6 C.W.N. 796 (798); 22 B. 267 (270); 22 B. 463 (469); (F.B.) R., 21 C. 437 (459); 5 M.L.J. 140 (141).]

THIS was a second appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri.

Mukund and Antaji were partners, and as such were indebted to the defendant Haridas Khemji. Antaji died and after his death the debt was settled by Haridas on the one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas, and for the other moiety a separate bond was given by Antaji's widow. Haridas sued Mukund on his bond, and obtained a decree, which was satisfied. He then sued the widow on her bond. She contended that she was not competent to give a bond binding her sons personally. The Court allowed this objection, and of its own accord made Mukund a defendant in the suit, and passed a decree against him and Antaji's estate. Haridas assigned this decree to the defendant Ramchandra, and Ramchandra applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction to prevent Ramchandra from executing the decree against him and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree was passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree was passed, he would not execute it. The Subordinate Judge allowed the claim, granted the injunction sought for, and damages in the event of the decree being executed. On appeal the Court rejected the plaint on the ground that as between Mukund and Ramchandra the question raised by the suit was *res judicata* and that there was no cause of action against Haridas. The plaintiff appealed to the High Court.

*Mahadev Chimnaji Apte*, for the appellant.—When we produced the agreement upon which we rely in the execution proceedings, the Court held that it would not then take it into consideration. The Court having taken that view it is not now open to the respondents to say that we must seek relief in the execution proceedings. We have a right to bring a separate suit [25] on the agreement in question for the purpose of restraining execution of the decree—*Dhuronidhur Sen v. Agra Bank* (1). The Court can set aside a wrong order passed in the execution of a decree and pass a fresh one—*Delhi and London Bank v. Melmoth A. D. Orchard* (2).

The provisions of s. 244 of the Civil Procedure Code (Act XIV of 1882) are not applicable to the present case. That section relates to proceedings in execution. But our contention is that the decree of which we seek to stop execution, cannot be executed at all. Section 244 is inapplicable to a case which involves a question as to whether the execution of a decree can or cannot be had. Questions like this cannot be opened in execution proceedings—*Sudindra v. Budan* (3). The remarks in the judgment in *Sakharam v. Govind* (4) support our contention. Our case is that the effect of the agreement we rely upon is to make the decree, so far as we are concerned, a nullity.

If the Court is against us on this point we contend that the agreement in dispute operates by way of satisfaction of the decree and,

(1) 4 C. 360. (2) 4 I. A. 127. (3) 9 M. 80. (4) 10 B.H.C. R. 361.

therefore, our right to bring a suit is not taken away by s. 244 of the Civil Procedure Code—*Nubo Kishen Mookerji v. Debnath Roy Chowdhry* (1); *Nujeem Mullick v. Erfan Mollah* (2); *Chukroo Singh v. Jowahir Singh* (3); *Meer Mahomed v. Khetoo Bebee* (4); *Ishan Chundar v. Indro Narain* (5).

*Ganesh Ramchandra Kriloskar*, for the respondents.—The question which arises in this case is one which can be determined in the execution proceedings, and ought not to be raised in a separate suit. There are authorities to show that provisions of law relating to the execution of a decree should be construed liberally so as to save litigants from the expenses of a separate suit—*Oseemunnissa Khatoon v. Ameerounnissa Khatoon* (6). The appellants have relied upon the remarks in *Sakharam v. Govind* (7), but that case does not lay down that a separate suit will lie. It has [26] been held in several cases that questions relating to the fraudulent execution of a decree can be entertained in execution proceedings—*Subbaji Rau v. Srinivasa Rau* (8); *Viraraghava v. Venkatacharyar* (9); *Ballodeb Lall v. Anadi Mohapattur* (10); *Paranjpe v. Kanade* (11). The words of s. 244 of the Civil Procedure Code are wide enough to include the question whether a decree can be executed or not—*Mohibullah v. Imami* (12). In support of our argument that the appellants must seek relief in the execution proceedings, and not in a separate suit, we rely upon the rulings in *Woomatara Debia v. Unnopoorina Dasse* (13); *Sakharam v. Damodar* (14). The decision in *Param Singh v. Lalji Mal* (15) is against us, but it has been dissented from by our High Court in *Chenvirappa v. Puttappa* (16).

If the Court be against us on the above points, then we would support the decree of the lower Court on the ground of *res judicata*—*Kalimandal v. Kadarnath* (17).

Lastly we submit that, if the agreement in suit be looked upon as a compromise, satisfaction or adjustment of the decree, it cannot be taken into consideration without the sanction of the Court under ss. 257A, 258 or 375 of the Civil Procedure Code.

[TELANG, J.—But a suit for specific performance can lie under s. 375. See *Ruttonsey v. Pooribai* (18).]

#### JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C.J.—According to the facts found by the Court, Mukund and Antaji were partners in a trade, in respect of which a debt was due to the first defendant Haridas. After Antaji died, the debt was settled between Haridas on the one side and Mukund and Antaji's widow, as guardian of his minor sons, on the other, by which the balance was fixed at 1,100 rupees, and both Mukund and Antaji's widow passed bonds for 550 rupees to Haridas. Haridas obtained a decree against Mukund on his [27] bond, which was satisfied, and he then sued Antaji's heirs. The Court allowed the widow's objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant and passed a decree against him and Antaji's estate. Haridas assigned this decree to the second defendant Ramchandra, who applied for execution against Mukund. The present suit is brought by Mukund

- |                           |                      |                      |
|---------------------------|----------------------|----------------------|
| (1) 22 W.R.C.R. 194.      | (2) 22 W.R.C.R. 298. | (3) 19 W.R.C.R. 152. |
| (4) 20 W.R.C.R. 150.      | (5) 9 C. 788.        | (6) 20 W.R.C.R. 162. |
| (7) 10 B.H.C.R. 361.      | (8) 2 M. 264.        | (9) 5 M. 217.        |
| (10) 10 C. 410.           | (11) 6 B. 148.       | (12) 9 A. 229.       |
| (13) 11 B.L.R. 158 (P.C). | (14) 9 B. 468.       | (15) 1 A. 403.       |
| (16) 11 B. 708.           | (17) 6 C.L.R. 215.   | (18) 7 B. 304.       |

1892  
 JAN. 11.  
 —  
 APPEL-  
 LATE  
 CIVIL.  
 —  
 17 B. 23.

to restrain the second defendant from executing the decree, alleging that during the pendency of the above suit Haridas agreed with him that he would not get a decree against him, and, in the event of its being passed against him, he would not execute it. The plaintiff also claims damages from the first defendant Haridas.

The Subordinate Judge granted an injunction as prayed for, and ordered that, in the event of execution, the plaintiff should recover from the defendants the amount realized under the decree with 12 annas per cent. per mensem. The lower Court of appeal rejected the plaint, on the ground that the question in issue in this suit as between plaintiff and second defendant was *res judicata* by the decree in the above suit, and that there was no cause of action for damages as against Haridas. The Court relied on the judgment of West, J., in *Chenvirappa v. Puttappa* (1). In that case the plaintiff sought to restrain execution of an *ex parte* decree for possession passed on a deed of conveyance to which he said he had submitted, because the defendant had expressly engaged after the conveyance that plaintiff's possession should not be disturbed. Mr. Justice West considered that "the above undertaking ought to have been pleaded against the defendant's claim, and could not be made the basis of a separate suit." But there the agreement between the parties was directly at variance with the decree for possession which the defendant obtained in the former suit, and of course might have been pleaded in that suit. Whilst here the defendant says: "I will not execute the decree against you. I will get the decree satisfied by Antaji," and the agreement, therefore, by its very terms provides for the decree being passed, and is only intended to prevent its execution. We think, therefore, that the District Judge was wrong in disposing of the case on the ground of *res judicata*.

[28] It was also contended for the respondents that the matter was one which should have been decided in execution, and that under s. 244 of the Civil Procedure Code (Act XIV of 1882) a suit would not lie. The words "relating to execution" in s. 244 of the Civil Procedure Code are doubtless very general, but they must be restricted, as pointed out by the Court in *Sakharam v. Govind* (2), to "the contents of the order made or to how far it has been carried out," and do not, therefore, include an agreement, such as the present one, not to execute the decree. It is to be observed that in *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (3) it was not suggested that a suit would not lie by reason of s. 11 of Act XXIII of 1861, although the agreement not to execute was subsequent to the decree. It was said indeed that the agreement raised a question as to the "satisfaction" of the decree, but the satisfaction contemplated by s. 244 must have arisen out of some transaction between the parties subsequent to the decree.

We must, therefore, reverse the decree of the Court below dismissing the plaint as against the second defendant, and remand the case for a decision on the merits as against the second defendant. The plaintiff not having taken any objection by his second appeal against the part of the decree of the Court below dismissing plaintiff's claim for damages against defendant No. 1, the decree will of course stand as regards that claim. Costs of this appeal to abide the result.

*Decree reversed.*

(1) 11 B. 708 (722).

(2) 10 B.H.C. R. 361.

(3) 22 W.R.C.R 194.