

(1877) 04 AHC CK 0003

Allahabad High Court

Case No: None

Sri Ram Mitter

APPELLANT

Vs

Agra Saving Bank
LimitedRESPONDENT

Date of Decision: April 20, 1877**Citation:** (1875) ILR (All) 388**Hon'ble Judges:** Robert Stuart, C.J; Pearson, J**Bench:** Division Bench**Final Decision:** Dismissed

Judgement

Pearson, J.

I am of opinion that the suit is barred by the provisions of Section 11 of Act XXIII of 1861. The money now claimed by the plaintiff in this suit was claimed and realized from him in execution of a decree which the defendant had obtained from the Small Cause Court. Whether it was rightly so claimable and realizable was a question to be determined by the Court executing the decree, and cannot be made the subject of a separate suit. The precedent cited 4 B.L.R. 111--Ekowri Singh and Ors. v. Bijay Nath Chattapadhyia. See also Kunhi Moidin Kutti v. Ramen Unni ILR Mad. I. p. 203 by the lower Appellate Court in support of the contrary opinion does not support it. I need not discuss the other questions raised by the pleas in appeal. The appeal should in my opinion be decreed with costs, the lower Appellate Court's decree being reversed, and that of the Court of First Instance being restored.

Robert Stuart, C.J.

2. The impression made upon me at the hearing of this appeal was that, contrary to my sense of justice, we were bound to hold that the suit was barred by Section 11 of Act XXIII of 1861; I say contrary to my sense of justice, for it seemed to be monstrous that the law should forbid a remedy in such a case as this when money had been paid in excess of a decree by mistake, and only because, by inadvertence or otherwise, the blunder had

been omitted to be noticed in the execution department, yet the language of Section 11 seemed to me to exclude all recovery by separate suit, when it says "all questions regarding the amount of any mesne profits, which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest, which may be payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree, 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 question before us appeared to be one relating to a sum which had been paid in discharge, or satisfaction of the decree, or the like, and was also a question relating to the execution of a decree.

3. But on reconsideration, I have arrived at the conclusion that such is not a right application of Section 11 to the present case, and that, therefore, we need not do injustice in deference to a literal and arbitrary construction of that section. The provisions of Section 11, should, I think, be confined to matters within limits of, and not outside, the decree, and money paid in excess of the amount decreed is, in my opinion, a matter outside the decree.

4. I have looked into the records in this case, and I find that the amount due under the decree was Rs. 516-8-3, but that by mistake the amount actually recovered was Rs. 592-11-0, the difference in excess, Rs. 76-2-9, being the sum now sued for. These figures do not appear to be disputed, and they show that Rs. 76-2-9 not only never formed any portion of the decree, but could in no construction of it, be items connected with it. It was simply a sum of money that was improperly, erroneously, and illegally obtained under the guise of the process of execution, and with regard to which no order could be made in the execution department. The present suit was, therefore, the necessary remedy. These views I find are supported by two Calcutta ruling"s, in which it is laid down that Section 11 of Act XXIII of 1861, does not enable any party to recover in execution anything, except that which has been given by the decree, and that the "question" as used in Section 11 must relate to something comprised in the decree, and that any other cannot be a question relating to its execution, *Elkonri Sing and Ors. v. Bijay Nath Chattapadhyaya* 4 B.L.R. Ap. C. 111, following *Haromohan Chaudhrani v. Dhumari Chaudhrani* 1 B.L.R. Ap. C. 135. It is true that the ruling appears to be opposed to a full bench decision of the Madras High Court, *Arunchilla Pillai v. Apava Pillai* 3 Mad. H.C.R. 188, by a majority of three Judges to two, but, for myself, I prefer the reasoning of the Chief Justice (Sir C. Scotland, C.J.) and Mr. Justice Innes, which, so far as it goes, is in accordance with the principle of construction recognized by the Calcutta ruling to which I referred.

5. Respecting, therefore, the competency of this suit, I agree with the Zilla Judge. But I differ from him when he says that the suit is cognizable by the Civil and not by the Small Cause Court, for in my judgment, the claim is in the nature of damages within the

meaning of Section 6 of Act XI of 1865, and this conclusion seems to be in conformity with several Calcutta rulings 2 B.L.R. Ap. C. 172 : 2 B.S.N. 13 : 10 W.R. 75 : 9 W.R. 336.

6. I would, therefore, annul the Judgment of the Lower Appellate Court, and dismiss the suit on the ground of want of jurisdiction, but without prejudice to the plaintiff suing in the Small Cause Court, and for that purpose direct the plaint to be returned to him. It is unnecessary to say anything as to the plea of limitation.