## APPELLATE CIVIL.

*Before B. B. Ghose and S. K. Ghose JJ.*

# HRIDAYMOHAN SANYAL

*v.*

# KHAGENDRANATH SANYAL.*

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*July* 22.

*Execution of decree—Decree for money superseded by contract to pay in instalments by compromise petition filed in court—Agreement that whole amount realizable by execution on default of any instalment—Fresh execution within 3 years of default but after 12 years from original decree—Code of Civil Procedure (Act V of 1908), s. 48, whether bars execution—Whether court has jurisdiction to proceed by way of execution.*

A money decree of 1913 was adjusted in 1922 by a compromise between the parties, by which it was made payable in three annual instalments due in October, 1923, 1924 and 1925, and it was provided that, in the event of the default of any instalment, the whole amount would be realizable by execution against the property and the person of the judgment-debtor. Default having been made of the first instalment, the decree-holder filed an application for execution for the whole amount then due, within 3 years of the due date. The respondents (judgment-debtors) objected that the application was barred under section 48 of the Civil Procedure Code and also that the court had no jurisdiction to realize the money due under the compromise by way of execution.

*Held* that the original decree of 1913 having been altogether superseded by a new arrangement in 1922 and this being an application to execute the substituted decree, the provisions of section 48 of Civil Procedure Code cannot bar the application.

*Syama Sundari Devi* v. *Sree Raj Gopal Acharya Gossami* (1) distinguished.

*Held* also, that since the parties, by agreement, can arrange their own procedure and give jurisdiction to the court to adopt that procedure, and since the parties agreed that the money due should be realized by execution, the court had jurisdiction to proceed by way of execution.

*Pisani* v. *Attorney-General for Gibraltar* (2), *Sadasiva Pillai* v. *Ramalinga Pillai* (3), *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (4) and *Muhammad Sulaiman* v. *Jhukki Lal* (5) followed.

APPEAL FROM APPELLATE ORDER by decree-holder.

The facts are stated in the judgment.

*Mr. Surajitchandra Lahiri*, for the appellant. What the decree-holder seeks to execute is not the

*Appeal from Appellate Order, No. 85 of 1929, against the order of Sris Kumar Som, Subordinate Judge of Pabna and Bogra, dated Sep. 15, 1928, affirming the order of S. N. Sen, Munsif of Serajgunj, dated Feb. 19, 1927.

(1) (1922) 27 C. W. N. xliii.
(2) (1874) L. R. 5 P. C. 516.
(3) (1875) 15 B. L. R. 383 ; L. R. 2 I. A. 219.
(4) (1892) I. L. R. 20 Calc. 22.
(5) (1888) I. L. R. 11 All. 228.

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original decree of 1913, but the compromise effected on 16th September, 1922, and, therefore, section 48 has no application. This procedure is permissible according to the decisions in *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (1), *Sheo Golam Lall* v. *Beni Prosad* (2), *P. M. Subramania Pillai* v. *Corera* (3) and *Muhammad Sulaiman* v. *Jhukki Lal* (4). The Privy Council decisions in *Pisani* v. *Attorney-General for Gibraltar* (5) and *Sadasiva Pillai* v. *Ramalinga Pillai* (6) have been explained in the above decisions of Indian High Courts. By the compromise effected on 16th September, 1922, the original decree was entirely superseded and it had no legal existence. The effect of the abolition of section 257A of the old Code is that such adjustments are now permissible even without the sanction of the court.

*Mr. Birendrakumar De*, for the respondents. The present argument was not advanced by the appellant in the courts below and I submit he cannot do so for the first time here. Without prejudice to this contention, I submit that the compromise is not a decree and it has not been incorporated in the decree by any order of the court. Therefore, it cannot be enforced in execution. The original decree cannot be entirely superseded by any agreement between the parties, unless the agreement is incorporated in the order of the court. The executing court cannot take cognizance of the supersession of the old decree, because Order XXI, rule 2 of the Civil Procedure Code cannot be so widely construed as to include a complete supersession of the old decree by a contract between the parties. The case of *Syama Sundari Devi* v. *Sree Raj Gopal Acharya Gossami* (7) is on all fours with the facts of the present case and fully supports my contention.

(1) (1892) I. L. R. 20 Calc. 22.
(2) (1879) I. L. R. 5 Calc. 27.
(3) (1924) 48 Mad. L. J. 121.
(4) (1888) I. L. R. 11 All. 228.
(5) (1874) L. R. 5 P. C. 516.
(6) (1875) 15 B. L. R. 383; L. R. 2 I. A. 219.
(7) (1922) 27 C. W. N. xliii.

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B. B. GHOSE J. We have heard learned advocates on both sides at some length and we must express our acknowledgment to them for the very careful way in which this case has been argued before us.

This is an appeal by the decree-holder or rather the person who has applied for execution of an agreement, against the judgment and order of the learned Subordinate Judge, affirming the decision of the Munsif, by which the application of the appellant was dismissed. The facts are shortly these: The appellant obtained a decree for money against the respondents, dated the 17th December, 1913. There were intermediate executions, which it is unnecessary to relate now. In one of the execution proceedings, the parties came to terms and a compromise was entered into between them, dated the 16th September, 1922, by which the decree-holder gave up a part of his claim and it is alleged in the petition of compromise that the judgment-debtors entreated the decree-holder to accept only Rs. 350 in satisfaction of the decree including costs. They paid Rs. 100 in cash and the balance was agreed to be paid in certain instalments. It was further agreed that, if there was default in payment of one of the instalments, the decree-holder would be entitled to realise the entire sum by way of execution against the properties of the judgment-debtors. The first instalment was due in October, 1923. The present application was made on the 8th November, 1926. It has been found by both the courts below that this application was made within three years of the due date, as holidays intervened. Both the courts below have, however, dismissed the application on the ground that it is barred under the provisions of section 48 of the Civil Procedure Code, as it was made more than 12 years after the date of the original decree passed in the year 1913. It was argued in the court below that the present petition is a continuation of the petition of 1922, which ended in the compromise. That argument the learned Subordinate Judge refused to

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accept and, in my judgment, he gives good reasons for rejecting it. He held that the nature and the scope of the two petitions of 1922 and 1926 are quite different and, therefore, the last petition cannot be considered as a continuation of the previous proceedings. It was also argued that under the circumstances of the case it falls within proviso (*a*) of sub-section (*ii*) of section 48 of the Code of Civil Procedure. The Subordinate Judge also rejected that contention. The learned advocate for the decree-holder, however, while not giving up the points that were urged in the court below, has presented the case in a different aspect. His argument amounts to this, that the decree was adjusted by the compromise, dated the 16th September, 1922, and the result of the adjustment was that the original decree was extinguished. That being so, the appellant might have brought a suit upon the agreement, dated the 16th September, 1922, but, as both the parties agreed that the money should be realised by execution, the executing court was given jurisdiction to proceed with the execution of the claim and give relief to the appellant. In support of his contention he has relied upon the cases of *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (1), *Sheo Golam Lall* v. *Beni Prosad* (2) and *P. M. Subramania Pillai* v. *Corera* (3). The learned advocate for the respondent naturally takes exception to the case being presented in this new form. But if the appellant can support his contention from the record of the case, it would only be a matter for costs.

What the appellant did in the trial court was to ask for the execution of what he described to be an "instalment decree" on compromise, dated the 16th September 1922. The question therefore resolves itself into this, can the appellant realise the money under the compromise by way of execution on the allegation that he is entitled to the money by that compromise of 1922? If the decree-holder had

(1) (1892) I. L. R. 20 Calc. 22. (2) (1879) I. L. R. 5 Calc. 27, 30.
(3) (1924) 48 Mad. L. J. 121.

sought for execution of the decree of 1913, there is no question that that application would be barred by limitation. But the question is whether it is an application to execute that decree. The court below has referred to the case of *Syama Sundari Devi* v. *Sree Raj Gopal Acharya Gossami* (4), which the learned Subordinate Judge cited. That case has a strong resemblance to the present but is not quite like it. There, a decree was passed on the 14th December, 1905. Parties came to certain terms in adjustment of the decree in 1910 for payment of the decretal amount in instalments. The application for execution was filed on the 16th September, 1919, and it was held by the court that that application was barred under section 48 of the Code. In so deciding, Sir Lancelot Sanderson C. J., who delivered the judgment of the Court, stated that, in his judgment, the application was clearly one for execution of the decree, dated the 14th December, 1905. If that was so, then an application made for its execution on the 16th September, 1919, was clearly barred under the provisions of section 48 of the Civil Procedure Code. The reason why the learned Chief Justice held that the application in that case was for execution of the decree of 1905 is clear from the terms of the compromise entered into by the parties. One of the terms ran as follows: "As long as the amount due "under the instalments remains unpaid, the said "original decree shall remain in force." From these words, it is quite clear that the original decree was not superseded by the compromise, but it was only an intermediate arrangement for payment of the original decree and it seems to me that on that ground it was held in that case that the decree-holder desired to execute the original decree of December, 1905, in September, 1919. Therefore, although there is some sort of resemblance of that case with the present, they are quite different, because in this case the original decree is altogether superseded and a new arrangement has been entered into and, as I have

(1) (1922) 27 C. W. N. xliii.

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pointed out, that in his execution petition the decree-holder wanted to execute the substituted decree of 16th September, 1922. The provisions of section 48 cannot bar that application, if that application is otherwise sustainable.

The objection raised by the learned advocate for the respondent is that the appellant cannot ask for execution, because the parties, by entering into a contract, cannot give jurisdiction to a court to realise any money due under a contract by way of execution. The point is not quite free from difficulty. It has, however, been held in a series of cases following the well-known case of *Pisani* v. *Attorney-General for Gibraltar* (1) that where there is no inherent want of jurisdiction in a court in the subject matter before it or with regard to the person, the parties, by agreement, may arrange their own procedure and give jurisdiction to the court to adopt that procedure. *Pisani's case* was followed in an Indian case by the Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai* (2) and also in a series of cases in the High Courts of India. In the case of *Thakoor Dyal Singh* v. *Sarju Pershad Misser* (3), a Division Bench of this Court, following the Privy Council case, held that the parties should be held to the agreement, that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ* and, applying this rule to the case, they held that the money due under the agreement there could be realised as in execution of a decree, rather than by recourse to a separate suit. In the case of *Muhammad Sulaiman* v. *Jhukki Lal* (4), Mr. Justice Mahmood discussed this question in detail. It is necessary however, to mention that, in these cases, section 257A was referred to because, under the Code of 1882, it was necessary to have the sanction of the court with regard to any adjustment of a decree, as without such sanction

(1) (1874) L. R. 5 P. C. 516.
(2) (1875) 15 B. L. R. 383; L. R. 2 I. A. 219.
(3) (1892) I. L. R. 20 Calc. 22.
(4) (1888) I. L. R. 11 All. 228, 233.

the adjustment would be void in law. There is no such provision in the present Code and, therefore, the decree-holder and the judgment-debtor can enter into any agreement for adjustment of a decree. In order to enable the executing court to execute the decree as adjusted, the only requirement is that the adjustment should be certified under Order XXI, rule 2 of the Code. The decree-holder can certify such adjustment at any time, as there is no limitation with regard to his certification. But the only question in this case is that, if the decree-holder might have brought a separate suit on the agreement, can he not ask for relief in execution by reason of the agreement entered into between the parties that the money should be realised in execution? The cases that have been cited above are authorities for an answer to that question.

The result is that the order of the court below is set aside and the case sent back to the trial court for allowing the appellant to proceed with the execution of the agreement and to recover the money due under it in the usual way as in the case of a decree. As, however, the case was not presented in the courts below in the way that it has been done here, the appellant is not entitled to his costs hitherto incurred in any of the courts. Future costs will abide by the discretion of the court.

S. K. GHOSE J. I agree.

*Appeal allowed: case remanded.*

R. K. C.