APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919 April 8, December, 11.

MAZUMDAR RAMAKRISHNA RAO PANTULU (PETITIONER), APPELLANT,

v.

MAZUMDAR BALAKRISHNA RAO PANTULU (RESPONDENT), RESPONDENT. *

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of partition decree—Adjustment as to partition of immoveable property—Necessity for certification by decree-holder—Sale by one decree-holder to another of his share in some of the lands decreed—Sale, not certified to Court, effect of—Subsequent application in execution by vendor for partition of lands sold and for other reliefs—Bar of execution.

Order XXI, rule 2, Civil Procedure Code, applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable property, and to adjustments with regard to such property. Such an adjustment cannot be recognised, unless certified or recorded as required by the rule.

Abdul Latif Sahib v. *Bathula Bibi Ammal* (1914) 15 M.L.T., 338, and *Sethurama Sahib* v *Chota Raja Sahib* (1917) M.W.N. 327 followed; *Kelu Nair* v. *Meenakshi* (1913) 25 M.L.J. 586 not followed.

APPEAL against the order of B. C. SMITH, the District Judge of Ganjām at Berhampur, in Original Execution Petition No. 50 of 1915, in Original Suit No. 19 of 1909.

In a suit for partition instituted by the appellant and respondent as plaintiffs against their brother as defendant, a decree for partition was passed on an award of arbitrators. The decree was executed by the defendant in respect of his share. The present application for execution was filed by the appellant to recover sums of money as well as partition of the lands, as between himself and the respondent. Prior to this application the appellant had sold his share in some of the lands comprised under the decree to the respondent, but this sale was not certified to the Court, nor satisfaction entered in respect thereof by order of Court. The vendor having applied to execute the decree for partition and recovery of his share in the lands sold to the respondent as well as other lands and for other

* Civil Miscellaneous Appeal No. 248 of 1918.

reliefs given by the decree, the respondent pleaded *inter alia* that the sale of the lands aforesaid was an adjustment in bar of execution of decree in respect of lands comprised in the sale. The lower Court held that adjustment need not be certified under Order XXI, rule 2, Civil Procedure Code, and excluded the lands comprised in the sale from execution proceedings but allowed execution in other respects. The decree-holder, who sold the lands, preferred this Civil Miscellaneous Appeal to the High Court.

N. Rama Rao for the appellant.

P. J. Kuppanna Rao for the respondent.

OLDFIELD, J.—The lower Court's conclusion as to items 2, 3, 7, 8, 9 is based on petitioner's admission in evidence, and we have been shown no reason for dissent. The appeal on this point fails. OLDFIELD, J.

The remaining argument is as to Exhibit I, and the question is whether it constitutes an adjustment and the Court can take notice of it, if it was never certified to it, as required by Order XXI, rule 2, Civil Procedure Code. It was a sale by petitioner to the other decree-holder, respondent, of part of the property, which was to be divided; and we have no doubt that the transfer was an adjustment of the decree. On the question whether Exhibit I should have been certified to the Court, several decisions have been quoted regarding the application of Order XXI, rule 2, to decrees, which, like the case before us, include provision for payment of money as well as for other relief. Of the two cases referred to by the lower Court, it is not clear that the decree in *Krishna Hande* v. *Padmanabha Hande*(1) contained any provision of the former description, and in *Abdul Latif Sahib* v. *Bathula Bibi Ammal*(2), Order XXI, rule 2, is applied to all decrees under which money is payable; and there is nothing in it to support the restriction of its application proposed by the lower Court to provisions for payment of money. That interpretation of it was in fact rejected in *Sethurama Sahib* v. *Chota Raja Sahib*(3). In the latter case a previous unreported decision of my own is referred to *Annamareddi Venkayya* v.

(1) (1913) 25, M.L.J., 442. (2) (1914) 15 M.L.T., 338.
(3) (1917) M.W.N., 327.

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Annamareddi Ramanna(1) but it was founded on a judgment of SADASIVA AYYAR, J., in *Kelu Nair* v. *Meenakshi*(2), the principle of which he statedly reconsidered in *Sethurama Sahib* v. *Chota Raja Sahib*(3). The recent course of decisions of this Court is strongly marked, and in a matter of this nature I should not depart from it except for far stronger reason than is available. In these circumstances, following the case last mentioned, I think that the lower Court should have applied Order XXI, rule 2, to the adjustment evidenced by Exhibit I. It is said, however, that in fact, the decree, so far as the properties dealt with in Exhibit I are concerned, was adjusted at a later date by the presentation by all the parties to it of Execution Application No. 369 of 1913, dated 8th July 1913. That application certainly certifies satisfaction as between the present parties and their brother, the defendant in the suit. But it is not possible to say on the information before us whether it involved any satisfaction as between the present parties, or whether all the properties in Exhibit I being in Schedule A referred to in Execution Application No. 369 of 1913, the division of Schedule A properties between them still has to be effected and the decree in respect thereof remained unexecuted.

Again respondent asks for an opportunity to ascertain whether Exhibit I was certified to the Court within the time allowed by Order XXI, rule 2; and in the absence of any categorical statement by the lower Court on the point, we think that he should be allowed an opportunity to show that there was such certification by production of documentary evidence regarding it.

We therefore call on the lower Court to submit findings on the issues:—

1. "Did Execution Application No. 369 of 1913 effect a valid satisfaction of the decree, so far as it related to immoveable properties, which renders it unnecessary for respondent to prove that Exhibit I was certified to the Court?"

2. "Was Exhibit I ever certified to the Court and, if so, were the provisions of Order XXI, rule 2, complied with?"

Fresh evidence may be taken with reference to the first issue and fresh documentary evidence with reference to the

(1) C.M.S.A. No. 11 of 1915 (unreported).

(2) (1913) 25 M.L.J., 586. (3) (1917) M.W.N., 827.

second. The finding should be submitted within six weeks after the re-opening of the lower Court after the midsummer vacation and seven days will be allowed for filing objections.

SESHAGIRI AYYAR, J.—As regards Exhibit I, the learned District Judge was right in holding, on the authority of *Kelu Nair* v. *Meenakshi*(1), that the adjustment relating to the partition of the immoveable properties was not within the mischief of Order XXI, rule 2. But one of the learned Judges who decided that case has receded from the position taken up by him, following the decision of the learned Chief Justice and AYLING J., in *Abdul Latif Sahib* v. *Bathula Bibi Ammal*(2), and my learned brother, who followed *Kelu Nair* v. *Meenakshi*(1) in *Annamareddi Venkayya* v. *Annamareddi Ramanna*(3), is prepared to accept the later view.

If the matter were *res integra* I would have had some hesitation in holding that the words in Order XXI, rule 2, clause (1) "or the decree is otherwise adjusted in whole or in part," related to portions of a decree in respect of which "money is not payable." However, acting on the principle that there should be uniformity on a question of procedure, I follow the two later decisions, namely, *Abdul Latif Sahib* v. *Bathula Bibi Ammal*(2) and *Setturama Sahib* v. *Chota Raja Sahib*(4), and hold that the present case is covered by Order XXI, rule 2, clause (1). I agree with my learned brother in his conclusion and direction on the other points argued before us.

In compliance with the order contained in the above judgment the District Judge of Ganjām at Berhampur submitted findings on the two issues in the negative and the Court delivered the following

JUDGMENT.—The appeal is allowed to the extent that the lower Court's order will be modified by insertion of a direction that the immoveable properties mentioned in Exhibit I should be divided in addition to those already specified. There will be proportionate costs here and in the lower Court.

K.R.

(1) (1913) 25 M.L.J., 586.
(2) (1914) 15 M.L.T., 338.
(3) C.M.S.A. No. 11 of 1915.
(4) (1917) M.W.N., 327.