APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., *Chief Justice*,
Mr. Justice Cornish and Mr. Justice Pandrang Row.

1935, March 29.

ADAPA PAPAMMA AND ANOTHER (PLAINTIFFS ONE, AND THREE—DECREE-HOLDERS), APPELLANTS,

v.

DARBHA VENKAYYA AND TEN OTHERS (DEFENDANTS ONE, THREE AND FIVE TO THIRTEEN—JUDGMENT-DEBTORS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92—Decree—If comes within the purview of—Pre-decree oral agreement between plaintiff and defendant—Defendant agreeing not to contest suit—Plaintiff agreeing not to execute decree that might be passed against him—Executing Court—If such agreement could be pleaded in bar of execution of the decree in.

In the executing Court a judgment-debtor resisted execution of a decree against him on the allegation that there was an oral agreement between him and the decree-holders (plaintiffs) therein, subsequent to the filing of the suit and before the passing of the decree, to the effect that they would not execute any decree that might be passed against him in the suit provided he did not contest the suit. On behalf of the decree-holders it was contended, *inter alia*, that evidence of the oral agreement was excluded by section 92 of the Indian Evidence Act and that the oral agreement could not be pleaded in bar of execution in the Court executing the decree.

Held that (i) a decree does not come within the purview of section 92 of the Indian Evidence Act,

(ii) an agreement not to execute a decree is not one which attempts to vary the terms of the decree, and

(iii) the agreement pleaded was one which related to execution alone and did not attack the decree itself and that the matter could be enquired into by the Court executing the decree.

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* Appeal Against Order No. 185 of 1931.

Chidambaram Chettiar v. *Krishna Vathiyar*, (1916) I.L.R. 40 Mad. 233 (F.B.), and *Butchiah Chetti* v. *Tayar Rao Naidu*, (1930) I.L.R. 54 Mad. 184, considered.

APPEAL against the order of the Court of the Additional Subordinate Judge of Cocanada, dated 8th October 1930, and passed in Execution Petition No. 91 of 1928 in Original Suit No. 61 of 1920.

The facts and the law arising in the appeal are fully dealt with in the judgment of PANDRANG ROW J.

In addition to the cases mentioned in the judgment, *G. Lakshmanna* with *G. Chandrasekhara Sastri* for appellants cited the following cases:—

Arumugam Pillai v. *Krishnasami Naidu*, (1920) I.L.R. 43 Mad. 725, *Mulla Ramzan* v. *Maung Po Kaing*, (1926) I.L.R. 4 Rang. 118 and *M. E. Moolla and Moolla & Sons, Ltd.* v. *Chartered Bank of India, Australia and China*, (1927) I.L.R. 5 Rang. 685, and

C. Rama Rao for *P. Somasundaram* for first respondent cited the following cases :—

Rama Ayyan v. *Sreenivasa Pattar*, (1895) I.L.R. 19 Mad. 230, *Krishnamachariar* v. *Rukmani Ammal*, (1904) 15 M.L.J. 370 and *Subramania Pillai* v. *Kumaravelu Ambalam*, (1915) I.L.R. 39 Mad. 541.

Other respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by PANDRANG ROW J.—This is an appeal from the order of the Additional Subordinate Judge of Cocanada, dated 8th October 1930, dismissing a petition for executing the decree in Original Suit No. 61 of 1920 on the file of the Sub-Court, Cocanada, as against the first judgment-debtor. The petitioner is the son and legal representative

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of the deceased second decree-holder and he applied to execute the decree for the benefit of the first decree-holder who did not join in the application. The decree sought to be executed was dated 28th September 1922 and the application was made on 12th October 1928 for realizing the mesne profits and costs awarded by the decree by arresting the first judgment-debtor and by attaching his properties as well as those of some other judgment-debtors. The application was resisted by the first judgment-debtor alone, and on two main grounds, namely, that there was an oral agreement between him and the petitioner in his capacity as agent of the two plaintiffs in the suit, sometime after he had filed his written statement in the suit and before the passing of the decree, to the effect that the plaintiffs would not execute any decree that might be passed against him in the suit, provided he did not contest the suit, and that the claim to execute the decree against him is barred by limitation. The Additional Subordinate Judge found that, while the claim was not barred by limitation, the oral agreement relied upon by the first judgment-debtor was true and could be successfully pleaded in bar of execution. The appeal of the petitioner in execution is directed against the latter finding about the oral agreement.

Three contentions are raised by the appellant in this appeal, namely :

(1) Evidence of the oral agreement is excluded by section 92 of the Indian Evidence Act ;

(2) the oral agreement cannot be pleaded in bar of execution in the Court executing the decree ; and

(3) the alleged oral agreement is not true.

In order to succeed in his first contention the appellant has to establish two propositions, namely, that decrees come within the purview of section 92 of the Indian Evidence Act, and that evidence of the oral agreement pleaded in this case is tendered for the purpose of contradicting, varying, adding to, or subtracting from the terms of the decree sought to be executed. The first of these propositions raises a question of law regarding which there is a conflict of opinion which is well-nigh irreconcilable. According to one view a decree is a "matter required by law to be reduced to the form of a document", the parties shown in the cause-title of the decree being parties to the instrument, and therefore comes within the purview of section 92 of the Indian Evidence Act. This view was taken in *Rajah of Kalahasti* v. *Venkatadri Rao*(1), following an earlier unreported decision by NAPIER and KRISHNAN JJ. in Second Appeal No. 62 of 1920, and dissenting from the contrary view taken by the Calcutta High Court in *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*(2) and in *Ananda Priya* v. *Bijoy Krishna*(3). The Bench decision in *Rajah of Kalahasti* v. *Venkatadri Rao*(1) was followed by a single Judge in *Gopala Krishna Iyer* v. *Sankara Iyer*(4). The same view had been expressed *obiter* by one of the two Judges of the Allahabad High Court who decided *Lachman Das* v. *Baba Ramnath Kalikamliwala*(5), but it was dissented from by the learned CHIEF JUSTICE of the same Court in a subsequent case, *Ganga Dihal Rai* v. *Ram Oudh*(6), and also by a single

(1) (1927) I.L.R. 50 Mad. 897.
(2) (1914) 24 I.C. 391.
(3) A.I.R. 1926 Cal. 643.
(4) A.I.R. 1930 Mad. 673.
(5) (1921) I.L.R. 44 All. 258.
(6) A.I.R. 1929 All. 79.

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Judge of the Rangoon High Court in *Ma Shwe Pee* v. *Maung San Myo*(1). The latest case is *Abdul Karim* v. *Hakam Mal-Tani Mal*(2) in which a single Judge agreed with the ruling in *Hotchand Tolaram* v. *Premchand*(3) to the effect that an oral agreement between parties to a decree varying the terms of the decree can be proved, and that the proof thereof is not barred by section 92 of the Evidence Act.

Debendra Narain Sinha v. *Sourindra Mohan Sinha*(4) and the unreported case decided by NAPIER and KRISHNAN JJ. (Second Appeal No. 62 of 1920) may be taken as representing the two contrary views, as the remaining cases more or less follow the one or the other of these two. In the former case it was held that the words "any matter required by law to be reduced to the form of a document" found in the earlier part of section 92 of the Indian Evidence Act are controlled by the words "as between the parties to any such instrument or their representatives in interest" in its later part, which are applicable only in the case of documents of a dispositive character, and that the former words have therefore a narrower scope in section 92 than in the preceding section, and cannot cover the case of a decree ; reliance was also placed on the omission of these words from the fourth proviso to section 92. NAPIER J. was of opinion that

> "the result of this decision is certainly startling, for it comes to this; that, where a decree has been given, it would be open to one of the parties to come into Court with a fresh suit the next day saying that directly after the decree was passed the parties made an agreement to vary its terms."

(1) (1928) I.L.R. 6 Rang. 573.
(2) (1933) I.L.R. 14 Lah. 668.
(3) A.I.R. 1931 Sind 42.
(4) (1914) 24 I.C. 391.

It does not appear, however, that this result would follow from the decision; the criticism fails to take note of the provisions of section 47 and of Order XXI, rule 2, of the Civil Procedure Code. NAPIER J. was further of opinion that a decree was an instrument between the parties to the suit in which the decree was passed, and KRISHNAN J. concurred in this opinion, and did not think that the words "between the parties" necessarily imply that the document should be executed by one of the parties. This second line of criticism appears to ignore the real nature of a decree and the part which the Court plays in bringing a decree into existence.

The correct method of approaching this question is to consider first the real nature of a decree. Apart from the definition of "decree" in section 2 (2) of the Code of Civil Procedure, in all systems of jurisprudence this word or its equivalent means an adjudication by a Court of the rights of the parties litigating before it; it is not an act of the parties but an act of the Court, and derives its binding force or validity from the authority of the Court and not from any agreement or contract between the parties. A decree is not a creature of consensus but of the Court. Only a Court can bring it into existence, and only a Court can vary or nullify it. Even when the parties to a suit compromise the suit, the agreement or compromise does not become a decree until the Court directs the passing of a decree in the terms of the compromise. Even where parties adjust a decree an order of the Court is necessary to give effect to the adjustment; without such an order the adjustment by the parties leaves the decree as

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it is. A decree or its terms cannot be varied or modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of the decree, whether the agreement be oral or written.

The rule enacted by section 92 of the Indian Evidence Act is a rule excluding evidence of oral agreement varying the terms of certain documents, and it implies that but for such exclusion the agreement could in law vary the terms. Where no such variation is possible in law by agreement, whether written or oral, the rule of exclusion of evidence of oral agreement cannot apply, and this is the case with a decree. The law does not contemplate the possibility of varying decrees of Court by mere agreement between the parties thereto; the mischief against which section 92 of the Indian Evidence Act is directed could never affect decrees. Attempts to vary the terms of decrees are guarded against not by any rule of evidence but by rules of procedure, such as those relating to amendment of decrees, appeal, review, and execution of decrees. To construe section 92 of the Indian Evidence Act so as to include decrees within its purview is to construe things clean from the purpose of the things themselves.

The second proposition covered by the first contention of the appellant has also not been established in the present case. The first judgment-debtor does not seek to vary the terms of the decree; it is not his case that the terms of the decree were varied by the oral agreement, but that it was agreed that the decree against him

should not be executed. An agreement not to execute a decree does not vary its terms, and in the present case the agreement pleaded is not one to which all the parties to the decree are parties but only some of them, as the other defendants are not parties to it. Section 92 of the Indian Evidence Act does not apply to an agreement of this kind ; see *Goseti Subba Row* v. *Varigonda Narasimham*(1) and *Sri Sailam* v. *Bhushayya*(2). The first contention of the appellant therefore fails.

The next question is whether the oral agreement can be pleaded in bar of execution. The oral agreement is one subsequent to the filing of the suit and prior to the passing of the decree, and according to the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathiyar*(3) such an agreement can be pleaded in execution. That decision was itself based on previous decisions to the same effect. ABDUR RAHIM Offg. C.J. refers at page 237 to the fact that

> " by a long course of decisions in this Presidency it has been held that an agreement made before the passing of the decree, by which the decree was not to be executed for a certain time, is a matter to be enquired into and decided by the executing Court ",

and at page 238 to

> " the practice which has so long obtained in this Presidency."

SESHAGIRI AYYAR J. bases his opinion expressly on the practice in this Presidency ; he observes at page 240 that he would have hesitated a great deal before allowing agreements of this kind to be raised in execution if the matter were

(1) (1903) I.L.R. 27 Mad. 368. (2) (1924) 48 M.L.J. 280.
(3) (1916) I.L.R. 40 Mad. 233 (F.B.).

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res integra. PHILLIPS J. who dissented from the majority view was of opinion that the case was one to which "the principle of *stare decisis* need not be strictly applied". The decisions of the other High Courts on this point were considered by the Full Bench, namely, *Laldas* v. *Kishordas*(1) and *Gauri Singh* v. *Gajadhar Das*(2) which adopted the same view as that of the majority of the Full Bench, and the Calcutta cases, *Benode Lal Pakrashi* v. *Brajendra Kumar Saha*(3), *Hassan Ali* v. *Gauzi Ali Mir*(4) and *Chhoti Narain Singh* v. *Musstt. Rameshwar Koer*(5) which took a different view, and it is therefore unnecessary to consider them in detail. The Madras decisions subsequent to the Full Bench Case of *Chidambaram Chettiar* v. *Krishna Vathiyar*(6) do not disclose any real departure from the rule laid down by the Full Bench. The case law has been so exhaustively reviewed by a Bench of this Court in a recent case, *Butchiah Chetti* v. *Tayar Rao Naidu*(7), that it is unnecessary to go through it again. The conclusion arrived at was tersely stated by PAKENHAM WALSH J., who pronounced the judgment of the Bench, as follows, at page 196 :

> "On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar*(6), only covers agreements which relate to execution, and not to agreements which attack the decree itself."

This view which reconciles almost all, if not all, the Madras decisions on the subject is one in which I venture to express my entire concurrence. The agreement pleaded in the present case is one

(1) (1896) I.L.R. 22 Bom. 463 (F.B.).
(2) (1909) 6 A.L.J. 403. (3) (1902) I.L.R. 29 Calc. 810.
(4) (1903) I.L.R. 31 Calc. 179.
(5) (1902) 6 C.W.N. 796. (6) (1916) I.L.R. 40 Mad. 233 (F.B.).
(7) (1930) I.L.R. 54 Mad. 184.

which relates to execution alone, and does not attack the decree itself, for it is merely an agreement not to execute the decree as against the first judgment-debtor, and nothing more. It follows therefore that the agreement can be pleaded in execution, and that the executing Court can determine whether the agreement is true.

The only question which remains is whether the agreement is true.

[His Lordship discussed the evidence and agreed with the finding of the Subordinate Judge that it was true and proceeded:]

It follows from what has been said above that this appeal must fail. It is accordingly dismissed with costs of the first respondent. Vakil's fee is fixed at Rs. 100 under rule 46 of Appendix III of the Appellate Side Rules.

G.R.