

1885

As to the other questions, with the exception of the third, they do not arise. As to the power of altering the charge, I am of opinion that the Judge had no power to alter the charge, or frame a new charge, in any way.

QUEEN-
EMPRESS
v.
PERSHAD.

APPELLATE CIVIL.

1885

February 2.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

FATEH MUHAMMAD (JUDGMENT-DEBTOR) v. GOPAL DAS (DECREE-HOLDER).*

Execution of decree—Contract superseding decree—Adjustment of decree—Certification—Civil Procedure Code, s. 258—Limitation—Acknowledgment in writing—Act XV of 1877 (Limitation Act), s. 19.

In the course of proceedings in execution of a decree dated the 14th June, 1878, the parties, on the 11th January, 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage-bond dated the 1st December, 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained; and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution-case be struck off the file, and the attachment maintained. On the 24th December, 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1886.

* First Appeal No. 110 of 1884, from an order of J. L. Denniston, Esq., District Judge of Ghazipur, dated the 19th March, 1884.

1885

 FATEH
 MUHAMMAD
 v.
 GOPAL DAS,

Held that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January, 1881, came within the terms of s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham v. Mukha* (1), *Janki Prasad v. Ghulam Ali* (2), and *Ramhit Rai v. Satgur Rai* (3) followed.

Per OLDFIELD, J.—That the agreement of the 11th January, 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor: and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force.

Per MAHMOOD, J.—That the agreement of the 11th January, 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract; but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s. 258 of the Civil Procedure Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist; and that therefore the certification of the adjustment was inadequate, and could not be recognized in executing the decree.

THE decree of which execution was sought in this case was dated the 14th June, 1878. It appeared that on the 11th January, 1881, in the course of proceedings in execution of the decree, the parties entered into an agreement, which was registered, and filed in the Court executing the decree, with a petition by the decree-holder. That agreement was to the following effect:—

“We, Fateh Muhammad, and Gopal Das, decree-holder, do hereby declare as follows:— That I, Fateh Muhammad, owe up to this time Rs. 1,385-1-3 under a decree to Gopal Das, decree-holder, of Benares, and Rs. 250 under a note-of-hand held by the said creditor; that the decree is under execution in the District Court of Benares, under certificate, and on the application of the said decree-holder for attachment, a mortgage-deed, dated the 1st

(1) I. L. R., 3 All. 320.

(3) I. L. R., 3 All. 247.

(2) I. L. R., 5 All. 201.

1885

FATEH
MUHAMMAD
v.
GOPAL DAS.

December, 1873, in favour of Kandhaia Lal, is advertized for sale on the 11th January, 1881 ; that I, the debtor, and the decree-holder have arranged for the payment of the amount of the decree in this way,—that I, the debtor, should make over the said mortgage-deed to the judgment-creditor in order that he should bring a suit thereon on my behalf under his own superintendence and at his own expense against the mortgagor, Kandhaia Lal, and realize the amount secured by the deed ; that out of the said amount he is to realize the whole of the amount of the decree under execution, with costs and future interest which may be found due from the date of the decree to date of realization, also costs of all sorts up to date of realization on account of the regular suit to be brought against Kandhaia Lal aforesaid, and also the sum due to him (decree-holder) under the note-of-hand for Rs. 250 mentioned above, with interest thereon due to the said Babu by me the said debtor ; that from the balance the Babu is to receive his remuneration for the trouble of instituting the aforesaid suit, at the rate of 5 per cent., and to pay what remains out of the amount realized to me, the debtor ; that I, the debtor, shall have no right to interfere, except to receive the balance ; that I shall not make any contract of adjustment or transfer of any sort, as regards the amount secured by the mortgage-deed aforesaid, with the obligor of the said document, or with any other person, and if I do so, such contract shall be invalid ; that should the obligor aforesaid or his representative come forward to settle the matter, then I, the debtor, and the aforesaid creditor, Babu Gopal Das, shall with mutual consent come to some terms, and accordingly a detailed compromise will be executed under the signatures of me, the debtor, and the Babu Sahib aforesaid ; that if the settlement of the matter should appear at the time to be expedient, each party shall be bound by such settlement ; and that the decree-holder has accepted this arrangement and admitted it for the benefit of me.

“ I, Babu Gopal Das, decree-holder, creditor, do hereby declare that I have accepted the conditions of this compromise.

“ For this reason we, both parties, having executed this compromise, as defined in art. 20, sch. i, Act I of 1879, on a stamped paper of the value of Rs. 10, have got it registered.”

The petition of the decree-holder was to the following effect :—

1885

“That the case of execution of decree of the petitioner (decree-holder) against Shaikh Fateh Muhammad, judgment-debtor, is pending in the Court, and a mortgage-deed attached at the instance of the decree-holder is advertised for sale to be held to-day, the 11th January, 1881. The judgment-debtor came to the petitioner, and under an agreement executed to-day and duly registered, made this arrangement for payment of the judgment-debt: that he made over to the petitioner the original deed advertised for sale, in order that he (the petitioner) should file a suit under it at his own cost against the obligors thereof, and realize the judgment-debt due under the decree sought to be executed, with interest and costs, &c. The petitioner (decree-holder) has accepted this arrangement. He therefore files this petition and prays that the sale to be held to-day may be postponed and the application for execution of decree be struck off for the present and the previous attachment maintained. After realization of the amount entered in the document advertised for sale, an application for execution of the decree will be duly filed.”

FATHI
MUHAMMAD
v.
GOPAL DAS.

On this petition the Court made an order directing that the execution-case should be struck off the file and the attachment should be maintained.

On the 24th December, 1883, the decree-holder applied for execution of the decree. The judgment-debtor objected to this application on the ground that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1880. The decree-holder replied to these objections that, as the judgment-debtor had failed to carry out the provisions of the agreement, and there was nothing in the agreement preventing execution of the decree, he, the decree-holder, was entitled to execution; and that, as in the agreement the judgment-debtor acknowledged the debt, under s. 19 of the Limitation Act, a fresh period of limitation began to run from the date of the agreement, and the application was within time.

The lower Court disallowed the objections of the judgment-debtor, allowing the contention of the decree-holder.

1885

The judgment-debtor appealed to the High Court, repeating the objections taken by him in the Court below.

FATEH

MUHAMMAD

v.

GOPAL DAS.

Lala *Lalta Prasad*, for the appellant.

Munshi *Nanuman Prasad*, for the respondent.

OLDFIELD, J. — This is an appeal from an order on an application by the decree-holder for execution of a decree dated the 14th June, 1878. It has been allowed by the Judge and the judgment-debtor has appealed. The objection that the application is barred by limitation has no force, since the Judge is right in holding that there was an acknowledgment of liability on the part of the judgment-debtor on the 11th January, 1881, in writing, which saves limitation. The other objection is, that the decree is no longer fit to be executed, since it was superseded by a new contract under the instrument of the 11th January, 1881. It appears that execution had been taken out, by attachment and sale of a mortgage-bond in favour of the judgment-debtor by one Kandhaia Lal, and the sale was advertized to take place on the 11th January, 1881. On that day the parties executed a deed on which the judgment-debtor relies. That instrument refers to the fact that the decree is under execution, and that a mortgage-deed, dated the 1st December, 1873, executed by Kandhaia Lal, *Kalwar*, of Mirdadpur, is advertized for sale, and that the decree-holder and judgment-debtor have arranged the following method of paying the decree: that the judgment-debtor shall make over the said deed to the decree-holder, in order that he shall bring a suit thereon on behalf of the judgment-debtor at his own expense against Kandhaia Lal, and realize the amount secured by the deed, and out of the amount realized satisfy the decree under execution, with costs and future interest, together with all costs of the suit to be brought against Kandhaia Lal, and together with a sum due by the judgment-debtor to the decree-holder under a note-of-hand for Rs. 250 with interest: that the decree-holder shall from the balance receive a remuneration for the trouble of instituting the aforesaid suit at the rate of 5 per cent., and pay to the judgment-debtor what remains out of the amount realized; and it proceeds to say that any settlement between the judgment-debtor and Kandhaia Lal will be the subject of future arrangement between the judgment-debtor and the decree-holder.

1885

FATEH
MUHAMMAD
v.
GOPAL DAS.

On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the deed advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the auction-sale to be held that day be postponed, and the application for execution of the decree be struck off for the present, and the previous attachment maintained; after realization of the amount entered in the deed advertized for sale, an application for execution of the decree will be duly filed. On this the order was that the case for execution of decree be struck off and the attachment be maintained. It appears that nothing was done under this agreement, and the decree-holder has now applied to execute his decree, alleging that the judgment-debtor failed to give effect to the agreement by making over the bond to him, and this has not been denied by the judgment-debtor. I am unable to hold that the arrangement entered into contemplated, or had the effect of, cancelling the decree and substituting a new contract in its place. All it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied, without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. If in whole, the decree would then be written off as satisfied; if in part, execution would proceed, the decree remaining in force until satisfied; and there is nothing in the deed to prevent the decree-holder executing the decree when the judgment-debtor failed to carry out the condition of the agreement. In a similar way a judgment-debtor might agree to make over the property to a decree-holder in order that he should realize the decretal amount from its proceeds, but the decree would not, in such a case, be cancelled. The deed contains nothing to the effect that the decree is superseded, and that henceforth the decree-holder's money is to be confined to the realization by suit on the bond. It is unlikely also that there should have been such an intention, considering the hazard and uncertainty of litigation.

1885

FATEH
MUHAMMAD
v.
GOPAL DAS.

The terms of the deed, in the absence of any words to the effect that the decree was to be considered as cancelled and inoperative and the remedy confined to realization by suit on the bond, are susceptible of the meaning I have put on them, and that this was the meaning intended is shown by the petition put in on the same day by the decree-holder, and the order for continuing the attachment of the bond; and it is significant that the judgment-debtor never objected to the petition or to the continuance of the attachment. In this connection it is deserving of notice that if the arrangement is to be considered to come within the meaning of an adjustment of the decree under s. 258, Civil Procedure Code, it can only be recognized by the Court when certified by the decree-holder or judgment-debtor; and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force. The objections, therefore, on the part of the appellant fail, and the appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion, and I will add a few words only in order to explain my reasons. There appear to be two questions which require consideration. The first relates to limitation, as to the right of the decree-holder-respondent to obtain execution of his decree. The second is a question as to the merits, and it is whether the "*ikrar-nama*" of the 11th January, 1881, extinguished the decree, leaving the judgment-creditor a right to proceed under the contract then made.

Upon the first point the ruling of this Court in *Ghansham v. Mukha* (1) and the ruling of Tyrrell, J., and myself in *Janki Prasad v. Ghulam Ali* (2), which followed the Full Bench ruling in *Rambhit Rai v. Satgur Rai* (3), settle the matter. These decisions leave no doubt that the acknowledgment in the *ikrar-nama* comes within s. 19 of the Limitation Act, so as to originate a fresh period of limitation in respect of the execution of the decree.

The second question relates to the merits, and upon this point my view is somewhat different from that of my brother Oldfield. In my opinion this agreement of the 11th January, 1881, was intended

(1) I. L. R., 3 All. 320. (2) I. L. R., 3 All. 247.
(3) I. L. R., 5 All. 201.

1885

 FATEH
 MUHAMMAD
 v.
 GOPAL DAS.

by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract. But that is not the real matter before us, and the question really is whether, whatever may have been the effect of the agreement, the decree-holder has lost his right to execution. The law, as expressed in s. 258 of the Civil Procedure Code, allows the parties to a decree to satisfy it by subsequent arrangement. But it is obvious that, in order to effect its policy, and to make the exercise of this right beneficial, the Legislature was constrained to impose some limit. If the question were now before me, whether the agreement of the 11th January, 1881, did or did not extinguish the decree, and if I could go into the merits, I should perhaps answer the question in the affirmative. That deed of agreement, after reciting the conditions under which it was made, and what had been done in execution, and what money was due to the decree-holder, shows that both parties agreed to satisfy the decree by the decree-holder obtaining possession of a mortgage-deed executed in favour of the judgment-debtor by a third person. It also refers to a note-of-hand executed by the judgment-debtor in favour of the decree-holder, which must also be regarded as included in the scope of the new contract, as substituting a new obligation in lieu of a document creating an obligation in favour of the decree-holder and providing a method of payment. The only question now is, even assuming that this deed of agreement was intended as a fresh adjustment of the decree, is that adjustment of such a character as to allow us to say in the execution department that the decree has been extinguished? At first I entertained some doubt upon this question, but having considered the deed of the 11th January, 1881, I am now of opinion that it cannot be regarded as such an adjustment of the decree as s. 258 of the Code contemplates. The section, after creating the right to certify adjustments made out of Court, proceeds to limit that right by providing that "the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree." What this means is that the judgment-creditor must go the Court and say:—"My decree has been adjusted and extinguished; strike off the case." Now, in the present case, this application of the 11th January, 1881, did mention the agreement, but the certificate was imperfect, that is, insufficient

1885

FATEH
MUHAMMAD
v.
GOPAL DAS.

to satisfy the requirements of s. 258 of the Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist. This is not a sufficient compliance with the provisions of s. 258, and therefore, without deciding what was the intention expressed by the agreement, I hold that the certification of the adjustment was inadequate, and that we cannot recognise it in executing the decree. This question leaves the parties their mutual rights under the agreement, but in connection with the execution of the decree, I concur in the order passed by my learned brother Oldfield.

Appeal dismissed.

Before Mr Justice Oldfield and Mr. Justice Mahmood.

1885
February 5.

JASWANT SINGH AND OTHERS (JUDGMENT-DEBTORS) v. DIP SINGH AND OTHERS
(DECREE-HOLDERS.)*

Reversal of decree—Repayment of money realized—Restitution—Interest—Question for Court executing decree—Fresh suit—Civil Procedure Code, ss. 244, 583.

In a suit for redemption of a mortgage, a decree was passed for possession by redemption on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest. X

Held that the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree, and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code.

X *Held* also that the decree-holder was entitled to restitution of the amount with interest. X

Roger v. The Comptoir d'Escompte de Paris (1) referred to. *Ram Ghulam v. Dwarka Rai* (2) distinguished by MAHMOOD, J.

The facts of this case are stated sufficiently for the purposes of this report in the judgment of Oldfield, J.

* First Appeal No. 41 of 1884, from an order of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 29th March, 1884.

(1) L. R. 3 P. C. 465. (2) *Ante*, p. 170.