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settlement was designed to put an end to a family dispute which would otherwise have resulted in ruinous litigation. On the authorities it is impossible to treat the compromise as an alienation, valid only if it can be shown to be justified by necessity. The appeal is dismissed with costs.

Appeal dismissed.

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February, 12.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MOHAN LAL (JUDGEMENT-DEBTOR) *v.* JAGAN NATH AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code (1908), *section* 47—*Execution of decree—Partition—Objection that decree-holders had realized certain debts assigned by the decree to the judgement-debtor—Procedure.*

The decree in a partition suit, *inter alia*, allotted a sum of money to be paid by the judgement-debtor to the decree-holders and assigned certain debts on account books to the judgement-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgement-debtor took objection that the decree-holders had as a matter of fact realized a large amount out of the debts which had been assigned by the decree to him. *Held* that the question thus raised was not a matter falling within the purview of section 47 of the Code of Civil Procedure, and that the judgement-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized.

THIS appeal arose out of proceedings in execution of a decree based upon a compromise in a suit for the partition of the property of the family to which both parties belonged. Amongst this property were certain debts due on bonds and other debts due on account-books. Several of the bond debts were assigned to the plaintiffs, and the rest as well as the debts on account-books to the defendant. In addition to this the sum of Rs. 3,400 was to be paid by the defendants to the plaintiffs, Rs. 400 at once and the balance within two years. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree whereby they sought to recover the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgement-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree, that the application was time-barred, that interest had been charged by the

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*First Appeal No. 205 of 1912 from a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 25th of May, 1912.

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decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgement-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application in which the judgement-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant.

The court of first instance disallowed the objections. The defendant judgement-debtor appealed to the High Court.

Pandit *Shiam Krishna Dar* and Pandit *Uma Shankar Bajpai*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is an appeal arising out of execution proceedings. The facts are briefly as follows:—The parties are step-brothers. A suit for partition was brought by the plaintiffs respondents for partition of the joint family property. The suit ended in a decree, dated the 3rd of March, 1908, based on a compromise. The compromise is dated the 14th of January, 1908, and was filed in the course of the appeal in this Court, on the 22nd of January, 1908, and was remitted to the court below for verification and report. It reached the court below on the 31st of January, 1908. According to the compromise the landed property was divided in a certain manner, likewise the house property. With these we are not concerned in this appeal. The third class of property consisted of debts on bonds and on accounts entered in certain account-books. Of this class about ten debts secured by bonds were allotted to the plaintiffs. The remaining debts, including all those due on accounts, were allotted to the defendant. In addition to this allotment of the property under the compromise a sum of Rs. 3,400 was to be paid by the defendant. Of this, Rs. 400 was to be paid at once and the balance of Rs. 3,000 at the end of two years. The compromise on being duly verified was submitted to this Court, and a decree was passed thereunder on the 3rd of March, 1908. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree, whereby they sought to recover

the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgement-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree; that the application was time-barred; that interest had been charged by the decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgement-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application, in which the judgement-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant. The lower court has disallowed the objections. The plea of limitation was not pressed, and the lower court held that if the decree-holders had wrongfully recovered the debts, the judgement-debtor had his remedy against the decree-holders in a regular suit. The judgement-debtor comes here on appeal, and the first plea taken is that the point raised as to the collection of debts due to the judgement-debtor by the decree-holders is a point which falls under section 47 of the Code of Civil Procedure and the lower court ought to have gone into it. To this we cannot agree. The appellant has an entirely a separate cause of action against the decree-holders, if the latter have as a matter of fact recovered the debts due to him and not to themselves. Once the final decree in the partition suit was passed, the plaintiffs, decree-holders, ceased to have any title whatever to the debts in question. It is not pleaded that the plaintiffs' decree for Rs. 3,000 has been satisfied. There has been no voluntary payment. It is further urged on behalf of the appellant that under clause (2) of section 47 we should treat his present petition of objection more in the nature of a plaint, so that the whole proceedings may be treated as a suit by him to recover the amount which he claims to have been collected by the decree-holders. We see no reason to do so, assuming for a moment that the second clause of the section enables us to do as he wishes. The present proceeding is one which has arisen out of an application by the decree-holders and the objections are merely objections asking the court to reject the application. No amount

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is specifically claimed therein as having been collected by the decree-holders.

The second ground of appeal is not pressed. The third ground of appeal has no force. Assuming that the respondents have misappropriated the money due to the appellant, the latter has a remedy by regular suit.

The fourth ground of appeal is that as the plaintiffs have refused to fulfil their obligations under the decree they are not entitled to recover the money from the appellant. In so far as the decree itself is actually concerned there is no obligation on the decree-holders which they have to perform. It is urged that on the 31st of January, 1908, when the compromise filed in this Court was received in the court below, an agreement was filed by the parties on the same day under which the plaintiffs, decree-holders, agreed to make over the account-books to the defendant. It is further urged that it was clearly understood by the parties that the defendant was to have two years' time given to him under the decree (as was actually granted thereby) for payment of Rs. 3,000, because he was to have the account-books at once handed over to him to enable him to recover the debts allotted to him. It is pleaded that the decree-holders have never handed over the accounts to him, and have thereby prevented him from recovering the debts, and as a consequence have prevented him also from paying the sum of Rs 3,000. It was urged that when the previous applications were made by the decree-holders this objection was all along taken, though it is also admitted that as a matter of fact it was not taken in the present instance in the court below. It seems to us quite clear that the rights of the parties, after the compromise had been arrived at, were governed by the decree of the 3rd of March, 1908. It may be that on a true interpretation of that decree the judgement-debtor was entitled to the possession of the account-books, as the debts based on those account-books were entered therein and they formed the chief proof of those debts. It was open to the judgement-debtor to put the decree into execution and to recover the books from the plaintiffs if they did not deliver them. As a matter of fact the decree is silent as to the possession of the account-books, and we do not think that we can go behind the decree to find out what other rights the parties may have. If any

portion of the compromise was accidentally omitted from the decree, it was open to the judgement-debtor to have the decree amended. *If he intentionally omitted any portion of the compromise from* the decree he has himself to blame. In any case he is not entitled to go behind the decree which finally decided the rights of the parties. This is a point which, as we have already pointed out, was not taken in the court below. If the appellant deems himself aggrieved in any way, we must leave him to his remedy by a separate suit. We think the decision of the court below is perfectly correct. We dismiss the appeal with costs.

Appeal dismissed.

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February, 15.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

GANESHI LAL AND OTHERS (PLAINTIFFS) *v.* CHARAN SINGH AND OTHERS (DEFENDANTS)*

Mortgage—Parties—Suit for entire mortgage money and sale of entire mortgaged property—Omission to implead certain persons interested—Decree to which plaintiffs entitled.

Where a plaintiff mortgagee sued for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, it was *held,* that so much of the claim should be decreed as was proportionate to the interests of the persons who were before the court.

THIS was a suit on a mortgage made in favour of the first plaintiff in January, 1891. Some of the defendants were the mortgagors and remainder were impleaded on the ground that they had acquired an interest in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first court gave the plaintiffs a decree for $\frac{5}{6}$ths of the amount due on the mortgage, to be recovered, if necessary, by sale of $\frac{5}{6}$ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of owners of one-sixth of the property was fatal to the suit, which he accordingly dismissed.

The plaintiffs appealed to the High Court.

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* Second Appeal No. 454 of 1912 from a decree of H. M. Smith, Additional Judge of Agra, dated the 29th of November, 1911, reversing a decree of Kalika Singh, Additional Subordinate Judge of Agra, dated the 27th of June, 1911.