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W. A. COLLARD v. MAIRE AGNES COLLARD.

Mr. *Chandra* has said that his client Mr. Collard is not desirous of making money out of his wife, and, therefore, he voluntarily abandoned any claim to the damages for Rs. 1,000 which Mr. Justice WALSH awarded against Mr. Dutton. In the circumstances we are of opinion that that is a proper thing for Mr. Collard to have done, because Mr. Dutton's point that these two parties, husband and wife, had got very much apart before Dutton became on terms of close friendship with Mrs Collard seems well founded.

The result, therefore, is that the wife's petition fails both on the ground of cruelty and adultery. The husband's petition succeeds on the ground of adultery, and, therefore, we grant to the husband a decree *nisi* for the dissolution of his marriage on the ground of his wife's misconduct with the co-respondent. In view of Mr. Collard's withdrawal of any claim to the damages which were assessed by Mr. Justice WALSH at Rs. 1,000, we rescind that part of the Judge's order. The costs of all parties in both suits and in this appeal must be borne by the co-respondent. The costs which Mr. Dutton will have to pay for both the hearings, including counsel's fees and all other matters, are to be taken to be Rs. 1,100. We allow Mr. Dutton two months from this date to pay this amount.

BANERJI, J.—I concur.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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December, 16.

LACHHMAN DAS (JUDGMENT-DEBTOR) *v.* BABA RAMNATH KALIKAMLIWALA (DECREE-HOLDER).*

Civil Procedure Code (1908), *Order XXI, rule* 2 (2)—*Act No.* I *of* 1872 (*Indian Evidence Act*), *section* 92—*Execution of decree—Adjustment of decree out of court—Oral executory contract set up by the judgment-debtor as a bar to execution.*

The holder of a decree payable by instalments applied for execution of the decree by arrest of the judgment-debtor alleging that nothing had been paid towards satisfaction of the decree. The judgment-debtor thereupon filed a petition alleging that the question of the execution of the decree had been settled out of court by means of an agreement between the parties under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immovable property. The decree-holder denied that any such adjustment as alleged had taken place, and the

* First Appeal No. 54 of 1921, from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 8th of January, 1921.

judgment-debtor was unable to show that any part of the alleged agreement which, according to his own account of it, was to be performed by him, had been so performed.

Held that such an agreement as alleged could not be set up by the judgment-debtor under rule 2 of order XXI of the Code of Civil Procedure as a bar to execution.

Held further, by Walsh, J., that section 92 of the Indian Evidence Act, 1872, was also a bar to the setting up of such an oral agreement substituting a new executory contract in place of the original decree.

THE facts of this case are fully set out in the judgment of PIGGOTT, J.

The question at issue was whether an execution court on an application by the judgment-debtor under order XXI, rule 2 (2), of the Code of Civil Procedure, should record as a certified adjustment of the decree an alleged executory contract of adjustment where the factum of the adjustment was denied by the decree-holder and the judgment-debtor had not performed his part of the contract prior to his application in court.

Dr. *Surendra Nath Sen* (with Babu *Surendra Nath Gupta*) for the appellant, contended that a mere denial of an adjustment by the decree-holder was not enough and did not amount to "showing cause," and cited—*Arjan Singh* v. *Harcharan Singh* (1), *Champa Lal* v. *Mahesh Sitla Bakhsh Singh* (2), *Runglal* v. *Hem Narain Gir* (3), *Muhammad Kasim* v. *Rukia Begam* (4), and *Shaik Davud Rowther* v. *Paramasami Pillai* (5).

He, however, conceded that this did not shift the burden of proof, and the adjustment when denied must, in the first instance, be proved by the judgment-debtor. He contended that an inquiry should have been made by the execution court and the adjustment, if proved, recorded as certified.

Munshi *Durga Prasad*, for the respondent :—

Order XXI, rule 2 (2), Civil Procedure Code, contemplates an actual completed adjustment *to the satisfaction of the decree-holder* and not a mere inchoate or incomplete agreement to adjust. It would lead to interminable confusion if execution courts were permitted to inquire into the existence of an unsigned agreement denied by one party, and in the result refuse execution of the decree

(1) Weekly Notes, 1884, p. 40. (3) (1885) I. L. R., 11 Calc., 166.
(2) Weekly Notes, 1888, p. 82. (4) (1919) I. L. R., 41 All., 443.
(5) (1916) 31 M. L. J., 207.

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and virtually give an order for specific performance of a new contract of adjustment. This is improper and could only be carried through by a subsequent regular suit, and such a procedure is clearly beyond the bounds of an inquiry under order XXI, rule 2 (2).

Here also the judgment-debtor is out of court as he had admittedly failed to carry out his part of the alleged contract.

He cited *Tirumalai Kandama* v. *The Eastern Development Corporation* (1).

Dr. *Surendra Nath Sen*, in reply, contended that an executory contract must be recorded by the execution court, once the factum of an adjustment on such a basis is found in the judgment-debtor's favour, and asked that he might be allowed to complete his part of the contract now.

PIGGOTT, J.:—This is a judgment-debtor's appeal in an execution case and it comes before us under the following circumstances. The decree in question is one passed on the 14th of February, 1920. It has some bearing on the equities of the case, though not on its legal aspects, that this was a compromise decree under which the judgment-debtor was at liberty to satisfy it by easy instalments. There was, however, a provision that, on default being made in respect of two consecutive instalments, execution could be taken out for the entire amount. The decree-holder on the 23rd of June, 1920, applied to the court which had passed the decree for execution of the same according to its terms, alleging that no instalment had ever been paid, and at the same time asked to have the decree transferred to the Civil Court at Saharanpur within whose jurisdiction the judgment-debtor resided. On the 2nd of July, 1920, he applied for execution of his decree by arrest of the person of the judgment-debtor. The record before us does not explain why he failed to obtain execution in the manner asked for. The court remained open until the 24th of September, 1920, when it closed for annual vacation. It re-opened on the 25th of October, 1920, and on that date the judgment-debtor himself came into court. He presented a petition, the precise terms of which will require to be further examined, but which purported to be under the second

(1) (1917) 43 Indian Cases, 537.

clause of order XXI, rule 2, of the Code of Civil Procedure, and asked the court to issue notice to the decree-holder to show cause why the adjustment of the decree should not be recorded. The decree-holder presented himself in court on the 4th of December, 1920, denied all the allegations of fact contained in the judgment-debtor's petition and alleged that there had been no payment made out of court under the decree and no adjustment of the decree, in whole or in part, to his satisfaction. The judgment-debtor desired to tender evidence in proof of certain facts set forth in his application. The court refused to hear him and recorded a brief order to the effect that the adjustment alleged by the judgment-debtor not being certified by the decree-holder, the execution court had no jurisdiction to inquire into the alleged adjustment. It accordingly disallowed or rejected the judgment-debtor's petition. The court was no doubt referring to the provisions of the third clause of order XXI, rule 2. The appeal before us is against this order. The learned Subordinate Judge was either under a misapprehension of fact, or under a misapprehension of law, when he passed his order in the particular form in which he did. He may have thought that the judgment-debtor's petition of the 25th of October, 1920, was beyond time as a petition under order XXI, rule 2, clause (2) of the Code of Civil Procedure and that, therefore, no possible question could arise of a payment duly certified to the court, when once the decree-holder declined to certify such payment. On the other hand, he may have thought that the decree-holder had shown sufficient cause, in any event, against the alleged adjustment being recorded when he denied that any adjustment had taken place. As a matter of fact, by reason of the court being closed during the vacation, the judgment-debtor's application was within time as an application under the second clause of order XXI, rule 2, of the Code of Civil Procedure, and there is very good authority for the proposition that the decree-holder, when brought into court by such an application, must show good cause why it should not be granted. *Primâ facie* the decree-holder showed good cause when he denied that there had been any satisfaction or adjustment of the decree; but ordinarily a judgment-debtor would be permitted in such circumstances to produce

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evidence with a view to satisfying the court that the decree-holder was not speaking the truth and that the decree had, as a matter of fact, been paid up or otherwise adjusted, in whole or in part. In the present case, however, the decree-holder was in a much stronger position, and although the order of the court below cannot be sustained on the precise ground on which it apparently proceeds, it was a correct order under the circumstances. What has been pointed out to us on behalf of the respondent is this, that, on the appellant's own showing, the decree had not been adjusted, in whole or in part, to the satisfaction of the decree-holder on the 25th of October, 1920, when the judgment-debtor's petition was presented to the court. What the judgment-debtor alleges to have taken place is somewhat as follows. On the day after the arrest of the judgment-debtor had been applied for, there was a meeting of the parties concerned, in the presence of members of the brotherhood, and an oral agreement was reached. That agreement was to the effect that the decree-holder would accept satisfaction of his decree in a modified form and would abandon the execution proceedings which were being taken, as soon as four specified conditions had been fulfilled by the judgment-debtor. One of these was a cash payment of Rs. 1,000. Another was the execution in favour of the decree-holder of a sale-deed conveying to him a certain enclosure in the town of Deoband valued at Rs. 5,600. The next was the execution by the judgment-debtor of a deed transferring to the decree-holder all his own rights under a certain mortgage of the 8th of March, 1908. Finally, the judgment-debtor was to execute yet another sale-deed, conveying certain land in the village of Rankhandi to the decree-holder, which land was alleged to be worth Rs. 4,500. Now, it is admitted that up to the 25th of October, 1920, and indeed up to the present day, the judgment-debtor has not done any of the things which according to his petition he had covenanted to do. It cannot be said that this petition explains in any way his own failure to execute the documents which he says he had bound himself to execute. Beyond all question there had been no adjustment of the decree to the satisfaction of the decree-holder, and there has been none to this day. The order of the court below was, therefore, perfectly correct. We have been

asked to go further into the matter and to consider what the position would be if the judgment-debtor were now to set to work to perform his part of the alleged oral contract. I do not think it is necessary for us to do this: it seems to me fairly clear that an oral agreement, not as yet performed by either party, could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree. On the facts stated in the judgment-debtor's own petition, the decree-holder had not bound himself by anything more than an oral agreement; whether it was or was not open to him to reconsider his position, whether he was not justified in doing so by facts ascertained by him subsequently to the date of the alleged oral agreement,—these and similar questions might arise, if this were a suit for specific performance of the alleged oral agreement of the 3rd of July, 1920, or a claim for damages against the decree-holder for having refused to abide by that agreement. I think the court below was right in holding that such matters could not be inquired into by an execution court, which could not conceivably substitute a different decree for the one which it was called upon to execute, or give the decree-holder in place of the decree under execution some sort of a decree for specific performance of a contract orally entered into. Under the circumstances of this case, therefore, I am quite satisfied that the order of the court below was right and that this appeal must fail. I would dismiss the appeal with costs.

WALSH, J.:—I entirely agree that the appeal fails. I agree also that the learned judge in the court below did not put his finger really upon the weak spot in the judgment-debtor's application. As at present advised I do not think the absence of a certificate by the decree-holder is necessarily a bar to an inquiry into the facts where a real adjustment is alleged. In my opinion sub-section (2) of rule 2 of order XXI enables a judgment-debtor to force the decree-holder into court and, if he has proper materials, to call upon him to show cause why an alleged adjustment should not be recorded as certified. I am personally indebted to the argument of Mr. *Durga Prasad* on behalf of the respondent in this case. It seems to me that he has put the real objections to the judgment-debtor's contention on the right ground. I will

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confine myself to the main point he argued, by quoting a dictum which he cited from one of the unauthorized reports which puts the matter as clearly as it can be put. I agree with Mr. *Durga Prasad's* contention that this application was in substance a suit for specific performance, and the dictum which I adopt is as follows:—"An inchoate contract, which if completed would bar execution of a decree, cannot be pleaded as a bar to execution under order XXI, rule 2, and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution."

There is another ground, based upon the general law, upon which I think the judgment-debtor's application was bound to fail. By his own showing he was setting up a verbal agreement by the decree-holder to accept some variation, or, as it may also be put, some new contract in substitution of the original decree, which was still in the executory stage, and he proposed to prove that agreement by verbal evidence. According to paragraph 1 (*b*) of his application he alleged a mutual agreement made before members of the brotherhood and respectable persons by which it was settled that (1) a sale-deed should be executed, (2) that cash should be paid. To my mind that allegation offends against section 92 of the Evidence Act which provides as follows:—"When the terms of any contract, etc., etc., or any matter required by law to be reduced to the form of a document have been proved, etc., no evidence of any oral agreement or statement shall be admitted, as between the parties or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms." A new agreement is clearly a matter contradicting or varying the terms of the original decree. Proviso 4 makes the matter even clearer. There can be no question that a decree is a matter required by law to be reduced to the form of a document. Appendix D to the Code of Civil Procedure contains statutary forms for decrees, which must be in writing and must accord with the judgment, which is also to be in writing. I agree with my brother that, strictly speaking, it is not necessary to decide this question. On the other hand, it does arise on the appellant's own showing in the court below and would in my judgment have been sufficient ground for dismissing

his application *in toto*. It follows that any further attempt to set up this alleged agreement, through any effort which the appellant may hereafter make to repair his own omission, ought to fail unless supported by an agreement in writing signed by the decree-holder.

I agree with the order passed by my brother.

BY THE COURT:—We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Stuart.

EMPEROR *v.* SUKHNANDAN SINGH AND ANOTHER.*

Act No. III of 1867 (Public Gambling Act), section 13—Public place—Grove to which public commonly have access in fact, although it is the subject of private ownership.

A place to which the public have access, without their access being refused or interfered with, is a public place, within the meaning of Act No. III of 1867, whether the public have a right to go there or not. *Queen Empress* v. *Sri Lal* (1) followed. *Queen* v. *Wellard* (2) referred to. *Ahmad Ali* v. *King-Emperor* (3) distinguished.

THIS was an application in revision from an order convicting the applicants of an offence under the Public Gambling Act, 1867. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

STUART, J.:—The only point raised in this revision is whether the applicants were gambling in a public place. On the finding of the Magistrate who tried the case, they were found gambling in the area occupied by a large grove. At one end of the grove is the shrine of a goddess and a tank. A fair was in progress at the time that they were gambling and visitors to the fair had penetrated to all parts of the grove. The grove is private property, but on the occasion of the fair the public use the grove

* Criminal Revision No. 648 of 1921, from an order of E. T. Thurston, Sessions Judge of Cawnpore, dated the 21st of June, 1921.

(1) (1895) I. L. R., 17 All., 166. (2) (1884) L. R., 14 Q. B. D., 63.

(3) (1904) 1 A. L. J., 129.