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Court,—*Makbul Ahmad* v. *Iftikhar-un-nissa* (1)—in a document which acknowledged a debt of Rs. 975 as being due to the plaintiff there were the words "I promise to pay you this sum in two months." This instrument was held to be a promissory note, though both the lower Courts had held it to be nothing more than a note or memorandum falling under art. 5, sch. ii, Act XVIII of 1869.

STRAIGHT, J.—I have nothing to add to the remarks made by me in my former judgment, or to the opinion therein expressed, to which I still adhere.

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March 2

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

DEBI RAI (JUDGMENT-DEBTOR) *v.* GOKAL PRASAD (DECREE-HOLDER).*

Execution of decree—Execution of compromise—Estoppel.

The parties to a decree for the payment of money altered by agreement such decree as regards the mode of payment and the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor. On the 1st March, 1878, the holder of such decree applied for execution of such agreement. The judgment-debtor objected that such agreement could not be executed as a decree, and such application should therefore be disallowed. *Held* (OLDFIELD, J., dissenting) that such agreement could not be executed as a decree, and such application could not be entertained, and that the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J. The facts of the case and the point of law referred are sufficiently stated for the purposes of this report in the order of reference, which was as follows:—

OLDFIELD, J.—A decree was obtained by the respondent against the appellant in this case on the 14th December, 1863, for a sum of money bearing interest at Re. 1 per cent. per annum. The decree continued to be executed up to September, 1870. Subsequently, in the course of proceedings taken in execution of the decree, the parties entered into an agreement by a deed, dated

* Second Appeal, No. 86 of 1879, from an order of W. Young, Esq., Judge of Moradabad, dated the 9th July, 1879, reversing an order of Maulvi Sami-ulla Khan, Subordinate Judge of Moradabad, dated the 27th July, 1878.

(1) N.-W. P. H. C. R., 1875, p. 124.

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14th September, 1871, by which it was arranged that the sum of Rs. 1,277-8-0 due on that date should be paid by the judgment-debtor with interest at 14 annas per cent. per mensem in two equal instalments at the end of 1872 and 1873, respectively, and in case of default of payment of the instalments, it would be competent for the decree-holder to realize the entire amount of the decree in a lump sum, with interest at Rs. 2 per cent. per annum, from the date of breach of contract, from the judgment-debtor personally and from his property. An application was made by the decree-holder to execute the decree in the terms of the above agreement on 21st July, 1873, and the judgment-debtor's property was attached, and a date for sale fixed; but the proceedings came to an end on 24th October; the attachment, however, continued in force. Another application for execution was made on 28th November, 1874, which was struck off on 10th May, 1875. Again on the 12th January, 1876, the decree-holder applied for execution, and the judgment-debtor's property was advertised for sale. Part payment towards satisfaction of the decree was made by the judgment-debtors. The property was sold on 23rd October, 1876; but the sale was subsequently cancelled on 22nd June, 1877, and the case struck off. On 22nd June, 1877, the decree-holder again made application to execute, and the judgment-debtor's property was sold, and the sale was confirmed on 20th September, 1877. In all the above proceedings the Court allowed execution on the terms of the agreement dated 14th September, 1871. On the 1st March, 1878, the decree-holder again made application to execute the decree on the terms of the said agreement; and this application is the subject of the appeal before us. The Court of first instance has held that the agreement superseded the decree which became no longer capable of execution, and it dismissed the application. The Judge, on the other hand, has allowed execution of the decree under the agreement, except in so far as its terms allowed enhanced rate of interest to be charged. The judgment-debtor in appeal contends that the decree of 14th December, 1863, was superseded by the agreement dated 14th September, 1871, and execution cannot proceed on the agreement, and the decree-holder's application should be disallowed. We refer the case to the Full Bench of the Court. The following cases may be referred to: *Sadasiva Pillai* v. *Ramalinga Pillai*,

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15 B. L. R. 383: *Sheo Golam Lall* v. *Beni Prosad*, I. L. R., 5 Calc. 27.

Pandit *Bishambhar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—On the case stated in the reference I am clearly of opinion that the Judge was wrong, and that the more correct view of the law has been taken in the judgment of the Court of first instance. I have looked into the records for the very words of the agreement of the 14th September, 1871, and I find that it contains a distinct statement of the money due under that date. It states: "Whereas, &c., it has been settled that the whole of the amount of the decree, principal with interest and costs due up to date, being Rs. 1,677-8-0, is declared to be due to the decree-holder from us the judgment-debtors, and out of that the said judgment-debtors have paid Rs. 400 to me, the decree-holder; and as regards the balance of Rs. 1,277-8-0, the amount of the decree, it is settled that Rs. 638-12-0 out of it is to be paid, with interest at 14 annas per cent. from this day, at the end of 1872, and Rs. 638-12-0 at the said rate is to be paid at the end of 1873, and in the event of default in paying the instalments the decree-holder shall be at liberty to realize the whole amount of decree in one lump sum, with interest at two per cent. per mensem from the date of the default, from the hypothecated and other property of the judgment-debtors; and the property hypothecated under the decree should still remain hypothecated and pledged; and we the judgment-debtors shall raise no objection in respect of the instalment, &c., therefore we have executed this by way of compromise that it may serve as an authority." Now, in the first place, I hold that this amounted to a complete abandonment of the decree as such, and, secondly, that this was an agreement not for the purpose of keeping the decree alive for execution, but as a mere record of the sum that was due by the one party to the other, and that such an agreement could not be enforced in the execution department, but, if at all, only by a separate

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suit. The words in the agreement "the whole of the amount of the decree" and "the whole amount of decree in one lump sum" did not and do not mean that the decree itself was to be executed to that effect, but were merely intended as terms descriptive of the amount acknowledged to be due by the party who had been judgment-debtor to the party who had been decree-holder. The decree had thus become incapable of execution not only by the law of limitation, but by estoppel under the agreement which superseded it.

The case of *Stowell* v. *Billings* (1), decided by Spankie, J., and myself, appears to be in point so far as it goes, and the same remark applies to the case of *Sheo Golam Lall* v. *Beni Prosad* (2). With regard to the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (3), it is an authority directly in favour of the view I have explained, that in such a case as the present the only remedy is by a suit on the agreement, if any, and determines the particular case then before the Council under "the special circumstances," which it was considered "take the plaintiff's claim out of the general rule." The appeal to this Court should therefore be allowed, the order of the lower appellate Court reversed, and that of the Court of first instance restored with all costs.

PEARSON, J.—The point for consideration appears to be whether a judgment-debtor, who submits to the partial execution in the execution of decree department of a compromise by which a decree has been superseded, is estopped from afterwards objecting to the continued execution in that department of the same compromise. It seems sufficient to observe that the execution of a compromise is not within the competency of a Court in the execution of decree department; and that the consent of the parties to the decree or the conduct of either of them cannot give to the Court a jurisdiction which the law does not confer upon it. In the case before us, the proceedings in execution of the compromise dated 14th September, 1871, being null and void for want of jurisdiction must count for nothing; and the application of the 1st March, 1878, which, if it be an application for the execution of the compromise, cannot be entertained, and, if it be an application for the execution

(1) I. L. R., 1 All. 350. (2) I. L. R., 5 Calc. 27.
(3) 15 B. L. R. 383.

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of the decree of the 14th December, 1863, is barred by limitation. I would allow the appeal with costs, reversing the lower appellate Court's order and restoring that of the Court of first instance.

SPANKIE, J.—It appears to me that the ruling of this Court, and indeed of the Presidency Court to which attention was directed, in the case of *Stowell* v. *Billings* (1) is unaffected by the decision of the Privy Council noticed by the Judges who referred the present case. Their Lordships of the Privy Council remark in that case—*Sadasiva Pillai* v. *Ramalinga Pillai* (2)—as follows :—"It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plaintiff's claim out of the general rule ; and are sufficient to support the order of the Civil Court of the 31st of January, 1872. And their Lordships will now proceed to consider what those circumstances are and the legal effect of them." The plaintiff in that case had obtained a decree for possession, and had there been no appeal, and the decree had been followed by immediate execution, he would have been put into possession of his lands, and would ever since have received the rent and profits of them. The only mesne profits touching which any question would have arisen would have been those for the year between the date of institution of the suit and that of the decree. Execution was suspended but not necessarily suspended by the appeal, and the defendant could only remain in possession on the terms of giving security for execution of the decree should it be affirmed against him. He did so. The instruments which he executed were addressed to the Civil Court. They contained an obligation to pay subsequent mesne profits for the years which they respectively cover, and pointed even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realization, if not then paid, by the Court. Their Lordships thus describe the effect of these documents. "The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the

(1) I. L. R., 1 All. 350. (2) 15 B. L. R., 383.

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appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question." In consequence of the execution of these instruments their Lordships were of opinion that the defendant came under an obligation to account in the suit for the subsequent mesne profits of plaintiff's land. They held that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the latter clause of the section. But even if it did not, they thought that upon the ordinary principles of estoppel the defendant could not now be heard to say "that the mesne profits in question are not payable under the decree."

It will thus be seen why, notwithstanding the general rule of all the Courts in India that, where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot under the clause in question give execution for such interest or mesne profits, their Lordships in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (1) held the defendant liable to account for the mesne profits in execution of the decree. The case was a special one. The defendant had come under an obligation to the Court itself to account in the suit for the subsequent mesne profits, which was capable of being enforced by proceedings in execution. The liability had made the accounting a question relating to the execution of the decree within the meaning of the latter clause of s. 11 of Act XXIII of 1861, and if it did not, defendant was estopped from saying that the mesne profits were not payable under the decree. When the defendant himself created the obligation the decree had not been put in execution. There was no question of altering or varying the terms of the original decree. By his own act the defendant had, in giving security for the due performance of the appellate Court's decree, to account for the subsequent mesne profits in the suit, and that being so, he could not be allowed afterwards to say that they were not payable under the decree. The Court executing the decree called upon the defendant to execute the instruments, and they were executed pursuant to the order of the Court. But the circumstance of the case before us are quite different. The

(1) 15 B. L. R. 383.

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decree was dated 14th December, 1863, and was for a sum of money (Rs. 1,440) bearing interest at 12 per cent., and it continued to be executed until September, 1870. Subsequently, in the course of proceedings taken in execution of the decree the parties entered into an agreement by a deed dated 14th September, 1871, by which the amount due on that date under the decree was stated to be Rs. 1,277-8-0, and it was arranged that it should be paid with interest at 14 annas per mensem in two equal instalments at the end of 1872 and 1873, respectively, and in case of default of payment of the instalments, the decree-holder was at liberty to realize the entire amount of the decree in a lump sum, with interest at 24 per cent., from the date of the breach of contract, from the judgment-debtors personally and from their property. This compromise, as it is called, completely altered the terms of the decree. The amount held to be due became payable by instalments, whereas the decree made the amount payable at once at the rate of one rupee per cent. interest per mensem, but the agreement reduced the rate to 14 annas per mensem, and it provided that in case of default the rate of interest should be increased to Rs. 2 per mensem, and that the decree-holder should realize the entire amount of the decree in a lump sum. The Judge observes that the agreement is strictly conformable to the procedure described in s. 210 of Act X of 1877. But even if this were so, the lower appellate Court overlooks the fact that, when the Court admitted the agreement which varied the terms of the decree, it had no authority to do so. The Court executing the decree had no power to execute another agreement in lieu of the decree. In all decrees for the payment of money the Court might for any sufficient reason order that the amount should be paid by instalments with or without interest (s. 194 of Act VIII of 1859). But the order was to be looked for in the decree, and could not be made by the Court executing the decree. The circumstance that what was done in 1871 corresponds with the procedure laid down in Act X of 1877 would not make the Court's action in 1871 legal. But in point of fact the procedure in 1871 did not correspond with that in s. 210 of Act X. of 1877. The parties in 1871 struck a balance and found Rs. 1,277-8-0 to be due under the decree. They made a new contract by which the judgment-debtor bound himself to discharge the

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debt found to be due in two years by two instalments, and to pay interest at different rates than that allowed by the original decree. Whereas in s. 210 of Act X of 1877 no compromise, no agreement, and no new contract are required. After the passing of a decree for money the Court may, on the application of the judgment-debtor, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him or otherwise, as it thinks fit; and there is a further proviso that, save as provided in this section and in s. 206, no decree shall be altered at the request of the parties. Then by s. 210, it is the Court that arranges the matter as it thinks fit and upon its own terms, on the application it is true of the judgment-debtor, and with the consent of the decree-holder; without such application and the consent of the decree-holder the Court would not act at all. But the decree cannot be altered at the request of parties, except as provided in the section, and in s. 206, which latter section refers to the amendment of clerical or arithmetical errors in a decree. The application is for time within which to pay the debt, and if the decree-holder is willing that time should be given, the Court allows the time and itself settles the terms upon which indulgence to the judgment-debtor may be granted.

It will be observed that the lower appellate Court does find that the agreement in 1871 did alter the terms of the decree in one respect at least. The Judge remarks: "It is true that the final interest of Rs. 2 per mensem, which the arrangement came to in 1871 authorized in case of default in payment of the instalments, was a condition which rested solely on the basis of that agreement, and I do not think it is enforceable in the execution department." But if the Court had power in 1871 to alter and vary the decree in one or more respects, it surely had power to do so in respect of the interest. If it had not such power, it could not enforce one condition of a compromise, and refuse to recognize another. It is, I think, certain that from the date of the compromise between the parties the compromise and not the decree of 1863 was executed, and that the decree-holder cannot revert to the original decree, under the terms of the compromise; and I fall back upon the deci-

sion of this Court already referred to (1) which holds that a compromise of this nature cannot enlarge the limitation provided by law for the execution of decrees.

OLDFIELD, J.—I am of opinion that the judgment-debtor's objection that the agreement which he entered into cannot now be enforced under the decree is not maintainable. The agreement only varied the decree to the extent of directing that its amount should be paid in instalments at a rate of interest less than decreed, and, in case of default of payment, by allowing a rate of interest higher than that payable by the decree. The Judge has not allowed the agreement to be enforced in execution of the decree in respect of the increased rate of interest, and the decision on this point is not objected to in appeal and we are not concerned with it; but there is no reason why the rest of the conditions agreed to should not at any rate be enforced under the decree, as relating to the execution, discharge or satisfaction of the decree under s. 244, Civil Procedure Code; but even if it could be held that the agreement should more properly be enforced by suit and not in execution of the decree, the judgment-debtor must be held estopped from raising this plea, since he entered into the agreement and took the benefit of it and has without objection allowed it to be enforced under the decree since 1873.

The case of *Sadasiva Pillai* v. *Ramalinga Pillai* (2) is distinctly an authority for this view. In that case the plaintiff obtained a decree for the possession of certain lands with mesne profits up to the date of suit. No claim was made in the suit for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant execution was from time to time stayed by the Court on the defendant giving security to abide the event of the appeal, for the execution of the decree, and for payment of mesne profits accruing while the plaintiff remained out of possession. The decree having been confirmed in appeal the plaintiff applied for execution in respect of the *interim* mesne profits. It was held by the Judicial Committee of the Privy Council that the proceedings whereby the defendant led the Court to stay execution

(1) *Stowell* v. *Billings*, I. L. R., 1 All. 350. (2) 15 B. L. R., 383.

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and continue him in possession laid him under an obligation to account in the suit for the mesne profits which he engaged to pay, and that this obligation was capable of being enforced by proceedings in execution, since, even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of s. 11 of Act XXIII of 1861, he was estopped from contending that the mesne profits in question were not payable under the decree. Their Lordships remarked: "The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* v. *The Attorney-General of Gibraltar* (1), in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*;" and they go on to observe "that proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal, since in such a suit the plaintiff might recover interest." I have quoted these remarks at length, as the facts of the case we are dealing with make them peculiarly applicable to it. I find also that the above decision was followed by the Calcutta Court in *Sheo Golam Lall* v. *Beni Prosad* (2), a case very similar to the one we have before us. I would dismiss the appeal with costs.

STRAIGHT, J.—I confess I am unable to follow the remarks of the Judge, where he observes that the agreement of 14th September, 1871, "is strictly conformable to the procedure described in s. 210 of Act X of 1877." At the time that instrument was

(1) L. R., 5 P. C. 516. (2) I. L. R., 5 Calc. 27.

executed, s. 194 of Act VIII of 1859 was in force, and the provisions of law were then, as now, that any order for the payment of a decretal amount by instalments was to be made by the Court passing the decree. In the present case, the decree of the 14th December, 1863, contained no provision permitting payment by instalments, nor was any subsequent application made to the Court passing it by the judgment-debtor for the insertion of any such stipulation. Down to the year 1870, the proceedings in respect of it appear to have been of a purely formal character, and the last application to enforce it, in ordinary course, was made on the 30th July, 1870. Between this and the next application on 21st July, 1873, the compromise of 14th September, 1871, was entered into. By that the sum due for principal and interest to date was consolidated at Rs. 1,277-8-0, and it was further provided that this amount should be paid in two equal instalments of Rs. 638-12-0 each, with interest at the rate of 14 annas per cent., at the end of the years 1872 and 1873, respectively. In case of default in either or both of these instalments, it was competent for the decree-holder to realize the entire amount of the decree with interest at Rs. 2 per cent. per annum. It will be found that these terms are very different to those contained in the original decree of 14th December, 1863. By that it was provided that the whole decretal amount, which was estimated at Rs. 1,740, should be satisfied within seven years, that interest thereon should be paid annually, and that in case of default the plaintiff should be entitled to realize the entire decretal sum at once. Default it seems was made in the payment of the full interest for 1870, and that was the ground upon which the last regular application to execute the decree was made on the 30th July, 1870. Moreover, it will be observed that before the compromise of 14th September, 1871, was entered into, the seven years limit given by the decree for satisfaction of the principal sum had expired, and the time had arrived, if it had not before, when the decree could be executed in its entirety. It appears to me that the compromise of 14th September, 1871, was an entirely new agreement, creating fresh obligations, and contemplating an extension of the period of limitation from three years from 30th July, 1870, when the last regular application to execute the decree was made, or from 14th December, 1870, when default in

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satisfaction of the principal sum had been completed, to three years from 1872 or 1873, at the option of the judgment-creditor. I am unaware of any provision of law by which decree-holders and their judgment-debtors can, by agreement between themselves, alter the period of limitation applicable to a decree, and make use of the execution department to enforce it. I certainly do not understand the two cases mentioned in the referring order (1) to be authorities in favour of such a view, nor does it appear to me that any question of estoppel arises in the present case. The last regular application to execute the decree of 14th December, 1863, was made on the 30th July, 1870, when default had been made in payment of the instalment of interest for that year. The next application was on the 21st July, 1873, when default had been made in payment of the half instalment of the principal sum as stipulated in the compromise of 14th September, 1871. This last application, and the four others that have succeeded it, have all been in reality to execute, not the decree of 1863, but the compromise of 1871. It is patent upon the face of it that at the end of the year 1873 limitation barred the execution of the decree, as no application had been made to execute it, and whatever arrangement the parties might enter into, it does not appear to me that they could stop limitation running. Consequently whether the judgment-debtors were or were not estopped from objecting to the decree being executed in the terms of the compromise, the Court asked to execute it could only treat it as an application to execute the decree of 1863, and was itself bound to take notice that it was barred by limitation. I would reverse the decision of the lower appellate Court with costs, and restore that of the Subordinate Judge.

Appeal allowed.

(1) *Sadasiva Pillai* v. *Ramalinga Pillai*, 15 B. L. R. 383; *Sheo Golam Lall* v. *Beni Prosad*, I. L. R., 5 Calc. 27.