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siyaha was accepted as affording good evidence of her possession. The Court at that time could have had little reason to think that it had been fabricated. It is only when the subsequent suit for arrears of rent was instituted and the plaintiff deposed on oath that he had not received the money and had got the entry made in the *siyaha* fictitiously that the commission of the alleged offence in the mutation case came to light. It would only defeat the ends of public justice if the order of the lower Court in respect of the alleged offence in the course of the mutation proceedings were to be set aside on the ground of delay.

For the above reasons I dismiss the application.

Application dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, and
Mr. Justice E. M. Nanavutty*

1934
November,
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BABU JUGUL KISHORE (DECREE-HOLDER APPELLANT) *v.*
PANDIT SATYA NARAIN SHUKLA (JUDGMENT-DEBTOR
RESPONDENT)*

Execution of decree—Executing court, powers of Executing court cannot go behind the decree unless it was passed without jurisdiction—Decree must be corrected by court which passed it—Civil Procedure Code (Act V of 1908), order XXI, rules 37 and 40—Money decree—Execution by arrest of judgment-debtor—Discretion of court to disallow execution by arrest.

A court executing a decree must take the decree as it stands and cannot go behind it except in cases where the Court passing the decree had no jurisdiction to pass it, and the decree is a mere nullity or incapable of execution. Unless the decree is corrected by the Court which passed it, it is not open to the executing court to go behind it. *Ram Narain v. Suraj Narain* (1), followed.

Where a judgment-debtor appears in pursuance of a notice under order XXI, rule 37 of the Code of Civil Procedure and

*Execution of Decree Appeal No. 58 of 1933, against the order of S. Shankat Husain, Subordinate Judge of Unao, dated the 11th of August, 1933.

shows cause why he should not be committed to the civil prison, the Court has a discretion to disallow the application for arrest on any of the grounds specified in rule 40 of the said order.

Where the respondent is the owner of property of considerable value and is a practising lawyer and is unable to satisfy the decree on account of the difficulty in realizing money from the tenants and in raising money on the security of zamindari property and the decree shows that it was in contemplation of the parties at the time of the compromise that the decree-holder would enforce payment of the decree by sale of the properties specified in the compromise, there is sufficient cause preventing the judgment-debtor from being able to pay the amount of the decree within the meaning of rule 40 or order XXI of the Code of Civil Procedure. *Hargobind Kishan Chand v. Hakim Singh and Co.* (1), referred to.

Messrs. *Radha Krishna and Narain Lal*, for the appellants.

Mr. *Ghulam Hasan*, for the respondent.

SRIVASTAVA AND NANAVUTTY, JJ.:—This is an execution of decree appeal by the decree-holder. It arises out of a decree passed by the 1st Additional District Judge of Cawnpore which was transferred for execution to the Court of the Subordinate Judge of Unao.

The facts of the case are briefly these. The plaintiff decree-holder brought a suit against the respondent and his brothers on the basis of a *hundi*. At the date of hearing the respondent was absent and the case proceeded *ex parte* against him. The plaintiff and two of the respondent's brothers who were present made a statement to the Court that they had entered into a compromise. The terms of the compromise were verbally stated to the Court and were embodied by the learned Additional District Judge in his judgment. A record of those terms was also made by the Reader of the Court in vernacular in the order-sheet. The operative part of the judgment was that a decree was to be framed in terms of the compromise against all the defendants. The decree which was prepared in pursuance of the judgment reproduced the terms of the compromise as noted in the vernacular order-sheet. Within two and

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a half months of the passing of the decree, the decree holder made an application for execution by arrest of the respondent. The learned Subordinate Judge of Unao issued a notice to the respondent to show cause why he should not be committed to the civil prison. The respondent appeared and made an application pleading *inter alia* that under the terms of the compromise the decretal amount was to be realized from certain properties mentioned in the compromise and that the decree could not be executed against him personally. He also set up several other grounds explaining his inability to pay the amount of the decree. The learned Subordinate Judge was of opinion that the Reader had misapprehended the purport of the compromise and had not accurately recorded it in the order-sheet. He held that the terms of the compromise as incorporated in the judgment of the Court were more reliable. Relying upon the provisions of the compromise as embodied in the judgment of the learned Additional District Judge he decided that the decree-holder was not entitled to obtain execution by arrest of the judgment-debtor. He accordingly dismissed the application.

It has been contended before us that the terms of the decree being perfectly clear and definite, the learned Subordinate Judge as an executing Court had no authority to go behind the decree. The argument proceeded that as the decree expressly makes the respondent personally liable the Subordinate Judge was wrong in refusing to issue a warrant of arrest against the judgment-debtor respondent. The law as regards this matter has been settled by the Full Bench decision of this Court in *Ram Narain and others v. Lala Suraj Narain* (1), where it was held that a Court executing a decree must take the decree as it stands and cannot go behind it except in cases where the Court passing the decree had no jurisdiction to pass it, and the decree is

(1) (1933) 11 O.W.N., 169.

a mere nullity or incapable of execution. In the present case it is unfortunate that the terms of the compromise were not embodied in any written application and the two versions of it as contained in the judgment of the Court and in the order-sheet are clearly at variance with each other. However the terms of the decree are quite clear, and unless the decree is corrected by the Court which passed it, it was not open to the learned Subordinate Judge to go behind it. As the decree stands it makes the respondent personally liable and as such the decree-holder is entitled to execute it by the arrest of the judgment-debtor.

Next the question arises whether it is a proper case in which the Court should enforce execution by arrest of the judgment-debtor. Reliance has been placed on behalf of the appellant on the decision of a Bench of the Lahore High Court in *Hargobind Kishan Chand v. Hakim Singh and Co.* (1). In this case it was held that although an execution Court has discretion to refuse execution against the person and property simultaneously yet it has no authority to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor. In our opinion this decision cannot help the appellant. Under Order XXI, rule 30 the decree-holder has the right to execute a decree for payment of money either by the detention in the civil prison of the judgment-debtor or by attachment and sale of the property or by both. Rule 21 of this order provides that the Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor. It does not follow from this that the Court is bound to enforce execution by arrest of the judgment-debtor in every case. Rule 37 of the same order provides that when such an application is made the Court may instead

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of issuing a warrant for arrest of the judgment-debtor issue a notice calling upon him to show cause why he should not be committed to the civil prison. When the judgment-debtor appears in pursuance of such notice the Court has a discretion to disallow the application for arrest on any of the grounds specified in rule 40 of the said order. It is true that this rule does not provide that the decree-holder must in the first instance proceed against the property of the judgment-debtor, but the application made by the judgment-debtor to the Subordinate Judge is not confined to this ground. One of the grounds stated in the application is that the times are very bad and there is great difficulty in realising money from tenants or in raising money on the security of zamindari property. It is not denied that the respondent is the owner of property of considerable value. He is also a practising lawyer. The decree also shows that it was in contemplation of the parties at the time of the compromise that the decree-holder would enforce payment of the decree by sale of the properties specified in the compromise. We think in these circumstances there was sufficient cause preventing the judgment-debtor from being able to pay the amount of the decree within the meaning of rule 40 of Order XXI of the Code of Civil Procedure. The decree-holder has not made out any of the grounds contained in clauses (a) to (e) of sub-rule 2 of rule 40. We think therefore that this is a proper case in which the Court in the exercise of its discretion under rule 40 of Order XXI should refuse to enforce execution by arrest of the judgment-debtor. We must therefore uphold the order of the lower Court on this ground.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.