

allowed interest at not more than 12 per cent. as being the commercial rate of interest. No argument has been addressed to us against this finding of the Subordinate Judge.

The third issue was whether the minor defendants are liable and on this issue the Subordinate Judge held that defendants 3 to 5 were liable along with defendant no. 1 but only to the extent of their share in the joint family property and that defendant no. 2 Rangi Sahu was not liable. This finding has not been attacked in second appeal and is, therefore, affirmed.

The result is that the appeal is allowed in part, the decision of the lower appellate Court reversed, and the suit decreed modifiedly in accordance with the findings. The interest will be at 12 per cent. per annum up to the date of the suit and thereafter at 6 per cent. per annum up to the date of realization.

The plaintiffs will get their costs proportionate to the amount of the claim decreed.

Appeal allowed in part.

APPELLATE CIVIL.

Before Ross and Rowland, JJ.

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Execution—agreement to pay decretal amount by instalments—decree-holder, whether entitled to proceed on terms of agreement—limitation—terminus a quo—agreement acted upon—judgment-debtor, whether estopped from saying that original decree should be executed—agreement that in default

* Appeal from Appellate Order no. 121 of 1930, from a decision of H. R. Meredith, Esq., i.c.s., District Judge of Manbhurn, dated the 21st of March, 1930, modifying an order of Babu Gajadhar Prasad, Subordinate Judge of Dhanbad, dated the 6th of April, 1929.

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of payment of instalments whole decretal amount would become payable—decree-holder, whether bound to enforce payment of whole amount—limitation.

A decree for Rs. 4,087-6-0 was passed against the judgment-debtors by the Subordinate Judge of Cawnpur on the 11th April, 1923, and the decree was transferred for execution to the Subordinate Judge of Dhanbad. On the 13th September, 1924, a petition of adjustment was filed in that Court and the Subordinate Judge directed that the terms should be noted and the case disposed of in terms of the petition of compromise, which provided, inter alia, that the decree-holder should get Rs. 4,000 in full payment of his claim, that the judgment-debtor should pay Rs. 1,000 forthwith and the balance in monthly instalments of Rs. 150 from October, 1924

“and in default of four instalments, i.e., if the judgment-debtors fail to pay Rs. 600 on the first week of the fifth month, the decree-holders will realize the whole of the decretal amount with interest at 9 per cent. by sale of the house and land described below.”

The one thousand rupees was paid and also the first two instalments Rs. 150 each, and thereafter payments ceased to be made. On the 26th of October, 1928, the decree-holder applied to the Subordinate Judge of Cawnpur again to transfer the decree for execution to Dhanbad and on the 10th of December, 1928, an application for execution was made and the decree-holder claimed to realize Rs. 3,932-7-0. The Subordinate Judge allowed the decree-holder to recover the instalments which were due for three years before the application and included in these instalments those of July to October, 1925, holding that they fell due in the first week of November, 1925. The District Judge modified this decision by disallowing the instalments for July, August and September, holding that they fell due, not in the first week of November, but in the first week of each succeeding month, and that they were consequently out of time as being due more than three years before the application for execution. The judgment-debtors preferred a second appeal against this decision while the decree-holder filed a cross-objection in respect of the instalments for July, August and September, 1925. It was contended by the judgment-debtors that the execution was out of time, more than three years having elapsed after the last step-in-aid of execution on the 13th

of September, 1924, that the parties could not by agreement enlarge the time of limitation and that, in any case, the compromise was not a decree and could not be executed. Alternatively it was urged that if effect could be given to the compromise then under its terms the whole debt became due in April, 1925, and that the present application was more than three years from that date.

Held, (i) that where a decree is altered by agreement of parties with respect to the mode of payment, the court executing the decree is bound to give effect to the compromise and that, therefore, the decree-holder was entitled to proceed on the terms of the compromise which was executable as a decree;

(ii) that the compromise having been acted upon and payments made thereunder, the judgment-debtors were estopped from saying that the judgment-creditor was bound to execute the original decree;

Taref Biswas v. Kalee Dass Banerjee(1), *Woopendro Mohun Tagore v. Takalia Beparee*(2), *Luchmeeput Singh Bahadoor v. Moonshee Jowahur Ali*(3), *Dinonath Sen v. Gooroo Churn Pal*(4), *Sitaram v. Dasrath Das*(5), *Muhammad Sulaiman v. Jhukki Lal*(6), *Sheo Golam Lall v. Beni Prasad*(7), *Sriranga Bupala Balai Rao Garu v. Raja Damara Kumara Thimma Nayanim Bahadur Varu*(8), *Sadasiva Pillai v. Ramalinga Pillai*(9), *Pisani v. Attorney-General for Gibraltar*(10), followed.

Kristo Komul Singh v. Huree Sirdar(11), distinguished. *Debi Rai v. Gokul Prasad*(12), not followed.

(iii) that, in the event of any default in payment of the instalments, the intention of the parties was to leave it at

(1) (1869) 11 W. R. 86.

(2) (1869) 11 W. R. 570.

(3) (1872) 18 W. R. 497.

(4) (1874) 21 W. R. 310.

(5) (1883) I. L. R. 5 All. 492, F. B.

(6) (1888) I. L. R. 11 All. 228.

(7) (1879) I. L. R. 5 Cal. 27.

(8) (1911) 13 Ind. Cas. 81.

(9) (1875) 15 Beng. L. R. 383, P. C.

(10) (1874) L. R. 5 P. C. 516.

(11) (1869) 13 W. R. 44, F. B.

(12) (1881) I. L. R. 3 All. 555, F. B.

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the option of the decree-holder either to enforce the payment of the whole of the decretal amount at once or to continue to abide by the instalments and that, therefore, the present application for execution was not out of time although filed more than three years after April, 1925, when the whole of the decretal amount could have been realized at the option of the decree-holder.

Manindra Nath Roy v. Kanhai Ram Marwari(1) and *Ramsekhar Prasad Singh v. Mathura Lal*(2), followed.

Held, further, on a construction of the agreement, that the instalments for July, August and September fell due, not in the first week of November, but in the first week of each succeeding month, and that, therefore, the execution in respect of these instalments was barred.

Appeal by the judgment-debtors.

The facts of the case material to this report are stated in the judgment of Ross, J.

S. C. Mazumdar, for the appellants.

K. P. Sukul, for the respondent.

ROSS, J.—A decree for Rs. 4,087-6-0 with costs and interest at 6 per cent. was passed against the appellants by the Subordinate Judge of Cawnpur on the 11th of April, 1923, and the execution of the decree was transferred to the Subordinate Judge of Dhanbad; and on the 13th of September, 1924, a petition of adjustment was filed in that Court and the Subordinate Judge directed that the terms should be noted and the case disposed of in terms of the petition of compromise.

The compromise provided that the decree-holder should get Rs. 4,000 in full payment of his claim; that the judgment-debtors should pay Rs. 1,000 forthwith and the balance in monthly instalments of Rs. 150 from October, 1924,

(1) (1919) C. W. N. (Pat.) 46.

(2) (1925) A. I. R. (Pat.) 557.

" and in default of four instalments, i.e., if the judgment-debtors fail to pay Rs. 600 on the first week of the fifth month, the decree-holder will realize the whole of the decretal amount with interest at 9 per cent. by sale of the house and land described below."

The last clause of the agreement was that the house belonging to the judgment-debtors should remain charged for the decretal amount and that the decree-holder should in default of payment of the aforesaid amount realize the same by sale of the house with interest at the rates stated above by calculating from the date of default of any month. The one thousand rupees was paid and also the first two instalments of Rs. 150 each, and thereafter payments ceased to be made. On the 26th of October, 1928, the respondent applied to the Subordinate Judge of Cawnpur again to transfer the decree for execution to Dhanbad and on the 10th of December, 1928, an application for execution of the decree was made. In that application under the heading 'date of decree' was given the 11th of April, 1923, and also the date of the compromise, the 13th of September, 1924. Under the heading 'previous application, if any' reference was made to the instalments under the compromise aforesaid in the previous execution case. The account stated the amount of the decree as Rs. 4,087-6-0 with costs and calculated interest at the rate of 6 per cent. A deduction of Rs. 1,300 realized was made and a further deduction of Rs. 1,350 was barred by limitation and the decree-holder claimed to realize Rs. 3,932-7-0. This account is a combination of the original decree and the compromise and it is stated on behalf of the respondent that the account has not been properly framed. The Subordinate Judge allowed the decree-holder to recover the instalments which were due for three years before the application and included in these instalments those of July to October, 1925, holding that they fell due in the first week of November, 1925. The District Judge modified this decision by disallowing the instalments for July, August and September, holding that they fell due, not in the first week of November, but in the first week of each succeeding month; and that they were

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consequently out of time as being due more than three years before the application. This is the subject of the cross-objection; and the judgment-debtors contend that the whole of the execution is out of time.

It is argued that more than three years had elapsed after the last step-in-aid of execution on the 13th of September, 1924, and that the parties could not by agreement enlarge the time of limitation and that in any case the compromise was not a decree and could not be executed. This argument was supported by two decisions of Full Benches, one of Calcutta, *Kristo Komul Singh v. Huree Sirdar*(¹) and the other of Allahabad, *Debi Rai v. Gokul Prasad*(²). Alternatively it was argued that if effect can be given to the compromise, then under its terms the whole debt became due in April, 1925, and that the present application was more than three years from that date. As the cases referred to appear to support this argument, it is necessary to examine the authorities in some detail.

Before the decision in *Kristo Komul Singh v. Huree Sirdar*(¹), the law in Calcutta was that payment by instalments could be substituted for a decree and that only the terms so substituted had to be carried out and they governed limitation: [*see Tareef Biswas v. Kalee Doss Banerjee*(³) and *Woopendra Mohun Tagore v. Takalia Beparee*(⁴)]. The decision of the Full Bench was undoubtedly intended to overrule these decisions. It was not a unanimous decision, Dwarkanath Mitter, J. dissenting, and its effect must not be extended beyond the actual decision. The Chief Justice pointed out that the defendant did not stipulate that the plaintiff should have an extended period of limitation and that there was ample time for the plaintiff to have issued his execution after the default; but he had not done so, and

(1) (1869) 18 W. R. 44, F. B.

(2) (1881) I. L. R. 3 All. 585, F. B.

(3) (1869) 11 W. R. 86.

(4) (1869) 11 W. R. 570.

that he saw nothing in the agreement of the defendant or in the consent of the Court of execution to allow the kistbundee to be filed, to extend the time allowed by law for executing the decree, time having expired at the end of three years from the date of the last step-in-aid of execution. There was nothing in that case which raised any estoppel against the judgment-debtor. The effect of the decision is made clear by two later decisions. In *Luchmeeput Singh Bahadoor v. Moonshee Jowahur Ali*⁽¹⁾ Couch, C.J., in dealing with a similar case, made the following observations: "The decision of the Full Bench [*Kristo Komul's*⁽²⁾ case] to which we have been referred is not applicable to the present case. The decision was that the decree-holder by agreeing to receive the amount of his decree by instalments, could not extend the period of limitation which the law allowed to him, and instead of counting the three years from the passing of the decree, count them from the time fixed for the payment of the first instalment. But this is a different case.....It is he (judgment-debtor) who waives as part of this agreement the benefit of the law of limitation, if the event should happen; and I know of no rule of law which prevents such an agreement as that being made; he in fact precludes himself from setting up the law of limitation, if the event should happen upon which the decree-holder is entitled to fall back upon and execute his decree. It would be most inequitable and contrary in fact to the intention of the parties, and would prevent such arrangements being entered into, if we were to hold that now the right to execute the decree having revived, the law of limitation shall be applied, and he shall not be allowed to execute it." In *Dinonath Sen v. Gooroo Churn Pal*⁽³⁾, the Chief Justice was dealing with a case where a judgment-debtor had entered into an arrangement for instalments with his

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(1) (1872) 18 W. R. 497.

(2) (1869) 13 W. R. 44, F. B.

(3) (1874) 21 W. R. 310.

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judgment-creditor and the parties had acted upon the kistbundee as if it had become part of the decree to the extent of moving the Court to credit payment made in satisfaction thereof; and it was held that in these circumstances the judgment-debtor was precluded from saying that the judgment-creditor was bound to execute the original decree and, if he could not execute that, to bring a regular suit upon the kistbundee. "He has by his conduct for some years treated this as the decree which the Court had made. Without deciding how far an alteration of a decree such as this was could be made by consent at the time the kistbundee was entered into, I think we must hold in the present case that the objection taken cannot and ought not to prevail." These decisions seem to me to apply in the present case where the compromise had been acted upon and payments made under it which were credited by the respondent; and the case is, in my opinion, not governed by the decision in *Kristo Komul Singh v. Huree Sirdar*(1).

The question raised by the decision in *Debi Rai's*(2) case is closely connected with this point. There also the decision was not unanimous, but it was decided that a decree altered by agreement of parties with respect to the mode of payment and the interest payable could not be executed as a decree and the acquiescence of the judgment-debtor in such execution cannot estop him from objecting to further execution of it. It may be worth noticing that that decision was under Act X of 1877; and section 210 which corresponds to Order XX, rule 11, contained a clause

"save as provided in this section and section 206 no decree shall be altered at the request of the parties"

a provision which is no longer in the Code. However that may be, there was a later decision of the Full Bench in *Sitaram v. Dasrath Das*(3) which is apparently inconsistent with the earlier decision. In

(1) (1869) 13 W. R. 44, F. B.

(2) (1881) I. L. R. 3 All. 585, F. B.

(3) (1883) I. L. R. 5 All. 492, F. B.

that case the decree was a mortgage decree for Rs. 1,211-5-0 with interest at six per cent. per annum and under an arrangement between the parties in execution Rs. 1,190-7-6 was to be paid in certain instalments with interest at 12 per cent. per annum and in default the entire decretal amount was to become payable with interest at 12 per cent. per annum. It was held by the Full Bench that the order of the executive court that the decree-holder was entitled to execute the decree in accordance with this arrangement was a legal and proper order. The whole matter was discussed by Mahmood, J. in *Muhammad Sulaiman v. Jhukki Lal*⁽¹⁾ where the later decision of the Full Bench was followed and it was held that although a Court executing a decree is not entitled to go behind the decree, yet, when an arrangement has been entered into for payment by instalments, the Court executing the decree is bound to give effect to the compromise; and an execution in terms of the compromise was allowed to proceed. The same view was taken in Calcutta in *Sheo Golam Lall v. Beni Prosad*⁽²⁾ and it was held that where the terms of the decree had been altered by agreement, the decree-holder was entitled to proceed upon the terms of the agreement. Their Lordships observed that "where parties by mutual agreement make certain terms and inform the Court of them, and the Court sanctions the arrangement and makes an order in conformity with it, either party, who had had the benefit of the arrangement and order, is not at liberty to resile from the agreement. The question, whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder". The same view was taken in Madras in *Sriranga Bupala Balai Rao Garu v.*

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(1) (1888) I. L. R. 11 All. 228.

(2) (1879) I. L. R. 5 Cal. 27.

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The right conclusion on this question is to be derived from the decisions of the Judicial Committee in *Sadasiva Pillai v. Ramalinga Pillai*⁽²⁾ which Mahmood, J. described as the leading case on the subject, and justly, because it is referred to in almost all these decisions and in *Pisani v. Attorney-General for Gibraltar*⁽³⁾. In the first of these cases there had been a decree for mesne profits up to the date of the suit only and an undertaking had been given by the defendant from time to time to be answerable for mesne profits pending his appeals to the High Court and to the Privy Council. Eventually the plaintiff applied in execution of the decree, for the mesne profits which had accrued subsequent to the decree and was allowed to recover them. Their Lordships treated the question as one that fell under what is now section 47, but added: "But even if it did not, they think that upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree." In the other case a number of instances were given where jurisdiction had by consent been exercised in a manner which was a deviation from the *cursus curiae* and it was held that this could be done unless there was an attempt to give the Court a jurisdiction which it did not possess or something occurred which was such a violent strain upon its procedure that it put it entirely out of its course. It cannot be said that the recording of this compromise by the Court executing the decree falls within either of these exceptions. I am, therefore, of opinion that the execution was not out of time on this ground.

The argument upon the clause in the agreement that in default of four successive instalments, the

(1) (1911) 13 Ind. Cas. 81.

(2) (1875) 15 Beng. L. R. 383, P. C.

(3) (1874) L. R. 5 P. C. 516.

whole of the amount of the decree should be realized is undoubtedly supported by a good deal of authority. This is a matter upon which there has been a conflict of judicial opinion; but in this Court what I may call the more liberal view has been taken: [see *Manindra Nath Rou v. Kanhai Ram Marwari*(¹) and *Ramsekhar Prasad Singh v. Mathura Lal*(²)]. It seems to me, when the last two clauses of the agreement are read together, that the intention of the parties was to leave it at the option of the decree-holder either to enforce the payment of the whole of the decretal amount at once or to continue to abide by the instalments. The present application is therefore, in my opinion, not out of time.

In the cross-objection the respondent contends that the view taken by the Subordinate Judge about the instalments which fell due from July to September, 1925, was the correct view. In my opinion this view rests upon a construction of paragraph 3 of the agreement which is not the correct construction.

I would, therefore, dismiss both the appeal and the cross-objection with costs.

ROWLAND, J.—I agree.

Appeal and cross-objection dismissed.

APPELLATE CIVIL.

Before Ross and Chatterjee, JJ.

DURGA PRASAD SAHU

v.

MUSAMMAT POWDHARO KUER.*

Execution—application for a relief which could not be granted under the law—application, whether one “in accordance with law”—limitation.

* Appeal from Original Orders nos. 206 and 218 of 1928 and no. 48 of 1929, from a decision of Mr. Ihtisham Ali Khan, Subordinate Judge of Saran, dated the 8th of August, 1928.

(1) (1919) C. W. N. (Pat.) 46.

(2) (1925) A. I. R. (Pat.) 557.

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