1936.

KUMAR SITARAM SINHA *v.* KUMAR JOGENDRA NARAYAN SINHA.

KHAJA MOHAMAD NOOR, J.

say. It is sufficient for the purpose of this appeal to hold that the plaint simply asks for a declaration that the record-of-rights is wrong as it omits the plaintiff's name and the extent of his share. Though Specific Relief Act is not in force in the Santal Parganas, section 25A of Regulation III of 1872 contemplates a declaratory suit. The fact that the plaintiff's name has not been recorded by the Settlement Officer is no ground by itself for holding that he must sue for possession. The plaintiff claims to be a sharer of the estate as a member of a joint Hindu family. The utmost that can be said is that it is a suit to do away with the effect of the decision of the Settlement Officer. In either view of the matter the court-fee payable is Rs. 15 under Schedule II, Article 17(*i*) and (*iii*) of the Court-Fees Act.

The appeal must, therefore, be allowed. The learned Subordinate Judge will restore the plaintiff's suit to its original no. and proceed to dispose of it according to law. The appellant will be entitled to get half costs (exclusive of court-fee on the memorandum of appeal) from the contesting respondents. He will get a certificate under section 13 of the Court-Fees Act for receiving back from the Collector the court-fee paid by him on the memorandum of appeal.

VARMA, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Saunders, J.

1936.

January, 7.

SATYABADI SAHU

v.

MANI SAHU*.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 2—*adjustment of decree, contract to do something in future, whether amounts to.*

*Circuit Court, Cuttack. Appeal from Original Order no. 12 of 1935, from an order of Babu S. M. Das, Subordinate Judge of Cuttack, dated the 15th August, 1935.

1936.

SATYABADI SAHU v. MANI SAHU.

A contract between the judgment-debtor and decree-holder that the judgment-debtor should for a certain sum assign certain property to the decree-holder is an adjustment within the meaning of rule 2 of Order XXI of the Code.

There was no reason why a decree should not be extinguished by a new contract between the parties.

Mara Ramanarasu v. *Matta Venkata Reddi*(1) and *Kalyanji Dhana* v. *Dharamsi Dhana*(2), followed.

Lala Lachhmin Das v. *Baba Kali Kamali Wala Ram Nath*(3), dissented from.

Appeal by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

B. N. Das, for the appellants.

Subba Rao and *H. Sen*, for the respondent.

COURTNEY TERRELL, C.J.—This is an appeal from a decision of the Subordinate Judge in execution. The respondent had obtained a decree against the appellants on bahi khata account and subsequently there was a compromise by which it was arranged that the appellants should pay a sum of Rs. 11,500. The appellants later applied to the learned Judge to investigate the allegation on their petition that they had entered into an arrangement with the respondent by which the decree was adjusted, the allegation being that a new contract had been entered into between the appellants and the respondent by which it had been agreed that the appellants should for a certain sum of money assign a certain property to the respondent. The learned Judge, however, declined to call upon the respondent to show cause why the alleged adjustment should not be recorded, holding that inasmuch as the contract alleged was to

(1) (1932) I. L. R. 56 Mad. 198.
(2) (1935) A. I. R. (Bom.) 303.
(3) (1921) 64 Ind. Cas. 990.

1936.

SATYABADI SAHU v. MANI SAHU.

COURTNEY TERRELL, C.J.

do something in the future that could not be considered an adjustment under Order XXI, rule 2. From time to time the Courts of India have given attention to the point noticed in the opinion of the learned Judge and for a time there was a current of decisions in some of the High Courts that a contract to perform something in the future could not be an adjustment within the meaning of Order XXI, rule 2. That view, however, may now be considered obsolete. Certainly I would be unwilling to follow the earlier arguments in some of the High Courts, notably that of Piggott and Walsh, JJ. in the case of *Lala Lachhmin Das* v. *Baba Kali Kamali Wala Ram Nath*(1) where one of the learned Judges, but not the other, took the view that contracts to perform acts in the future were not within the meaning of Order XXI, rule 2. The same learned Judge expressed the opinion that inasmuch as the contract relied upon was an oral contract and inasmuch as the decree was in writing, the matter was governed by section 92 of the Evidence Act and the evidence of an oral contract to modify a written contract was not admissible. That view was not followed except in one insignificant case and was not followed by the other High Courts in India. Indeed it has been many times expressly dissented from. In my opinion the clearest and the correct pronouncement of the law is in the judgment of the Madras High Court delivered in 1932 by Reilly and Anantakrishna Ayyar, JJ. in the case of *Mara Ramanarasu* v. *Matta Venkata Reddi*(2), and after a careful review of the authorities the learned Judges point out that there is no reason why a decree should not be extinguished by a new contract in which the judgment-debtor agreed to do something in the future if the decree-holder chose to accept the contract in the place of his rights under the decree. The same view was taken by Broomfield, J. in 1935 in the case of *Kalyanji Dhana* v. *Dharamsi Dhana*(3). In his decision the learned Judge carefully reviews

(1) (1921) 64 Ind. Cas. 990.
(2) (1932) I. L. R. 56 Mad. 198.
(3) (1935) A. I. R. (Bom.) 303.

the many earlier authorities on this point and agrees with the view expressed by the decision to which I have just referred. It would appear that the point of view that an agreement to do something in the future cannot be considered as an adjustment coming under Order XXI, rule 2, arose out of the earlier decision of Walsh, J. in which he had used the expression that an "inchoate" agreement could not be an adjustment. By the words 'inchoate agreement' I understand an agreement which has not been completed as an agreement. It is hardly necessary perhaps to deal with the proposition that an incomplete agreement cannot be an adjustment for it is not an agreement at all. There is a very pronounced distinction between the completion of the agreement and the completion of the acts which are to be performed in fulfilment of the agreement as Reilly, J. pointed out in the Madras case to which I have referred, provided there be an agreement in fact. The point that the agreement has got to be carried out in the future is not a point against the agreement and is no point against its being considered as an adjustment of the decree. The point taken under section 92 of the Evidence Act is at the present day hardly worthy of serious consideration. By the fresh agreement we do not find a modification of an old agreement but merely that it is agreed that the decree-holder shall abandon his rights under the decree and there is nothing in section 92 of the Evidence Act and there is nothing in the Contract Act to necessitate that such an agreement should be in writing.

The case, therefore, should go back to the learned Subordinate Judge in order that he may call upon the decree-holder to answer the allegation that the alleged agreement was come to. It may be that after investigation the learned Subordinate Judge may find that no such contract was in fact effected, in which case of course he will maintain his original decision. If, on the other hand, he should find that there has

1936.

SATYABADI SAHU v. MANI SAHU.

been in fact such a contract, then the contract whatever it is, if it is proved, should be recorded as the adjustment of the decree. The case should be disposed of by the learned Subordinate Judge as soon as he can possibly do so.

COURTNEY, TERRELL, C.J.

I would allow the appeal with costs.

SAUNDERS, J.—I agree.

Appeal allowed.

LETTERS PATENT.

1936.

December, 20.
January, 3, 7.

Before Wort and Rowland, JJ.

SORABJI DADABHAI

v.

BENGAL NAGPUR RAILWAY COMPANY.*

Railways Act, 1890 (*Act IX of* 1890), *sections* 58, 75 *and* 78—*declaration of value of valuable articles—plaintiff, whether can recover damages for loss according to true value and go behind the declaration—declaration found to be false—Estoppel.*

The plaintiff sued the Railway Company for damages for loss of a certain quantity of Ganja in transit out of a package which was part of a consignment and had made a declaration as regards the value of the entire consignment at the time of delivering the goods for despatch. The plaintiff valued the claim at a price in excess of the proportionate value according to the declaration.

Held, (*i*) the words "shall not exceed the value so declared" in section 75(2) must be read subject to the context, viz. "the compensation recoverable in respect of such loss, destruction and deterioration and therefore the contention of

* Letters Patent Appeal no. 63 of 1935, from a decision of the Hon'ble Mr. Justice Fazl Ali, dated the 26th of March, 1935, in second appeal no. 96 of 1932 (Cuttack Circuit), modifying the decree of Babu Ramesh Chandra Mitra, Subordinate Judge of Sambalpur, dated the 7th of June, 1932, in turn confirming the decision of Babu Sailendra Bhusan Sen Gupta, Munsif of Sambalpur, dated the 8th of October, 1931.