LETTERS PATENT APPEAL.

Before Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Wilberforce.

HEM RAJ AND BISHAN DAS (PLAINTIFFS)—*Appellants*,

versus

DOST MUHAMMAD (DEFENDANT)—*Respondent.*

1920

April 24.

Letters Patent Appeal No. 30 of 1920.

Compromise—not notified to Court—claim decreed subsequently—whether decree-holder can bring a fresh suit for recovery of sums on the compromise which he might have got by execution of the decree.

The plaintiffs-appellants brought a suit against the defendant-respondent for the recovery of money due to them by the latter. The evidence in the case had been closed on 25th January 1910 and the Court ordered certain files to be sent for, so the case was adjourned to 10th February, and on that day to the 28th February for the same reason. On the 19th February the defendant by way of compromise, executed a lease in favour of plaintiffs of certain land under which the latter's claim was to be adjusted. The plaintiffs, however, did not withdraw their suit, and on the 28th February the Court passed a decree in their favour. The plaintiffs having failed to recover their claim, now sued for the amount due to them under the lease; admittedly their decree had become barred by limitation

Held, that the decree superseded the compromise, and the plaintiffs could not now sue on the lease to recover the sum which they might have got by execution of the decree.

Moturi Seshayya v. *Sri Rajah Venkatadri* (1), approved. *Swamirao Narayana* v. *Kashinath* (2), *Tukaram* v. *Anantbhat* (3), *Keshab Panda* v. *Bhobani Panda* (4), distinguished.

Appeal from the decree of Mr. Justice Abdul Raoof, dated the 23rd December 1919.

RAM CHAND, *Manchanda*, for Appellants.

HAR GOPAL, for Respondent.

The facts are fully given in the Single Bench judgment under appeal.

(1) (1916) 31 Mad. L. J. 219.
(2) (1890) I. L. R. 15 Bom. 419.
(3) (1900) I. L. R. 25 Bom. 252.
(4) (1913) 21 Indianases 538.

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The judgment under appeal—

ABDUL RAOOF, J.—The facts giving rise to this second appeal briefly put are as follows :—

The plaintiffs obtained a decree against the defendant for Rs. 1,035 on the 17th of May 1909. In the same year they brought another suit for the recovery of Rs. 700 due on a bond. On the 19th of February the defendant executed a lease in favour of the plaintiffs of half of two squares of land with the following conditions :—(*a*) The plaintiffs to remain in possession and for seven years to realise the decretal amount of Rs. 1,035 ; (*b*) the plaintiffs to remain in possession of the same land as a lessee for another term of seven years to realise from the produce a sum of Rs. 900—the total of the two amounts to be recoverable came to Rs. 1,935 ; (*c*) in case of the land leased being confiscated by Government the defendant was to pay the balance personally.

According to the plaint the plaintiffs were put in possession under the lease. On the 11th of December 1912 the defendant applied to the Colonization authorities stating that he was prepared to pay what was due under the terms of the lease and that he was anxious to get back his lands. On the 4th of January 1913 the plaintiffs were made to give back the land to the defendant and give up possession, the balance remaining due was never paid ; thereupon the plaintiffs instituted the suit out of which the present appeal has arisen for the recovery of Rs. 1,543-14-6. They state the account in their plaint thus :—The amount secured under the lease was Rs. 1,935. The proportionate amount realisable during the period in which he was in possession by the land came to Rs. 691-1-6, deducting this amount from Rs. 1,935 the balance came to Rs. 1,243-14-6, adding interest to it, Rs. 300, the total balance claimed by the plaintiffs came to Rs. 1,543-14-6.

The suit was resisted by the defendant on various grounds, two of those grounds which were most important have formed the subject of discussion before me, and I shall mention them briefly here The second sum of Rs. 900, which was made recoverable by the plaintiffs under the term of the lease, was made up of two items, to wit, Rs. 800, which was acknowledged to be due on account of the claim made in the suit on the bond, the other item of Rs. 100 being due on *bahi* account.

With regard to the first item, namely, Rs. 800, the defendant urged that, in spite of the execution of the lease, the plaintiffs had not withdrawn the suit but had allowed a decree to be passed in their favour, and that therefore the claim relating to the Rs. 800 had merged in the decree. It is admitted that the decree is now barred by time and the plaintiffs are driven to the necessity of bringing a claim on the basis of the lease. The

lease is an unregistered document. The defendant, therefore, pleaded that it was not admissible in evidence. It was also pleaded that the plaintiffs had realised more than enough to liquidate the whole amount of the debt due to them, and that they were not entitled to claim anything. The Court of first instance cut down the rate of interest from 2 *per cent. per mensem* to Re. 1 *per cent. per mensem* and passed a decree in favour of the plaintiffs for Rs. 1,393-14-6. Both the parties being dissatisfied appealed against the decision. The appeal coming on for hearing before Mr. T. P. Ellis, District Judge, Shahpur, he referred to the first Court certain issues for determination. Findings were returned by the first Court on 1st July 1915. It is not necessary to refer to those findings because no reference is made to them in the judgment which is now under appeal, nor were those findings material for the decision which Mr. J. A. Ferguson has given in the case. The learned Judge of the Court below has held that having regard to the understanding between the parties the plaintiffs ought to have withdrawn their suit and ought not to have allowed it to proceed to a decree and that a decree having been passed it cancels the deed of lease *pro tanto*. The learned District Judge further found that the plaintiffs actually had realised Rs. 1,350. He, therefore, held that having realised more than Rs. 1,035 due under the decree the plaintiffs were not entitled to claim anything on account of that sum. With regard to the item of Rs. 800 he held that the plaintiffs could not realise it under the lease because their proper remedy was to realise the amount by executing their decree. The sum of Rs. 100 said to be due on *bahi* account was found by the learned Judge not proved. The defendant-appellant's appeal was therefore, accepted with costs and the plaintiffs' suit was dismissed. The plaintiffs' appeal, therefore, necessarily failed and was dismissed, with costs. The plaintiffs have come up in second appeal to this Court. On the contentions by the learned Vakils representing the parties the following questions arise for decision :—

(1) whether the lease which is unregistered is admissible in evidence under section 49 of the Indian Registration Act;

(2) whether the personal liability to pay the balance due is separable and can be separately enforced in spite of the fact that the lease may not be admissible so as to affect immoveable property; and

(3) whether the claim relating to the item of Rs. 800 is not maintainable for the reason that the plaintiffs allowed a decree to be passed for that portion of the claim.

I shall take up the last question first. If the plaintiffs are unable to recover this portion of the debt they have to thank themselves inasmuch as the *impasse* has been created by them. Having obtained a decree for the amount it is inconceivable how

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they can institute a fresh suit for the recovery of the amount decreed to them. The lease was executed on 19th February 1910, and the decree under discussion was passed at a subsequent date on the 28th February 1910. The legal consequence is that so far as the above mentioned amount was concerned the plaintiffs are precluded from claiming the amount otherwise than by executing the decree. The decision of the learned Judge of the Court below is correct on this point. In this view it becomes unnecessary to decide the first two questions formulated above. The finding relating to the realisation of Rs. 1,350 by the plaintiffs from the crops is a finding of fact with which I cannot interfere. As the amount received by the plaintiffs is more than Rs. 1,135 they are not entitled to claim anything on that account. The finding relating to the sum of Rs. 100 said to be due on *bahi* account is also a finding of fact and cannot be interfered with.

In view of the above conclusions the plaintiffs were not entitled to any decree, and the learned Judge of the lower appellate Court was justified in dismissing their suit.

I therefore dismiss the appeal with costs.

Appeal dismissed.

The judgment of the Court was delivered by—

CHEVIS, C. J.—The facts are fully stated in the judgment now under appeal. The sole question for us to decide is whether the plaintiff, having obtained a decree on the 28th February 1910 and having allowed that decree to become time-barred, can now fall back on the terms of the lease executed on the 19th February 1910 and get a fresh decree. For the plaintiff it is urged that after the execution of the lease the plaintiff did not again appear in Court, and that the decree passed in his absence and never executed by him goes for nothing. The evidence in the case had been closed on the 25th January 1910, and the Court had ordered certain files to be sent for, so the case was adjourned to the 10th February. On 10th February the files had not come, so the case was adjourned to 28th February. On the 19th the lease was written, and the parties having thus adjusted their dispute out of Court the plaintiff should have withdrawn the case. Apparently he took no steps to inform the Court of the adjustment, and on the 28th February

judgment was written and the case was decreed. There is no note as to attendance of parties or counsel at the head of the judgment, but the decree sheet shews pleaders as present.

For the plaintiff it is urged that when a decree is satisfied, as for instance, by a bond, a fresh suit is maintainable on the bond (see *Swamirao Naryana* v. *Kashinath* (1), *Tukaram* v. *Anantbhat* (2), and other rulings to the same effect), even though the adjustment be not certified to the Court which passed the decree; it is contended that the fact of the adjustment in this case preceding the decree instead of following it makes no difference. I think there is a difference. When a claim is adjusted prior to decree then the decree ought not to be passed; but if it is subsequently passed, then I do not see how it can be said to be satisfied by what took place prior to the decree. In the present case if the plaintiff had chosen to execute his decree I do not think the defendant could have produced the lease and pleaded that the decree had been satisfied thereby. Unless the defendant took steps to get the decree set aside I think the plaintiff could have insisted on execution though the defendant would probably have had another remedy. If instead of executing the lease on the 19th February the defendant had paid off the plaintiff by a cash payment, still I think the plaintiff could have executed the decree subsequently passed on the 28th February; though the defendant would, I think, have been able to sue to recover the money paid on the 19th. The above rulings seem to me to help the defendant rather than the plaintiff. If an adjustment subsequent to decree wipes out the liability under the decree why should not a decree subsequent to adjustment wipe out the liability under the adjustment? If the lease in question had been executed subsequently to the decree and duly certified to the Court, then I take it the plaintiff would have been unable to execute the money decree, but would have been able to bring a fresh suit to enforce the terms of the lease. In other words the lease would have been substituted for the decree. But as it stands I think it is a case of the decree substituting the defendant's

(1) (1890) I. L. R. 15 Bom. 419. (2) (1900) I. L. R. 25 Bom. 252.

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liability under the lease. The plaintiff cannot have the two rights, both to execute the decree and to enforce the lease. As I have already said I think he had the right to enforce the decree, and therefore I think he cannot now enforce the terms of the lease.

For the plaintiff it is urged that a contract is none-the-less binding because it is followed by a decree; see *Keshab Panda* v. *Bhobani Panda* (1). This is true enough in the case of compromises which are embodied in a decree. But what if the decree does not follow the compromise? Of course, it should do so, but mistakes will happen; and if a compromise is effected out of Court and not brought to the notice of the Court a mistake will in all probability happen. Suppose the plaintiff sued for Rs. 1,000, and the parties out of Court agreed that the defendant should pay Rs. 800, but the Court, unaware of the compromise, or misunderstanding the terms thereof, passed a decree for Rs. 700 only. The plaintiff could, of course, execute for Rs. 700 only. Could he bring a fresh suit for the remaining Rs. 100? I certainly do not think so.

For the defendant *Moturi Seshayya* v. *Sri Rajah Venkatadri* (2) is quoted. Here there was a suit between the parties in 1893 and another in 1895. The finding in the second suit was different to the finding in the first suit. The plea of *res judicata* should have been pleaded in the second suit, but apparently this was not done. In a third suit it was held that of the two earlier inconsistent adjudications the later must be held to have superseded the earlier. Here we have not two inconsistent decrees, but a compromise followed by a decree. The compromise and the decree are inconsistent, the former providing for payment of the debt by a farm of land, the latter providing for payment in cash. If instead of a compromise and a decree we had had two decrees the finding would be that the later superseded the earlier. Then are we to say that the decree in this case does not supersede the earlier compromise? If so we are putting the compromise on a higher level than a decree.

(1) (1913) 21 Indian Cases 538. (2) (1916) 31 Mad. L. J. 219.

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In my opinion the decree supersedes the compromise, and I do not think the plaintiff can now sue on the lease to recover the sum which he might have got by execution of decree. It is all very well for the plaintiff to say that he had no knowledge of the decree, or that he was content to let the decree lapse ; it was his duty to inform the Court of the compromise.

I would dismiss this appeal, but as plaintiff has lost his money I would leave the parties to bear their own costs.

WILBERFORCE, J.—I fully concur. The appeal is therefore dismissed. Parties to bear their own costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Wilberforce.

1920

April 26.

KHUSHI RAM (APPLICANT)—*Petitioner*,

versus

THE CROWN—*Respondent.*

Criminal Revision No. 149 of 1920.

Criminal Procedure Code, Act V of 1898, sections 145 and 146—inherent power of Magistrate to release property from attachment.

Khushi Ram, Petitioner, presented an application to the Magistrate praying for the release of a house which had been attached in a proceeding under section 145, Criminal Procedure Code, on the ground that Shadi Ram, the other claimant, had died, and that he, Petitioner, was his heir. The Magistrate refused this application as no judgment of a competent Court was produced as required by section 146, Criminal Procedure Code.

Held, that section 146, Criminal Procedure Code, is not exclusive, and that an attaching Magistrate has inherent power to release from attachment. When all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders passed on account of the dispute.

Sreeputty Chun v. *Empress* (1), *The Queen* v. *Kaly Kishroe Roy* 2), referred to

Revision from the order of Pandit Kishan Lal, Kichlew, Magistrate, 1st Class, Ludhiana, dated the 19th September 1919, rejecting the application.

BALWANT RAI, for Petitioner.

Nemo. for Respondent.

(1) (1875) 24 W. R. 14 (Cr.). (2) (1876) 25 W. R. 68 (Cr.).