appellant should be allowed a reduction of the total amount claimed as items 1 and 5 in case the remainder of the decree is upheld. We, therefore, dismiss the appeal with costs except in so far as to reduce the total amount by Rs. 1,587-10-8.

In this case a final decree had been given on the expiry of the period of grace allowed and a further interval of over three years and ten months has elapsed. The question, therefore, does not arise of any further action being taken before execution is sought.

A. R.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

GHULAM MUSTAFA AND OTHERS (DEFENDANTS) Appellants,

versus

GHULAM NABI AND OTHERS (PLAINTIFFS) Respondents.

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March 15.

Civil Appeal No. 1112 of 1919.

Civil Procedure Code, Act V of 1908, *Order XXIII, rule* 3—*Compromise dealing with other immoveable property besides that in suit—proper procedure—whether the compromise is admissible in evidence, being unregistered, where the Court has not recorded it nor passed a decree in accordance therewith—Indian Registration Act, XVI of* 1908, *section* 17 (1) (*b*) *and* (2) (*vi*) *and section* 49.

In 1909 the present respondents brought a suit for possession of certain land. The parties arrived at a compromise on the 9th February 1910, which declared the shares of the parties in 5 villages. The compromise was made in writing and tendered to the Court which held that as the suit was in respect of one village only, and the compromise dealt with the lands of the parties in five villages, a decree could not be passed in accordance with the terms of the compromise, and ordered "that the record of the

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case be consigned to the Record room according to the compromise." The agreement itself was not recorded; nor was a decree passed in accordance therewith. The present suit was brought to enforce the terms of the compromise in respect of part of the land thereby agreed to be allocated to the plaintiff-respondents. The defendant-appellants contended that the document could not be received in evidence as it had not been registered.

Held, that the procedure adopted by the Court in the 1909 suit was wrong. Under Order XXIII, rule 3, of the Code of Civil Procedure, the Court should have recorded the whole of the compromise and then passed a decree in accordance with so much of the compromise as related to the subject-matter of the suit.

Hemanta Kumari Debi v. *Midnapur Zamindari Company* (1); followed.

Held also, that if this had been done the respondents could have put the document of compromise in evidence in the present suit without having it registered. Such of its terms as were embodied in the decree would have been binding upon the parties as *res judicata*, and the order of the Court incorporating the terms not contained in the decree itself would have been "judicial evidence available to the respondents" that the appellants had agreed in those terms to the partition of the lands which were outside the scope of that suit.

Pranal Anee v. *Lakhshmi Anee* (2), followed.

Held, however, that in the present case as the compromise had not been recorded by the Court in a decree or order, the exception provided in sub-section 2 (*vi*) of section 17 of the Registration Act in respect of "any decree or order of a Court" was not applicable, and the deed of compromise being unregistered was consequently inadmissible in evidence.

Hari Chand v. *Maghi Mal* (3), and *Khair-ul-Nisa* v. *Bahadur Ali* (4), distinguished.

Second Appeal from the decree of M. H. Harrison, Esquire, District Judge, Sialkot, dated the 4th March 1919, affirming that of Lala *Devi Dial Dhawan, Subordinate Judge, 2nd Class, Sialkot, dated the 17th December 1917, decreeing the plaintiffs' claim.*

AZIZ AHMAD and MUHAMMAD RAFI, for Appellants.

ZAFRULLA KHAN, for Respondents.

(1) (1919) L. R. 46 I. A. 240, 246 (P. C.).
(2) (1899) L. R. 26 I. A. 101, 106 (P. C.)
(3) 78 P. R. 191
(4) 27 P. R. 1906

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The judgment of the Court was delivered by—

FFORDE J—The main question in this appeal is whether a certain document, dated the 9th February 1910, is admissible in evidence in a suit brought to enforce its terms, in spite of the fact that it has not been registered in accordance with the provisions of section 17 (1) (*b*) of the Indian Registration Act of 1908.

The facts, out of which the appeal has arisen, are shortly as follows :—In 1909 the respondents brought a suit for possession of certain lands. In the course of the proceedings the parties came to an agreement, and the suit was compromised upon terms which were reduced to writing and signed by all the parties to the suit except one for whom one of the signatories appears to have acted. The material parts of this document are as follows :—

" In the case noted above the plaintiff adult for himself and as guardian (*wali-sarparast*) of the minors, Ghulam Jilani, Muhammad Shafi and Muzaffar Khan on one side, and the defendants on the other, have entered into a mutual compromise to the following effect :—

" According to the conditions laid down in the deed of partition, dated the 10th January 1898, we have agreed to partition the lands, situate in the villages of Chanan Nagar, Ainowali, Raya Goraya, Mirak Pur and Bhoja Dhandsa (as noted in the said deed) in the following shares.

" Rahim Bakhsh, son of Ghulam Muhammad, and Jalal-ud-Din, son of Rahim Bakhsh .. ⅓rd share
" Ghulam Nabi, adult, and Ghulam Jilani, Muhammad Shafi and Muzaffar Khan, minors, sons of Inayat Ullah, plaintiffs .. ⅓rd share
" Ilahi Bakhsh, son of Ghulam Muhammad, defendant .. ⅓rd share.

" Thus each of us shall be owner of ⅓rd share in all the villages above mentioned. From today we have made a settlement in respect of the mortgage-money, paid by any co-sharer on behalf of the others for redemption of land or in respect of the payment of debt made by any of them. Nothing now remains due by any party to the other. We have entered into this compromise with the above-mentioned conditions.

" We have produced this deed of compromise for being accepted. Jalal-ud-Din, defendant, is not present. Defendant No. 1 is responsible for him.

" Dated the 9th February 1910."

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This document was tendered to the Court for the purpose of being recorded under the provisions of Order XXIII, rule 3, of the Code of Civil Procedure. The Court, however, seemed to think that it could not record the agreement embodied in this document as it included some parcels of land which were not the subject matter of the suit, and the Court thereupon dismissed the suit and at the same time made the following order :—

"The parties have entered into a compromise. As this general compromise is in respect of all the lands and the suit is in respect of one village only, a decree cannot be passed according to the compromise.

"It is, therefore, ordered that the record of the case be consigned to the record room according to the compromise.

"Dated the 9th February 1910."

The effect of this order is that the suit was dismissed upon the terms of the compromise, but the agreement itself was not recorded nor was a decree passed in accordance therewith.

In adopting this course the Court was clearly wrong. What it should have done was to record the whole agreement, even though it included matters outside the scope of that suit, and then pass a decree in accordance with so much of the agreement as related to the subject matter of the suit. In *Hemanta Kumari Debi* v. *Midnapur Zamindari Company* (1), the procedure to be adopted under section 375 of the Code of Civil Procedure, 1882, which corresponds to Order XXIII, rule 3, of the present Code, was suggested in the judgment of the Privy Council. The view expressed by Lord Buckmaster is as follows :—

"In the first place, it is plain that the agreement or compromise in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative

(1) (1919) L. R. 46 I. A. 240, 246 (P. C.)

part of the decree would be properly confined to the actua subject matter of the then existing litigation, the decree taken as a whole would include the agreement."

Had this procedure been adopted in the case before us the respondents could have put the document of compromise in evidence in the present suit without having it registered. Such of its terms as were embodied in the decree would have been binding upon the parties as *res judicata*, and the order of the Court incorporating the terms not contained in the decree itself, would have been "judicial evidence available to the respondents" that the appellants had agreed in those terms to the partition of the lands which were outside the scope of the former suit (*Pranal Anee* v. *Lakhshmi Anee* (1)).

The present suit has been brought to enforce the terms of the compromise in respect of part of the land thereby agreed to be allocated to the plaintiff-respondents. The appellants' contention now is that this document cannot be received in evidence as it has not been registered. This contention is founded on the judgment of the Privy Council already referred to, and on the later case, *Hemanta Kumari Debi* v. *Midnapur Zamindari Company* (2), which definitely decide that a written document embodying the terms of a mutual agreement compromising a suit, can only be received in evidence without being registered if its provisions have been recorded by the Court in the form of a decree. This exception is extended to agreements incorporated in a decree even in cases where the operative part of the decree does not contain all the stipulations and provisions contained in the agreement. In other words, if a suit has been adjusted in the manner contemplated by Order XXIII, rule 3, of the Code of Civil Procedure, and the terms and conditions of the adjustment have been reduced to writing by the parties, and if the Court has duly recorded those terms and conditions and passed a decree in accordance with such of them as are the subject of the then existing litigation, then the writing of the parties may be produced in evidence in any subsequent suit without being registered. In the present case the document evidencing the terms upon which the first

(1) (1899) L. R. 26 I. A. 101, 106 (P. C.) (2) (1919) L. R. 46 I. A. 240 (P.C.)

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suit had been adjusted between the parties, has not been incorporated in the decree of the Court nor has it been embodied in the order of the 9th of February 1910. The exception provided in sub-section (2) (*vi*) of section 17, which declares that nothing in clauses (*b*) and (*c*) of sub-section (1) applies to, among other things, "any decree or order of a Court," does not, therefore, cover this case.

It follows, therefore, that the document is subject to the provisions of section 17 (1) (*b*) and being unregistered is prohibited by section 49 of the Act from being received as evidence of the compromise arrangement.

The lower appellate Court thought that *Hari Chand* v. *Maghi Mal* (1), was a clear authority for holding that the document did not require registration, but we are unable to understand how the learned District Judge came to that conclusion. In that case the parties in a pending suit settled the matters in dispute by mutual consent. The document embodying the terms of the settlement was presented to the Court in which the suit was pending, for the purpose of having the mutual agreement recorded under the provisions of Order XXIII, rule 3, of the Code of Civil Procedure. The Court refused to act on the compromise on the ground that the document could not be accepted as it had not been registered, and on a further ground not material to the present question. The document was not tendered as evidence of a contract sued upon in that litigation, but was merely a memorandum of the terms upon which the parties had agreed to put an end to the litigation, and which the Court was requested to accept and record in accordance with Order XXIII, rule 3. It, therefore, could not possibly be held to come within the provisions of section 17 (1)(*b*) of the Registration Act. The Court was bound under the Civil Procedure Code to record the terms of the arrangement arrived at by the parties if it was satisfied that the arrangement was a lawful one and that it adjusted the suit either wholly or in part, and the appeal was brought against the order of the Subordinate Judge solely on account of his refusal to comply with the provisions of the Code.

That is an entirely different case to the present one. Here the document embodying the terms of the

(1) 78 P. R. 1917.

compromise is sought to be given in evidence in a fresh suit brought to enforce those terms, the previous suit which was compromised having been dismissed. The document is here tendered as evidence of the terms of the compromise which is sought to be enforced in the present litigation.

A number of other cases have been cited by counsel for the respondents, but in all those cases it appears that the document containing the terms of the compromise was in fact incorporated with, and given effect to by, the order of the Court which tried the suit. In one case only amongst those referred to there appears to be some doubt as to the extent to which the compromise was in fact incorporated in the order of the Court of first instance. This is the case of *Khair-ul-Nisa* v. *Bahadur Ali* (1). The judgment in that case discussed at some length the question as to what was the exact nature of the document of compromise, and certain *dicta* in the judgment of Rattigan, J, have been seized upon by counsel for the respondents as authority for the somewhat remarkable proposition that a document can be tendered as evidence in a suit without being registered, provided it is merely the record reduced to writing of an antecedent verbal arrangement. We confess we cannot follow this line of reasoning. Most contracts in writing are merely the formal documentary expression of an antecedent verbal arrangement, but it is an elementary principle of law that the antecedent agreement cannot be proved by parol evidence if the parties have reduced the agreement to writing. Where that has been done the writing itself must be tendered in evidence, and by section 49 of the Indian Registration Act, such writing, if it comes within the category of documents required by section 17 to be registered, cannot be received by the Court as evidence of the verbal agreement unless it is registered. This is subject to the *proviso* contained in sub-section (2) exempting *inter alia* any decree or order of a Court.

If *Khair-ul-Nisa* v. *Bahadur Ali* (1) does, as counsel for the respondents contend, in fact decide that a compromise, though requiring registration under section 17 of the Act, which is merely referred to by the Court, but the terms of which are not incorporated in an order

(1) 27 P. R. 1906.

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or decree, can be tendered as evidence in subsequent litigation without having been registered, all we can say is that that decision can no longer be a binding authority in view of the judgments of the Privy Council already referred to. We do not, however, agree that those were the facts in that particular case. It appears in the judgment of the Court that—

"The plaintiff and defendant were both examined by the Court with reference to the document and repeated in full detail all that was set forth in that document, the plaintiff concluding by expressly requesting the Court to dismiss her suit in accordance with the terms of the compromise. The Court accordingly wrote an order reciting the said terms, and dismissed the suit as prayed."

That case, therefore, cannot be said to conflict with the long series of authorities terminating in the decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapur Zamindari Company* (1). Holding as we do that the documentary evidence upon which the respondents rely is not admissible by reason of its not having been registered, we must accept the appeal, the appellants to have their costs throughout.

C. H. O.

Appeal accepted.

(1) (1919) L. R. 46 I. A. 240.