

ought to have filed her appeal before she got ill, that last two days is fatal.

I therefore confirm the decree of the lower appellate Court and dismiss this appeal with costs.

1928

MA THEIN
KHIN
v.
MA U BYU.

BAGULEY,
J.

APPELLATE CIVIL.

Before Mr. Justice Carr.

MA SHWE PEE

v.

MAUNG SAN MYO.*

1928

June 11.

Oral agreement to modify decree—Suit for damages for breach of agreement to certify adjustment—Evidence Act (1 of 1872), s. 92, no bar to proof of oral variation or novation.

Where a judgment-debtor sets up a verbal agreement by the decree-holder to accept some variation or a new contract in substitution of the original decree he is not debarred from doing so by s. 92 of the Evidence Act, in a suit for damages by him against the decree-holder for wrongfully proceeding with the execution of his decree and in contravention of his promise to certify the adjustment to the Court.

Lachhman Das v. Baba Ramnath, 44 All. 258—dissented from.

Maung Kun for the appellant.

R. M. Sen for the respondent.

CARR, J.—The plaintiff's case in this suit was that the defendant had a decree against him for rather more than Rs. 350, in execution of which she had attached a piece of land belonging to him. There were then negotiations between the parties and it was agreed that the decree-holder (the defendant) should accept Rs. 350 in full settlement of the decree. Rs. 329 was paid on the spot and it was further agreed that the remaining Rs. 21 should be paid at the next harvest. The defendant agreed to certify this adjustment to the Court and in fact went to see her pleader but not finding him left a petition reporting

* Special Civil Second Appeal No. 679 of 1927 against the judgment of the District Court of Henzada in Civil Appeal No. 98 of 1927.

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 MA SHWE
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 v.
 MADUNG SAN
 MYO.
 CARR, J.

adjustment with his clerk. This petition was never filed and the land under attachment was sold for Rs. 190. The plaintiff claims damages for the loss of his land owing to the execution of the decree being allowed to proceed after the compromise. The Township Judge dismissed the suit but gave no substantial reason for doing so. The District Judge held that the plaintiff's case was established and that he was entitled to damages and gave him a decree accordingly. The defendant now appeals against this decree.

On the facts it is quite clear that the finding of the District Court was correct. The only other point for consideration is an argument raised for the appellant that evidence of the alleged adjustment of the decree is inadmissible under section 92 of the Evidence Act. This argument is based on the judgment of Mr. Justice Walsh in *Lachman Das v. Baba Ramnath Kalikamlwala* (1). The learned Judge in that case held that the judgment-debtor setting up a verbal agreement by the decree-holder to accept some variation, or, as it may also be put, some new contract in substitution of the original decree, was barred from doing so by section 92 of the Evidence Act. I am entirely unable to follow this decision. In my opinion there is nothing whatever to prevent the parties from entering into an oral agreement for the settlement of decrees for money. They have the same freedom to do so as to make novation of contract by an oral agreement modifying the previous written contract so long, of course, as the contract is not required to be in writing and registered. I find therefore no reason whatever for interference with the decision of the District Court.

This appeal is dismissed with costs.

(1) (1921) 44 All. 258.