FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Dunkley, and Mr. Justice Braund.

A.N.A.R. ARUNACHALLAM CHETTYAR

v.

V.M.R.P. FIRM.*

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Mar. 25.

Adjustment of decree—Promise by judgment-debtor to do something in future—Performance of promise—Immediate satisfaction of decree on promise—Satisfaction conditional upon performance of promise—Civil Procedure Code, O. 21, r. 2.

A decree can be adjusted within the meaning of O. 21, r. 2 of the Civil Procedure Code by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a promise instead of the decree which he has. It is not necessary in every case that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete.

Per ROBERTS, C.J.—An adjustment of a decree must fulfil the essentials of any other valid contract before it can be enforced. It may be reached by the offer of a promise for a promise and mutual acceptances ; or it may be reached by the offer of a promise for an act. In the first case though the contract is executory there is an adjustment ; in the second case it is not the debtor's promise but his performance that results in an adjustment.

Per DUNKLEY, J.—A promise to do something in future is legal consideration and if the decree-holder chooses to accept such a promise by the judgment-debtor in satisfaction of the decree, there is a legal adjustment of the decree. An inchoate agreement without being completed cannot be pleaded as a bar to execution.

Per BRAUND, J.—The first question is whether there has been a concluded contract at all. The second question is whether or not it is a term of that concluded contract that the decree shall be immediately extinguished or whether its extinguishment is made conditional upon the previous execution by the judgment-debtor of his promise. In the former case there has been an "adjustment"; in the latter there has not.

Ramanarasu v. *Venkata Reddi*, I.L.R. 56 Mad. 198, followed.

Kalyanji v. *Dharamsi*, 37 Bom. L.R. 230 ; *Palibandhu* v *Garapati*, 69 M.L.J. 77 ; *Satyabadi* v. *Mani*, I.L.R. 15 Pat. 390, referred to.

Lachhman Das v. *Baba Ramnath*, I.L.R. 44 All. 258 ; *N.P.L. Firm* v. *Bhanja*, Civil 1st Ap. No. 82 of 1933, H.C. Ran., explained

* Civil Reference No. 9 of 1937 arising out of Civil First Appeal No. 74 of 1937 of this Court.

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An order of reference was made by Baguley and Sharpe JJ. in the following terms :

BAGULEY, J.—This case arises out of execution proceedings. The V.M.R.P. Firm got a mortgage decree against, among others, A.N.A.R. Arunachallam Chettyar. The mortgaged property was put up for sale and sold, and in the end there was a personal decree against two of the judgment-debtors for Rs. 21,000 odd. Execution proceedings were taken to sell certain land. In the course of these proceedings the decree-holder certified part satisfaction of the decree by payment of Rs. 3,500. A little later, however, before any land had been sold, the present appellant filed an application, in which he says that an arrangement had been come to between him and the decree-holder by which the decree-holder agreed to accept in full satisfaction of the decree the sum of Rs. 3,500 and a transfer of eighty acres of paddy land, which he was to select from the judgment-debtors' land and which the judgment-debtors were then to transfer to him. He stated that he had paid the Rs. 3,500 and was ready and willing to transfer the eighty acres of paddy land as soon as the decree-holder made his selection. The learned Judge refused to hold an inquiry. He did not even decide whether the application was time-barred or not. He felt himself bound by two rulings of this Court ; one officially reported [*A.K.R.M.M.C.T. Chetty Firm* v. *Maung Tha Din* (1)], and one unofficially reported [*N.P.L. Firm* v. *B. K. Bhanja* (2)]. From these rulings he deduced that because the agreement pleaded was still in part executory, it could not be an adjustment within the meaning of Order XXI, rule 2, Civil Procedure Code. What assistance in this matter can be obtained from *A.K.R.M.M.C.T. Chetty Firm*'s case (1) I do not know : it does not appear to me to be in point at all. With regard to *N.P.L. Firm*'s case (2), it is unfortunate that this judgment has ever been published. It was a short judgment dictated from the Bench and is not really understandable without a knowledge of the facts. It would appear that in that case it was pleaded that the decree-holder had agreed to buy some land at Rs. 100 an acre, but it was admitted that the land had not actually been transferred. The exact terms of the agreement alleged are not deducible from the judgment alone, and what the judgment says is :

"The agreement relied upon is merely an executory agreement to adjust ; and before it has become an executed

(1) (1929) 7 Ran. 310. (2) A.I.R. (1934) Ran. 190.

agreement, *viz.*, a transfer of the land by the appellants to the respondent decree-holder, and thereby become an adjustment to the satisfaction of the decree-holder, the agreement cannot amount to an adjustment which may be taken into account in the execution of the decree."

The headnote that has been added to this Report, I regret to say, I am unable to understand ; but it would appear that this has been quoted in some Reports apparently to the effect that unless all the terms of an agreement had been carried out there can be no adjustment. If this is the meaning of the judgment, which is a judgment of a Bench of this Court, with respect, I am unable to agree.

It seems to me that the true position of affairs is set out in *Mara Ramanarasu* v. *Malla Venkata Reddi* (1), in which Reilly J., if I may say so, sets out with great clearness when an agreement is, and when it is not, an adjustment ; and, as he shows, a purely executory contract may become an adjustment. To alter his illustration slightly : if "A" has obtained a decree against "B" for Rs. 100, and then agrees with "B" that if "B" promises to pay him Rs. 1,000 when his father, aged 90, died, he will take that in full satisfaction of his decree for immediate payment of Rs. 100, the acceptance of the promise to pay Rs. 1,000 on the death of his father is a complete transaction which extinguishes the decree ; and yet it cannot be said that the agreement to pay Rs. 1,000 on a future date is anything but a mere executory contract : the judgment-debtor has paid nothing, but the promise has been accepted in consideration of giving up of all rights under the decree. The headnote of this judgment is as follows :

"A transaction which extinguishes a decree as such in whole or in part is an adjustment of the decree within the meaning of rule 2 of Order XXI of the Code of Civil Procedure.

A promise to do something in future is legal consideration, and there is no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree. Where the decree-holder accepts such a promise, there is a new contract amounting to a legal

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> adjustment of the decree on the basis of which the judgment-debtor is entitled to apply to the Court to enter up satisfaction of the decree."

With the whole of this headnote I agree; and it seems to me that the idea that no executory agreement can be an adjustment is fallacious. It is necessary to distinguish between two things: In one case the decree-holder accepts the promise to do something in return for the extinguishment of his decree: the agreement is then an adjustment; on the other hand, if the decree-holder makes an offer to adjust and says, "If you do this, then I will accept it in satisfaction of the decree", then there is no adjustment until the thing has been done: but there is nothing to prevent the decree-holder accepting the promise to do a thing as a complete adjustment; it all depends on the actual nature of the agreement come to.

As my view on this point appears to run counter to the Bench decision of this Court which had been brought to our notice, I think it better to have the matter referred to a Full Bench. The question which I would refer is as follows:

> "Can a decree be adjusted within the meaning of rule 2 of Order XXI, Civil Procedure Code, by a new contract that the judgment-debtor will do something in future, if the decree holder is willing to take such a promise instead of the decree which he has; or is it in every case necessary that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete?

The wording of the question could, I know, be better framed, but the real point which I wish to have decided is whether the Madras case of *Mara Ramanarasu* (1) has been correctly decided, but I hardly see how a decision of another Court can be made the subject of a reference in this Court.

SHARPE, J.—It is necessary for the proper determination of this appeal to know what is meant by the word "adjustment" in Order 21, rule 2. To my mind there is no doubt that Mr. Justice Reilly correctly (and, if I may say so, in admirable phraseology) stated the true position in *Ramanarasu* v. *Venkata Reddi* (1); I refer particularly to the long paragraph which commences on page 205 and ends at the top of the next page. Unfortunately, however,

(1) (1932) I.L.R. 56 Mad. 198.

there is a decision of this Court, in the case of *N.P.L. Firm* v. *B. K. Bhanja* (1), from which it is possible to say that this Court has taken a view different from that adopted in Madras. The only report of that Rangoon case is to be found in the unofficial All-India Reporter. The terms of paragraph 3 of the Petition in that case do not appear from the report, which is unsatisfactory and one upon which I would not care to place too much reliance. But there is in it sufficient to prevent our disposing of this appeal by giving a decision in line with the view taken in Madras.

In *King-Emperor* v. *Nga Lun Thoung* (2), the former Chief Justice said at pages 586-7 : "It is a fundamental of the constitution of the Court that where one Bench of the Court in unambiguous terms has laid down the law in a certain sense it is not competent for another Bench of equal standing to refuse to follow the earlier decision, or to give to the language used therein a meaning contrary to that which the words used would naturally bear."

I therefore agree with my brother Baguley that the present is a case in which a question should be referred for determination by a Full Bench of the Court. I concur with my learned brother that the question which he has proposed is the one which should be put in this case.

P. B. Sen for the applicant. An executory contract can be the basis of an adjustment within O. 21, r. 2 of the Civil Procedure Code. See *Ramanarasu* v. *Venkata Reddi* (3); *Satyabadi* v. *Mani* (4); *Kalyanji* v. *Dharamsi* (5); *Patibandhu* v. *Garapati* (6); *Bharat National Bank, Ltd.* v. *Bhagwan Singh* (7); *Surput Singh* v. *Maharaj Bahadur Singh* (8).

The judgment in *Luchman Das* v. *Ramnath* (9) is correct, but the headnote is somewhat misleading. An inquiry is necessary in this case as to what agreement the parties came to.

Clark for the respondent. In this case the judgment-debtor has only made an offer, and there is no

(1) A I.R. (1934) Ran. 190.
(2) (1935) I.L.R. 13 Ran. 570.
(3) I.L.R. 56 Mad. 198.
(4) I.L.R. 15 Pat. 390.
(5) 37 Bom. L.R. 250.
(6) 69 Mad. L.J. 77.
(7) A.I.R. (1935) Lah. 347.
(8) A.I.R. (1937) Cal. 232.
(9) I.L.R. 44 All. 258.

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concluded contract between the parties. A decree can be adjusted by any contract, but in the large majority of cases decree-holders want performance and not a mere promise for the adjustment of a decree.

ROBERTS, C.J.—I have had the advantage of reading the judgment about to be delivered by my learned brother Dunkley and I agree with it. I desire only to make a few observations with regard to the adjustment of a decree within the meaning of Order 21 rule 2.

A new agreement between the parties may be certified to the Court whose duty it is to execute the decree; thereupon the Court shall record the new agreement and it takes the place of the decree. An uncertified adjustment cannot be recognized by any Court executing the decree.

Now the adjustment, or new agreement, must fulfil the essentials of any other valid contract before it can be enforced as such.

It may be reached by the offer of a promise for a promise and mutual acceptances; as for instance where the decree holder agrees to accept a mere promise by the judgment debtor to convey certain lands to him. The fact that the contract is executory on both sides does not mean that it is any the less a valid agreement and adjustment of the decree.

On the other hand the adjustment, or new agreement, may be reached by the offer of a promise for an act; as for instance where a decree holder agrees that upon the conveyance by the judgment debtor of certain lands to him he will accept them in full settlement of the decree. In such a case a mere promise by the judgment debtor to do so does not conclude the agreement for it is not his promise but his performance which is asked for and which is to form the basis of a contract.

It is therefore necessary to see, as in the case of every other alleged contract, whether the parties really came to terms and were *ad idem*, or whether the negotiations proceeded no further than proposals and counter proposals without the clear and definite acceptance of an offer which is the necessary foundation of every concluded contract. If they came to terms it does not matter that the concluded contract was still executory. A contract is said to be executory when it is as yet not performed or only partly performed by both parties; when one party has completely fulfilled his obligations in respect of the contract he is then said to have executed the contract. If they did not come to terms there can be no adjustment, and the offer of promises which are not accepted in the precise terms in which they are made cannot be recorded as such.

DUNKLEY, J.—The question which has been referred for the decision of the Full Bench is as follows:

"Can a decree be adjusted, within the meaning of rule 2 of Order XXI, Civil Procedure Code, by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a promise instead of the decree which he has; or is it in every case necessary that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete?"

The answer to the first part of this question is plainly in the affirmative and the answer to the second part is in the negative.

The law regarding executory contracts as adjustments of decrees has been clearly laid down by a Bench of the Madras High Court in *Mara Ramanarasu* v. *Matta Venkata Reddi* (1), and we respectfully concur in the judgment of Reilly J. in that case. This decision

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has subsequently been followed by the Madras High Court itself in *Patibandhu Raghupathirayadu* v. *Garapati Pichaya* (1). It has also been followed by the Patna High Court in *Satyabadi Sahu* v. *Mani Sahu* (2) and by the Bombay High Court in *Kalyanji Dhana* v. *Dharmsi Dhana & Co.* (3). There are also judgments of the Calcutta and Lahore High Courts to the same effect, in which judgments *Mara Ramanarasu* v. *Matta Venkata Reddi* (4) was cited with approval.

The decision of a Bench of the Allahabad High Court in *Lachhman Das* v. *Baba Ramnath Kalikamliwala* (5) has been cited as being contrary to the Madras decision ; but when the facts of this case are considered with the judgments it becomes clear that there is nothing in this decision which is opposed to the decision in *Mara Ramanarasu* v. *Matta Venkata Reddi* (4). The headnote of the report seems to be too broadly stated, for it appears from the judgment of Piggott J. (at page 262), that the agreement under consideration was not an executory agreement, but was an inchoate agreement, in that a proposal made by the decree-holder for adjustment of the decree had not been legally accepted by the judgment-debtor. The decree-holder had proposed to the judgment-debtor that he would accept satisfaction of his decree in a modified form and would abandon the execution proceedings if the judgment-debtor fulfilled four specified conditions. Acceptance of this proposal by the judgment-debtor could be only by performance of these four covenants, and he had not performed any of them. There was, therefore, no new contract in adjustment of the decree. The words used by Piggott J. (at page 263), when he says " it seems to me fairly clear that an

(1) 69 Mad L.J. 77.
(2) (1936) I.L.R. 15 Pat. 390.
(3) 37 Bom. L.R. 230.
(4) (1932) I.L.R. 56 Mad. 198.
(5) (1921) I.L.R. 44 All. 258.

oral agreement, not as yet performed by either party, could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree ", appear to be very wide; but they must be read subject to the facts of the case, and the facts were that no agreement had been concluded between the decree-holder and the judgment-debtor. Walsh J. in his judgment (at page 264) stated the real decision of the Bench when he said :

" An inchoate contract, which if completed would bar execution of a decree, cannot be pleaded as a bar to execution under order XXI, rule 2, and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution."

With due respect, this is, in our opinion, a correct statement of the law.

As stated by Reilly J. in *Mara Ramanarasu* v. *Matta Venkata Reddi* (1), there is no reason why a decree should not be extinguished by a new contract that the judgment-debtor will do something in future, if the decree-holder is willing to take such a contract instead of the decree which he has in his hand. A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment-debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. But, naturally, if a judgment-debtor comes into Court and alleges that his decree-holder has given up his decree, which he can execute at once, and accepted in its place a promise by the judgment-debtor that he will do something at a future date, and if that is disputed, then the evidence that the decree-holder has accepted

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such a promise must be carefully scrutinized. Cases in which a decree-holder has accepted a promise by his judgment-debtor to do something in the future as satisfaction of his decree must be rare, and what usually happens in cases of adjustment of decrees is that the judgment-debtor suggests terms of settlement and the decree-holder agrees to accept the performance of these terms by the judgment-debtor as a settlement. At that stage that is not a completed contract, but the settlement is still in the stage of negotiation. It is a counter-proposal by the decree-holder, which proposal can only be accepted by performance. That is what Piggott J. meant when in *Lachhman Das* v. *Baba Ramnath Kalikamliwala* (1) he said that an oral agreement not as yet performed by either party could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree; and that is what my brother Mya Bu and I meant in our short judgment in *N.P.L. Firm* v. *B. K. Bhanja* (2), which has apparently given rise to this reference.

The reporting of this latter case in the All-India Reporter exemplifies the danger of reliance on unofficial reports. The case before us was so plain and, in our view, of so little importance that we did not consider it necessary even to set out the facts in our judgment, and we certainly had no intention of enunciating any proposition of law. When the facts of that case are examined it becomes at once apparent that what we had before us was a suggestion for settlement of the decree which had not yet passed the stage of negotiation; there was no completed agreement between the parties. The use of the words "executory" and "executed" was perhaps somewhat unfortunate, and

(1) (1921) I.L.R. 44 All. 258. (2) Civ. First Ap. No. 82 of 1933, H.C. Ran.

it would have been better if we had described the agreement as inchoate ; but our judgment is not open to any possibility of misunderstanding if it is read, as it ought to be, in connection with the facts of that case.

The correct law regarding the adjustment of a decree by a new contract may perhaps be most plainly stated by means of an example. If **A** holds a decree against **B** and **B** offers to transfer certain property to **A**, and **A** accepts that promise to transfer in whole or part satisfaction of his decree, that is a binding contract which constitutes an adjustment of the decree in whole or in part, and can be pleaded by **B** in bar of execution. But if **A**, as is usually the case, agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but **A** has really made a counter-offer which can be accepted by **B** only by performance, *i.e.*, by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred.

The question referred will be answered in the above sense.

The costs of this reference to be costs in the appeal, advocate's fee five gold mohurs.

BRAUND, J.—I agree.

The question, as it seems to me, is in each case whether the decree-holder has, in fact, agreed immediately to take the judgment-debtor's promise—to use the words of the reference itself—" instead of the decree which he has. " If he has, then, even if the judgment-debtor's promise is executory, an " adjustment " has in fact been accomplished.

If there has been no concluded contract between the parties by a definite offer and a definite acceptance of that offer, it should be evident upon the ordinary

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principles of contract that there can have been no concluded "adjustment."

In my view, however, that does not quite end the matter. For there may well be a concluded contract that a decree shall be "adjusted" or "extinguished" *in futuro* without the stage of a present "adjustment" of the decree having been reached. If, for instance, the judgment-debtor agrees to transfer to the decree-holder a certain property upon a future date and, in consideration of that promise, the decree-holder agrees to release his decree when the property has been transferred, that is a contract. But it is not an "adjustment" within the meaning of Order 21 Rule 2 of the Civil Procedure Code. The decree for the time being stands and it does not become actually "adjusted" until the judgment-debtor's promise has been executed.

In short, there are I think two questions always to be considered. The first is whether there has been a concluded contract at all. The second is whether or not it is a term of that concluded contract that the decree shall be immediately extinguished or whether its extinguishment is made conditional upon the previous execution by the judgment-debtor of his promise. In the former case there has been an "adjustment." In the latter, there has not.

I think that the reference, having regard to the terms in which it is framed, should, as to the first part, be answered in the affirmative; and, as to its alternative in the negative.

G.B.C.P.O.—No 14, H.C.R., 6-7-38—1,750.