

APPELLATE CIVIL.

Before Addison J.

ABDUL KARIM AND OTHERS (DEFENDANTS)

Appellants

versus

HAKAM MAL-TANI MAL (PLAINTIFFS)

Respondents.

Civil Appeal No. 1427 of 1932.

*Civil Procedure Code, Act V of 1908, Order XXI, rule 2—
Adjustment of a decree out of Court—Certification thereof—
by Execution Court—Oral agreement varying the terms of a
decree—whether can be proved—Indian Evidence Act, I of
1872, section 92.*

The respondents obtained a mortgage decree for Rs. 13,172 against the appellants with a provision that if Rs. 2,000 were paid into Court by 31st March 1930 and Rs. 4,000 by 31st March 1931 the decree should be held to be satisfied and that in case of failure of either of these two instalments the whole amount of the decree would be payable. The first instalment was duly paid but not the second. The respondents later applied for execution of the whole decree. The judgment-debtors pleaded that when the time came to pay the second instalment they could not do so and asked for an extension of time to pay it, and that an agreement was arrived at that the judgment-debtors should pay Rs. 3,000 by the end of April, 1931, and the sum of Rs. 1,500 by the end of December, 1931, and thereon the decree should be considered fully satisfied as before. The judgment-debtors claimed that they had made these payments in time, and that therefore the decree was incapable of being further executed. The Lower Court held that the alleged oral agreement amounted to an adjustment of the nature referred to in Order XXI, rule 2, Civil Procedure Code, and should have been certified in Court within 90 days of the alleged completion, in December, 1932, which had not been done.

Held, firstly, that the oral agreement in the present case amounted to an adjustment of the decree, as it was alleged that the agreement was carried out and the instalments fix-

ed paid and, secondly, that as the last instalment under the agreement was alleged to have been paid in December 1931 the adjustment had to be certified within 90 days of its payment and that this not having been done the executing Court could not recognise the alleged adjustment.

Hotchand Tolaram v. Prem Chand (1), relied on.

Miscellaneous first appeal from the order of Mr. G. U. Whitehead, Senior Subordinate Judge, Simla, dated the 23rd of September 1932, disallowing the objection of the judgment-debtors and ordering the execution to proceed.

JALAL-UD-DIN and NIHAL CHAND MEHRA, for Appellants.

ACHHRU RAM, for Respondents.

ADDISON J.—The firm of Hakam Mal-Tani Mal obtained a consent mortgage decree for Rs. 13,172 against Abdul Karim, etc., but there was a provision that the decree would be held to be fully satisfied, if the judgment-debtors paid into Court Rs. 2,000 by the 31st March 1930 and Rs. 4,000 by the 31st March 1931, and that in case of default in paying either of these instalments, the whole amount of the decree with costs and future interest would be payable. Rs. 2,000 were paid before the 31st March 1930, but the sum of Rs. 4,000 was not paid by the 31st March 1931. Accordingly the decree-holder applied for execution of the whole decree by sale of the mortgaged property. The judgment-debtors, on 22nd July 1932, put in a petition to the effect that, when the time came to pay the second instalment of Rs. 4,000, they could not do so and asked the decree-holder for an extension of time. Accordingly, an agreement was arrived at that

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the judgment-debtors should pay Rs. 3,000 by the end of April 1931 and the sum of Rs. 1,500 by the end of December 1931; and if this were done, the decree was to be considered fully satisfied as before. The judgment-debtors claimed that they made these payments in time and that, therefore, the decree was incapable of being further executed. The decree-holder replied that the last payment alleged under the new agreement was to be made in December 1931 and that the objection of the judgment-debtors being dated the 22nd July 1932, it was time-barred as an application for certification under Order XXI, rule 2, Civil Procedure Code. The decree-holder also denied the facts, stating that the first instalment of Rs. 2,000 was paid on the 1st April 1930, that there was no oral agreement in 1931 and that although Rs. 3,000 were paid before the end of April 1931, nothing more was paid. The executing Court has held that the alleged agreement amounted to an adjustment of the nature referred to in Order XXI, rule 2, Civil Procedure Code, and that it ought to have been certified within 90 days of the alleged completion in December 1931. This not having been done, it rejected the objections and ordered the execution of the decree to proceed. Against this decision the judgment-debtors have preferred this appeal.

It was held in *Hotchand Tolaram v. Prem Chand* (1), that an oral agreement between parties to a decree varying the terms of the decree can be proved and that the proof thereof is not barred by section 92 of the Evidence Act. It was further held there that an oral agreement that an instalment of the decree is to be paid in Court, which is later on actually so paid,

(1) 1931 A. I. R. (Sind) 42.

amounts to an adjustment of the decree within the meaning of Order XXI, rule 2, and is capable of proof. With this ruling I am with all respect in agreement. It follows that the agreement pleaded in the present case amounted to an adjustment of the decree, it being alleged that the agreement was carried out and the instalments fixed paid. As the last instalment is alleged to have been paid in December 1931, the adjustment had to be certified within 90 days of its payment, that is, of the alleged completion of the agreement. This not having been done the executing Court could not recognize the alleged adjustment.

The decision of the Court below was, in my opinion, correct, and I dismiss the appeal with costs.

A. N. C.

Appeal dismissed.

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