APPELLATE CIVIL.

Before Coldstream and Bhide JJ.

SKINNER (VENDEE) (PLAINTIFF) Appellant

versus

MRS. R. M. SKINNER AND OTHERS (DEFENDANTS) Respondents.

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Nov. 11.

Civil Appeal No. 847 of 1933.

Compromise — pre-decree — not presented in Court — whether can be pleaded in executing Court as a bar to execution of decree — Suit for declaration — whether competent — Limitation for such suit — Indian Limitation Act, IX of 1908, Article 120 — starting point of — Res Judicata *— Civil Procedure Code, Act V of 1908, Section 11 Explanation IV — whether de-bars plaintiff from relying on the compromise — Compromise entered into with minors — without complying with Order XXXII, rules 6, 7 — whether enforceable.*

Held, that a pre-decree compromise not presented in Court cannot be pleaded as a bar to execution in the executing Court and must be enforced, if at all, by obtaining an injunction in a separate suit.

Held also, that section 47, Civil Procedure Code, presupposes the existence of a decree which is validly susceptible of execution. The executing Court can, therefore, only go into matters relating to the execution, discharge and satisfaction of the decree which arise *after* the decree came into existence and result in its discharge or satisfaction, and not into a pre-decree compromise like the one pleaded in this case, which practically nullifies the decree, and that the separate suit for declaration of the plaintiff's rights on the basis of the compromise was maintainable.

Dilsukh Rai v. Lachhman Das (1), and *Hassan Ali v. Gauzi Ali Mir* (2), followed.

Ram Das v. S. P. Netto (3), referred to.

Other case law, discussed.

(1) 1927 A. I. R. (Lah.) 894. (2) I. L. R. (1904) 31 Cal. 179.
(3) (1922) 67 I. C. 753.

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Held further, that as the defendants did not appear in the proceedings before the executing Court when the present plaintiff pleaded the compromise and did not repudiate the compromise till 1st August, 1929, the present suit was within time under Article 120 of the Indian Limitation Act.

Held however, that the plaintiff-appellant was bound to raise the plea of the compromise in the previous suit, in view of Explanation IV to section 11, Civil Procedure Code, and as he did not do so he was now debarred from raising it, the mere fact that the compromise was made with some of the plaintiffs in that suit only being no bar to its being presented in the Court; and as the parties proceeded with the suit, it was the decree of the Court and not the alleged compromise that must be held to have determined the rights of the parties finally.

Hem Raj v. Dost Muhammad (1), *Benode Lal Pakrashi v. Brojendra Kumar Saha* (2), and *Ram Das v. S. P. Netto* (3), referred to.

Held also, that the compromise was in contravention of Order XXXII, rules 6 and 7, Civil Procedure Code, and therefore not binding on the defendants who were minors at the time of the alleged compromise.

First appeal from the final decree of Lala *Jeshta Ram, Senior Subordinate Judge, Hissar, dated 1st February, 1933, dismissing the plaintiff's suit.*

SHAMAIR CHAND, SHAM LAL, J. L. KAPUR, PARKASH CHAND and YASHPAL GANDHI, for Appellant.

MOHAMMAD AMIN KHAN and MOHAMMAD DIN JAN, for Respondents.

BHIDE J.

BHIDE J.—This is a plaintiff's appeal, arising out of a suit for a declaration that the defendants are debarred from executing the Privy Council decree in suit No.97 of 1918, instituted in the Court of the

(1) I. L. R. (1920) 1 Lah. 445. (2) I. L. R. (1902) 29 Cal. 810.
(3) (1922) 67 I. C. 753.

Senior Subordinate Judge, Hissar, and for an injunction restraining them from executing it. The facts which led to the suit were as follows :—

On the 30th May, 1914, three brothers named Thomas Skinner, Robert Skinner and George Skinner entered into an agreement with R. H. Skinner, the plaintiff, for sale of certain villages in the Hissar District for a sum of Rs.4,23,000. Rs.5,000 were to be paid in cash and one lac of rupees by the 18th June, 1914. The balance was to be paid by transfer and adjustment of accounts in the Bank of Upper India. The first two conditions were fulfilled, but the third one was not, with the result that a sum of over rupees three lacs remained due from the vendee. The vendors instituted a suit against the vendee R. H. Skinner (suit No.97 of 1918, referred to as suit No.97 of 1918, in the judgment, but really instituted in 1917) for specific performance of the contract by payment of this sum and obtained a decree from the Court of the Senior Subordinate Judge, Hissar, on the 9th July, 1918. The vendee appealed to the High Court and during the pendency of the appeal, the legal representatives of Robert Skinner and George Skinner who are the defendants in the present suit are alleged to have entered into a compromise with the present plaintiff on the 5th November, 1923, giving up their rights in the suit entirely for a consideration of Rs.80,000, which was paid to them. The compromise however, was not presented to the Court and was, therefore, not embodied in the decree. The reason given for adopting such an extraordinary course is that all the plaintiffs in that case had not entered into the compromise. The decree of the Senior Subordinate Judge was affirmed by the High Court on 26th November, 1923. The vendee appealed to their Lordships of the

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Privy Council, but there also the compromise was not mentioned. The appeal was dismissed by their Lordships, though with a slight modification of the decree, which is not material for the purposes of the present suit. The decree of their Lordships of the Privy Council was passed on 16th December, 1927. The defendants in the present suit who were parties to the aforesaid compromise did not appear before their Lordships of the Privy Council.

The defendants did not at first make any attempt to execute the decree in their favour but one Shankar Das, who had a decree against the present plaintiff R. H. Skinner, attempted to execute it. When the question of execution of the decree was thus raised, R. H. Skinner presented an application to the executing Court under Order 21, rule 2, Civil Procedure Code, on 17th December, 1923, stating the facts relating to the compromise and praying that the decree may be recorded as satisfied. The executing Court, however, dismissed this application, holding that the alleged compromise could not be taken notice of by it, as it was arrived at during the pendency of the appeal in the High Court, but was not presented to the High Court and was not embodied in the decree. This order was passed on 29th October, 1924 (*vide* Ex.D.2 and the order thereon). Shankar Das's application was, thereafter dismissed, as he had no right to execute the decree in the manner in which he sought to do so. Nothing further happened till 1st August, 1929, when the present defendants made an application for execution of the decree passed by their Lordships of the Privy Council on 17th December, 1927, ignoring the alleged compromise. R. H. Skinner then instituted the present suit for a declaration and injunction in

order to prevent the execution of the decree. The suit was resisted by the defendants on various objections, most of which were upheld by the trial Court and the suit was dismissed. From this decision, R. H. Skinner has presented this appeal.

Before proceeding to discuss the merits of the appeal it may be stated that only some of the defendants in suit No.97 of 1918 had entered into a compromise with the present plaintiff and it is only against them that the present suit was instituted. The plaintiff does not dispute the right of the other decree-holders to execute the Privy Council decree in question.

The main points urged in this appeal were that the trial Court has erred in holding:—

(1) that the suit was not maintainable.

(2) that it was time-barred, and

(3) that the compromise alleged by the plaintiff was not binding on the defendants.

I shall take up these points in the above order.

As regards the first point, the trial Court has held that the alleged compromise could be pleaded as a bar to execution only in the executing Court as that Court alone has jurisdiction to decide *all* questions relating to execution, discharge and satisfaction of a decree according to the provisions of section 47, Civil Procedure Code, and therefore a separate suit was not maintainable for the purpose. There appears to be a considerable divergence of judicial opinion on the question as to whether a pre-decree compromise such as is relied on in the present case can be pleaded as a bar to execution in the executing Court only, or whether it must be enforced, if at all, by obtaining an

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injunction in a separate suit. The Bombay and Madras High Courts take the former view [see *Laldas Narandas v. Kishordas Devidas* (1), *Chidambaram Chettiar v. Krishna Vathiyar* (2)], while the Calcutta and Rangoon High Courts take the latter view [see *Hassan Ali v. Gauzi Ali Mir* (3), *Chhoti Narain Singh v. Mst. Rameshwar Koer* (4), *Mulla Ramzan v. Maung Po Kaing* (5) and *M. E. Moolla and M. E. Moola & Sons, Ltd. v. Chartered Bank of India, Australia & China* (6)]. The Calcutta as well as the Rangoon High Courts have dissented from the Bombay Full Bench ruling. The Madras rulings proceed largely on the principle of *stare decisis* [*see Venkatasubba Mudali v. Manickammal* (7)]. There is no ruling of this Court on all fours with the present case; but the rulings reported as *Dilsukh Rai v. Lachhman Das* (8) and *Ram Das. v. S. P. Netto* (9), so far as they go, appear to be in favour of the appellant. In *Dilsukh Rai v. Lachhman Das* (8), a pre-decree arrangement was pleaded by the judgment-debtors on the basis of which they claimed that they were not personally liable in spite of the provisions in the decree to the contrary. *Chidambaram Chettiar v. Krishna Vathiyar* (2), referred to above was relied on by the appellant in that case. The learned Judges pointed out that the Madras ruling had been dissented from by the Calcutta High Court and was moreover not exactly applicable to the case before them. For, the question before them was not whether the decree should or should not be executed, but whether the

(1) I. L. R. (1898) 22 Bom. 463 (F.B.).
(2) I. L. R. (1917) 40 Mad. 233 (F.B.).
(3) I. L. R. (1904) 31 Cal. 179.
(4) (1902) 6 Cal. W. N. 796.
(5) I. L. R. (1926) 4 Rang. 118.
(6) I. L. R. (1927) 5 Rang. 685.
(7) I. L. R. (1926) 49 Mad. 513.
(8) 1927 A. I. R. (Lah.) 894.
(9) (1922) 67 I. C. 753.

Court should depart from the terms of the decree and decline to execute it personally against the judgment-debtors. They held that the compromise alleged by the judgment-debtors, if given effect to, would involve variation in the terms of the decree and this was beyond the powers of an executing Court. In *Ram Das v. S. P. Netto* (1), the question was whether an order of discharge passed in insolvency proceedings could be pleaded in bar of execution of a money decree. It was held that the plea could have been taken up during the pendency of the suit which resulted in the decree and the executing Court had no power to go behind the decree.

Section 47 of the Civil Procedure Code is, no doubt, very widely worded and lays down that all questions relating to the execution, discharge and satisfaction of a decree shall be determined by the Court executing the decree. But there is, I think, an essential distinction between the functions of a Court which adjudicates on the rights of the parties and embodies the decision in a decree and the functions of a Court whose duty is merely to execute such a decree. As pointed out by the learned Judges of the Calcutta High Court in *Hassan Ali v. Gauzi Ali Mir* (2), section 244 of the Civil Procedure Code, 1882 (which corresponds to section 47 of the Civil Procedure Code of 1908) pre-supposes the existence of a decree which is validly susceptible of execution. The executing Court can, therefore, only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a *pre-decree* compromise like the one pleaded in this case which practically nullifies the decree. I respectfully

(1) (1922) 67 I. C. 753. (2) I. L. R. (1904) 31 Cal. 179.

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concur in this view and hold that the compromise in question could not be pleaded as a bar in execution proceedings, and that a separate suit for declaration of the plaintiff's rights (such as they might be) on the basis of the compromise is maintainable.

The next question for consideration is that of limitation. The learned Judge of the trial Court was of the opinion that the cause of action arose when the appellant's application under Order 21, rule 2, referred to above, for recording satisfaction of the decree was dismissed on 29th October, 1924, and that the suit being governed by Article 120 of the Indian Limitation Act and having been instituted more than six years after the cause of action arose, *i.e.* on the 21st April, 1931, was barred by time. As regards the application under Order 21, rule 2, it must be noted that it was not contested by the present defendants who did not put in appearance. The executing Court dismissed the application, but the plaintiff could have no cause of action against the defendants unless and until they repudiated the compromise and sought to execute the decree. It is admitted that no application for execution of the decree was made by the present respondents till 1st August, 1929, and they had not repudiated the compromise in question on any previous occasion. In the circumstances, the present suit appears to be clearly within time.

The next point for consideration is whether the compromise alleged by the plaintiff, even if it was entered into, has any legal effect and is binding on the defendants. The learned Judge of the trial Court has held that the agreement was not binding because—

(*a*) it was entered into during the pendency of the appeal in the High Court and was superseded by a decree; and

(*b*) secondly, because it was effected without the sanction of the Court in contravention of the provisions of rules 3 and 7 of Order XXXII, Civil Procedure Code, and was not for the benefit of the defendants, all of whom except defendant No.1 were admittedly minors on the date of the alleged compromise.

As regards the first point, the learned Judge has relied on Explanation 4 to Section 11, Civil Procedure Code and *Hem Raj v. Dost Muhammad* (1) and *Benode Lal Pakrashi v. Brajendra Kumar Saha* (2), and I agree with the view taken by him in the circumstances of the case. According to the alleged compromise, the defendants gave up their rights entirely in lieu of a consideration of Rs.80,000 which was paid to them. Consequently, after the payment of that sum they were not entitled to any decree at all. It was, therefore, incumbent on the present appellant to raise this plea in the previous suit in view of Explanation IV to Section 11, Civil Procedure Code, and as he did not do so, it seems to me that he is now debarred from raising it. It was conceded by the learned counsel for the appellant that the mere fact that the compromise was effected with some of the plaintiffs only was no bar to its being presented to the Court and the Court could have dismissed the suit so far as those plaintiffs were concerned. As the parties proceeded with the suit it is the decree of the Court and not the alleged compromise that must be held to have determined the rights of the parties finally. A similar view was taken in *Hem Raj v. Dost Muhammad* (1), in which the plaintiff tried to enforce a lease which he had obtained before the decree in a previous suit, but which he did not bring to the notice of the Court and

(1) I. L. R. (1920) 1 Lah. 445. (2) I. L. R. (1902) 29 Cal. 810.

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was consequently held to be superseded by the decree. *Benode Lal Pakrashi v. Brajendra Kumar Saha* (1) would also appear to support the view. It is true that the point was raised there in the executing Court, but the learned Judges did not base their decision on the want of jurisdiction in that Court. The decision in *Ram Das v. S. P. Netto* (2) (Lahore), also appears to me to support the respondents. It was held in that case that a plea as regards the discharge of a debt in insolvency-proceedings which could have been taken during the pendency of a suit, could not be raised after the decree as a bar to its execution.

In view of the above finding, it seems unnecessary to go into any other question for the purposes of this appeal. But I may add that the compromise was clearly in contravention of the provisions of Order 32, rules 6 and 7 of the Code of Civil Procedure, and was therefore not binding on defendants Nos.2 to 5, who were minors on the date of the alleged compromise, as sanction of the Court was not obtained. It is also not shown how the compromise can be said to have been for the benefit of the minors, as the appellant was liable to pay a sum of over three lacs, while he paid only a sum of Rs.80,000 according to the alleged compromise, and the minors continued to be still liable to the Bank of Upper India for a large sum, as pointed out by the learned Judge of the trial Court, as the encumbrance in favour of the Bank was not cleared.

The learned counsel for the appellant urged in the end that his client should at least be allowed a refund of the sum paid by him, with reasonable interest, and that the defendants should be restrained from executing the decree until they make such refund. The

(1) I. L. R. (1902) 29 Cal. 810. (2) 1922) 67 I. C. 753.

learned counsel for the respondents opposed this request on the ground that this point was neither pleaded nor put in issue. He pointed out that Mrs. Rosalind Skinner, defendant No.1 had alleged that the sum of Rs.40,000 received by her was repaid by her to an agent of the appellant soon afterwards. He contended further that it was not shown that the guardians of these defendants who were minors had spent the money for the benefit of the minors. The learned counsel for the appellant conceded that there was no specific issue on the question raised by him, but pointed out that the plaintiff had prayed for such alternative relief as he might be found to be entitled to and urged that it was always open to the Court to order such refund by way of restitution or damages.

In my opinion, there is force in the respondents' counsel's contention. The plaintiff sued only for a declaration and an injunction. He valued the suit arbitrarily at Rs.11,000 and paid Court fees of Rs.10 only in the first instance. On an objection being raised, the plaintiff's counsel contended that the suit was only for a declaration (the injunction being only a consequential relief) and hence the Court fee was sufficient (*vide* his statement, dated 23rd November, 1931, on the record). He was required to pay Court fee on Rs.11,000, but that was only on the arbitrary jurisdictional value he had fixed. If he were suing for refund of Rs.80,000 he would have been required to pay Court fees on that amount but no such question was raised. If the question of refund had been raised, the minor defendants might have taken up other pleas and shown that the amount was not spent for their benefit, as is contended by the learned counsel for the respondents. Moreover, when the suit was instituted, the defendants had merely applied for execution and

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had not realized anything. The plaintiff may become entitled to a refund of Rs.80,000 if the defendants succeed in realising Rs.80,000 or more. As matters stood at the date of the suit, the plaintiff could only sue for an injunction to restrain the defendants from executing the decree. If they execute it and realise anything in breach of the alleged contract it may be open to the plaintiff to sue for damages for breach of the contract.

As a result of the above findings, I would dismiss this appeal, but in view of all the circumstances leave the parties to bear their costs in this Court.

COLDSTREAM J. COLDSTREAM J.—I agree.

A. N. C.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

1936

Nov. 19.

MUSSAMMAT HARNAMO (DEFENDANT) Appellant

versus

DEWA SINGH AND OTHERS (PLAINTIFFS)
SANT SINGH AND OTHERS (DEFENDANTS) } Respondents.

Letters Patent Appeal No. 109 of 1936.

Colonization of Government Lands (Punjab) Act, V of 1912, sections 20 (c) and 21 — Unmarried daughter succeeding as a non-occupancy tenant — acquiring occupancy rights and then marrying — Revenue authorities conferring proprietary rights on her after *her marriage — whether they could do so.*

B. S. was the grantee from Government of some land in a Colony as a non-occupancy tenant. He died and was succeeded as a non-occupancy tenant by his unmarried daughter *Mst.* H. who, while still unmarried, acquired the occupancy rights. On her marriage in 1930, the collaterals