1885.

NENGÁPPÁ v. GANGÁWÁ.

The order of the District Judge, in appeal, setting aside the Subordinate Judge's order, dismissing opponent's application under section 103, is annulled; and the Subordinate Judge's order is restored. Costs on the opponent.

Order of the Appellate Court reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886.
March 9.

SHIREKULI TIMA'PA' HEGDA', (ORIGINAL PLAINTIFF), APPELLANT, *v.* MAHA'BLYA AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Penalty—Consent decree.

A consent decree provided that the defendant should retain possession of certain land in perpetuity on payment of a fixed annual rent to the plaintiff, but that the plaintiff might re-enter in case the defendant failed to pay the rent. The rent was not paid, and the transferree of the plaintiff's interest under the decree sued for possession. The defendant contended that the above clause in the decree was a penal stipulation which the Court would not enforce.

Held, that the doctrine of penalties was not applicable to stipulations contained in decrees, and that the plaintiff was entitled to recover.

SECOND appeal from the decision of Satyendranáth Tagore, District Judge of Kánara, confirming the decree of Ráv Sáheb Vishvanáth Vaikunth Wág, Subordinate Judge at Sirsi.

This action was instituted by plaintiff to recover possession of certain land, together with two years' arrears of rent. Plaintiff alleged that in a partition-suit brought by one Venkápá against the third defendant's father and others, a decree was passed by consent, whereby the father of the third defendant was allowed to retain possession of the lands now sued for, on condition of paying a fixed annual rent to Venkápá in perpetuity. The decree contained a stipulation that the plaintiff in that suit might re-enter in case the land were alienated, or in case the tenant failed to pay the rent. Plaintiff in the present suit stated that he had purchased the decree from one Sheshgiri, to whom it had been transferred by Venkápá, and he claimed to recover

* Second Appeal, No. 138 of 1884.

1886.

SHIREKULI TIMÁPÁ HEGDÁ v. MAHÁBLYA.

possession under the forfeiture-clause contained in the decree. The plaint also stated that the fourth defendant was the auction-purchaser of the rights and interests of the third defendant, and that defendants 1 and 2 had been put in possession of a moiety of the *mulgeni* land, in execution of a decree of the High Court against defendants 3 and 4.

Defendant 3 denied his possession and liability. Defendants 1, 2 and 4 offered to pay their respective shares of the rent due to plaintiff, and contended that the stipulation in the decree relied on by plaintiff was a penal one, and ought to be relieved against.

The Subordinate Judge of Sirsi held that the stipulation of forfeiture embodied in the consent decree was in the nature of a penalty, against which defendants might be relieved upon payment of the rent due to plaintiff. He, therefore, gave the plaintiff a decree for rent, but refused to award him possession, as claimed.

This decree was confirmed, on appeal, by the District Judge of Kánara.

The plaintiff thereupon preferred a second appeal to the High Court.

Náráyan Ganesh Chandávarkar for appellant.

G. R. Kirloskar for respondents.

BIRDWOOD, J.:—The defendants 1 and 2 were willing to pay rent for the lands in their occupation. They are jointly liable to pay Rs. 10. We concur with the District Judge that the decree, exhibit No. 24, obtained by Venkápá, through whom the plaintiff claims, was not binding on defendants Nos. 1 and 2, who were not parties to the suit in which it was made. It was, however, binding on defendant No. 4, who purchased the *mulgeni* right of defendant No. 3, who was the son of one of the parties to that suit. The decree was one made by consent of the parties. It created a perpetual tenancy, but contained a stipulation for the plaintiff's re-entry if the property was alienated, or if the defendant failed to pay rent. The plaintiff now seeks to eject on failure by defendants to pay rent. The Courts below have relieved against this stipulation, treating it as

1886.

SHIREKULI TIMÁPÁ HEGDÁ v. MAHÁBLYA.

penal. But, having regard to the decisions in *Bálprasád* v. *Dharnidhar Sakhárám*[1] and *Bálkrishna Bhálchandra* v. *Gopál Raghunáth* (I. L. R., 1 Bom., 73) we are of opinion that the Judge was in error in applying the doctrine of penalties to a stipulation contained in a decree giving effect to the compromise of a suit. The following remarks were made by West, J., in the former case:—"The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos; and as ordinary decrees are thus unchangeable, so we think are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court, must, if they fail to perform the one, perform the other, however greatly severe its terms may be."

We amend the decree of the District Judge by reversing so much of it as rejects the claim to eject defendant No. 4, and award the claim as against defendant No. 4. Defendants Nos. 1 and 2 to pay Rs. 10 to plaintiff. Defendant No. 4 to pay his own costs and the plaintiff's costs. Plaintiff to pay the costs of the other defendants.

Decree amended.

(1) The following is the judgment of West and Nánábhái, JJ., in *Bálprasád* v. *Dharnidhar Sakhárám* referred to in the above case:—

WEST, J.:—"The decree in this case was based on an agreement made by the parties. It was passed on the 21st February, 1874, and ordered payment, by the

1886.

SHIREKULI TIMÁPÁ HEGDÁ v. MAHÁBLYÁ.

judgment-debtors, of Rs. 881-6 within two months, and, failing such payment, it directed that they should pay Rs. 2,740. The Court closed on the 20th April, so that, on the last day of the two months, payment through the Court was impossible. The Court re-opened on the 1st June, and the Rs. 881 with interest were paid in on the 2nd June.

"The judgment-creditors refuse to accept this sum as satisfaction of the decree, and the Courts below have held that, as payment on the 21st April into Court was impossible, and payment on the 1st June was prevented by an accident, the intention of the decree will be satisfied by a delivery to the judgment-creditors of the sum paid in by the judgment-debtors. Before us it has been argued that the decree embodies a bargain, that the higher sum payable on default is a penalty, and that payment of it should not be exacted, seeing that reasonable diligence was exercised with a view to satisfying the order for the minor payment. This is, in effect, asking us to apply to the construction and enforcement of a decree the equitable principles by which the Courts revise the literal requirements of too rigorous contracts. If parties, instead of submitting to the judgment of the Court before which they have placed their dispute, make a decision for themselves by an agreement which they then ask the Court to reduce to a decree, there is no authority, that we know of, for treating the decree thus obtained as to be enforced in any way differently from one proceeding solely from the mind of the Judge. The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed, would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos; and as ordinary decrees are thus unchangeable, so we think are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court must, if they fail to perform the one, perform the other, however greatly severe its terms may be.

"In the present case the order was not to pay *on* the 21st April, but *on or before* that date. The defendants had two months *minus* two days in which to execute the order of the Court. Its vacation was duly announced, so that they had the means of knowing that payment could not be made on the last two days of the month. According to the case of *Mayer* v. *Harding*,(1) where the law requires something to be done within a given time, it must equally be done within that time, though performance during some part of the time is impossible. The command of the law thus expressed and its command proceeding from the mouth of a Judge are strictly analogous; and the judgment-debtors here

(1) L. R., 2 Q. B., 410.

1886.

SHIREKULI TIMÁPÁ HEGDÁ v. MAHÁBLYA.

being prevented, as they knew, from paying on the 20th or 21st April, could avoid incurring the alternative liability only by payment before the former date. They failed to pay in time, and thus part of the decree being no longer applicable they must pay according to its other command. We must, for these reasons, reverse the orders of the Courts below, and direct payment of Rs. 2,740 by the first judgment-debtor.

"The parties respectively to bear their own costs." (*See* Printed Judgments for 1875, p. 366.)

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1886 *March* 8.

RANCHHODDA'S KRISHNA'DA'S, PLAINTIFFS, *v.* BA'PU NARHAR, DEFENDANT.*

Evidence Act I of 1872, *Secs.* 11, 13 *and* 40—*Judgments between third parties—Admissibility of such judgment.*

The plaintiff sued to recover arrears of rent for a certain shop, alleging the annual rent to be Rs. 250. The defendant contended that t was only Rs. 60. The defendant and the plaintiff's brother were partners in business, and the plaintiff relied upon the evidence of his brother and on two entries in the firm's books in the writing of his brother. To prove the *bona fides* of these entries, the plaintiff tendered, in evidence, a judgment passed against the defendant in a suit brought by the defendant against the plaintiff's brother, charging him with having improperly debited their firm with Rs. 250 as the rent of the shop.

Held, that the judgment was not admissible as evidence against the defendant in the present suit.

Náranji Bhikábhái v. *Dipá Umed* (1) referred to and distinguished.

THIS was a reference by Ráv Sáheb Dinánáth Atmárám Dalvi, Joint Second Class Subordinate Judge of Ahmednagar, under section 617 of the Civil Procedure Code (Act XIV of 1882).

This was a suit to recover arrears of rent for a shop. The plaintiff alleged that the rent was Rs. 250 *per annum*, while the defendant contended that it was Rs. 60. In support of his allegation, the plaintiff relied upon the evidence of his brother and two entries in his handwriting in the books of the firm, of which the plaintiff's brother and the defendant were partners. To prove

* Civil Reference, No. 40 of 1885.

(1) I. L. R., 3 Bom., 3.