appellate Court and restore that of the trial Court with costs.

HEATON, J.:—I agree. Primarily an application under Order XXI, Rule 89 of the Civil Procedure Code must be made to the Court. The application in this matter was undoubtedly made to the wrong person in the first instance, and not made to the Court until long after the time allowed; unless the Collector or the Mamlatdar can be regarded as authorized to receive such applications on behalf of the Court. We are asked to infer such authorization from Rule 17 of the Rules. It seems to me this Rule can best be read as meaning that the Collector should not receive applications, but should return them to any one presenting them to him with an intimation that the persons presenting them must go to the Civil Court. On that interpretation of Rule 17 it follows that this appeal must succeed, and I agree with the order proposed.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton

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JAGANNATH AND TWO OTHERS, SONS AND HEIRS OF THE DECEASED KASHIRAM MANIRAM TAMBOLI, MINORS, BY THEIR GUARDIAN THEIR MOTHER HIRABAI (HEIRS OF ORIGINAL PLAINTIFF), APPELLANTS, *v.* SHANKAR VALAD GANPAT SHIMPI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS. *

Indian Evidence Act (I of 1872), section 92, proviso 4—Contract of mortgage —Oral evidence led to prove discharge of mortgage debt by payment of a smaller sum of money than actually due—Inadmissibility of such evidence.

* Appeal No. 29 of 1915 under the Letters Patent.

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In a suit by a mortgagee to recover Rs. 2,000 as balance due on two registered mortgage deeds, the defendant-mortgagor pleaded that the mortgagee had received Rs. 800 in full satisfaction of the mortgage debt. The lower Courts allowed oral evidence to show that the mortgages in suit were discharged by the mortgagee by a payment of Rs. 800. On appeal to the High Court,

Held, that oral evidence was inadmissible to prove discharge of the mortgage debt under section 92, proviso 4 of the Evidence Act, 1872.

Mallappa v. *Matum Nagu Chetty*[1], followed.

APPEAL under the Letters Patent against the decision of Batchelor J. confirming the decree passed by F. K. Boyd, District Judge of Nasik, confirming the decree passed by F. W. Allison, Assistant Judge at Nasik.

Suit for the recovery of money due on mortgage.

The plaintiff sued to recover Rs. 2,000 as balance due at the foot of an account of two registered mortgage deeds, dated the 8th September 1894 and 26th April 1899.

The defendants admitted the execution of the mortgage deeds sued upon but pleaded that their father paid a sum of Rs. 800 to the plaintiff who accepted it in full satisfaction of the mortgage debts.

The Assistant Judge allowed oral evidence led by the defendants to show that the plaintiff had agreed to accept Rs. 800 in full satisfaction of his claim and holding the defendants' contention proved dismissed the plaintiff's suit.

On appeal, the District Judge confirmed the decree.

The plaintiff appealed to the High Court. The second appeal No. 971 of 1913 was heard by Batchelor J. who confirmed the decree of the District Court on February 12, 1915.

[1] (1918) 42 Mad. 41.

The plaintiff preferred an appeal under the Patent.

A. G. Sathaye, for the appellants :—I submit that the lower Courts erred in allowing evidence to prove an oral agreement to take less in full satisfaction of a liability for a larger amount arising out of a transaction evidenced by a registered document. Such evidence is inadmissible according to the proviso 4 to section 92 of the Indian Evidence Act: see *Mallappa* v. *Matum Nagu Chetty*[1]. It is a Full Bench Ruling and on all fours with the facts of the present case.

G. S. Rao and *D. G. Dalvi*, for the respondents :—In the Full Bench case of *Mallappa* v. *Matum Nagu Chetty*[1], the subsequent agreement to take a lesser amount was admitted in the pleadings and was not therefore required to be proved. Besides, that case excepts the present case of a "perfected discharge by payment," as distinguished from a mere agreement.

We rely on the earlier cases of the Madras High Court: *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti*[2]; *Goseti Subba Row* v. *Varigonda Narasimham*[3]; *Kattika Bapanamma* v. *Kattika Kristnamma*[4]; which lay down that in the case of a discharge and satisfaction of the contract, perfected by actual payment—which is found as a fact in the present case—the proviso to section 92, clause (4), Indian Evidence Act, does not apply. The proviso refers only to "rescission or modification" which is quite different from an actual perfected discharge and satisfaction: see *Ramlal Chandra Karmokar* v. *Govinda Karmokar*[5]. The abovementioned Madras cases are not, therefore, touched much less overruled by the Full Bench case of *Mallappa*[1], as they proceeded on a different ground.

(1) (1918) 42 Mad. 41.
(2) (1902) 26 Mad. 195.
(3) (1903) 27 Mad. 368.
(4) (1906) 30 Mad. 231.
(5) (1900) 4 Cal. W. N. 304.

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MACLEOD, C. J. :—This is an appeal under the Letters Patent from the decision of Mr. Justice Batchelor. The trial Court had admitted evidence led by the defendant to show that the two mortgages in the suit were discharged by the mortgagee by a payment of Rs. 800. It was argued in appeal that this evidence was inadmissible on the ground that it rescinded or modified the contract required to be in writing which had been registered according to law. The learned appellate Judge has held that the evidence called and received was directed to a totally different purpose, namely, the purpose of showing that these contracts of mortgage had been terminated by the discharge of the obligation imposed by them, and he saw nothing in section 92 prohibiting the admission of such evidence. We have been referred to the recent case of *Mallappa* v. *Matum Nagu Chetty*[1], which seems to be exactly on all fours with the present case. The head-note runs: "A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under section 92, proviso 4, of the Indian Evidence Act." But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800 "I now discharge you from the mortgage," there was none the less an agreement which modified the original agreement of mortgage. It would

[1] (1918) 42 Mad. 41.

be an extremely dangerous precedent if oral evidence were allowed of such agreements. In this case it may be noted that the plaintiff himself denied having received Rs. 800, or having given a discharge on the mortgage, although the payment has been proved as a fact. But one can easily imagine that there may be many cases where the mortgagor may set up a false case of such an agreement, and it appears to me that it was to meet such cases *inter alia*, that proviso 4 of section 92 of the Evidence Act was enacted. In my opinion the appeal must succeed. The result will be that the defendant will be allowed credit for Rs. 800 which he has proved he has paid to the mortgagee. We allow the appeal with costs in proportion throughout, and remand the case to the lower Court to take an account in accordance with this judgment.

HEATON, J. :—I agree. But as the case presents so many possibilities of argument, I would like to put my conclusion in my own way. There are three ways in which the defendant's case might have been presented. The defendant might simply have pleaded that the mortgage was discharged and nothing further. That was not what he did plead, and presumably not what he could have proved. So I come to the second way in which the defendant could make his defence, and that was the way he adopted. He said that an agreement had been entered into between the mortgagee and the mortgagor according to which, on the payment of Rs. 800, which was only a part of the mortgage debt, the mortgagee would give a complete discharge, and the mortgage-deed would cease to operate. It is found as a fact that Rs. 800 were paid. But this payment was a payment of part only of the mortgage debt, so the mortgage-deed would still be operative ; it would still regulate the relations between the mortgagor and the mortgagee, unless there had been some modification of

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its terms. The modification suggested is that the mortgage debt should be changed, from what under the deed it would be, to a sum of Rs. 800. That would be a very large modification of the terms of the deed. This modification could not be proved, as is provided by proviso 4 to section 92 of the Evidence Act, by the method by which the defendant sought to prove it. We cannot therefore take it that the defendant can succeed in this way. He has not shown that the mortgage debt has been discharged because the law of evidence prevents him from showing it.

The third way in which the defendant might have presented his defence was one which has not been adopted by him, and as to which I will say nothing beyond mentioning it. He might have pleaded that the mortgagee had entered into an agreement to reconvey to him the mortgaged properties on payment of Rs. 800. Whether that defence would have availed him or not I do not know. But I do not wish my judgment to be understood as stating that a defence of that kind would necessarily be excluded by the law of evidence. I, therefore, agree with the proposed order.

Decree reversed.

J. G. R.