

APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice N. J. Wadia.

SHANKAR ATMARAM WANI (ORIGINAL DECREE-HOLDER), APPELLANT v.
KESHAV GOVIND TAMBULKAR AND OTHERS (ORIGINAL JUDGMENT-
DEBTORS), RESPONDENTS.*

1936
January 7

Civil Procedure Code (Act V of 1908), Order XXI, rule 2—Decree—Execution—Immovable property—Execution proceedings transferred to Collector—Adjustment of decree—Jurisdiction to record adjustment—Civil Court, and not Collector, has jurisdiction to record adjustment.

The Collector executing a decree sent to him by a civil Court is not a Court.

Bhagwan Das Marwari v. Suraj Prasad Singh⁽¹⁾ and *Balkrishnadas v. Malakajappa*,⁽²⁾ followed.

Where execution proceedings are transferred to Collector he has no jurisdiction to inquire into the question as to whether there has been an adjustment of the decree. It is for the Civil Court to determine the question judicially under Order XXI, rule 2, of the Civil Procedure Code, 1908.

Muhammad Said Khan v. Payaj Sahu⁽³⁾ and *Khushalchand v. Nandram Sahebram*,⁽⁴⁾ disapproved.

Reait-un-nissa v. Haji Muhammad Ismail Khan⁽⁵⁾ and *Abdul Shakur v. Muhammad Matin*,⁽⁶⁾ referred to.

FIRST APPEAL against the decision of M. R. Chaubal, First Class Subordinate Judge, at Jalgaon.

Proceedings in execution.

The facts are sufficiently stated in the judgment of Broomfield J.

P. N. Nijasure, for the appellant.

W. B. Pradhan, for the respondents.

G. S. Gupte, for respondent No. 1.

BROOMFIELD J. These are companion appeals in execution proceedings from the orders of the First Class Subordinate Judge at Jalgaon disposing of two darkhasts in accordance

*First Appeal No. 92 of 1932 (with First Appeal No. 293 of 1934).

⁽¹⁾ (1924) 47 All. 217.

⁽⁴⁾ (1911) 35 Bom. 516.

⁽²⁾ (1933) 35 Bom. L. R. 761.

⁽⁵⁾ (1891) 11 All. W. N. 189.

⁽³⁾ (1894) 16 All. 228.

⁽⁶⁾ (1924) 46 All. 414.

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with an adjustment set up by the respondents—judgment-debtors. The facts of the case are somewhat complicated and must be set out at some little length.

The plaintiff-appellant got a decree in suit No. 102 of 1924 for Rs. 10,000 to be paid by annual instalments of Rs. 1,000. He filed a darkhast on December 17, 1927, to recover Rs. 3,217-9-0, the amount then due, by sale of the mortgaged property. This darkhast was No. 1606 of 1927 and it was transferred to the Collector for execution. The plaintiff had another decree in suit No. 254 of 1923 against the defendants. This was for the amount of Rs. 14,500 payable by annual instalments of Rs. 2,000. The darkhast for the execution of this decree was filed on August 17, 1928, to recover Rs. 9,570 by sale of the mortgaged property. The first of these darkhasts is the subject of First Appeal No. 92 and the second is the subject of the companion appeal. While the proceedings in the first darkhast were going on before the Collector's subordinate, it is alleged that there was an adjustment of these two decrees and also of a third decree obtained by the plaintiff against the defendants in the Chalisgaon Court, the execution of which had not been commenced at the time of the alleged adjustment. Originally January 4, 1929, was fixed for the sale of the property, but the plaintiff had made various applications for fresh panchnamas in connection with the valuation of the property. Finally he requested the Mahalkari, who was acting for the Collector, personally to inspect the property to be sold. Accordingly on January 24, 1929, the Mahalkari went to the defendants' house and saw the property to be sold. The Sub-Registrar was also present at the invitation of the defendants and, as I say, it is alleged that on that day the parties came to terms adjusting for three decrees. The alleged terms were that the defendants were to convey two fields (survey Nos. 135 and 136) to the plaintiff for the sum of Rs. 14,500. Out of this, Rs. 1,500 were to be taken in part payment of the amount

due in darkhast No. 1606 of 1927, and Rs. 13,000 were to be taken in part payment of the amount due under the second darkhast. The balance remaining in respect of these two decrees and also the amount due under the decree of the Chalisgaon Court were to be paid by yearly instalments of Rs. 1,000 each, commencing from January, 1930. It was also agreed that the defendants were to pay off the mortgages on the two fields transferred to the plaintiff and were to obtain possession from the tenants who were in occupation.

It is agreed by both parties that there was a discussion about a compromise on these lines on January 24, 1929. The plaintiff says that he never consented to the terms but the defendants allege that he did consent and the contract was formally completed. Prior to this, the plaintiff had applied to the Collector for permission to bid at the auction sale. After some inquiry this permission was granted and the sale of the property was fixed for March 22, 1929. On March 20, 1929, two days before the date fixed for the sale, defendant No. 1 sold another field of his to one Dodhu by a sale-deed (exhibit 57). His case is that this was done in order to pay off the mortgages on the two fields which were agreed to be transferred to the plaintiff. The sale-deed—exhibit 57—contains a recital of the alleged adjustment of the plaintiff's decrees against the defendants. The defendants' case is that up till this time the plaintiff had accepted the arrangement which had been agreed to on January 24, 1929; but late on the evening of this day (viz. March 20), he suddenly changed his mind and repudiated the agreement. The defendants then made an application to the Subordinate Judge on March 21, 1929, alleging the adjustment of the decrees. The Court proceeded to hold an inquiry and held, after taking evidence, that the adjustment alleged by the defendants did actually take place. He thereupon passed orders in accordance with the adjustment, which have given rise to the present appeals.

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The learned advocate who appears for the appellant-plaintiff has taken the following points: first, that as the execution proceedings had been transferred to the Collector, the Court had no jurisdiction to entertain the defendants' application or to record the adjustment of the decrees or to stay the sale; secondly, that the alleged agreement does not amount to an adjustment within the meaning of Order XXI, rule 2, of the Civil Procedure Code; and thirdly, that the alleged agreement has not been proved. The first point, which is the only one which had caused us any serious difficulty, was not taken in the lower Court nor does it find a place in the memorandum of appeal. Under Order XXI, rule 2, any payment of money payable under a decree out of Court, and any adjustment of the decree in whole or in part, has to be certified to the Court whose duty it is to execute the decree. Section 71 of the Code provides that in executing a decree transferred for execution under section 68 the Collector and his subordinates shall be deemed to be acting judicially. But the Collector is not a Court; if he were a Court it would not be necessary to make any such provision, the object of which is that the Collector and his subordinates may be entitled to the benefit of the provisions of the Judicial Officers Protection Act, XVIII of 1850. That the Collector is not a Court whose duty it is to execute a decree has been held in *Bhagwan Das Marwari v. Suraj Prasad Singh*⁽¹⁾ and *Balkrishnadas v. Malakajappa*.⁽²⁾ In section 70, clause (2), of the Code, it is provided that the power conferred by rules on the Collector shall not be exercisable by the Court, but it is conceded that the power to record adjustments under Order XXI, rule 2, is not conferred by rules on the Collector. Powers which are not conferred on the Collector are exercisable by the Court, as held by Sir Lawrence Jenkins in *Pita. v. Chunilal*.⁽³⁾ *Prima facie*, therefore, the

⁽¹⁾ (1924) 47 Ail. 217.

⁽²⁾ (1933) 35 Bom. L. R. 761.

⁽³⁾ (1906) 31 Bom. 207 at p. 217.

judgment-debtors' application to the Court was competent and the Court had jurisdiction to make the orders appealed against.

Mr. Nijasure relies on *Muhammad Saïd Khan v. Payag Sahu*.⁽¹⁾ There it was held by Mr. Justice Burkitt sitting alone that a joint application by a decree-holder and a judgment-debtor, stating that a decree had been adjusted, was properly made to the Collector as being, within the meaning of section 258 of the Code of Civil Procedure (Order XXI, rule 2), "the Court whose duty it is to execute the decree". This decision was in 1894 and I may point out that in 1891 another Judge of the Allahabad High Court (Mr. Justice Mahmood) had expressed a directly opposite opinion—*Reait-un-nissa v. Haji Muhammad Ismail Khan*.⁽²⁾ *Muhammad Saïd Khan v. Payag Sahu*⁽¹⁾ was discussed in *Bhagvan Das Marwari v. Suraj Prasad Singh*,⁽³⁾ and Mr. Justice Mukerji observed at page 224 that "all that was held by Burkitt, J., was that it was the duty of the Collector to execute the decree and he was, therefore, properly seized of the application for adjustment". The view that the Collector is a Court for the purposes of section 258 was dissented from by both the learned Judges who decided this later case. *Balkrishnadas v. Malakajappa*⁽⁴⁾ is also a decision of a bench of this Court against the view. *Muhammad Saïd Khan v. Payag Sahu*⁽¹⁾ has also been referred to in *Arjuna Bin Raghu v. Krishnaji*,⁽⁵⁾ where Mr. Justice Beaman said that the principle underlying Burkitt J.'s decision appears to have been that there cannot be two Courts executing the same decree at the same time. Another Bombay decision which has been referred to is *Bhurchand Hansraj v. Vira Champa*,⁽⁶⁾ where it was held that the Collector is the sole authority so far as the machinery necessary for the satisfaction of the decree is concerned.

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⁽¹⁾ (1894) 16 All. 228.⁽²⁾ (1891) 11 All. W. N. 189, 190.⁽³⁾ (1924) 47 All. 217.⁽⁴⁾ (1933) 35 Bom. L. R. 761.⁽⁵⁾ (1914) 38 Bom. 673.⁽⁶⁾ (1912) 37 Bom. 32.

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In that respect the discretion is his and no civil Court can interfere with it. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. That jurisdiction is the civil Court's. It is that Court alone which is competent to determine the question judicially. These observations are hardly consistent with the view that the Collector can recognise an adjustment under Order XXI, rule 2, of the Code.

On the other hand, *Muhammad Said Khan v. Payag Sahu*⁽¹⁾ was approved of in *Khushalchand v. Nandram Sahebram*,⁽²⁾ where it was held on the authority of this case that the intimation of an adjustment to the Collector, who was in charge of the execution, amounted to a due certifying of the adjustment of the decree, which satisfied the conditions of section 258. It is by no means easy to reconcile this case with *Balkrishnadus v. Malakajappa*,⁽³⁾ where it has been held that the Collector is not a Court executing a decree. But, even if we assume that the view taken in *Muhammad Said Khan v. Payag Sahu*⁽¹⁾ and *Khushalchand v. Nandram Sahebram*⁽²⁾ is correct, it is one thing to hold that the Collector can take notice of an admitted adjustment but quite another to hold that he has power or that the Court has no power to inquire into the question as to whether there has been adjustment, if the fact is disputed. The Collector's powers are confined to the execution of a decree transferred to him. If the decree is adjusted, he is *functus officio*. That was one of the grounds for holding in *Khushalchand v. Nandram Sahebram*⁽²⁾ that the fact of an adjustment may be reported to the Collector. Mr. Justice Chandavarkar says at page 522 that :—

“When a decree-holder intimates to the Collector that his decree has been satisfied, and that the necessity for its execution by the Collector has ceased to exist, the

⁽¹⁾ (1894) 16 All. 228.⁽²⁾ (1911) 35 Bom. 516.⁽³⁾ (1933) 35 Bom. L. R. 761.

Collector's powers under sections 322 to 325 also cease, because the very foundation of them, consisting in the fact of a decree which is alive and capable of execution, has disappeared."

But *Muhammad Saïd Khan v. Payag Sahu*,⁽¹⁾ whatever authority it may have in view of the criticisms of it in later cases, is no authority nor is *Khushalchand v. Nandram Sahabram*⁽²⁾ any authority, for the view that the Collector can inquire into and determine whether a decree has been adjusted or not. In that connection I may refer to one other decision of the Allahabad High Court in *Abdul Shakur v. Muhammad Matin*.⁽³⁾ It was held there that when a decree of a civil Court is transferred to a Collector for execution, the Collector has to find out the best way of raising money in order to satisfy the decree. He has absolute jurisdiction to choose the best method allowed to him by the law. But beyond this it is not within his province to decide how much money is due to the decree-holder and how much of the decree has been satisfied. The case of *Bhurechand Hansraj v. Vira Champa*⁽⁴⁾ was cited with approval. It appears, therefore, that there are no grounds for holding that the learned Subordinate Judge acted without jurisdiction in entertaining this application. On the first point the appeal fails.

[The rest of the Judgment is not material for the purposes of this report.]

N. J. WADIA J. I agree.

Appeals dismissed.

J. G. R.

⁽¹⁾ (1894) 16 All. 228.

⁽³⁾ (1924) 46 All. 414.

⁽²⁾ (1911) 35 Bom. 516

⁽⁴⁾ (1912) 37 Bom. 32