

APPELLATE CIVIL.

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

1921.

July 7.

ELLIS ENAS PAVLO, GHARRY (ORIGINAL DEFENDANT No. 1), APPELLANT
v. KITTER PHILIP GOWRYA AND ANOTHER (ORIGINAL PLAINTIFF AND
DEFENDANT No. 2), RESPONDENTS^o.

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 2—Decree—Payment
under decree—Payment not certified to Court—Executing Court cannot
recognise such payment.*

The provisions of Order XXI, Rule 2, of the Civil Procedure Code, 1908, are not confined to money decrees, but extend to any decree.

The principle of the rule is that the Court executing the decree shall not be troubled with any disputes between parties with regard to any payment or adjustment unless the same has been duly recorded and certified.

FIRST Appeal from the decision of G. G. Nargund,
First Class Subordinate Judge at Thana.

Execution proceedings.

The decree under execution, which was a partition decree, was obtained by the plaintiff against her two brothers (defendants) and entitled her to recover her one-third share by partition.

Subsequently, the parties arrived at a compromise by which the plaintiff agreed to receive Rs. 5,000 in satisfaction of her claim. She received Rs. 4,600 in cash from the defendant. Neither the compromise nor the payment was certified to the Court.

Later, a portion of the property was sold, evidently with the consent of all parties concerned.

The plaintiff ignored the adjustment and the payment and elected to execute the decree. The defendants pleaded the adjustment and the payment.

^o First Appeal No. 292 of 1920.

The executing Court ordered the execution to proceed.

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Defendant No. 1 appealed to the High Court.

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G. S. Mulgaokar, for the appellant.

N. V. Gokhale, for respondent No. 1.

MACLEOD, C. J. :—This is an application for execution of a decree which directed that the suit property should be partitioned amongst the sharers. The defendants alleged that the plaintiff had compromised on the 22nd September 1919, and in pursuance of the compromise they had paid plaintiff Rs. 4,600, while Rs. 400 were yet to be paid in full satisfaction of the plaintiff's claim. It is admitted that the compromise was not recorded, therefore the plaintiff says that the Court executing the decree in the absence of any certificate cannot recognise the adjustment. The Subordinate Judge decided in favour of the plaintiff and directed that the papers should be sent to the Commissioner and the Collector for the partition of the property.

It has been argued that Order XXI, Rule 2, only applies to decrees for money. The words are "where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted." These words do not seem to me to confine the provisions of the rule to money decrees. Clearly any decree is provided for. A decree may provide for the payment of money or for any kind of relief other than the payment of money. But if either money is paid or the decree is otherwise adjusted, then the payment or adjustment must be certified. That is the duty of the person in whose favour the payment is made or the adjustment is arrived at. If that person does not perform his duty, then the opponent may inform the

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Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified, and the period of limitation for that application is thirty days under Article 174 of the Indian Limitation Act. But, as was decided in *Pandurang v. Jagya*,⁽¹⁾ there is no limitation for the decree-holder who can certify a payment or adjustment up to the time that he applies for execution. But the principle of the rule is that the Court executing the decree shall not be troubled with any disputes between parties with regard to any payment or adjustment unless the same has been duly recorded and certified: Otherwise in execution proceedings there would be endless disputes as to how far execution should proceed. In this case it is alleged that the plaintiff has received a certain sum of money in satisfaction of the share which she would otherwise get in partition. She denies having received the money. Her allegation seems to be that the other sharers have sold some of the property, and did not allow her a share in it. Whatever the real truth may be, those questions cannot be dealt with by the Court executing the decree. If there is a case of fraud, then the party defrauded will have his right of action. As far as I can see the provisions of Order XXI, Rule 2 would be entirely defeated if we once permitted an uncertified adjustment of a decree to be discussed in execution proceedings. In my opinion the decision of the lower Court was right and the appeal must be dismissed with costs.

If the plaint properties or any of them have been sold so that the partition proceedings can no longer go on, then the Court in charge of the execution proceedings will have to decide what is the proper course to

(1) (1920) 45 Bom. 91.

follow, whether to direct that the parties entitled to partition should get the sale proceeds into Court and divide them, which would of course be the simplest way of settling the matter, or to relegate the parties to separate suits. However, we are not concerned with this question at present. All that we are concerned with is that the Court executing the decree must proceed with the execution.

SHAH, J. :—I agree.

Appeal dismissed.

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APPELLATE CIVIL.

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MAHOMEDBHAH HUSENBHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. ADAMJI HALIMBHAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS^o.

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Civil Procedure Code (Act V of 1908), section 20, Order II, Rule 2, Order VII, Rule 10—Some of defendants residing outside jurisdiction—Leave of the Court refused—Cause of action, splitting up of—Return of plaint.

Two persons Husenbhai and Sulemanji owned a house in the Portuguese possession of Delagoa Bay. On Husenbhai's return to India, Sulemanji realized the rent of the house and tendered account till Husenbhai's death in 1897. Sulemanji died in 1902. In 1907 Husenbhai's heirs sued the executor of Sulemanji's will to recover their share of the rent of the house in the British Indian Court at Bulsar. The will of Sulemanji having been set aside by the Delagoa Bay Court pending the suit, the heirs of Sulemanji were made party defendants, and the Court passed a decree for accounts of rents up to the death of Sulemanji. Subsequently Husenbhai's heirs came to know that Sulemanji had during his life time mortgaged the house to a Bank and under the terms of the deed the Bank had taken possession of the house and sold it

^o Appeal from Order No. 4 of 1919.