

Appellate Jurisdiction. (a)

Special Appeal No. 58 of 1869.

KONNAPALEN UTHATCHADAYAN } HAJE..... }	<i>Special Appellant</i> <i>(3rd Defendant.)</i>
PEROTTA MELODEN RAMEN } NAMBIAR..... }	<i>Special Respondent</i> <i>(Plaintiff.)</i>

An agreement to take an oath by the parties to a suit filed in Court is not an adjustment by mutual agreement or compromise within the meaning of Section 98 of the Code of Civil Procedure.

The defendants agreed that a decree should be passed against them if they failed to perform an agreement by which they bound themselves to take an oath, the terms of which were set forth in the agreement, and one of them failed to take the oath. The Lower Courts thereupon passed a decree for the plaintiff.

Held by the High Court that the procedure of the Lower Courts was not sanctioned by law.

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THIS was a Special Appeal against the decision of G. D. Leman, the Acting Civil Judge of Tellicherry, in Regular Appeal No. 293 of 1867, confirming the decree of the Court of the Principal Sadr Amin of Tellicherry in Original Suit No. 44 of 1867.

J. H. S. Branson, for the special appellant, (the 3rd defendant).

O'Sullivan, for the special respondent, (the plaintiff).

The facts appear sufficiently from the following.

JUDGMENT:—In this suit the Principal Sadr Amin passed a decree in the plaintiff's favor, because the 2nd defendant had failed to take an oath at a pagoda according to an agreement entered into between the parties before the suit came to a hearing.

Upon appeal, the Civil Judge confirmed that decree; but we think that the Lower Courts were not justified in so disposing of the suit.

There is no doubt that the parties and their vakils did execute a written agreement whereby the plaintiff on the one hand agreed that his suit should be dismissed with costs if the 2nd defendant on a certain day before a certain

(a) Present: Bittleston, and Innes, JJ.

pagoda should swear according to the usage of the pagoda that the statements in the plaint were untrue, and if the 3rd defendant should take a like oath before a certain Mosque, and the defendants on the other hand agreed that a decree should be given according to the plaint, if either the 2nd or 3rd defendant should fail to take the prescribed oath.

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Upon this agreement being filed, it appears that the Principal Sadr Amin issued a commission to a Commissioner to see that the oaths were taken according to the agreement, and that upon the Commissioner reporting that the 2nd defendant had refused to take the oath, a decree was at once passed in the plaintiff's favor, the case not being posted for re-hearing, and the 3rd defendant objecting to the decree.

The Lower Courts have acted in this case in conformity with an old practice which as to District Munsifs was based upon Regulation VI of 1816, Section 27, and as to Zillah Courts upon Regulation III of 1802, Section 6, but these enactments are repealed, and the Courts no longer possess the power of following that procedure, as was pointed out in the Madras High Court Proceedings, 3rd March 1868 (4th Volume, High Court Reports "(Rulings)" p. iii.)

In those Proceedings an observation was added that "there is nothing to prevent the Courts, if they have the means, from facilitating a settlement of this nature by the parties, by satisfying themselves that the necessary conditions are fulfilled," but we do not suppose that it was intended by this remark to sanction the issuing of such a commission as was issued in this case, for which the Civil Procedure Code certainly furnishes no authority. Nothing more was meant, we apprehend, than that if the Courts could, without any departure from the provisions of the Code, furnish any facilities to the parties for adjusting the suit by this mode of settlement, there was nothing to prevent them from doing so. But the question which we have to consider is whether this suit has been disposed of in a manner sanctioned by

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the Code. Now it was admitted by Mr. O'Sullivan, on behalf of the special respondent, that unless the case is brought within the 98th Section of the Code, the procedure adopted cannot be justified. That Section provides that, if a suit shall be adjusted by mutual agreement or compromise, such agreement or compromise shall be recorded and the suit shall be disposed of in accordance therewith, and the question is whether this suit was adjusted by mutual agreement or compromise, so that it could be disposed of in accordance therewith. We think that what is meant by this language is that the parties should agree upon some terms respecting the subject matter of the suit, which are capable of being embodied in a decree, whereby the suit would be disposed of. In the present case there certainly was no such agreement but only an agreement that, if the defendants should do certain things, a decree should be passed in favor of one party, and if they should fail to do those things then in favor of the other party; so that what decree should be passed would depend upon the result of an inquiry, whether subsequently to the agreement certain acts had or had not been performed. The suit was not adjusted by the agreement, and the decree which was passed was admittedly not a decree by consent. It was a decree passed against the strong objection and protest of the 3rd defendant the present appellant; and we think that having been given without any investigation of the merits, and not in accordance with any procedure sanctioned by law, it must be set aside, and the case restored to the file of the Principal Sadr Amin for investigation on the merits.

We do not, however, think the appellant entitled to costs, for it certainly was his own agreement which led to the procedure of which he now complains.
