1906.

SECRETARY OF STATE v. BHAGIRATHIBAI.

Thus if a plaintiff brought a suit for possession of land and then withdrew the suit as the result of a compromise whereby he received a sum of money, and he were to be regarded as having succeeded in the suit, no order under section 411 would lead to any practical result. But if the plaintiff, in the circumstances with which we are concerned in this case, has not succeeded in the suit, has she failed in the suit? I think she has. It may be that she has obtained a substantial advantage; but it has not been in the suit. The only order in the suit has been that which is equivalent to a dismissal of the suit.

We hold that the plaintiff has failed in the suit, notwithstanding that there has been a compromise under which she has derived a benefit, and, in our opinion, in answer to the reference we should say that the plaintiff, in the circumstances, has failed in the suit within the meaning of section 412 of the Code of Civil Procedure. The case will be sent back to the Division Bench with that answer.

Order accordingly.

G. B. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, Mr. Justice Aston, Mr. Justice Beaman and Mr. Justice Heaton.

KRISHNABAI, WIDOW OF HARBHAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI GOVIND AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1906. *September* 12.

Civil Procedure Code (Act XIV of 1882), section 375—Consent decree—Status of landlord and tenant—Forfeiture clause—Suit to enforce forfeiture—Relief against forfeiture.

When a plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree (passed under section 375 of the Civil Procedure

* Second appeal No. 571 of 1905.

1906.

KRISHNABAI v. HARI GOVIND.

Code in accordance with a lawful agreement recorded under that section), whereby the status of landlord and tenant is established between the plaintiff and defendant, the Court in the exercise of its equitable jurisdiction is not precluded from granting such relief against forfeiture as it might have granted, had the status arisen from contract or custom.

Per JENKINS, *C. J.*—As under section 375 of the Civil Procedure Code (Act XIV of 1882) the decree was to be in accordance with the agreement, it cannot have altered the relations of the parties as they existed under the agreement. And as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement.

Per BEAMAN, *J.*—The difference between a consent decree declaring the agreement of parties, and the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, goes no futher than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made.

Shirekuli Timapa Hegda v. *Mahablya*(1), dissented from.

SECOND appeal from the decision of A. Lucas, District Judge of Sátára, confirming the decree of R. T. Kirtane, Subordinate Judge of Islámpur.

The plaintiff sued to recover possession with rent and profits of the land in suit under the terms of a consent decree in Suit No. 448 of 1887. The decree was dated the 25th September 1888 and it ran as follows:

Plaintiff has given to the defendant her *mirasi* right over the land in suit by taking from him Rs. 150 in cash this day. Defendant is to pay to plaintiff for the land in suit Rs. 0-15-1½ every year as *chavdi* (rent) and make *vahivat* of the same in *mirasi* right in perpetuity from father to son in hereditary succession. Whatever *judi* and local fund may be levied hereafter and is levied at present on the said land is all to be paid by the defendant directly (to Government) and independently of the aforesaid Rs. 0-15-1½, and he is to pay to plaintiff every year the aforesaid Rs. 0-15-1½ without any deduction whatever. If the plaintiff fails to receive from the defendant the amount of the *chavdi* (rent) every year, defendant's *mirasi* right shall be extinguished.

* * * * *

If the defendant fails to pay to plaintiff every year the aforesaid amount of Rs. 0-15-1½, the plaintiff should wait for two months after the termination of the year. If even within that period the plaintiff fails to take the *chavdi* (rent), the defendant should credit the said amount with a banker.

(1) (1886) 10 Bom. 435.

The plaint alleged that the defendant paid rent up to July 1893. The suit was filed in the year 1903 and the plaintiff claimed possession and rent for the years 1900-01, 1901-02 and mesne profits, namely, Rs. 10 for the year 1902-03.

The defendants, sons of the defendant, who was a party to the consent decree, contended that the allegation that rent for the year 1893 was not paid was false, that the monies due on account of the rent had been paid to a banker for the benefit of the plaintiff according to the terms of the consent decree, that they had not forfeited the tenure and that they had sunk a well in the land at the cost of Rs. 2,000.

The Subordinate Judge found that the plaintiff was not entitled to recover possession, that she was entitled to receive Rs. 2-13-4½ as rent for the years in suit and that she was entitled to recover possession on failure of the defendants to pay the said sum within six months from date of decree. A decree was passed embodying these findings and confirmed on appeal.

The plaintiff having preferred a second appeal, it was argued before the Division Bench consisting of Jenkins, C. J., and Aston, J., who on the 19th March 1906, referred the case to a Full Bench for consideration of the following point:—

Whether when a plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree whereby the status of landlord and tenant is established between the plaintiff and the defendant, the Court in the exercise of its equitable jurisdiction is precluded from granting such relief against forfeiture as it might have granted, had the status arisen from contract or custom?

In referring this case to a Full Bench their Lordships delivered the following judgment:—

We are led to make this reference by reason of the decision in *Shirekuli Timapa Hegda* v. *Mahablya*[1]. We are not satisfied that the principles there enunciated are sound or in harmony with the decisions in *Wentworth* v. *Bullen*[2], *Lievesley* v. *Gilmore*[3],

(1) (1886) 10 Bom. 435 at p. 437. (2) (1829) 9 B. & C. 840.
(3) (1866) L. R. 1 C. P. 570.

1906.

KRISHNABAI v. HARI GOVIND.

Conolan v. *Leyland*(1), *Great North-West Central Railway Co.* v. *Charlebois*(2), *Islington Vestry* v. *Hornsey Urban Council*(3), *Balkishen Das* v. *Run Bahadur Singh*(4), *Nagappa* v. *Venkat Rao*(5), *Thakur Ganesh Bakhsh* v. *Thakur Harihar Bakhsh*.(6)

The reference was heard by the Full Bench consisting of Jenkins, C. J., Aston, Beaman and Heaton, JJ.

N. M. Samarth appeared for the appellant (plaintiff):—The ruling in *Shirekuli Timapa Hegda* v. *Mahablya*(7) shows that we can enforce the right of forfeiture. There are conflicting rulings of the other High Courts, but we contend that the sounder view is taken by this High Court in the above case. There is no distinction between a decree passed by the Court and that passed by the Court with the consent of parties. When a decree is passed it must be enforced: *Chenvirappa* v. *Puttappa*(8). Equitable principles connot over-ride the terms of a decree. There is no dispute that the Court can grant relief against a forfeiture clause in a contract. The Ruling of the Madras High Court in *Nagappa* v. *Venkat Rao*(9) is based on certain observations of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*(4) and expresses a dissent from *Shirekuli Timapa Hegda* v. *Mahablya*(7). We submit that the Madras High Court has put an erroneous interpretation on the observations of the Privy Council. The test of construction of a judicial decision is given in *Quinn* v. *Leathem*(10). The Privy Council ruling contains no decision on the point. It refers to the solehnama in dispute and holds that the forfeiture clause contained therein should not be relieved against. The Madras High Court has, in *Nanjappa* v. *Nanjappa*(11), ruled that a clause for the payment of higher rate of interest from a prior date is penal. The Privy Council ruling in *Balkishen Das* v. *Run Bahadur Singh*(4) is referred to in *Sajaji Panhaji* v. *Maruti*(12). The Full Bench of Calcutta in *Kalachand Kyal* v.

(1) (1884) 27 Ch. D. 632.
(2) [1899] A. C. 114.
(3) [1900] 1 Ch. 695 at p. 706.
(4) (1883) 10 Cal. 305.
(5) (1900) 24 Mad. 265.
(6) (1904) 31 I. A. 116.
(7) (1886) 10 Bom. 435.
(8) (1887) 11 Bom. 708 at p. 720.
(9) (1900) 24 Mad. 265 at pp. 270, 271.
(10) [1901] A. C. 495.
(11) (1888) 12 Mad. 161.
(12) (1889) 14 Bom. 274.

Shib Chunder Roy[1] concurs with the Madras rulings and lays down that a claim for the enforcement of a penalty is governed by section 74 of the Contract Act. The Full Bench of Allahabad, however, in *Banke Behari* v *Sundar Lal*[2] held a different view and came to the conclusion that such a claim is not governed by section 74 of the Contract Act and that the intention of the parties should be taken into consideration.

The other Privy Council case is *Thakur Ganesh Bakhsh* v. *Thakur Harihar Bakhsh*[3]. In this case there was a decree on a compromise and the question was whether interest on the arrears of rent could be awarded. Such interest was not contemplated by the compromise. The observations contained in the ruling strengthen our position.

Section 375 of the Civil Procedure Code precludes the Court from interfering with the terms of a decree after it is passed. When a decree is once passed, it must be enforced according to its terms. A decree is a solemn act of the Court and it stands on a higher ground than a mere agreement between parties. So far as Indian legislature is concerned we contend that they adopted the principle laid down in *Shirekuli Timapa Hegda* v. *Mahablya*[4]. Where a relief flows from the terms of a decree, though not directly given by the decree, the Court can grant such relief, but it cannot grant a relief which is in contravention of the terms of the decree. The reasoning of the Madras High Court seems to be that a decree based upon a compromise is nothing more than a compromise. If so, then there would be no necessity in getting a decree upon a compromise. Such a decree would be a mere superfluity.

The English cases on the point are mentioned in the referring judgment. A general deduction to be drawn from those cases is that a contract, though merged in the decree, is none the less a contract, therefore, a forfeiture clause contained in it can be relieved against.

J. R. Gharpure appeared for the respondents (defendants):— The consent decree was made between the present plaintiff and

(1) (1892) 19 Cal. 392.
(2) (1893) 15 All. 232.
(3) (1904) 31 I. A. 116.
(4) (1886) 10 Bom. 435.

1906.

KRISHNABAI v. HARI GOVIND.

the defendants' father. Under the decree the rent was paid regularly for some years and then the defendants' father died leaving them minors. Default in the payment of rent, if there was any default at all, must have arisen during the defendants' minority. The Judge has found that the plaintiff wants to take advantage of this circumstance and to deprive the defendants of the land which they have improved at very great expense.

It was argued that when a decree is passed on a compromise, the compromise becomes merged in the decree in such a manner that it ceases to exist. The proposition is stated too broadly. There are some judgments and decrees which are not final by their very nature, as for instance, decrees in partition suit, declaratory decrees, &c. Declaratory decrees are not capable of execution and a fresh suit has to be brought to carry it to completion. The mere fact that a decree is passed does not conclude the parties from raising questions as to their interpretation, construction &c. Under the present consent decree the status of landlord and tenant has been created. With regard to the enforcement of such a decree, it is nothing higher than a contract: *Wentworth* v. *Bullen*(1), *Lievesley* v. *Gilmore*(2), *Conolan* v. *Leyland*(3). The light thrown by the current of the said authorities shows that *Shirekuli Timapa Hegda* v. *Mahablya*(4) is not rightly decided. It is dissented from by the Madras High Court: *Nagappa* v. *Venkat Rao*(5), *Lakshmanaswami Naidu* v. *Rangamma*(6).

The Privy Council ruling in *Balkishen Das* v. *Run Bahadur Singh*(7), which was relied on by the Madras High Court, does apply to decrees on compromise. The remarks made therein clearly show that such decrees were in contemplation. Drift of the rulings of the Allahabad High Court is to the same effect: *Banke Behari* v. *Sundar Lal*(8).

The consent decree was, no doubt, passed under section 375 of the Civil Procedure Code. The effect of the section is that the

(1) (1829) 9 B. & C. 840.
(2) (1866) L. R. 1 C. P. 570.
(3) (1884) 27 Ch. D. 632.
(4) (1886) 10 Bom. 435.
(5) (1900) 24 Mad. 265.
(6) (1902) 26 Mad. 31.
(7) (1883) 10 Cal. 305.
(8) (1893) 15 All. 232.

decree would be enforceable as a decree if it is lawful and final. The present consent decree was not final inasmuch as the plaintiff had to bring a suit for its enforcement. The section, therefore, does not preclude the Court from examining how far the decree is enforceable and in doing so they must look to the terms of the contract which was the basis of the decree. *Sri Raja Viravara Thodhramal Rajya Lakhshmi* v. *Sri Raja Viravara Thodhramal Surya Narayana*[1], *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*[2], *Amolak Ram* v. *Lachmi Narain*[3].

Having regard to the above rulings, we submit that Courts have the right in equity to interfere in cases like the present.

JENKINS, C. J. :—The question referred to this Full Bench is, "whether when a plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree whereby the status of landlord and tenant is established between the plaintiff and defendant, the Court in the exercise of its equitable jurisdiction is precluded from granting such relief against forfeiture as it might have granted, had the status arisen from contract or custom."

This should be supplemented by the statement that the consent decree was passed under section 375 of the Civil Procedure Code in accordance with a lawful agreement recorded under that section.

The reasons for the reference are set forth in the referring judgment in which are enumerated the material authorities. The first case mentioned is *Shirekuli Timapa Hegda* v. *Mahablya*[4], in which the plaintiff, relying on a right of re-entry on failure to pay rent, sought to eject the defendant. The District Judge however confirmed the decree of the First Court, which granted relief against the forfeiture. On appeal to the High Court it was said 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."

This decision is expressed to be based on the two cases there cited, but it apparently was not perceived that in neither case

(1) (1897) L. R. 24 I. A. 118.
(2) (1875) L. R. 2 I. A. 263.
(3) (1896) 19 All. 174.
(4) (1886) 10 Bom. 435.

1906.

KRISHNABAI v. HARI GOVIND.

did the question arise in an original suit, but that in each execution of a decree was being sought. Still there the decision stands, and it must be seen whether on principle it can be supported.

Now there can be no doubt that if the matter had rested in agreement, the Court could have relieved: the right to relief would have been an incident of the agreement. Then does it make any difference that the agreement was recorded and a decree passed in accordance therewith?

The mere recording of the agreement can in no way change its legal effect.

Can the passing of the decree have any such result? I think not.

So far as the decree embodied the right to forfeit, it was declaratory and could not be directly enforced by way of execution. This is conceded by the fact that the plaintiff has deemed it necessary to institute a suit. It appears to me on principle that as under the section the decree was to be in accordance with the agreement, it cannot have altered the relations of the parties as they existed under the agreement. And as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement. It was laid down in *Wentworth* v. *Bullen*[1], and has since been repeatedly affirmed that "the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge" and this in my opinion lends a sanction to the conclusion I have expressed.

In my opinion, therefore, the question referred as above supplemented should be answered in the negative.

ASTON, J.:—I concur.

BEAMAN, J.:—The facts are that the parties entered into a compromise which was embodied, under section 375, Civil Procedure Code, in a decree of the Court. That decree (*inter*

(1) (1829) 9 B. & C. 850.

1906.

KRISHNABAI v. HARI GOVIND.

alia) contained a forfeiture clause. The defendant failed to pay rent on due dates and the present suit was brought on the decree for possession of the demised lands. The question arising upon these facts, which has been referred to the Full Bench, is whether the Court is bound to enforce the forfeiture, or may relieve against it as though the suit, instead of being founded on a consent decree in the terms of the compromise, were founded on contract. Upon this point there is a difference of opinion between the High Courts of Bombay and Madras. The view of the Bombay High Court as expressed in *Shirekuli Timapa Hegda* v. *Mahablya*[1], was that the doctrine of penalties was not applicable to stipulations contained in decrees; that of the Madras High Court as expressed in *Nagappa* v. *Venkat Rao*[2], and affirmed in *Lakshmanaswami Naidu* v. *Rangamma*[3], that inasmuch as the decree passed by the Court was a "mere adoption of the contract [which *existed between* the parties to it] the Court must be taken to have adopted the contract with all its incidents." It was therefore competent to the Court to relieve against the forfeiture. I may observe that *Shirekuli's* case, while purporting to be based on, and follow the judgment of West, J., in *Balprasad* v. *Dharnidhar Sakharam*[4], ignores an important distinction, as to the effect of which we do not think it necessary to express a considered opinion, in disposing of this reference. The latter was a case in which execution of the decree itself was sought to be enforced. Both the Madras cases, however, arise out of facts which cannot in this particular be distinguished from those in *Balprasad* v. *Dharnidhar*[4]. The dissent of the Madras High Court from the view which has hitherto prevailed in this Court is more positive and definite, than if it were limited to such a case as *Shirekuli Timapa* v. *Mahablya*[1], and had taken account of the distinction to be drawn between that, and the case on which it is founded. Premising that I confine myself strictly to the facts of this reference, I am of opinion, that the doctrine which found favour with the learned Judges who decided *Shirekuli's* case, is erroneous. I think that it makes

(1) (1886) 10 Bom. 435.
(2) (1900) 24 Mad. 265.
(3) (1902) 26 Mad. 31.
(4) (1875) P. J. p. 366: (1886) 10 Bom. 437 *f. n.*

1906.

KRISHNABAI v. HARI GOVIND.

consent decrees of this kind, when they are subsequently sued upon, too rigid, and loses sight of an important principle which has more than once been mentioned, in analogous cases, with approval by some of the most eminent English Judges. When parties compromise and request a Court to embody the terms of the compromise in a decree, the Court has not adjudicated upon the dispute, it has done no more than sanction and stereotype a contract made by the parties themselves. And this it is bound to do. The only condition imposed upon it is that the agreement should be lawful. By private agreement, converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone—*Great North-West Central Railway Company* v. *Charlebois*[1]. If such a decree in virtue merely of being a decree of Court is not competent to do that for the parties which they might not do for themselves; if in other words it is on proper cause shown liable to examination; it follows logically and necessarily that when a suit is afterwards brought upon it, it is to be taken not as what has to be unquestioningly and literally enforced; but only as the indisputably correct presentment of the contract which at the time it was drawn up, the parties had made and wished to be decreed. The difference between a consent decree declaring the agreement of parties, and the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, appears to me on general principles to go no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made. As was observed by Parke B. in *Wentworth* v. *Bullen*[2], afterwards cited with approval by Erle C. J. in *Lievesley* v. *Gilmore*[3], "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge." Applying that principle to the facts we here have to deal with, it appears to me, that when a party brings a suit to enforce a consent decree of this kind by which the terms of a perpetual lease were roughly

(1) [1899] A. C. 114.
(2) (1829) 9 B. & C. 850.
(3) (1866) L. R. 1 C. P. 570.

declared, with a forfeiture clause added, and when the defendant prays for the ordinary relief against that forfeiture, the Court is not precluded from treating the decree as no more than the contract between the parties, subject to the incidents of such a contract. Amongst those incidents equitable relief against a forfeiture is not the least important and is well established.

1906.

KRISHNABAI v. HARI GOVIND.

A party to a contract embodied in a consent decree cannot, I think, be held to have renounced any incidental advantages or equitable reliefs of which, upon the face of the contract itself as presented in the decree, he might ordinarily have claimed the benefit.

HEATON, J.:—I concur.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *September* 12.

FRANCIS GHOSAL *bin* CONSTANCE GHOSAL AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 2), APPELLANTS, *v.* GABRI GHOSAL *bin* LALU GHOSAL AND OTHERS (ORIGINAL DEFENDANTS 1 AND 4 TO 15), RESPONDENTS.*

Native Christians—Converts from Hindu Religion—Joint family—Co-parcenership—Inheritance—Indian Succession Act (X of 1865), section 93—Intestate and testamentary succession.

Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion.

Tellis v. Saldanha(1) disapproved.

The Indian Succession Act (X of 1865) does not affect rights of co-parcenership as between those to whom it applies. The purpose of that Act was to amend and define the rules of law applicable to intestate and testamentary succession. It is with the *devolution* of rights on intestacy that the Act deals. It does not purport to enlarge the category of heritable property. Section 93 of the Act actually recognizes a joint tenancy with the right of survivorship.

Navroji Manockji Wadia v. Perozbai(2) referred to.

* Appeal No. 78 of 1905.

(1) (1886) 10 Mad. 69.

(2) (1898) 23 Bom. 80.