ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1908.
March 3.

SIR JEHANGIR COWASJI JEHANGIR, APPELLANT AND PLAINTIFF, *v.* THE HOPE MILLS, LIMITED, AND OTHERS*, RESPONDENTS AND DEFENDANTS.

Practice—Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order.

A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties, a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

APPEAL from an order of Davar, J.

The plaintiff, Sir Jehangir Cowasji Jehangir, as mortgagee in possession of the property of the first defendant company, The Hope Mills, Limited, instituted this suit in August 1903 to recover the moneys due to him under his mortgage and prayed that in default of payment the right to redeem may be foreclosed or the mortgaged premises might be sold. The mortgage was dated the 5th April 1900. After the date of the mortgage the plaintiff on the 30th of May 1901 had entered into an agreement with the first defendant company under the terms of which he worked the Mills of the company.

On the 26th of January the plaintiff obtained a decree which was defective in some respect. On the 9th August 1904, an application for final decree for foreclosure or sale was refused

*Suit No. 490 of 1903; Appeal No. 3 of 1908.

on the ground that the exact amount due to the plaintiff as first mortgagee was not determined.

On the 19th of October 1907 one Jivanlal Choonilal Chinoy, claiming to be the senior partner in the firm of Rangildas Bhookandas and Co., agents of the first defendant company, obtained on behalf of the company, a rule *nisi* calling upon the plaintiff to show cause "why he should not pass his accounts as first mortgagee in possession of the moveable and immoveable property of the said first defendant company before the Commissioner for taking accounts."

The rule was argued before Davar, J., on the 21st November 1907, who made the rule absolute by ordering the plaintiff to pass his accounts before the Commissioner.

Against this order the plaintiff appealed.

Scott, Advocate General, and *Robertson* for the appellant. In the course of this argument they referred to the following cases:—*Ajudhia Pershad* v. *Baldeo Singh*(1), *Nandram* v. *Babaji*(2), *Tiluck Singh* v. *Parsotein Proshad*(3), *Tara Prosad Roy* v. *Bhobodeb Roy*(4), *Akikunnissa Bibee* v. *Roop Lal Das*(5), *Tara Pado Ghose* v. *Kamini Dassi*(6).

Setalvad (with *Raikes*) for the respondent.

CHANDAVARKAR, J.—We are of opinion that the order appealed from ought to be set aside.

A preliminary point has been raised by the learned counsel for the respondent that no appeal lies from that order upon the ground that it was made under either section 206 of the Civil Procedure Code or Rule 305 of this Court's Rules.

In order to bring the order under section 206 of the Code it is necessary that the application was made to bring the decree into conformity with the terms of the judgment or to correct or rectify a clerical or arithmetical error found in the decree. Now, it is not pretended by the counsel for the respondent that the decree or order was defective on the ground of a clerical or

(1) (1894) 21 Cal. 818 at p. 823.
(2) (1897) 22 Bom. 771.
(3) (1895) 22 Cal. 924.
(4) (1895) 22 Cal. 931.
(5) (1897) 25 Cal. 133.
(6) (1901) 29 Cal. 644.

1908.

SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED.

arithmetical error; nor has it been argued that there was any inaccuracy to bring the decree within the terms of Rule 305. What has happened is that while the decree contemplated an account being taken between the parties, it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. It is argued that the omission was due to pure inadvertance, but we do not think we can presume anything of the kind, because, as the learned Advocate General has said, the decree *nisi* was settled by the solicitors of the parties and they could not have failed to note what the terms they settled would mean.

Under these circumstances we must presume that the omission was intentional. The decree left it open to the parties to have the account taken and settled privately by some person of their nomination.

We do not think that the application made before the learned Judge in the Court below can be treated as one for the mere amendment of the decree under either section 206 of the Code or Rule 305.

It must be remembered that the defence set up by the appellant in the Court below was that after the decree, new rights had come into existence; that the decree having contemplated an account being taken, it had been taken by a person appointed jointly by the parties with the result that a certain sum was found due by the respondent company to the appellant. This is not disputed. In this state of facts the rights of the parties would fall within the law enunciated in the case of *McKellar* v. *Wallace*[1]. There the Right Hon. T. Pemberton Leigh in delivering the Judgment says:—"The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those

(1) (1853) 5 Moo. I. A. 372 at p. 395.

accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side".

Therefore, if there is no fraud, it is a settled account and gives rise to new rights between the parties to the decree. Under these circumstances, what the learned Judge was deciding was the question of a right; by his order he has varied the decree which he had no jurisdiction to do in a proceeding such as this initiated by a rule *nisi*. We must, therefore, hold that an appeal lies.

Another cogent ground is that the order now under appeal requires the plaintiff to file a suit. That certainly affects the plaintiff's rights. The plaintiff is entitled to say that he is not bound to file a suit. If the respondent questions the agreement between the appellant and the company there is no reason why the respondent should not, if he chooses, file a suit to have that agreement cancelled: why should the appellant be compelled to file a suit? We think that again leads us to hold that an appeal lies.

1908.

SIR JEHANGIR COWASJI v. THE HOPE MILLS, LIMITED.

Having held that an appeal lies, we now come to the merits, and the observations, which I have made, dispose of that point also. We think there was no question of any amendment, and if new rights have come into operation between the parties, the Court was not called upon to modify the decree or to direct the plaintiff to file a suit and have the rights between the parties adjudicated upon. The plaintiff says there has been an account taken under the decree between him and the defendants and that as a result of the account a new agreement has come into existence between the parties. That is not disputed. His defence is in fact that the decree is superseded by the agreement. If it is so, it would be open to the defendants to have that agreement cancelled.

Under these circumstances, we must reverse the order appealed against with costs.

We do not express any opinion upon the question whether the agreement set up by the plaintiff falls within section 257A of the Code of Civil Procedure. That is not a question which was before the learned Judge or which can arise in this proceeding. The question now merely is whether the decree should be amended or not, and therefore, no question under section 257A can arise, nor can any question as to the invalidity of it upon any other ground be gone into.

We set aside the order and discharge the rule with costs.

The appellant is entitled to add the costs to his mortgage debt.

Attorneys for the appellant:—*Messrs. Mulla & Mulla.*

Attorneys for the respondents:—*Messrs. Bhaishankar, Kanga & Girdharlal*; *Messrs. Malvi, Hiralal, Modi & Runchhoddas*; and *Messrs. Daphtary, Farrera & Divan.*

B. N. L.