

the Bhagalpur firm, was clearly not barred by limitation. The earliest dealing with the Calcutta shop was the 10th September, 1906. The acknowledgment by the Board of Revenue in their letter (Ex. 20) of the 24th of August, 1909, was within 3 years from the date of the debts. This suit was therefore, in my opinion, brought within time. The present appeal, therefore, fails and must be dismissed with costs. Let the record be sent down at once.

RICHARDSON J. I agree.

S. M.

Appeal dismissed.

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APPELLATE CIVIL.

Before Jenkins C.J., and Holmwood J.

KUSODHAJ BHUKTA

v.

BRAJA MOHAN BHUKTA.*

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 July 21.

Mistake—Suit to set aside previous decree on ground of mistake—Competence of compromise and decree thereon—Rectification—Fraud.

A decree can be set aside by suit on the ground of fraud if of the required character.

But a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake.

Jogeswar Atha v. Ganga Bishnu Ghattach (1) dissented from.

Mahomed Golab v. Mahomed Sulliman (2), *Sadho Misser v. Golab Singh* (3), and *Bhandi Singh v. Dowlat Ray* (4) referred to.

Appeal from Appellate Decree, No. 1933 of 1914, against the decree of Benode Behari Mitter, Subordinate Judge of Midnapur, dated April 7, 1914, affirming the decree of Phanindra Mohan Chatterjee, Munsif of Tamluk, dated Feb. 22, 1913.

(1) (1904) 8 C. W. N. 473.

(4) (1912) 17 C. W. N. 82 ;

(2) (1894) I. L. R. 21 Calc. 612.

15 C. I. J. 675.

(3) (1897) 3 C. W. N. 375.

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While in the case of a compromise, as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract.

Huddersfield Banking Co. Ltd. v. Henry Lister and Son Ltd. (1) followed.

SECOND Appeal by Kusodhaj Bhukta, the defendant No. 1.

This was a declaratory suit to set aside a previous decree on the ground of mistake, and to get a $\frac{2}{3}$ share of the lands in suit on establishment of plaintiff's title thereto. The defendants Nos. 2 and 3 supported the plaintiff. The defendant No. 1 contended that neither the plaintiff nor the defendants Nos. 2 and 3 ever had any right to the disputed lands, that the previous decree was not liable to be set aside or rectified, and he had the right to $\frac{1}{3}$ of the properties in suit. The learned Munsif, 1st Court of Tamruk, decreed the suit; and on appeal the Subordinate Judge of Midnapore affirmed that decision. Thereupon, the defendant No. 1 preferred this appeal to the High Court.

Babu Bipin Behari Ghose (senior) (with him *Babu Satindra Nath Roy* and *Babu Manmatha Nath Pal*), for the appellant. The main question is whether a civil suit lies to declare that a previous suit between the same parties was erroneous. I say such a suit does not lie.

[JENKINS C.J. Is there no fraud alleged?]

Nothing of the kind. This was pointed out when my Lord the Chief Justice admitted the appeal. The learned Munsif held that such a suit was maintainable following the decision of Maclean C. J. in *Joyeswar Atha v. Ganga Bishnu Ghattack* (2), and that section 623 of the Code of Civil Procedure was an enabling section only and not compulsory. Such a suit will not

(1) [1895] 2 Ch. 273.

(2) (1904) 8 C. W. N. 473.

lie in England. I rely on the case of *Bhandi Singh v. Dowlat Ray* (1).

[JENKINS C.J. (to Respondent). Are you going to contend that a suit can be brought to correct a previous decree?]

[*Babu Jyotish Chandra Hazra. Jogeswar Atha's Case* (2) is authority that a suit will lie for the correction of previous mistakes.]

That case has been considered in later cases, viz., *Chand Mea v. Srimati Asima Banu* (3), and *Bhandi Singh v. Dowlat Ray* (1) where it has been distinguished. *Kaveri Ammall v. Sastri Ramier* (4), and *Sri Gopal v. Pithri Singh* (5) are also in my favour. In *Jogeswar Atha's Case* (2) there was no consent decree but a mere clerical error in describing property No. 4. as No. 3.

My next point is this:—In the previous suit it was settled that defendant No. 1 (appellant) and plaintiff would each have a half share. Thereafter, on the 20th June, the defendants Nos. 2 and 3 executed a release in favour of the plaintiff when it had been declared that they had no interest; so none can accrue to the plaintiff by that release. My next point is that when we have got possession from Court this suit for a mere declaration won't lie under section 42 of the Specific Relief Act: *Mahomed Golab v. Mahomed Sulliman* (6) *Sadho Misser v. Golab Singh* (7).

[JENKINS C.J. If the decree is not tainted by fraud no suit lies to set it aside. We had better hear the other side.]

Babu Jyotish Chandra Hazra, for the respondent. Seeing plaintiff in previous suit claimed a $\frac{1}{3}$ share

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| (1) (1912) 17 C. W. N. 82 ; | (4) (1902) I. L. R. 26 Mad. 104, 109. |
| 15 C. L. J. 675. | (5) (1902) 6 C. W. N. 889. |
| (2) (1904) 8 C. W. N. 473. | (6) (1894) I. L. R. 21 Calc. 612. |
| (3) (1906) 10 C. W. N. 1024. | (7) (1897) 3 C. W. N. 375. |

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had the Court any jurisdiction to give him a decree for $\frac{1}{2}$? The judgment gave $\frac{1}{3}$ only, and in consequence there was an application for amendment of decree. My submission, therefore, is that the Court had no jurisdiction to pass the decree it did in the first suit.

[JENKINS C.J. The Judicial Committee of the Privy Council has set that question at rest by ruling that every Court has jurisdiction to make a mistake.]

[HOLMWOOD J. Nor has any other Court jurisdiction to set it aside.]

If a Court having jurisdiction exceeds its jurisdiction in the decree, that portion can be set aside.

[JENKINS C.J. It is not a question of jurisdiction, but the error lies in the giving more than was asked for.] Yes.

[*Babu Bipin Behari Ghose*. It could have been corrected in appeal.]

Anything in excess of $\frac{1}{3}$ share was not in suit.

[JENKINS C.J. How could evidence of this be given in the face of section 44 of the Evidence Act?]

Jogeswar Atha's Case (1) was a Letters Patent Appeal. The decree is not in accordance with the judgment, and I don't see why a separate suit should not lie now.

[JENKINS C.J. There is no cause of action.]

How?

[JENKINS C.J. When it is fraud it is not of the Court, but of the party; while mistake is of the Court. Then what cause of action does the latter give?]

Of course nobody has any remedy against mistakes of Court.

[JENKINS C.J. Can you rectify a decree or an agreement when the mistake is unilateral? You can *set aside*, but not *rectify* a decree in case of fraud.]

Yes.

[JENKINS C.J. Rectification of decree must be done by the Court by which it was passed.]

Babu Bipin Behari Ghose. The former decree is correct. Except *Jogeswar Atha* (1) there is no other case in my favour.

[JENKINS C.J. The power of rectification is given by the Specific Relief Act, and applies to a contract when it does not give correct expression to the contract as made: *Madhavji Bhanji v. Ramnath Dadoba* (2). Rectification does not mean correcting a contract.]

Can I not say that my suit is really one for a declaration that the decree does not give what the judgment says?

[HOLMWOOD J. Have you ever heard of a suit to amend a decree?]

The right of suit cannot be limited by Court unless expressly taken away by statute. Here I have a real grievance. Besides cannot my suit be regarded as an application for amendment?

[JENKINS C.J. The Chancery decision on which Sir Francis Maclean professed to act, is a case of consent decree. As you can rectify an agreement, you can also rectify the consent decree based upon an agreement.]

Unless there is a particular remedy appointed for my grievance my right of suit is not taken away. Appeal, Review and Amendment of decree, as provided by the Code of Civil Procedure, do not exhaust all remedies.

[JENKINS C.J. Read the observation of Lindly L.J. in *Huddersfield Banking Co. Ltd. v. Henry Lister & Son, Ltd.* (3). Of course if the agreement cannot be invalidated the consent-order is good. To set aside a judgment you must prove fraud. The case of a consent

(1) (1904) 8 C. W. N. 473.

(2) (1906) I. L. R. 30 Bom. 457.

(3) [1895] 2 Ch. 273.

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decree is not an exception, but a different principle is brought into play.]

In the case of *Percival v. Collector of Chittagong* (1), Ameer Ali and Brett JJ. held that a mistake in decree giving more than was asked in plaint gives rise to a separate suit.

[JENKINS C.J. You have not been able to bring to our notice any case of a decree after contest being set aside in a subsequent suit, except that of *Jogeswar Atha* (2) which followed an authority regarding *consent* decrees.]

I have just found the only case where *Jogeswar Atha* (2) has been followed, in the Punjab Records.

[HOLMWOOD J. Well, make a second application for amendment, but don't attempt to bring in a new kind of suit.]

JENKINS C.J. This appeal arises out of a suit to set aside a decree in a previous suit on the ground that the Judge in passing the decree in that previous suit made a mistake. As an authority for this suit and its competence, we have been referred to the decision in the case of *Jogeswar Atha v. Ganga Bishnu Ghattack* (2). It may be that a superficial examination of that decision gives an appearance of authority for the proposition which the respondent advances before us, and apparently has advanced with success in both the lower Courts.

Already it has become noticeable that there has been a crop of cases in this Presidency in which it has been sought to set aside previous decrees on the ground of fraud. The readiness to find fraud encourages this class of litigation and the new departure has been a misfortune. If we encourage the idea that the alleged mistake of a Judge is to furnish a disappointed litigant

(1) (1900) I. L. R. 30 Calc 516, 519. (2) (1904) 8 C. W. N. 473.

with a fresh starting point for keeping his opponent in Court then this misfortune would be gravely increased to the public detriment. There must be some end to litigation. I have said there may appear to be some authority for this suit in the case I have mentioned. But it is apparent from the judgment in that case that there was no intention of proceedings beyond the English authority. No instance has been brought to our notice where a suit to set aside or rectify a decree in a previous suit has succeeded on the ground that the Judge was mistaken though his decree accurately expressed his intention. The only case to which reference was made in the case of *Jogeswar Atha* (1) was a decision of the English Court where the decree was one passed not after contest but on agreement between the parties. But that class of case is governed by a principle that has no application here. It is well settled that a contract of the parties is none the less a contract because, there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. I am unable to draw from those decisions, of which *Huddersfield Banking Co., Ltd., v. Henry Lister & Son, Ltd.* (2) is typical, the conclusion that a decree after contest and giving accurate expression to the Court's intention can be set aside. There is no analogy between the two cases. In the one the decree is set aside merely because the agreement on which it was founded was set aside. In the other case this consideration has no application. It is not as if the litigant is without remedy. Our Code provides ample means without a fresh suit whereby the litigant can obtain the correction

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of error. If a fresh suit can be started on the ground placed before us here, then I can see no end to litigation.

In holding as I do that this suit does not lie, I am making no new departure. I am merely following previous decisions of this Court, and in particular the decision of Sir Comer Petheram in *Mahomed Golab v. Mahomed Sulliman* (1), the decision of a Division Bench in the case of *Sadho Misser v. Golab Singh* (2), and finally the decision of a third Division Bench in the case of *Bhandi Singh v. Dowlat Ray* (3).

It is not suggested in this case that there was any fraud. Had that been so, then the matter would have been different, for it is recognised that a decree can be set aside on the ground of fraud if of the required character.

In my opinion the decree under appeal is erroneous and should be set aside and the suit dismissed with costs throughout.

HOLMWOOD J. I entirely agree with what has fallen from the learned Chief Justice. I desire to add that I do not think it matters whether the decree accurately expresses the intention of the judgment. If there is any divergence between the decree and the judgment, as has been thrown out at one part of the argument before us, then this is a matter for amendment. As long as the Court has jurisdiction and authority to decide a matter, as it has decided it, it cannot be re-opened by a suit.

I desire to emphasise all that has fallen from the Chief Justice with regard to the disastrous consequences which will follow by opening any fresh door of litigation such as appears to be indicated in this case.

G. S.

Appeal allowed.

(1) (1894) I. L. R. 21 Cal. 612. (2) (1897) 3 C. W. N. 375.

(3) (1912) 17 C. W. N. 82; 15 C. L. J. 675.