

that argument, but I do not think it matters much in this case.

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W. M. C.

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### APPELLATE CIVIL.

*Before Jenkins C.J., and N. R. Chatterjea J.*

PABAN SARDAR

*v.*

BHUPENDRA NATH NAG.\*

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 May 20.

*Compromise—Compromise, if not recorded, effect of—Consent decree—Appeal—Civil Procedure Code (Act V of 1908), s. 96, cl. (3); O. XXIII, r. 3; O. XLIII, r. 1, cl. (m).*

A (consent) decree under r. 3 of O. XXIII of the Civil Procedure Code can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form, as the aggrieved party has a right of appeal against this order, and s. 96, cl. (3) of the Code is not otherwise a bar to an appeal from such a decree.

APPEAL by Paban Sardar, the plaintiff.

The facts are fully set out in the judgment of Mr. A. J. Chotzner, Additional District Judge of Alipur, which was as follows :—

“This appeal arises out of a suit in which the plaintiff applied for a declaration that a certain registered *kobala*, alleged to have been executed by him in favour of the defendant, was fraudulent and inoperative.

The case was fixed for final disposal on the 4th May 1912, but on the 25th April preceding, plaintiff filed an application, which was consented to

\* Appeal from Appellate Decree, No. 2870 of 1913, against the decree of A. J. Chotzner, Additional District Judge of 24-Parganas, dated June 4, 1913, confirming the decree of Dandadhari Biswas, Subordinate Judge of Alipore, dated Aug. 13, 1912.

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by the defendant, wherein he admitted the genuineness of the *kobala* and the receipt of the consideration money, and prayed for the dismissal of the suit. The defendant acceded to the application and relinquished his claim to costs. The Court directed that the application should be put up on the date fixed, and on that date plaintiff filed a fresh application praying for permission to withdraw his previous application on the ground that it had been procured from him by undue influence.

The learned Subordinate Judge on the evidence found that no such improper influence had been exercised upon the plaintiff as would entitle him to have his application annulled, and held that the parties were bound by the terms of the application of the 25th April. He accordingly passed a decree dismissing the suit in terms of that application.

Plaintiff has appealed and the preliminary objection has been taken on behalf of the respondent that no appeal will lie. Reference was made to section 96 (3) of the Code of Civil Procedure which provides that no appeal shall lie from a decree passed by the Court with the consent of parties.

The learned pleader for the appellant, however, contends that an appeal will lie under Order XLIII, rule 1 (m). This order provides for an appeal from an order under Order XXIII, rule 3, recording or refusing to record an agreement, compromise or satisfaction.

It seems clear that this contention is unsound. His appeal is in effect directed not against the order recording the agreement, but against the decree in which that order has been embodied. The learned pleader has contended that the difference is one of form rather than of substance, but if that is so then the appeal is from the order refusing the application, and it will be barred under the statute of limitation.

I think therefore that the objection taken must prevail, and that the appeal should be dismissed with costs."

From that judgment the plaintiff preferred this appeal to the High Court.

*Babu Manmatha Nath Roy*, for the appellant. An appeal lay to the lower Appellate Court from the decree passed by the Court of first instance. S. 96(3) of the Code of Civil Procedure (Act V of 1908) does not apply to this case. The rule laid down in that section that no appeal lies from a consent decree does not apply when there was a dispute as to the *factum* of consent between the parties in the first Court, and the Court passed the decree on an adjudication that

there was such a consent: see *Ayyagiri Veerasalingam v. Koovur Basivi Reddi* (1), and *Brojodurlabh Sinha v. Ramanath Ghosh* (2).

[N. R. CHATTERJEA J. Do you say that you withdrew your consent on the day the case was put up for final disposal?]

No. My case, as I stated by petition on that day, the 4th May, is that the petition filed on the 25th April admitting the genuineness of the *kobala* impugned by me in the plaint and the receipt of the consideration money denied by me therein and praying for a dismissal of the suit was not filed by me willingly, but I was forced to file the same under threat and compulsion. That being so, a decree passed by the Court after rejecting my aforesaid objection cannot be said to be a consent decree within the meaning of s. 96(3) of the Code.

[JENKINS C.J. Let us first see under what provision and in what way the first Court disposed of the case.]

The provision in the Code is O. XXIII, r. 3.

Possibly the Subordinate Judge had that rule in his mind, but he did not follow its terms. He did not pass an order under that rule directing "the agreement, compromise or satisfaction to be recorded."

*Babu Ram Chandra Majumdar* (with him *Babu Jagesh Chandra Bose*), for the respondent. Although that order was not passed in so many words he meant to do that when in his judgment he said—"The rejection of the application of the 4th May 1912 makes the application of the 25th April operative." This is what is usually done in the Mofussil Courts; besides it is only a matter of form, and not one of substance.

[JENKINS C. J. No. This is a matter of substance, as the aggrieved party had a right of appeal against

(1) (1914) 27 Mad. L. J. 173. (2) (1897) I. L. R. 24 Calc. 908, 935.

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this order, but he could not appeal unless an order was passed.]

The appellant argued in the Court of Appeal below that his appeal might be treated as one under O. XLIII, r. 1 (*m*) against the order recording the compromise, and therefore the appellant had no grievance on the score that no order was passed. The lower Appellate Court held on that argument that if that was so; the appeal was barred under the Statute of Limitation.

[*Babu Manmatha Nath Roy* (interposing). When no order was passed how could an appeal against it be barred by limitation?]

The appeal in the Court of Appeal below may now be directed to be treated as an appeal against an order under O. XLIII, r. 1 (*m*).

[JENKINS C. J. But that cannot be done unless the other side consents.]

JENKINS C. J., AND CHATTERJEA J. We must allow this appeal and set aside the decree of the lower Appellate Court. A decree in this case was passed by the Subordinate Judge not after a hearing but on the basis of a compromise, that is to say, it was a decree justified, if at all, by Order XXIII, rule 3. But when the terms of that rule come to be examined, it is apparent that a decree can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form. It has an important result. If the decree is in accordance with a recorded compromise then it may well be contended that the provisions of section 96, clause (3) of the Code apply and the person feeling himself aggrieved by such a decree may be without the remedy of an appeal from that decree. I put it in a tentative form as whether it is so or not is not a matter which calls for our

express decision now. But the remedy of a person who says that in fact there was no compromise is that he is able to appeal from the order directing the compromise to be recorded under Order XLIII, rule 1, clause (m), which permits an appeal from an order under rule 3 of Order XXIII, recording or refusing to record a compromise. In this case there was no order that the compromise be recorded; and accordingly there was no order from which an appeal could be preferred. And as there was no order, so there could not be a decree under Order XXIII, rule 3. The result has been that though the plaintiff maintains that he did not enter into this compromise he has not had the opportunity which the law provides of discussing this question not only in the Court of first instance but, if necessary, in the Court of Appeal. The appellant, therefore, appears to me to be a person under a distinct grievance and none the less because apparently the learned Subordinate Judge thought badly of him.

We can only secure to him the rights to which he is entitled by setting aside the decree that has been passed by the Munsif on the ground that there was no order that the compromise be recorded. The case must go back to the Court of first instance in order that it may then be determined according to law. What the course there will be we need not now anticipate. It is sufficient for us to say that the appeal must be allowed and the decrees of the Additional District Judge and the Subordinate Judge must be set aside and the case sent back to the Court of the Subordinate Judge of Alipore in order that he may deal with it according to law. Costs hitherto incurred will abide the result.

G. S.

*Appeal allowed; case remanded.*

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