

APPELLATE CIVIL.

Before Jack and Khundkar JJ.

DAMODAR SHAHA

v.

ASHWINIKUMAR SHAHA.*

Interlocutory order—Appeal—Preliminary decree—Compromise, Order to record—Code of Civil Procedure (Act V of 1908), O. XXIII, r. 3.

Though the Full Bench case of *Talebali v. Abdul Aziz* (1) distinctly refers to preliminary decrees and not to interlocutory orders, the same principle applies in the case of an order under Order XXIII, rule 3, of the Civil Procedure Code, for the decree is involved in the order and indeed might be made at the same time, the wording being that the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith.

No doubt it would be more correct to appeal against the decree at the same time, but, in fact, if the order is set aside, the decree must go with it.

Where no appeal has been preferred against the decree, an appeal against an order for the compromise to be recorded is competent.

Provabati Debya v. Sorojini Devi (2) followed.

The Bengal Coal Company, Ltd. v. Apcar Collieries, Ltd. (3) not followed

APPEAL FROM ORIGINAL ORDER by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Radhabinode Pal, Anilchandra Ray Chaudhuri and Diptendramohan Ghosh for the appellant.

Heeralal Chakrabarti and Shyamadas Bhattacharjya for the respondent.

JACK J. This is an appeal against an order of the lower court directing that the plaintiff appellant's suit be disposed of in terms of the draft *solenâmâ*. A

*Appeal from Original Order, No. 378 of 1932, against the order of K. P. Bageli, Third Subordinate Judge of 24-Parganâs, dated May 30, 1932.

(1) (1929) I. L. R. 57 Calc. 1013.

(2) (1932) 36 C. W. N. 1015.

(3) (1924) 29 C. W. N. 928.

preliminary point has been raised, that there having been no appeal against the decree, the appeal against the order for the compromise to be recorded is incompetent. In support of this the case of *The Bengal Coal Company, Ltd. v. Apcar Collieries, Ltd.* (1) has been relied on. On the other hand, in the case of *Provabati Debya v. Sorojini Devi* (2), it has been held that an appeal lies, their Lordships holding that the decision in the former case (1) is no longer good law in view of the Full Bench decision in *Talebali v. Abdul Aziz* (3), in which it has been held that an appeal against a preliminary decree lies, although there has been no appeal against the final decree. It is true that the Full Bench case distinctly refers to preliminary decrees and not to interlocutory orders, but the same principle applies in the case of an order under Order XXIII, rule 3, for the decree is involved in the order and indeed might be made at the same time, the wording being that the court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith. When, therefore, Order XLIII, rule 1, expressly lays down that an order under Order XXIII, rule 3 is appealable, it would be obviously absurd to hold that the right of appeal is lost, because the decree involved in the order has been passed. No doubt it would be more correct to appeal against the decree at the same time, but, in fact, if the order is set aside, the decree must go with it. The preliminary objection, therefore, fails.

On the merits, it is clear from the order sheet that there was no concluded adjustment of the suit on the 27th of April, 1932, when a draft petition of compromise was filed. On that date the parties applied for 15 days' time to file the petition of compromise. The suit was then adjourned to the 12th May, 1932. On that date on a joint petition of the parties the case was adjourned to 26th May, 1932, for

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(1) (1924) 29 C. W. N. 928.

(2) (1932) 36 C. W. N. 1015.

(3) (1929) I. L. R. 57 Calc. 1013.

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hearing, the order being that the parties must file their petition of compromise in the meantime, otherwise they must come ready on the date fixed. On the 26th May, 1932, the plaintiff was ready to proceed with the suit but defendants put in a petition for enforcing the draft *solenâmâ*. On the 28th, the plaintiff put in an objection and, on the 30th, the court passed the order for recording the compromise under Order XXIII, rule 3, against which this appeal has been filed.

In the defendants' petition of the 26th May, paragraph 8, the defendants having offered alternative terms state :

If the plaintiff does not agree to the aforesaid settlement, then, according to the draft *solenâmâ*, these defendants are willing to sell the said land on stating the same to be in the *benâmi* of their mother ; but, if, in consequence thereof, the title of the said land be bad or if the plaintiff suffers by loss, these defendants will not be liable in any way.

It is thus clear that, while applying to enforce the alleged adjustment, the defendants want to introduce a fresh condition. Had the parties completely adjusted their dispute on the 27th of April, there was no reason to apply for an adjournment for 15 days to file the petition of compromise and hence in their application to record the compromise the defendants seek to introduce a fresh condition. They were not, in the circumstances, entitled to have the compromise recorded by the court under Order XXIII, rule 3, for it is clear that the suit was not really completely adjusted when the draft compromise was filed or at any subsequent time. The order under Order XXIII, rule 3, is set aside and the suit will proceed according to law.

The appellant will get his costs of this appeal, hearing-fee one gold *mohur*.

KHUNDKAR J. I agree.

Appeal allowed ; suit remanded.