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petition of the 17th December, 1920, was quite in order and the application for substitution was made on account of the death of the persons mentioned there within three months of their death. This does not seem to be a *bona fide* application at all. Under such circumstances, we agree with the learned Subordinate Judge that the abatement should not be set aside and the application was barred by limitation and that no grounds have been shown why the period of limitation should be extended under section 5 of the Limitation Act. This appeal must, therefore, stand dismissed with costs, hearing fee, five gold mohurs.

R. K. C. *Appeal dismissed.*

APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

J. C. GALSTAUN

v.

PRAMATHANATH RAY.*

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Mar. 7

Decree by Consent—Procedure for setting aside consent decree on grounds of fraud—Civil Procedure Code (Act V of 1908), ss. 96, 104, 151, 152; O. XXIII, O. XLVII.

The proper course of having a consent decree amended or vacated upon the ground that it was obtained fraudulently is to proceed by a separate suit.

Obiter. It is not competent under O. XLVII of the Civil Procedure Code to obtain a review of a consent decree on the ground of fraud.

Gulab Koer v. *Badshah Bahadur* (1), *Ram Gopal Mazumdar* v. *Prasanna Kumar Sanial* (2), *Chhajju Ram* v. *Neki* (3) and *Barhamdeo Prasad* v. *Banarsi Prasad* (4) referred to.

Ram Lagan Sahu v. *Ram Birish Koeri* (5) followed.

APPEAL FROM APPELLATE DECREE by the defendant.

The facts out of which this appeal arose are as follows: This dispute was between J. C. Galstaun

*Appeal from Appellate Decree, No. 645 of 1927, against the decree of N. G. A. Edgley, Additional District Judge of 24-Parganas, dated Nov. 19, 1926, confirming the decree of Jatindra Chandra Lahiri, Subordinate Judge of 24-Parganas, dated April 30, 1924.

(1) (1909) 13 C. W. N. 1197.
(2) (1905) 10 C. W. N. 529.
(3) (1922) I. L. R. 3 Lah. 127; L. R. 49 I. A. 144.
(4) (1901) 3 C. L. J. 119.
(5) (1919) 4 P. L. J. 205.

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and Raja Sreenath Ray and had reference to certain land. The matter came before the court and was compromised on the 28th November, 1918, when a decree was passed in the terms of a petition of compromise, which *inter alia* provided that certain leasehold land should be given to Mr. Galstaun and that the latter, in exchange for this land, should give the Raja an equal quantity of land from the land abutting the Woodburn Park Road. It was also provided "that if the portion of the land be not "sufficient to equalise in area that excess leasehold "land then Mr. Galstaun will pay for the whole of "excess." When the respondents came to put this decree into execution, a dispute arose as to the interpretation of the word "whole." During the hearing of this dispute before the High Court a point was raised by the respondents that the petition of compromise had been altered after it had been drawn up by the substitution of the word "whole" for the word "balance" and it was stated in the judgment of the High Court that it would be open to the respondents to make an application with a view to getting the decree amended if they so desired. The respondents filed an application before the first Subordinate Judge at Alipore, who finding that there was an alteration, amended the decree. Against this decision, an appeal was taken before the 1st Additional District Judge of the 24-Parganas. A preliminary objection was taken on behalf of the respondents that no appeal lay from the Subordinate Judge's order. The learned District Judge allowed the objection and dismissed the appeal with costs. Against this dismissal the present appeal was taken to the High Court.

Sir B. C. Mitter, Mr. Charuchandra Biswas and *Mr. Manindrakumar Basu*, for the appellant.

Mr. Dwarkanath Chakravarti, Dr. Saratchandra Basak and *Mr. Jatindramohan Basu*, for the respondents.

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RANKIN C. J. In this case, the appellant, J. C. Galstaun, was defendant in Title Suit No. 3 of 1918 in the Court of the Subordinate Judge at Alipore. The case had reference to certain land, situate to the south of premises belonging to the appellant, and was settled in terms of a petition of compromise filed on the 28th November, 1918.

Reading the petition of compromise, as it now stands, and as it stood on the date of the decree, the first word of the third line on the third page is the word " whole " and the effect of the petition so read has been held to be that, while the respondents were to give certain land to the appellant, the appellant was to give in exchange an equal quantity of land from the land abutting certain roads, but if this land of the appellant was not sufficient to equalize in area the land which the appellant was to receive, then the appellant would pay for the whole of the land which he was to receive at a certain price. The respondents' contention is that the word " whole " in the place where it occurs as above mentioned, has been substituted for the word " balance ", the real bargain between the parties being that the appellant was to give to the respondents from his land enough to equalize in area the land which he was to receive, but that if he had not enough land at the place specified, he should give what he had and pay the respondents for the balance. It appears that the land which the appellant was to get by this exchange was an area of about $8\frac{3}{4}$th *cottas* and that the land which the appellant had at the place above mentioned was short of that area by about two *cottas*.

The respondents, as plaintiffs, made an application in execution to enforce the consent decree, and it appears that they contended, first, that the word " whole " should be " balance " and, secondly, that, even if the consent decree were read as it stands, the true meaning and intent thereof was to the effect that the appellant should give all the land he had at the place mentioned and should pay for the shortage only. This execution

matter came before this Court on appeal and it was determined between the parties that, as the decree stood, its true construction was that the present appellant was to pay money compensation for the entire 8¾th *cottas*. The Court, however, took notice of the fact that the present respondents were contending that the compromise petition had been fraudulently tampered with and that the consent decree had been in this way fraudulently obtained by alteration of the word "balance" into the word "whole." This Court pointed out that such a question could not be raised in execution and went on to say that "any amendment on the ground that there "was fraud in the matter must be made by the court "in the suit in which the decree was passed. It "will be open to the Rays to make such applica- "tion as may be necessary to the court to make an "enquiry in the matter." The present respondents, thereupon, made an application before the learned Subordinate Judge for amendment of the decree alleging that the word "balance" had been fraudulently altered in the compromise petition. This application was not brought as an application in review under Order XLVII of the Civil Procedure Code; indeed it was brought upon an eight anna court-fee stamp, whereas an application in review requires an *ad valorem* stamp of the same amount as the plaint. It would appear to have been contended by the present respondents that the application was brought under section 152 of the Civil Procedure Code, but it is clear that the case made is entirely outside that section. Section 151 has also been put forward as a section which governs and authorises the application for amendment of this consent decree upon the ground that the decree as it stands had been fraudulently obtained.

Accordingly, when the present appellant appealed to the District Judge against the order amending the decree, he was made to face a preliminary objection on the part of the respondents to the effect that no appeal lay from the order complained of. He

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did his best to persuade the District Judge that, as an order amending a consent decree was, when made on contest, much the same in effect as an order directing, after contest, that an adjustment of suit be recorded under Order XXIII, rule 3 of the Civil Procedure Code, an appeal at least should be given to him as it is given to a party against whom it has been held that a suit has been adjusted. This argument from analogy was not accepted by the District Judge, who further held that, under section 96 of the Code, it was not possible to appeal from a consent decree. As Order XLIII of the Code does not specify orders made under section 151 of the Code as being orders from which an appeal shall lie, the appeal to the District Judge was rejected as incompetent.

It appears to me that, in these circumstances, it is very necessary to examine the propriety of the procedure adopted by the respondents in this case. The order of the Subordinate Judge not only affects the proprietorship of some 6 *cottas* of land in Calcutta : but also convicts the appellant of fraud, and indeed of a very great fraud, not lacking in incidents which would bring it within the scope of the criminal law. If the appellant is to be told that there is no appeal whatever from this decision, it is a serious matter for him. Even if the case could be regarded as within Order XXIII, rule 3, the appellant's right would be restricted to an appeal to the District Judge, as no Second Appeal lies from an order made under this rule. Compare section 104, sub-section (*2*), Civil Procedure Code.

Now, it appears to me, that, if a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course, and indeed his only course, is to proceed by separate suit for the purpose. The matter is certainly grave enough to deserve a separate suit. The questions which have to be decided are entirely different from those at issue in the original suit. The relief sought is a very well-recognised form of relief

appropriate to a suit. In English practice, it is old law that a fresh action is necessary to set aside a consent decree upon the ground of fraud and that such relief is not properly sought in an action of review. It appears to me that section 152 of the Code, which is confined to clerical or arithmetical mistakes and to an accidental slip or omission, is based upon this general principle, and that section 151 is in no way intended as a violation of that principle. If the relief can be properly obtained in a separate suit, it does not appear that there is any justification for invoking section 151 at all.

Now a leading case in this Court upon this subject is the case of *Gulab Koer* v. *Badshah Bahadur* (1) in which numerous decisions are considered. The authorities in this Court are not uniform, but putting the matter at the highest in favour of the respondents, it may be said that there is some difference of opinion upon the question whether, and in what circumstances, a consent decree may be reviewed under Order XLVII of the Code. It was said in that case that "while it must be conceded that a "large preponderance of authority is against the con- "tention that a consent decree cannot on any "ground be challenged upon an application for re- "view of judgment, there is no foundation for the sug- "gestion that there is a preponderance of authority "in favour of the contention that a consent decree "may be reviewed on the ground of fraud." The main proposition decided in that case was that a party who had applied unsuccessfully under Order XLVII for review of a consent decree on the ground that it has been obtained by fraud was entitled, notwithstanding his failure, to prosecute a remedy by suit. This decision was contrary to a previous decision in the case of *Ram Gopal Mazumdar* v. *Prasanna Kumar Sanial* (2) and I desire to reserve my opinion upon the point. In *Gulab Koer's case* (1), it was pointed out that there are weighty reasons why a regular suit should be regarded as a

(1) (1909) 13 C. W. N. 1197. (2) (1905) 10 C. W. N. 529.

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more appropriate remedy in such cases. Now, I desire to say that, in my opinion, it is not competent under Order XLVII to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. It appears to me that before such a doctrine can be taken as authorised by the Code, it is very necessary to lay one's finger upon some enactment which is clearly intended to make so large and inconvenient an exception to the general principles which govern this matter. Rule 1 of Order XLVII, after speaking of a case where a party has discovered new and important matter which was not within his knowledge or could not be produced by him at the time when the decree was passed, and of mistake or error apparent on the face of the record, introduces the words " or " for any other sufficient reason." In *Chhajju Ram's case* (1), the Judicial Committee had occasion to point out that these words were not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. It appears to me that if mistake or error is *prima facie* intended to be beyond the scope of the rule, unless the mistake or error be apparent on the face of the record, it is curious, to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud. In my opinion, the correct doctrine under the Code of Civil Procedure is in no way different upon this point from that which is laid down for England in Daniel's Chancery Practice, 8th Edition, 709. The authorities in this Court to the contrary are neither numerous nor impressive and have not infrequently been challenged [cf. *Barhamdeo Prasad* v. *Banarsi Prasad* (2)]. On principle, and as a matter of construction of Order XLVII of the Code, I approve of the view taken in *Ram Lagan Sahu* v. *Ram Birich Koeri* (3) and were it necessary I should desire to refer the matter to a Full Bench.

(1) (1922) I. L. R. 3 Lah. 127; L. R. 49 I. A. 144.

(2) (1901) 3 C. L. J. 119.

(3) (1919) 4 P. L. J. 205.

In the present case, however, the applicants themselves did not even take the precaution of applying by way of review and they succeeded before the District Judge in having the defendant's appeal dismissed as incompetent. Assuming it to be possible that we should now treat this matter as arising under Order XLVII of the Code, by giving leave to the respondents to pay the necessary court-fees, I am clearly of opinion that we ought not to do so. The method which they have adopted is highly inappropriate to the circumstances of the case, and, moreover, so long as there is any room for argument to the effect that the applicants, should they fail in review, can proceed all over again by suit, I should be most unwilling to allow the amendment upon any terms.

It has been contended before us that because the Division Bench of this Court, which heard the appeal brought from the order made in execution, expressed itself as though the best course for the respondents was to make an application in the suit for amendment of the decree, the present appellant should be held bound by this expression of opinion and must sit down under the decision of the Subordinate Judge, however disastrous its consequences may be to his business or to his reputation. I am of opinion that the remarks made by the Division Bench in the execution matter carry with them no legal consequence whatever and were in the nature of gratuitous advice.

In my judgment, the correct course for us is to treat this appeal as an application under section 115 of the Civil Procedure Code against the order of the Subordinate Judge and to set aside the whole of the proceedings upon the application for amendment of the decree. It may or may not be that the respondents, if they bring a suit, will get an allowance under the Limitation Act for the time which has been expended before the Subordinate Judge. It will be a part of our order that the respondents do pay to the

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appellant his costs of the proceedings before the Subordinate Judge and in this Court.

GHOSE J. I agree.

RANKIN C. J.

RANKIN C. J. AND GHOSE J. The appellant is entitled to a refund of the court-fee paid on the memorandum of the appeal to this Court less Rs. 10 stamp which would have been paid on the revision application.

O.U.A. *Proceedings set aside.*

APPELLATE CIVIL.

Before Page and Patterson JJ.

1929.

July 30.

NARAYANCHANDRA DAS

v.

CHAIRMAN, MUNICIPAL COMMISSIONERS OF THE PANIHATI MUNICIPALITY.*

Rating—Annual value—Assessment of holdings not usually let out—Bengal Municipal Act (Beng. III of 1884), ss. 85, 101.

In a suit for a declaration that an assessment of annual value under the Bengal Municipal Act (Beng. III of 1884) on the basis of a percentage on the valuation of the property is *ultra vires*,

Held, on appeal, that the effect of sections 85(*b*) and 101 of the Act is that in every case where a rate is to be imposed on the annual value of the holding such value is deemed to be the gross annual rent at which the holding may reasonably be expected to let.

Held, also, that the proviso (*i*) to section 101 did not empower the municipality to assess on an alternative basis.

West Derby Union v. *Metropolitan Life Assurance Society* (1) and *Nundo Lal Bose* v. *The Corporation for the Town of Calcutta* (2) applied.

APPEAL FROM APPELLATE DECREE by the plaintiff.

This was an appeal from an appellate decree dismissing the plaintiff's suit against the Chairman of the commissioners of Panihati Municipality for a declaration that the assessment of his garden house in

*Appeal from Appellate Decree, No. 2169 of 1927, against the decree of L. B. Chatterjee, 1st Additional District Judge, 24-Parganas, dated May, 18, 1927, confirming the decree of Nalini Mohan Banerjee, Subordinate Judge, 24-Parganas, dated June 19, 1926.

(1) [1897] A. C. 647. (2) (1885) I. L. R. 11 Calc. 275.