APPELLATE CIVIL.

Before R. C. Mitter J.

1934

Dec. 13, 14, 17;

1935

Jan. 3.

NIBARANCHANDRA SHAHA

v.

MATILAL SHAHA.*

Consent Decree—Compromise—Suit to set aside compromise decree, if maintainable on ground other than fraud—Difference between decree passed on adjudication and on consent—Vakâlâtnâmâ—*Pleader's power to compromise—Limitation—Indian Limitation Act (IX of 1908), Art. 120.*

A suit to set aside a consent decree is maintainable although fraud is not alleged and proved. A consent decree in relation to such a suit stands on a different footing from a decree obtained on adjudication, even though it be *ex parte*, as the former derives its force primarily from the consent of the parties: a suit would lie on any ground which would invalidate an agreement.

Huddersfield Banking Company, Limited v. *Henry Lister & Son, Limited* (1) and *Wilding* v. *Sanderson* (2) followed.

Observations of Jenkins C. J. in *Kusodhaj Bhukta* v. *Braja Mohan Bhukta* (3) relied upon.

Jhanda Singh v. *Lachhmi* (4) and *Duni Chand* v. *Mota Singh* (5) dissented from.

Sadho Misser v. *Golab Singh* (6) referred to and distinguished.

Aushootosh Chandra v. *Tara Prasanna Roy* (7), *Surendra Nath Ghose* v. *Hemangini Dasi* (8), *Sarbesh Chandra Basu* v. *Hari Doyal Singh* (9), *Gulab Koer* v. *Badshah Bahadur* (10), *Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial* (11) and *Kailash Chandra Poddar* v. *Gopal Chandra Poddar* (12) referred to.

A pleader named in the *vakâlâtnâmâ* who had not accepted it in writing, but was allowed to appear and conduct the case, has all the powers which have been mentioned in the *vakâlâtnâmâ*.

*Appeal from Appellate Decree, No. 745 of 1932, against the decree of Rebatimohan Goswami, Second Subordinate Judge of Faridpur, dated Aug. 5, 1931, affirming the decree of Jagatnath Basu, First Munsif of Madaripur, dated June 30, 1930.

(1) [1895] 2 Ch. 273.
(2) [1897] 2 Ch. 534.
(3) (1915) I. L. R. 43 Calc. 217.
(4) (1919) I. L. R. 1 Lah. 344.
(5) (1927) I. L. R. 9 Lah. 248.
(6) (1897) 3 C. W. N. 375.
(7) (1884) I. L. R. 10 Calc. 612.
(8) (1906) I. L. R. 34 Calc. 83.
(9) (1910) 14 C. W. N. 451.
(10) (1909) 13 C. W. N. 1197.
(11) (1905) 10 C. W. N. 529.
(12) (1914) 18 C. W. N. 1204.

Mohesh Chandra Addy v. *Panchu Mudali* (1) followed.

Article 120 of the Indian Limitation Act and not Article 91 or 95 is the proper Article to apply to a suit to set aside a consent decree.

Phulwanti Kunwar v. *Janeshar Das* (2) referred to.

SECOND APPEAL by the plaintiffs.

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

Sateendranath Ray Chaudhuri for the appellants.

Jogeshchandra Ray and *Prakashchandra Majumdar* for the respondents.

Cur. adv. vult.

MITTER J. This appeal is on behalf of plaintiff No. 1 and arises out of a suit (Title Suit No. 99 of 1929) instituted by him and another person named Adityaprasad Shaha for a declaration that the compromise decree passed in Title Suit No. 506 of 1923 is fraudulent, collusive and illegal, that defendants Nos. 1 to 3 have acquired no rights thereunder for enabling them to receive rent or profits of the land (*dâg* No. 2213) covered by the said decree from defendants Nos. 4 to 6 and for confirmation of their possession therein. One or two other reliefs of an incidental nature are also asked, but it is not necessary to detail them for the purpose of this appeal. To the suit one Sadananda Shaha has been made a *pro forma* defendant (*pro forma* defendant No. 7). This suit will be called hereafter as the title suit and whenever the words plaintiffs or defendants are used they shall be deemed to be the persons named as plaintiffs or defendants in this title suit.

Defendants Nos. 1 to 3 instituted a suit being Money Suit No. 1 of 1929 (hereafter called the Money Suit) against defendants Nos. 4 to 6 for recovery of rent or profits from them of the lands described in *dâg* No. 2213. In this suit, the plaintiffs and *pro forma* defendant No. 7 have been impleaded as *pro*

(1) (1915) I. L. R. 43 Calc. 884. (2) (1924) I. L. R. 46 All. 575.

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forma defendants Nos. 5 to 7. No relief has been claimed against them.

It appears that the plaintiffs and *pro forma* defendant No. 7 hold a *howlâ* named *Howlâ* Jeebankrishna Shaha, which include *dâg* No. 2213. The said *dâg* was formerly held under them by some boatmen on a service tenure. The boatmen sold the plot to one Brajabashi Shaha, the father of defendants Nos. 1 and 2 and grandfather of defendant No. 3. Defendants Nos. 4 to 6 had been sub-tenants under the boatmen.

After the purchase by Brajabashi Shaha, the plaintiffs and *pro forma* defendant No. 7 sued defendant Nos. 1 and 2 and the father of defendant No. 3 in 1920 for *khâs* possession and got a decree. Thereafter they realised rent directly for some time from defendants Nos. 4 to 6. In the year 1923, defendants Nos. 1 and 2 and the father of defendant No. 3 sued the plaintiffs and *pro forma* defendant No. 7 for specific performance of an alleged contract. This suit was numbered 506 of 1923, to which defendants Nos. 4 to 6 were also parties. The contract set up and in respect of which specific performance was sought was one by which the plaintiffs and *pro forma* defendant No. 7 are said to have promised a *nim howlâ* interest to defendant Nos. 1 to 3 in respect of *dâg* No. 2213. The plaintiffs and *pro forma* defendant No. 7 entered appearance separately, one *vakâlâtnâmâ* having been executed jointly by plaintiff No. 2 and *pro forma* defendant No. 7 (Ex. Q) and another by plaintiff No. 1 [Ex. Q(1)]. These *vakâlâtnâmâs* were accepted by a pleader, Mr. K. Sen, but the case was conducted by another pleader, Mr. Manmohan Shaha, whose name appeared in the body of the *vakâlâtnâmâs*, but who did not accept them in writing and probably he was assisted by Mr. K. Sen. The *vakâlâtnâmâs* authorised the pleaders to sign compromise petitions on behalf of the clients and to file them in court. 20th April, 1925, was fixed for hearing. On that

date, an applicaton for a long adjournment was prayed for, but the court refused it and fixed the 21st April, 1925, for the hearing. On that date, a petition of compromise was filed, by which defendants Nos. 1 to 3 were recognised as tenants in *kâyem karshâ* right, and the other terms of the tenancy defined. This petition was signed by defendants Nos. 1 to 3, by plaintiff No. 2 and *pro forma* defendant No. 7. It was also signed and filed by Mr. Manmohan Shaha on behalf of plaintiff No. 1, plaintiff No. 2 and *pro forma* defendant No. 7. It has been found that plaintiff No. 2 and *pro forma* defendant No. 7 were actually present in court, but plaintiff No. 1 was away at some place in the district of Bakarganj and was not consulted about the terms and was totally ignorant about the *solenâmâ*, till he learnt about it a few days after when a decree had already been passed on the basis of the same. It has also been found that *pro forma* defendant No. 7, who looked after the case on behalf of plaintiff No. 1, had no authority from him to compromise the suit and that plaintiff No. 1 did not ratify the compromise. These are findings of fact binding on me in Second Appeal. It has also been found that plaintiff No. 1 came to know of the compromise decree beyond three years of the suit and this finding has not been challenged, nor could it be by the appellant.

On the 27th April, 1929, the plaintiffs filed the suit, out of which this appeal arises. They stated that *pro forma* defendant No. 7 was won over by defendants Nos. 1 to 3 by fraudulent ways and means and the *solenâmâ* was filed in collusion with him. The plaint also states that neither *pro forma* defendant No. 7 nor Mr. Manmohan Shaha had any authority to enter into a compromise on behalf of the plaintiffs. The learned Munsif found that *pro forma* defendant No. 7 had authority from the plaintiff No. 1 to enter into the compromise, that he, the plaintiff No. 1, came to know of the consent decree beyond three years of the suit, that plaintiff No. 2 was himself present in court

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and signed the *solenâmâ*. He held that the *solenâmâ* was binding on the plaintiffs and the suit, moreover, was barred by limitation. The money suit was tried along with the title suit, inasmuch as defendants Nos. 1 to 3 claimed relief against defendants Nos. 4 to 6 on the basis of a title acquired by them on the basis of the aforesaid consent decree. The money suit was decreed against defendants No. 4 to 6. Two appeals were preferred before the Subordinate Judge; one by the plaintiffs (Title Appeal No. 252 of 1930) and the other by defendants Nos. 4 to 6 (Money Appeal No. 253 of 1930). The two appeals were heard together and both of them dismissed by the Subordinate Judge.

The Subordinate Judge held that fraud or collusion in respect of the compromise had not been established and the pleader Manmohan Babu or *pro forma* defendant No. 7 had no authority to compromise on behalf of plaintiff No. 1, and the plaintiff No. 1 had not ratified the compromise. He held, however, that, as the plaintiff No. 1 had known of the compromise decree at least in June, 1925 (that is beyond three years of the suit), the suit was barred under Article 91 or Article 95 of the Limitation Act. He also held that the case of fraud having failed, the suit was not maintainable. The findings of the trial court relating to plaintiff No. 2 were affirmed. The Money Appeal was also dismissed, as the compromise decree was not set aside. It is admitted that plaintiff No. 1 has four annas' share, plaintiff No. 2, eight annas' share and *pro forma* defendant No. 7, four annas' share in the *Howlâ* Jeebankrishna Shaha.

Plaintiff No. 1 alone has filed this appeal against the decree passed in the title suit. There is no appeal against the decree passed in the Money Appeal.

The appellant urges before me the following points:—

(1) that the learned Subordinate Judge is wrong in holding that the suit is not maintainable, as fraud had not been established,

(2) that the Subordinate Judge is wrong in holding that the suit is barred by limitation either under Article 91 or 95 of the Limitation Act. He ought to have held that Article 120 was the appropriate Article,

Mr. Jogeshchandra Ray, who appears on behalf of the respondents besides supporting the reason of the Subordinate Judge urges before me three further points, namely :—

(1) that the suit is barred by *res judicata*, and

(2) that on the construction of the *vakâlâtnâmâ* [Ex. Q (1)], the Subordinate Judge ought to have held that Manmohan Babu had authority to compromise on behalf of plaintiff No. 1 and that the act of Manmohan Babu binds him, and

(3) that a pleader has implied authority to compromise on behalf of his client and the compromise put through by a pleader is binding on the client, unless it is proved that the *pro forma* defendant acted fraudulently.

Both parties have cited before me a large number of rulings in support of their respective contentions, but it would not be profitable to deal in detail with all the cases cited before me.

With regard to the first point the appellant has contended before me that the preponderance of authority is in favour of maintainability of a suit to set aside a compromise decree even when fraud is not alleged or proved. Mr. Ray, on the other hand, contends that, in this respect, there should not be any distinction between a decree based on adjudication (in which expression he includes *ex parte* decrees) and decrees passed on consent. It is no doubt now well established that a suit to set aside a decree passed on adjudication would not lie unless the decree is attacked on the ground of fraud, and Mr. Ray contends that the same rule ought to apply to consent decrees.

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To support his contention he placed before me two decisions of the Lahore High Court, *Jhanda Singh* v *Lachhmi* (1) and *Duni Chand* v. *Mota Singh* (2). These decisions do support his contention and, therefore, it is necessary to examine the correctness of the said decisions and to determine whether they should be followed in this Court. In my judgment, the said cases have not been correctly decided and are, moreover, against the *cursus decisionis* of this Court. In *Duni Chand's* case (2) there is really the judgment of a single Judge on the point in question, because, although Agha Haider J. agreed with Tekchand J. in dismissing the appeal, his view was in favour of the maintainability of such a suit but he only agreed with the result being pressed very much by the decision of a Division Bench of the Lahore High Court in *Jhanda Singh's* case (1). It would, therefore, be necessary to examine the decision in *Jhanda Singh's* case (1) first. In that case, a compromise was effected in a suit in which adults and minors were parties. A suit was brought to set aside the compromise on behalf of the minors and also on behalf of one of the adult parties. Fraud was alleged but negatived. As a second line of defence the adult challenged the compromise on the ground that he had not consented and the minors alleged that sanction of the court to the compromise applied for by their guardians had been given under a misapprehension. The court gave effect to the minors' contention and held that the sanction having been given under a misapprehension the compromise was not binding on them and a suit would lie at their instance for avoiding the compromise decree. With regard to the adult plaintiff, the court held that he not having given his consent to the terms of the compromise, the decree was really an *ex parte* decree against him, and his remedy was either to set aside the decree by an application under Order IX, rule 13 of the Code, or by way of review or appeal from the decree itself, but a suit at his instance was not maintainable. In so

(1) (1919) I. L. R. 1 Lah. 344. (2) (1927) I. L. R. 9 Lah. 248.

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deciding, the Court followed the case *Sadho Misser* v. *Golab Singh* (1). In *Sadho Misser's* case (1), however, the decree was not a compromise decree. A prior mortgagee instituted a foreclosure suit impleading the puisne mortgagee also as party defendant. The plaint, as originally filed, contained a defective description of the mortgaged properties. The puisne mortgagee did not appear in the suit. Before the hearing, the plaint was amended, whereby the mis-description was corrected. Thereafter, an *ex parte* decree was passed. The puisne mortgagee brought a suit for redemption, contending that by the *ex parte* amendment of the plaint the properties included in his security was included in the foreclosure suit. The court held that the *ex parte* decree against him was binding on him and his prayer, if allowed, would have the effect of setting aside the *ex parte* foreclosure decree which the court said could not be done in a suit unless the decree was obtained by fraud. *Jhanda Singh's* case (2), therefore, extended the procedure for obtaining relief against a decree passed on adjudication to consent decrees. If consent decrees stand on a different footing, the authority of this decision would be of a doubtful character.

In *Duni Chand's* case (3), Tek Chand J. followed *Jhanda Singh's* case (2). He admitted, however, that other High Courts had taken a different view and merely stated that decisions of this Court cited before him were distinguishable on facts. Some of them were no doubt suits brought on behalf of minors to set aside compromise decrees.

In my judgment, consent decrees stand on an entirely different footing. Such decrees derive their force primarily from the consent of the parties. If, in fact, no consent was given, or if the parties had not been *consensus ad idem*, or if consent of one was procured by misrepresentation, undue influence or

(1) (1897) 3 C. W. N. 375. (2) (1919) I. L. R. 1 Lah. 344.
(3) (1927) I. L. R. 9 Lah. 248.

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coercion the foundation of the decree is shaken: see *Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited* (1). But the name of the aggrieved party appearing in the decree itself, he has to get rid of the decree and that he can do only by getting rid of the compromise, on which the decree is based, on any of the grounds on which a contract can be avoided, and this relief he can also obtain in a suit.

In *Huddersfield Banking Company's* case (1), an action was brought to set aside a consent order on the ground of common mistake of the parties. The action was held maintainable and relief granted on the principle which has been oft quoted. In *Wilding* v. *Sanderson* (2), relief was also granted in a suit. The observations of Byrne J. are very pertinent to the case before me and, in my judgment, lay down the correct principles to be applied in such cases. At pages 543 and 544 of the report, the learned Judge observes:—

> A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose. In my opinion there was no agreement in the present case between the parties prior to the judgment being passed and entered, their minds never having been *ad idem* in respect of the subject matter with which they were dealing. It also appears to me that the divergence of their minds was in respect of an essential or fundamental point. If there was no agreement, there was no consent upon which the judgment could be founded. And just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there was no agreement, and, consequently, no true consent to the order made. When it is once ascertained that there was no actual agreement arrived at before the judgment was completed, and that the consent upon which it purports to be founded never existed, the actual judgment pronounced does not, I think, in itself constitute or represent an agreement, but stands as a judgment of the court made in pursuance of a supposed agreement or consent which both parties believed to exist, but which did not in fact exist.

(1) [1895] 2 Ch. 273. (2) [1897] 2 Ch. 534, 543-4.

In this Court, there is a series of cases beginning from 1871 reviewed in *Aushootosh Chandra* v. *Tara Prasanna Roy* (1), which have treated consent decrees on a different footing from decrees passed on adjudication. In *Aushootosh Chandra* v. *Tara Prasanna Roy* (1), a compromise decree made in the High Court was sought to be set aside on motion. It was pointed out that the proper remedy was by review or suit. In the case of *Surendra Nath Ghose* v. *Hemangini Dasi* (2), where a suit was brought on the ground that the guardian of a minor had not consented to a compromise, Ghose and Caspersz JJ. held that the suit was maintainable and observed that there was nothing said in the later cases to justify the least departure from the principles laid down in *Aushootosh Chandra* v. *Tara Prasanna Roy* (1). In *Sarbesh Chandra Basu* v. *Hari Doyal Singh* (3), a suit to set aside a compromise decree, based on the ground that the plaintiff who was an administrator to the estate of his deceased brother, had entered into the compromise in excess of authority was held maintainable. In *Kusodhaj Bhukta* v. *Braja Mohan Bhukta* (4), which was a suit to set aside a decree passed on adjudication on the ground that the judge had committed a mistake, Sir Lawrence Jenkins C. J. pointed out that there is a well-founded distinction between a decree passed on adjudication and a decree passed on consent and that, in the former case, no suit would lie except on the ground of fraud, but, in the latter case, a suit would lie on any ground which would invalidate the agreement. In the case of *Gulab Koer* v. *Badshah Bahadur* (5), Sir Asutosh Mookerjee, after an exhaustive examination of the authorities, reaffirmed the *dictum* pronounced in *Aushootosh Chandra* v. *Tara Prasanna Roy* (1) and, although it has been held in some cases that, where no fraud is alleged or proved, a party who had unsuccessfully prosecuted an application for review cannot be again allowed to attack the consent decree

(1) (1884) I. L. R. 10 Calc. 612.
(2) (1906) I. L. R. 34 Calc. 83.
(3) (1910) 14 C. W. N. 451.
(4) (1915) I. L. R. 43 Calc. 217.
(5) (1909) 13 C. W. N. 1197.

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by a suit [*Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial* (1), *Kailash Chandra Poddar* v. *Gopal Chandra Poddar* (2)], no case of this Court has held that a suit would not be maintainable to set aside a consent decree where fraud is not alleged and proved. I hold, accordingly, that the suit is maintainable.

Before I take up the other contentions raised by the parties before me, it would be convenient to decide the other issue raised in bar, *e.g.*, the issue of *res judicata*. Mr. Ray contends that the decree in the money suit has now become final, and, inasmuch as the judgment in that suit is based on the validity of the consent decree passed in Title Suit No. 506 of 1923, the question about the validity of the said consent decree cannot be re-agitated. One of the questions involved in this contention is whether findings in a suit *inter parties* tried analogously with another suit between the same parties is *res judicata* when an appeal is preferred from the decree of one of the suits only. On this point there is difference of opinion and nearly all the cases are reviewed in *Monmohan Das* v. *Shib Chandra Saha* (3) and *Oates* v. *D'Silva* (4). If it had been necessary to decide the said question in this case, I would have followed the decision in *Isup Ali* v. *Gour Chandra Deb* (5) and *Oates* v. *D'Silva* (4).

On the facts of this case, I cannot, however, give effect to the plea of *res judicata*. No relief was claimed in the money suit against the plaintiffs. They were not necessary parties at all to that suit and, although it may have been thought desirable to have them as parties defendants, their position was that of *pro forma* defendants only. In these circumstances, the findings in the money suit cannot conclude the plaintiffs: *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (6), I, accordingly, overrule the plea of of *res judicata*.

(1) (1905) 10 C. W. N. 529.
(2) (1914) 18 C. W. N. 1204.
(3) (1930) 34 C. W. N. 839.
(4) (1932) I. L. R. 12 Pat. 139.
(5) (1922) 37 C. L. J. 184.
(6) (1886) I. L. R. 12 Calc. 580.

The next question that falls to be determined is the question of limitation. On the principles formulated by Byrne J. in *Wilding* v. *Sanderson* (1), the consent decree has to be set aside. The plaintiff No. 1 cannot treat it as a void decree which he can ignore altogether. The question, therefore, is what Article of the Limitation Act would be applicable. Article 95 is out of the way, as fraud has been negatived. Nor can Article 91 be invoked, as, by no stretch of language, a decree can be called an instrument. The alleged agreement evidenced by the petition of compromise has no independent existence, it has merged in the decree. In this view of the matter, I would hold that Article 120 of the Limitation Act would be the proper Article to apply. In suits instituted by minors to set aside compromise decrees, not on the ground of fraud, but on other grounds, Article 120 has been applied on the principle that Article 91 or 95 being inapplicable the residuary Article would apply: *Phulwanti Kunwar* v. *Janeshar Das* (2). The suit being instituted within six years of the date of the compromise decree, I hold it is not barred by limitation.

I now take up the question of the pleader Manmohan Babu's authority to bind plaintiff No. 1 by the compromise. He had not accepted the *vakâlâtnâmâ* in writing, but his name appeared in the *vakâlâtnâmâ* and was allowed to appear and conduct the case. Under these circumstances, there was an acceptance of the *vakâlâtnâmâ* by him [*Mohesh Chandra Addy* v. *Panchu Mudali* (3)] and he had all the powers which had been mentioned in the *vakâlâtnâmâ*. On a fair construction of the *vakâlâtnâmâ*, Ex. Q (1), I hold that plaintiff No. 1 is bound by the act of Manmohan Babu. In some of the cases, it has been held no doubt that the authority to file a compromise petition does not authorise the pleader to compromise, but, in my judgment, that would be giving more weight to form than to

(1) [1897] 2 Ch. 534. (2) (1924) I. L. R. 46 All. 575, 590.
(3) (1915) I. L. R. 43 Calc. 884.

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substance. A pleader does not require an express authority to simply file a petition of compromise. His position as pleader of a party authorises him to "file" any petition on behalf of his client. In the case before me this pleader is also authorised to sign the petition of compromise on behalf of his client. His signature on the petition of compromise is in law the signature of his client. I hold, accordingly, that the act of the pleader Manmohan Babu binds the plaintiff No. 1 and he is bound by the compromise decree. In this view of the matter, it is not necessary to decide the question whether a pleader has implied authority to compromise a suit on behalf of his client, when there is no express instruction by the client not to compromise. The cases decided by the High Courts draw a distinction between the position of a counsel and a pleader in this respect, but, in my judgment, the authority of these decisions has been considerably shaken by the observations of the Judicial Committee in the case of *Sourendranath Mitra* v. *Tarubala Dasi* (1). Lord Atkin no doubt reserved the question of pleaders acting with written authority but the observations at pages 139 and 140 of the report would be applicable to them also. A pleader has as much responsibility in conducting a suit as a counsel, the same duty to watch and protect the interest of his client and to make the best of a case. But, as I have held in favour of the respondents on the construction of the *vakâlâtnâmâ*, Ex. Q (i), this point does not require further discussion.

The result is that this appeal is dismissed with costs.

Leave to appeal under the Letters Patent asked for is refused.

A. A. *Appeal dismissed.*

(1) (1930) I. L. R. 57 Calc. 1311; L. R. 57 I. A. 133.