ORIGINAL CIVIL.

Before Cunliffe J.

MOUSELL & CO.

v.

GHANSHAYAMDAS JUMNADAS.*

1934

Aug. 2.

Compromise—Intimidation of counsel—Inherent power of court to set aside consent decree.

After the plaintiffs had closed their case and before the defendant had been examined, the Judge said to counsel for the defendant that if the defendant gave evidence to support his written statement, he would recommend the prosecution of the defendant for perjury. Thereupon, counsel for the defendant consented to a decree.

Held, that, since counsel was intimidated and was not free to consider the whole aspect of the settlement from an unbiassed point of view, the consent decree should be set aside. In such a case, the court has an inherent power to set aside any decree.

APPLICATION by the defendant.

The necessary facts of the case appear from the judgment.

P. N. Sen for the applicant. In the interest of the client I had to consent to a decree, but I had no time to consider the settlement properly. Therefore the consent decree was bad and should be set aside. *Radha Kissen Khettry* v. *Lukhmi Chand Jhawar* (1). In this case there was no proper consent given on behalf of the defendant.

B. C. Ghose for the respondent. Coercion by a third party or the court cannot affect an otherwise valid compromise between the parties. If the defendant objected to the compromise, he ought to have withdrawn the authority of his counsel and informed the other side accordingly. *Matthews* v. *Munster* (2), *Ghasiram Goenka* v. *Haribux Gobardhandas* (3).

*Application in Original Suit No. 1009 of 1933.

(1) (1920) 24 C. W. N. 454. (2) (1887) 20 Q. B. D. 141.
(3) (1931) I. L. R. 59 Calc. 31.

1934

Mousell & Co. v. *Ghanshayamdas Jumnadas.*

CUNLIFFE J. This is a somewhat embarrassing petition, which arises out of a suit for the sale between the parties of a consignment of imported *sârhis*. In actual fact, there was a cross action on the part of the defendants, who were to take delivery of the goods, but, at the hearing of what I may call the main action, after the plaintiffs had called their evidence, the learned Judge presiding over the trial thought fit to make certain observations. They concerned the defendant and consisted, broadly, of a threat to sanction his prosecution for perjury if he gave evidence along certain lines.

There are various descriptions of what happened during this incident. In the petition, which is before me, which asks for the setting aside of the decree and for a new trial, this is how the incident was described.

Paragraph 9. That, after the witnesses on behalf of the plaintiffs were cross-examined by my counsel, the learned Judge, without giving your petitioners an opportunity to state their case, threatened to send your petitioners to jail, as soon as your petitioners would step into the witness box, whereupon your petitioner's counsel, Mr. P. N. Sen, consented to a decree being passed for the full amount of the claim and costs.

In the affidavit, which supports that petition, what occurred is referred to as follows:—

With reference to the statements contained in paragraph 4 of the plaintiff's affidavit, I repeat that the learned Judge did not give me any opportunity to place my case; whilst the cross-examination of the plaintiff was going on, the learned Judge threatened to send the deponent to jail as soon as he got me into the witness box. As a matter of fact, the learned Judge told counsel for the deponent that his Lordship would himself be able to give sanction to prosecute under section 476 of the Criminal Procedure Code and asked the assistance of the Registrar of this Court to have the Indian Penal Code and the Criminal Procedure Code ready.

Then the respondent's version of what occurred is in the affidavit of Mr. Fritz Grellsamer. He says this:—

After the cross-examination of myself and a broker witness, counsel for the plaintiff company closed their case and, thereupon, Mr. P. N. Sen called a witness, from the Customs Office, to prove certain letters which were being proved when the Judge asked Mr. Sen as to whether he intended to call his client into the box. Mr. Sen said that he did, upon which the learned Judge asked whether his client was going to deny the agreement spoken to by myself and the broker witness on behalf of the plaintiff, to which Mr. Sen

said that that was so. Thereupon, the learned Judge said that, if, on hearing the evidence given by Mr. Sen's client, his Lordship came to the conclusion that he was not speaking the truth, his Lordship would not hesitate to take proceedings for the sanction of the prosecution of the witness. After that, Mr. Sen was asked to proceed with the case and he did so to some extent.

It is not disputed that the case was settled. In my opinion, the offer for settlement came from Mr. Sen and not from the other side. The description of the settlement is by no means accurately set out in the petitioner's affidavit. It was a partial, not a full settlement; and, although the petitioner now denies that he gave any authority to Mr. Sen to take this course or that his attorney did either, in my view, both the attorney and petitioner acquiesced in what Mr. Sen was doing.

It is of course, exceedingly difficult, on affidavit evidence only, untested by cross-examination, to come to an exact conclusion as to what actually took place. In the circumstances described, I think it will be safer, in considering what the learned Judge said and the effect of his words upon counsel for the defendants, the petitioners here, if I rely solely on the version given by the plaintiffs respondents. Their's seems to be an honest affidavit. There is no attempt to deny that the outburst from the learned Judge did in fact take place; nor is there a denial that the negotiations for settlement followed very closely upon the outburst in question.

It is argued, on behalf of the petitioners, that this settlement was no settlement in that the settlement was brought about without proper freedom on the part of counsel for the petitioners. Reference has been made to a well-known English case and an equally well-known case in this province which deals with the scope and limit of the authority of counsel to settle cases in court when there is some dispute about what occurred as to the instructions given to them by their professional or lay clients; but these cases do not seem to me to have an exact bearing upon the problem before me. The question is, should this settlement be set aside, because, to use the words of a

1934

Mousell & Co.
v.
Ghanshayamdas Jumnadas.

Cunliffe J.

very learned Judge of this Court (the late Sir Asutosh Mookerjee) the consent here could not be deemed to be free and fair and might well be regarded as a constrained and involuntary acquiescence in the mode of trial which the court had decided to adopt. I shall refer to that case again in a moment; but I mention it here because the language which the late learned Judge used, in deciding that case, is, in my opinion, singularly apposite to this case. Of course, it is exceedingly unfortunate, and I said so during the hearing, that Mr. Sen himself is instructed to appear before me to-day to argue in support of this petition. It is quite obvious why it is undesirable that counsel, in such circumstances, should appear once more, because it was hardly possible for Mr. Sen to put his client's case before the Court without giving evidence himself, and this he proceeded to do. I believe that, in truth and in fact, he was intimidated into taking the settlement course by what the learned Judge said—intimidated in the sense that he was apprehensive on behalf of his client; and I cannot help observing, and I do not wish to be harsh in any way, that such an avowal is not, in the ordinary course of things, quite creditable to a member of the Bar.

The circumstances here were, however, very peculiar. There was little time to make up his mind. Counsel was appearing for a person, who was, I think, without much education and without perhaps an exact appreciation of what was going on. It cannot, however, be too strenuously insisted, in similar circumstances, that it is the duty of members of the bar, if their clients are threatened prematurely from the Bench, not to adopt an attitude which may be described as pusillanimous, but to protest then and there that they resent such observations; and possibly, after consulting with their attorney instructing them, it may become necessary for them to apply for a transfer of the case to the list of another Judge. In my opinion, the settlement here was not a free settlement.

The only decision, which has been cited to me, that has any bearing on the particular facts of this case

is that of *Radha Kissen Khettry* v. *Lukhmi Chand Jhawar* (1). That was a case, which was tried by Rankin C. J., sitting as a puisne Judge on the Original Side of this Court. It was a suit under section 14 of the Indian Arbitration Act and when counsel was arguing before the learned Judge, the head note sets out that he held that the suit did not lie and declined to entertain the hearing of the application except on the basis that he treated both the trial and the application as a petition under the Act. Under the mistaken impression that counsel on both sides had consented to this view, he proceeded to hear the matter on affidavits and then dismissed both the action and the motion with costs.

Dealing, with that aspect of the case, the late Sir Asutosh Mookerjee, on appeal, said :—

> Even if the minute book has shown the *factum* of consent, it could not be treated as consent freely given by counsel in the exercise of his discretion as an advocate invested with a general control over the conduct of the case of his client. The learned Judge states in his judgment that the consent (which he thought was given) was accorded only when he intimated that he would otherwise decline to entertain the motion. If counsel had consented, after the expression of such determination by the Court, the consent could not be deemed free and fair, and might well be regarded as constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt.

Now, although this case, so far as the facts are concerned, is in no way analogous to that case, it does seem to me that this settlement would never have been proposed had the learned Judge not made the observations that he did. It was brought about, in my opinion, by a form of judicial coercion. Counsel for the defendants was not prepared to take the risk of putting his client into the box to support his pleaded case. The learned Judge, without seeing his client, had said that if he, the defendant, gave evidence to support his written statement he was prepared to go to the length of recommending the prosecution of the defendant for perjury. If I think that counsel *was* intimidated and was not free to consider the whole aspect of the settlement from what I

(1) (1920) 24 C. W. N. 454, 458.

1934

Mousell & Co. v. *Ghanshayamdas Jumnadas.*

Cunliffe J.

may call an unbiased point of view, I apprehend that I have an inherent power to set aside this settlement. I propose to do so. It is unfortunate that this application was not made to the learned Judge himself before he laid down his office, but it is of cardinal importance that suitors in courts of justice should enter and leave the courts with a feeling that, whatever may be the upshot of actions which are commenced and fought out, that the court, at any rate, does not make up its mind as to the truth or untruth of their witnesses before the witnesses have been seen in the witness box.

I consider that the setting aside of this decree based on the settlement is in the public interest, the highest interest which can be considered in a court of justice. I shall make no order as to costs in favour of the petitioner here. The respondents will have the costs of this petition in any event. I am not concerned with the question of costs already incurred which I think will be better dealt with by the Judge who tries the case at the new trial.

Attorney for petitioners: *P. C. Ghose.*

Attorneys for respondents: *Leslie & Hinds.*

S. M.