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petition, dated the 29th November 1877, made by the plaintiff is not enough to prove the said proclamation, because it appears from the above copy that the plaintiff had brought the mortgage alleged by him to the notice of the Court. But it has not at all been shown on behalf of the plaintiff that the fact of the mortgage was proclaimed at the time of the sale in such a manner as to make the defendants, purchasers, aware of it." The only fact, therefore, which is in evidence and which could have any bearing on this matter in the plaintiff's favor, is that, on the 29th November 1877, at what stage of the proceedings it does not appear, he filed a petition in which he informed the Court of his mortgage. If there were a charge against the plaintiff of having deliberately and fraudulently concealed his mortgage, no doubt this matter would be of considerable importance. But the fact that, for some purpose at some time or other, he informed the Court of the mortgage is not evidence upon which the conclusion could be arrived at that the defendants purchased with notice.

For this reason we think that the decree of the Subordinate Judge must be reversed and that of the Munsiff affirmed.

The appellant will have his cost in this and the lower Appellate Court.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Tottenham.

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April 24.

AUSHOOTOSH CHANDRA AND ANOTHER (PETITIONERS) *v.* TARA PRASANNA ROY (OPPOSITE PARTY.)*

Compromise and decree thereon—Application to set aside compromise—Review of judgment—New suit.

For the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court, there are two available modes of procedure—(1) by suit; (2) by a review of the judgment sought to be set aside; the latter being the more regular mode of procedure. *Lalji Sahu* v. *The Collector of Tirhoot* (1); *Mewa Lal Thakur* v. *Bhujhun Jha* (2); *Gilbert* v. *Endean* (3) followed.

THIS was a rule obtained by Aushootosh Chandra and his brother calling upon one Tara Prasanna Roy to show cause why a

* Civil Rule No. 272 of 1884.

(1) 6 B. L. R., 649. (2) 13 B. L. R. Ap. 11.

(3) L. R. 9 Ch. D. 259.

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compromise entered into by them with Tara Prasanna Roy should not be set aside. There were two appeals pending in the High Court between these parties—Aushootosh Chandra and his brother were appellants in the one, and respondents in the other, and Tara Prasanna respondent in the one, and appellant in the other. Before the hearing of these appeals negotiation for a compromise were set on foot, on the faith of which Aushootosh Chandra and his brother applied to the Court on the 31st January 1884, stating that the matters in dispute between them had been settled out of Court, and asking that their appeal against Tara Prasanna might be dismissed and the appeal of Tara Prasanna decreed. Orders were made for decrees to be passed accordingly; but as the applicants did not set out in their petition the terms of the compromise, no terms were embodied in the decree. Subsequently Aushootosh Chandra and his brother presented a petition to the Court to set aside the decrees, stating that the condition of the compromise provided that a sum of money was to be advanced to them by Tara Prasanna on a certain date, and that this term had not been complied with; and that several decree-holders who were to have been satisfied by that money had consequently come in and were about to sell the properties of the petitioners. The High Court thereupon issued a rule against Tara Prasanna to show cause why the terms of the compromise should not be set aside, and the rule came on for hearing on 24th April 1884. Both sides put in affidavits—the petitioners supporting by their affidavit the petition on which the rule was obtained, and Tara Prasanna Roy affirming that it was a term of such advance that the petitioners should show a clear title to the property on which the advance was to be made and that they had not done so.

The Advocate-General (Mr. *Paul*) and Baboo *Rash Behary Ghose* for the petitioner.

Mr. *Evans* and Baboo *Troylocky Nath Mitter* for the opposite party.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was delivered by

WILSON, J. (TOTTENHAM J. concurring).—This was a rule ob-

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tained to show cause why a compromise should not be set aside. It was shown that there were two appeals pending in this Court between the same parties, in one of which the present applicants were appellants and in the other their opponents were appellants. It appears that a petition was presented by the present applicants stating that the matters in dispute in those appeals had been settled by compromise out of Court, and asking in substance that their appeal should be dismissed, and that in the case in which they were respondents a decree should be made against them: and orders were made for decrees to be passed accordingly. The petition did not set out the terms of the compromise. The terms, therefore, could not be embodied in the decrees. The compromise was only referred to. It is now stated that the facts are such that the present applicants are entitled to have that compromise disregarded, and to have the appeals proceed.

Now, the first question which we have to consider is, supposing the facts to be of such a nature as they are alleged to be, can we entertain this application in its present form? We think we cannot. The mode in which such a miscarriage, as is said to have occurred in this case, is to be dealt with has been considered on more occasions than one; and it seems to be clear that there are two modes in which the matter can be dealt with. In the first place a suit will lie to set aside the whole transaction. It is not necessary for us to consider whether in the present case, if a suit were brought, it ought to be brought in the Mofussil or in the Original Side of this Court. It is for the parties to consider that. On the other hand, it has also been held that there is another and a more proper mode of procedure, by applying for a review of judgment.

In the case of *Lalji Sahu* v. *The Collector of Tirhoot* (1) a decree had been made founded on a compromise. An application for a review was made, and facts were brought to the knowledge of the Court, showing that the compromise ought to be treated as a nullity, and the Privy Council appear to us clearly to treat that application for review as a proper mode of raising the question whether the compromise ought to be treated as a nullity or not. A similar

(1) 6 B. L. R., 640.

question came before this Court in the case of *Mewa Lall Thakur* v. *Bhujhun Jha* (1). That was a case in which the decree was obtained by fraud, and the parties had proceeded by a suit to set it aside. The case was heard by Mr. Justice PHEAR and Mr. Justice MORRIS; and judgment was delivered by Mr. Justice PHEAR, who said: "It seems to us that this suit has been to a considerable extent misdirected. It has already been mentioned that the immediate aim of the plaintiff is to get a decree, which was formerly passed against him by a competent Court, set aside on the ground that it was obtained by fraud and collusion. But the proper course for obtaining such an object as that is to go to the Court which passed the decree either within the time specified in s. 119 of the Civil Procedure Code, if the circumstances are such as would justify action under that section, or at any time (so that it be done with due diligence), if the ground upon which the decree is sought to be set aside be a good ground for reversing and altering the judgment upon which the decree was passed."

These decisions seem to us to be authorities for saying that a mode of proceeding in such cases is by a suit, but that the more proper mode is by an application for review. The question which is now before us arose before the Court of appeal in England in the case of *Gilbert* v. *Endean* (2). In that case the very procedure adopted here was adopted by the parties. A compromise had been arrived at in the course of a suit, and an application was made by motion to set aside that compromise and to allow the suit to proceed, as if the compromise had not been made. The Vice-Chancellor allowed the application. In the Court of appeal it was pointed out that such an application was not the right mode of procedure. We think that is so in this country also, and the proper course is that which we have already pointed out. It occurred to us that we might possibly treat this application as an application for review. But whether we can do so without straining matters unduly we think it unnecessary to say. It is undesirable in the interests of the applicants. The materials are very scant; and it might very well happen that the

(1) 13 B. L. R., App. 11. (2) L. R., 9 Ch. D., 259.

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Judges by whom the application might be dealt with might feel bound to dismiss the matter on that ground. We think it better therefore to leave the parties to make a fresh application for review if so advised. If they elect to make that application it ought to be made on very much better materials than those before us, and that the whole of the facts in the matter on the best evidence available should be before the Judges before whom the application is made.

Rule discharged.

PRIVY COUNCIL.

P. C. * 1883 *Nov.* 28, 29.

ABDUL HYE (PLAINTIFF) *v.* MIR MOHAMMED MOZAFFAR HOSSEIN AND ANOTHER (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Statute 13 *Eliz. c.* 5—*Fraud upon creditors—Hibba—Equity and good conscience.*

Whether or not the Statute 13 Eliz. c. 5 (1) (which may or may not extend to or operate in the "mofussil") is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles, and those of the common law for avoiding fraudulent conveyances, have received effect in the Indian Courts, and have properly guided the decisions of the Courts in administering law according to justice, equity and good conscience.

A *hibba* having been found on the evidence to have been made not *bonâ fide*, nor on any good consideration, and by it creditors being delayed in their just rights, the maker having intended to protect his property thereby from those who at the time were his creditors;—*held*, that the *hibba* was void according to equity and good conscience.

APPEAL from a decree (23rd April 1880) of a Divisional Bench of the High Court, varying a decree (9th May 1878) of the District Judge of Dacca.

This appeal arose out of proceeding in execution of a decree, and raised the question whether properties which were admitted

* *Present*: Lord FITZGERALD, Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH and Sir A. HOBHOUSE.

(1) By Statute 13 Eliz. c. 5, all covinous conveyances, gifts, and alienations of lands or goods, whereby creditors may be in anywise disturbed, hindered, delayed or defrauded of their just rights, are utterly void.