

Before Mr. Justice Niamat-ullah and Mr. Justice Collister

1934
August, 27

HUSAIN YAR BEG (DEFENDANT) *v.* RADHA KISHAN AND
OTHERS (PLAINTIFFS)*

Civil Procedure Code, order XXIII, rule 3—“Lawful” compromise—Scope of inquiry—Allegation that agreement was obtained by fraud—Civil Procedure Code, section 151.

The word “lawful” in order XXIII, rule 3 of the Civil Procedure Code excludes agreements which in their very terms or nature are unlawful, but includes agreements which may be voidable at the option of one of the parties as having been brought about by fraud, misrepresentation or undue influence.

Order XXIII, rule 3 does not provide for an inquiry into disputed facts collateral to the terms of the compromise. An inquiry into an allegation by one party that an agreement, admittedly executed by him, was brought about by fraud of another party is not within the purview of order XXIII, rule 3, and the party alleging fraud can not be allowed to avoid the compromise. The court is bound to give effect to it forthwith if it is lawful having regard to its own terms. It is open to the party to institute a regular suit for setting aside the compromise and the decree passed thereon.

Section 151 of the Civil Procedure Code can not properly be invoked to authorise the court to inquire into such an allegation of fraud in a proceeding under order XXIII, rule 3.

Mr. *Mushtaq Ahmad*, for the appellant.

Messrs. *A. M. Khwaja, S. N. Seth, G. S. Pathak*, and *Krishna Murari Lal*, for the respondents.

NIAMAT-ULLAH and COLLISTER, JJ.:—This is an application by the appellant (defendant No. 2 in the original suit) praying that a decree be passed in terms of a registered compromise arrived at between the appellant and the plaintiffs respondents on the 1st February, 1933. The original document was in the possession of the plaintiffs respondents. The appellant filed a certified copy thereof with his application in this Court. He also prayed that the respondents be called upon to produce the original deed of compromise. An order was passed by this Court sending down the certified copy of the compromise to the lower court for “verification and report”.

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The lower court issued a notice to the plaintiffs directing them to file the original deed of compromise and to verify the same. The plaintiffs appeared before the lower court and filed the original with an application in which they admitted having executed the registered compromise relied on by the appellant but alleged that the appellant's conduct in inducing the plaintiffs respondents to enter into the compromise was fraudulent. According to them, the appellant had given an assurance that no other defendant would file any cross-objection, but in contravention of that assurance a cross-objection had been filed by another defendant, namely, Mst. Sabri Begam just a day before the compromise was registered, a fact of which the plaintiffs respondents were not aware and which the appellant concealed from them. The compromise itself does not contain any such stipulation.

The lower court did not enter into the truth or otherwise of the respondents' allegation and made a report to the effect that the compromise had not been "verified". We do not think that the plaintiffs respondents can be considered to have refused to "verify" the compromise except in the sense that they declined to give effect to it. They admit its execution and registration. They do not plead that any of the stipulations contained in the document was not known to them or that they were not free agents in entering into it. Apart from the allegation of fraud, to which reference has already been made, the compromise is a perfectly valid and binding document. The question is whether the respondents' averment of fraud should be inquired into before the compromise is given effect to under order XXIII, rule 3 of the Civil Procedure Code. Rule 3 is mandatory in its terms and provides that if it is proved to the satisfaction of the court that a suit (or appeal) has been adjusted by a lawful compromise, the court has no option but to order such compromise to be recorded and to pass a decree in accordance thereof. The compromise, if given effect

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to, adjusts the appeal as between the parties to the compromise. It is not disputed that they consented to its terms. Therefore a decree must be passed unless it is shown that order XXIII, rule 3 does not apply for any reason.

The learned advocate for the respondents contends that order XXIII, rule 3 does not apply inasmuch as the compromise in question in the present case is not "lawful" as the same had been obtained by fraud. He offers to show by evidence, if an opportunity is given to him, that the fraud alleged by his clients in their application already referred to was in fact perpetrated by the appellant. Assuming, in favour of the respondents, that the appellant had given an assurance to them that no other defendant would file any cross-objection and that he was privy to a cross-objection being filed by another respondent, we do not think that the compromise can, for that reason, be considered to be otherwise than lawful within the meaning of order XXIII, rule 3 of the Civil Procedure Code. The point is covered by *Qadri Jahan Begam v. Fazal Ahmad* (1) in which a Division Bench of this Court held: "The word 'lawful' in order XXIII, rule 3, does not merely mean binding or enforceable. A contract which is brought about either by undue influence, misrepresentation or fraud is, under sections 19 and 19A of the Indian Contract Act, merely voidable and not absolutely illegal or unlawful. Section 23 of the Contract Act indicates when the consideration or object of an agreement is unlawful. These are cases where it involves or implies injury to any person or property, or where the court regards it as immoral or opposed to public policy. We think that the word 'lawful' in order XXIII, rule 3 refers to agreements which in their very terms or nature are not 'unlawful', and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about

(1) (1928) I.L.R., 50 All., 748 (751).

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by undue influence, coercion or fraud." We are in entire agreement with the views expressed in the passages quoted above. A contract which has been induced by fraudulent conduct is, between the parties, not void but only voidable at the option of the party defrauded. Such a contract is valid until it is set aside at the instance of the party at whose option it is voidable.

A contract vitiated by fraud can be set aside by a decree obtained in a regular suit instituted for that purpose. A mere repudiation by one of the parties, not acquiesced in by the other, is not avoidance of such a contract. A judicial determination of facts on which the right to avoid rests is a necessary preliminary to the contract being set aside. Order XXIII, rule 3 does not provide for an inquiry into disputed facts collateral to the terms of the compromise. It is highly inexpedient that questions of the character raised in the present case should be inquired into in a miscellaneous proceeding started by an application under order XXIII, rule 3. If such inquiry is allowed, all the various stages of a regular suit will have to be gone through in disposing of that application. For these reasons, we do not think that a proceeding of the nature above referred to is within the purview of order XXIII, rule 3 and we think that a party alleging fraud cannot be allowed to avoid the compromise admittedly executed by it in proceedings started by an application under order XXIII, rule 3. The court is bound to give effect to it forthwith if it is lawful having regard to its own terms.

The learned advocate for the plaintiffs respondents invoked our jurisdiction under section 151 of the Civil Procedure Code. We do not think this is a fit case in which we should act in the exercise of our inherent power and inquire into the truth or otherwise of the plaintiffs' allegations, assuming we have such power under that section. It is open to the plaintiffs respondents to institute a regular suit for setting aside the compromise. If

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such a suit is successful, the compromise shall be set aside and the decree passed thereon shall be vacated with the result that the appeal which has been compromised shall have to be reopened.

Having regard to the circumstances which exist at present, the compromise which was admittedly executed by the plaintiffs respondents cannot be considered to be otherwise than lawful. Accordingly we order the compromise to be recorded and pass a decree in accordance therewith.

Before Mr. Justice Niamat-ullah and Mr. Justice Collister

BIHARI LAL AND ANOTHER (PLAINTIFFS) v. HAR LAL SAH
AND OTHERS (DEFENDANTS)*

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*Hindu law—Kumaun customs—Succession—Vaish community
—Widow's right to succeed to her husband's collaterals*

While not deciding whether a custom had been established in Kumaun, among the Vaish community, of a widow succeeding to her husband's collaterals, it was held that if such a custom existed it was confined to the case of sonless widows only.

Dr. S. N. Sen and Messrs. P. L. Banerji and Hari Ram Jha, for the appellants.

Dr. K. N. Katju and Mr. B. L. Dave, for the respondents.

NIAMAT-ULLAH and COLLISTER, JJ.:—This is a plaintiffs' appeal. One Kundan Lal, a vaish by caste, owned certain property in the Kumaun district. He died in 1875, leaving a widow Musammat Gomti Sahan and also an adopted son Gopal Sah, who died without issue. Musammat Gomti Sahan remained in possession of the property up till August, 1921, when she died; but before her death she made a trust in respect to the said property. Mohan Lal and Debi Lal, defendants Nos. 1 and 2, and Musammat Chittra Sahan, defendant No. 3, sued for

*First Appeal No. 196 of 1930, from a decree of F. W. W. Baynes, Subordinate Judge of Almora, dated the 17th of June, 1929.