

Before Justice Sir Edward Bennet and Mr. Justice Ganga Nath

BALESAR MISIR (PLAINTIFF) v. TEKESAR MISIR AND
OTHERS (DEFENDANTS)*

1939

January, 5

Civil Procedure Code, order XXIII, rule 3—Compromise decree—“So far as it relates to the suit”—Recital in the compromise that parties had effected an exchange of certain properties outside the subject matter of the suit—Decree incorporating whole compromise—Not an adjudication of the rights of the parties in respect of those properties—Suit for enforcement of the exchange—Question of title of parties regarding those properties can be raised.

In a suit for possession of a bamboo clump a compromise was effected. The compromise had two terms, the first of which set out that the plaintiffs were the owners of the bamboo clump, and the second term set out that the parties had made an exchange and had put each other in possession of certain other properties which were not in suit. A decree was passed in terms of the compromise. Apparently, however, the exchange had not been fully carried out and given effect to: for subsequently one of the parties brought a suit against the other for possession of the item of property which was mentioned to have been given to him by the exchange. In this suit the defendant raised a question of title of the plaintiff to the item of property claimed by him, and the point arose whether in view of the compromise decree such a question could be raised:

Held, that the embodiment in the decree of the statement in the compromise that the exchange had taken place was in no way a bar to the court investigating the question of the title of the plaintiff to the item of property claimed by him. Not only did the second term of the compromise relate to properties outside the subject-matter of the suit, but further the decree, in incorporating the second term of the compromise, did not determine the rights of the parties in regard to the properties exchanged; it merely recited the fact stated in the compromise that there had been this exchange and transfer of possession between the parties. This recital, which neither determined the rights of the parties nor was capable of execution, was in no way a part of the operative decree; and the plaintiff could not claim that any special result, by way of conferment of an unquestionable title, accrued from the mere recital of this part of the compromise in the decree.

*Second Appeal No. 598 of 1936, from a decree of Shiva Harakh Lal, Additional Civil Judge of Azamgarh, dated the 8th of February, 1936, reversing a decree of Suraj Prasad Dube, Munsif of Haveli, dated the 29th of August, 1934.

1939

BALESAR
MISIR
v.
TEKESAR
MISIR

Mr. *A. P. Pandey*, for the appellant.

Mr. *K. L. Misra*, for the respondents.

BENNET and GANGA NATH, JJ.:—This is a second appeal by one of the plaintiffs against a decree of the lower appellate court dismissing the suit of the plaintiffs. The trial court had decreed the suit. The plaintiffs brought a suit for an injunction restraining the defendants first set from interfering with the possession of the plaintiffs over the land of two *karis* of sub-plot 10/1 and a kothri, and in the alternative for possession and also for Rs.20 damages. The suit of the plaintiffs was based on the following considerations. The defendants first set brought a suit No. 126 of 1931 against the plaintiffs and defendant second set for possession of a bamboo clump in the village. That suit was terminated by a compromise dated the 29th of March, 1932. This compromise had two terms, the first of which set out that the plaintiffs were the owners of the bamboo clump. The second term set out that the parties had made an exchange and had put each other in possession of certain other property which was not in suit. This exchange was that the defendants first set gave two *karis* of plot No. 10/1, the present property in dispute, to the plaintiffs and the plaintiffs had given two *karis* of sub-plot No. 28 to the defendants first party and that each party had been put in possession. It was further provided that if one party interfered with the possession of the other party over any part of the land exchanged, that party would be liable for Rs.20 damages. A decree was passed in terms of the compromise. Now it is to be noted that this decree in dealing with the second paragraph of the compromise did not provide for any adjustment of the rights of the parties. In section 2(2) of the Civil Procedure Code a “decree” is defined as the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

1939

 BALSAR
 MISIR
 v.
 TEKESAR
 MISIR

Without considering for a moment the fact that a "decree" refers to matters in controversy in the suit we must point out that "decree" involves the determination of the rights of the parties with regard to matters. Now paragraph 2 of this compromise decree does not determine the rights of the parties in regard to the property exchanged. It merely sets out that something has happened, that is, that the parties have made an exchange and have put each other in possession. The case is therefore one in which there could not be an execution of this portion of the decree by an application for possession to be handed over to the plaintiffs and therefore the plaintiffs have not made any application for execution of this decree in suit No. 126 of 1931. On the contrary the plaintiffs have brought this separate suit, suit No. 302 of 1933. We may note that if the decree had been capable of execution in regard to this property then the present suit of the plaintiffs would be barred by the provisions of section 47 of the Civil Procedure Code. Admittedly, therefore, the suit of the plaintiffs is based on something in the decree which is not capable of execution. This appears to us to be an admission that the second paragraph of the decree is merely a recital of facts and is in no way a part of the decree. The court below has proceeded on the following lines. The defence was that the title of the plaintiffs to the sub-plot 10/1 in dispute was defective because there was an *iqrarnama* by which the parties had agreed as part of their compromise that the plaintiffs should obtain within one year the consent of two widows Mst. Batasi and Mst. Kalindi. The court below has found that these two widows were widows of persons who were separate from the plaintiffs and who were entitled to a share in the two *karis* of plot No. 28 which the plaintiffs had purported to transfer by the compromise. The court found that the plaintiffs had not carried out their part of the *iqrarnama* and had not obtained the consent of these two ladies within one year from the compromise and that the *iqrarnama* had provided that if the

1939

BALESAR
MISIR
v.
TERESAR
MISIR

plaintiffs failed to get the signature of the ladies within the year then on their failure to do so the parties remain in possession of their own respective plots and that it was in accordance with this condition of the *iqrarnama* that the defendants first set continued to remain in possession of this sub-plot 10/1 and the defendants objected to the application of the plaintiffs for mutation. The right of the defendants to make this objection was based by the court below on section 55(2) of the Transfer of Property Act.

The plaintiff has based his case in second appeal on a claim that under the Full Bench ruling of *Sahu Shyam Lal v. Shyam Lal* (1) where there is a decree based on a compromise, any title derived under the decree cannot be attacked. Learned counsel therefore argues for the appellatant plaintiff that it was not open to the court below to go into the question of the validity of the title of the plaintiff to sub-plot 28. Now the Full Bench ruling dealt with a case where there was a suit, No. 125 of 1923, brought by one Sahu Shyam Lal for dissolution of partnership from Kalyan Das and others. A compromise was made between the parties by which the defendant was to pay a sum of money and the defendant hypothecated certain property in case he failed to pay the money. Sahu Shyam Lal executed this decree as a mortgage decree and in an auction sale purchased the property. One Gopal Ram had a simple money decree No. 439 of 1926 against Kalyan Das and others and in auction sale under this decree one Munshi Shyam Lal, who was a different person from Sahu Shyam Lal, purchased the interest of Kalyan Das and others in the property which had been mortgaged. The case before the Full Bench arose on appeal from a suit brought by Munshi Shyam Lal against Sahu Shyam Lal for a declaration that the property which he had purchased by auction sale was not affected by the decree in the mortgage suit and that the purchase under that

(1) (1933) I.L.R. 55 All. 775.

mortgage decree by Sahu Shyam Lal was invalid and not binding on Munshi Shyam Lal. What was laid down in the Full Bench ruling was that as the plaintiff Munshi Shyam Lal was the representative of Kalyan Das and others he therefore was bound by the decree in suit No. 125 of 1923 and that the validity of that decree was binding on him as a representative of a party to it and he could not attack its validity in the execution department and no title derived under that decree could be attacked by a party to that decree or a representative. It will be noted that the question raised in the Full Bench ruling was whether the execution sale under the mortgage decree was valid or not and the representative of a party to that decree desired to challenge the validity of that auction sale by that separate suit. The question in the Full Bench ruling dealt with a decree which was capable of execution and which was in fact executed under order XXXIV by auction sale. On the other hand the decree of compromise in the present suit is one which was admittedly not capable of execution and no question as to the validity of its execution arises before us. It has not been executed but the separate suit is now brought by the plaintiffs claiming that in some way the existence of this decree prevents the question of title in regard to certain matters being raised between the defendants first set and the plaintiffs. We do not think that the Full Bench ruling applies at all to a case like the present. No doubt the propositions in the Full Bench ruling apply to say that a compromise decree may relate to matters which are not matters in suit and that where the court does pass a decree in regard to such matters in any suit the decree is not a nullity and is not one passed without jurisdiction but is one which is binding on the parties and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked. The terms of order XXIII, rule 3 are as follows: "Where it is proved to the satisfaction of the court that

1939

BALESAR
MISIR
v.
TERESAR
MISIR

1939

BALESAR
MISIR
v.
TERESAR
MISIR

a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit." It will be noted that the direction is that the court shall pass a decree in accordance with the compromise *so far as it relates to the suit* and where the compromise does not relate to the suit the presumption is that the rule implies that the court should not pass a decree in regard to it. In this connection we may refer to *Hemanta Kumari Debi v. Midnapur Zamindari Co.* (1) where their Lordships of the Privy Council laid down on page 495 as follows, in regard to the corresponding section, section 375 of the Code of Civil Procedure of 1882: "The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit. or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents."

(1) (1919) I.L.R. 47 Cal. 485.

1939

 BALSAR
 MISIR
 v.
 TEKESAR
 MISIR

Now it appears to us that the court in suit No. 126 of 1931 did not pass any decree in regard to the present matters in suit, that is plots No. 10/1 and No. 28. The court merely recited the fact stated in the compromise between the parties that there had been this exchange and transfer of possession between them. A mere recital in a decree of a fact which has already taken place is not necessarily a part of the decree as it does not necessarily amount to any adjustment of the rights of the parties to be affected by the decree. We may refer to *Vishnu Sitaram v. Ramchandra Govind* (1), in which it was held that the operative part of the decree confined to the subject-matter of the suit can be enforced between the parties under section 47 of the Code of Civil Procedure but any agreement as to matters extraneous to the suit can only be enforced in a separate suit. The same view has been laid down in *Charu Chandra Mitra v. Shambhu Nath Pandey* (2). It would be open therefore for the plaintiffs to bring a suit for enforcement of the contract so far as it relates to these sub-plots. But they cannot claim that any special result accrues from the mere recital of this part of the compromise in the decree in suit No. 126 of 1931. We think therefore that learned counsel for the appellant is not correct in the argument that the embodiment in the decree of the statement that the exchange had taken place is in any way a bar to the court below in investigating the question of title of the plaintiffs to this sub-number 28.

Some further arguments were made on behalf of the appellant. One of the arguments was that of the two ladies one had been a party to the decree in suit No. 126 of 1931. The claim is that the lady referred to as Mst. Batasi Kunwar is identical with defendant No 3 whose name was given as Mst. Tapsi wife of Zingari Misir. In any case it is admitted that neither of these ladies signed the compromise. The mere fact that one of them might have been a party to the suit will not be of any avail in

(1) A.I.R. 1932 Bom. 466.

(2) (1918) 3 Pat. I.J. 255.

1939

BALESAR

MISIR

v.

TEKESAR

MISIR

regard to a question of a compromise to matters extraneous to that suit where she did not sign the compromise.

Another argument is that the *iqrarnama* is not genuine and a further argument is that the kothri which has been found by the court below to have been made by the defendants first set was actually made by the plaintiffs. Both of these questions are questions of fact which it is not permissible for the appellant to raise in second appeal.

We consider that the decree of the lower appellate court was correct and accordingly we dismiss this second appeal with costs.