APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

SADHO SARAN RAI

v.

ANANT RAI.*

1923.

May, 11.

Compromise Decree—power to set aside—difference between absence of consent and consent obtained by fraud.

A court is not competent, either in review or under its inherent powers, to set aside a compromise decree on the ground that the consent of the parties to the compromise was obtained by fraud. The only remedy of the injured party is to institute a suit to set aside the decree on the ground of fraud.

But where it is found that the aggrieved party had not in fact consented to the compromise the court has inherent power to set aside a decree based on the compromise.

Hakimgir v. *Basdeo Sahi*(1), *Peary Choudhury* v. *Sonoo*(2), *Basangowda Hanmantgowda Patil* v. *Churchigirigowda*(3) and *Vilakathala* v. *Vayalil*(4), approved.

Appeal by the defendants.

Appeal against an order setting aside a consent decree passed in a suit instituted by the respondents against the appellants for partition of joint family property.

The facts of the case material to this report are stated in the judgment of Das, J.

K. P. Jayaswal (with him *Nawal Kishore Prasad*), for the appellant: A Court has no power in review to set aside a consent decree. The only remedy open to a party aggrieved by such a decree is by way of suit.

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* Appeal from Original Order No. 18 of 1922, from an order of M. Saiyid Hasan, Subordinate Judge of Arrah, dated the 14th January, 1922.

(1) (1912-13) 17 Cal. W. N. 631.
(2) (1914-15) 19 Cal. W. N. 419.
(3) (1910) I. L. R. 34 Bom. 408.
(4) (1914) 27 Mad. L. J. 172.

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Barhamdeo Prasad v. *Banarsi Prasad* (1), *Mussammat Gulab Koer* v. *Badshah Bahadur* (2), *Flower* v. *Lloyd* (3) and *Chajju Ram* v. *Neki* (4), referred to.

C. C. Das, for the respondents: When fraud has been practised upon the Court, the Court has inherent power to set aside a compromise decree. *Basangowda Hanmantgowda Patil* v. *Churchigirigowda* (5), *Vilakathala* v. *Vayalil* (6), *Mewa Lal Thakoor* v. *Bhujhun Jha* (7) and *Peary Choudhury* v. *Sonoo* (8), referred to.

Jayaswal, in reply. The inherent powers of the Court can be exercised only when the Code provides no procedure in remedy. *Basangowda Hanmantgowda Patil* v. *Churchigirigowda* (5) is based on an incorrect appreciation of the English case which has been discussed in *Mussammat Golab Koer* v. *Badshah Bahadur* (9). *Mirali Rahimbhoy* v. *Rehmoobhoy Habibbhoy* (10) was not cited in *Basangowda Hanmantgowda Patil* v. *Churchigirigowda* (5). *See* also *Fatmabai* v. *Sonbai* (11) *Cursandasnatha* v. *Ladkavahu* (12) and *Shami Nath Chaudhuri* v. *Ramjas* (13). The Madras case merely follows Bombay. In *Peary Chaudhuri* v. *Sonoo* (8) there was in effect an *ex parte* decree. The ruling does not apply. Even when fraud is practised upon the Court a separate suit is the only remedy, *Flower* v. *Lloyd* (3). An unreported decision of this Bench supports my contention.

DAS, J.—This is an appeal against an order of the learned Subordinate Judge of Arrah by which he set aside a consent decree. The suit in which the consent decree was passed was instituted by the respondents against the appellants for partition of joint family properties. The properties sought to be partitioned were set forth in the several schedules

(1) (1906) 3 Cal. L. J. 119.
(2) (1909) 10 Cal. L. J. 420.
(3) (1877) 6 Ch. D. 297.
(4) (1921-22) 26 Cal. W. N. 697, P.C.
(5) (1910) I. L. R. 34 Bom. 408.
(6) (1914) 27 Mad. L. J. 172.
(7) (1874) 22 W. R. 213.
(8) (1914-15) 19 Cal. W. N. 419.
(9) (1909) 10 Cal. L. J. 420.
(10) (1891) I. L. R. 15 Bom. 594
(11) (1912) I. L. R. 36 Bom. 77.
(12) (1895) I. L. R. 19 Bom. 571.
(13) (1912) I. L. R. 34 All. 143.

annexed to the plaint. On the 3rd January, 1921, a petition of compromise was filed in the Court. The petition alleged that:

> "All the properties sought to be partitioned have been partitioned and under the said partition the properties are in possession and occupation of the parties in equal halves."

It set out the properties in Schedule *A* and declared that the parties were and shall be in separate possession of their respective shares. The schedule annexed to the petition deals with an insignificant portion of the properties enumerated in the schedules to the plaint. It does not, for instance, deal with the *milkiat* properties; and in regard to the bond debts to the joint family, while it awards about Rs. 12,000 to the defendants it gives less than Rs. 6,000 to the plaintiffs. There are important alterations in the schedule which attracted the suspicion of the Court when it was called upon to pass a decree in terms of the compromise. For instance, the whole of the money due from Sathan Choubey, Hargun Rai and Baijnath Rai seemed to have been allotted in the first instance to the plaintiffs; but at the time when the compromise petition was actually filed in Court it was noticed that the figures standing against those persons had been tampered with and that only half the amount due from them was allotted to the plaintiffs and the other half was allotted to the defendants. As I have said, the alterations made in the schedule attracted the suspicion of the Court which called upon the plaintiffs' pleader, Babu Inder Deo Sahay, to initial the alterations. I cannot help thinking that the learned Subordinate Judge should have done well to call upon the plaintiff personally to appear before him and to say whether he had consented to those alterations which were obviously to his detriment; but that course was not adopted and the learned Subordinate Judge was apparently satisfied with the initials of the learned pleader for the plaintiffs and he passed a decree in terms of the settlement. The plaintiff's case is that the compromise actually filed was not the compromise

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which he signed. His evidence is to the effect that the compromise petition was copied "in six leaves" and that the schedule contained all the family properties sought to be partitioned and that after signing the petition he made it over to Sadho Saran, one of the defendants, for the purpose of being filed in Court. He makes the definite case in his evidence that only the first page and the last page of the compromise petition were retained and that the intervening pages were extracted and were not filed in Court and that alterations were made in the last page without his knowledge but to his detriment. He definitely states that Babu Indra Deo Sahay was not his pleader and that he did not remember which pleader had signed the compromise petition for him and that he did not himself take the petition to any pleader for signature, and that he left it entirely to Sadho Saran relying upon Sadho Saran's honesty in the matter.

Upon the evidence I have no doubt that a gross fraud has been perpetrated, not only upon the plaintiffs but upon the Court itself. The petition definitely states that all the properties sought to be partitioned had been partitioned and that the specifications were given in schedule *A* to the petition. Now the properties sought to be partitioned are given in different schedules annexed to the plaint. As I have said before, schedule *A* of the petition of compromise comprises only a very insignificant portion of the properties sought to be partitioned. Mr. *Jayaswal* contends before us that in their written statement the defendants disputed the correctness of the properties set out in the schedule and that their case in the written statement was that most of the properties sought to be partitioned were not joint family properties at all. That may be so; but where the petition definitely states that all the properties sought to be partitioned have been partitioned, I must assume that the meaning of the petition is that the properties sought to be partitioned in the suit by the plaintiffs have been partitioned. There is no indication in the compromise

petition that the plaintiffs had recognized the justice of the defendants' claim that most of the properties sought to be partitioned by him were not joint family properties and that they could not be partitioned. In my opinion it is sufficient to refer to the schedule *A* annexed to the petition of compromise and to compare it with the properties set out in the schedules to the plaint to hold that the plaintiff's position in this respect is unassailable. It was then argued that the compromise petition bore the signature of the plaintiff's pleader and that it must be assumed that the pleader had authority to settle the case on the terms mentioned in the petition of compromise. The plaintiffs, however, deny that Babu Indra Deo Sahay is their pleader. The evidence of Projit Rai on this point is as follows :

" Indra Deo Sahai was not my pleader. I do not remember which pleader had signed the *solehnāma* petition for me. I have not taken that petition to my pleader for signing it. Sadho Saran had done so on my behalf."

Babu Indra Deo Sahay has been examined as a witness on behalf of the defendants-appellants. His evidence is that he signed the *solehnama* petition on behalf and at the request of the plaintiffs. He says that he had enquired from his client that he had compromised and he was satisfied that the plaintiffs had compromised the suit on the terms contained in the petition of compromise as filed by him. In cross-examination he admits that he was not the pleader in the case and that the " party " went to him only when the compromise was to be filed in Court. He also admits that he cannot recognize the different persons that had gone to him, although his impression is that it was Anant Rai, plaintiff No. 1, who saw him in connection with the compromise petition. He adds, however, that he did not know Anant Rai before. He says that the person who saw him told him that he was Anant Rai and he was apparently satisfied with that and signed the compromise petition. The evidence of the pleader, therefore, does not establish that the plaintiffs or any of them engaged him to file the petition of compromise

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on behalf of the plaintiffs. If indeed any of the plaintiffs were known to him at the time when he was engaged on their behalf it would be impossible to accept the evidence of Projit Rai that the plaintiffs did not engage Babu Indra Deo Sahay as their pleader in the case. The *vakalatnama* itself strongly supports the case of the plaintiffs. We have carefully examined the *vakalatnama* and it is a matter of grave suspicion that, though Babu Indra Deo Sahay actually appeared on behalf of the plaintiffs in the matter of the compromise, his name does not appear in the printed list of pleaders appearing in the *vakalatnama*. It was very strongly contended before us that there is an admission in the petition of the plaintiffs that Indra Deo Sahay was their pleader in the matter. I have read the petition very carefully and I am unable to agree that there is any admission to that effect. No doubt it is not alleged in the petition that Babu Indra Deo Sahay was not their pleader, but it is distinctly stated that it was defendant No. 1 who obtained the signatures of the pleaders of the parties on the petition. There may be an admission by implication; but there is no clear and definite admission that Babu Indra Deo Sahay was the pleader of the plaintiffs. If the defendants intended to make any point of such admission by implication contained in the petition filed by the plaintiffs they should have cross-examined Projit Rai on this point. The attention of Projit Rai was not drawn to the alleged admission contained in the petition, and, in the absence of any explanation of Projit Rai, I am not disposed to attach much importance to the alleged admission contained in the petition. The evidence is clear and definite that the name of Indra Deo Sahay does not appear in the printed list of Vakils in the *vakalatnama* and that Babu Indra Deo Sahay was not the regular pleader of the plaintiffs but was only engaged for filing the compromise petition. Indra Deo Sahay admits that he did not know the plaintiffs but that he accepted the word of the person who actually saw him and thought

that he was acting on behalf of the plaintiffs. I have no doubt whatever that a gross and deliberate fraud has been practised upon the Court and that the Court was persuaded to sign a decree to which the plaintiffs had never consented, and that upon the representation made to the Court that the plaintiffs had consented to it.

The question then arises whether the Court had power to set aside the compromise decree either in review or in the exercise of its inherent power. There is a long list of cases of the Calcutta High Court, of the Bombay High Court and of the Madras High Court in which it has been broadly laid down that a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. It was urged before us on behalf of the defendants-appellants that the only remedy is by suit and that once the decree has been signed there is no jurisdiction in the Court to set it aside on the ground of fraud. A distinction has been drawn in the cases of the Indian Courts between a fraud practised upon a party and a fraud practised upon the Court. It has been laid down that where the question is whether there was a consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a consent in fact, that is to say, where the parties have filed a compromise petition and they admit that they have filed it but one of the parties alleges that his consent was procured by fraud, the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated. In *Hakimgir* v. *Basdeo*

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Sahi (1) it was held by Mookerjee and Caspersz, J.J., that where an order is obtained from the Court on the allegation that both parties had assented to it and it is asserted by one of the parties that he never consented to the order in question, it is open to the Court to review the order and recall it. In *Peary Choudhury* v. *Sonoo Das* (2) it was held by Chatterjea and Greaves, J.J., that it is the inherent power of every Court to correct its own proceedings when it has been misled and that it has complete jurisdiction to recall the order on being apprised of the true facts. In *Basangowda Hanamantgowda Patil* v. *Churchigirigowda* (3) the facts were that in the course of a suit a compromise was presented which was signed by the defendants' pleader who was not especially authorized in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to set aside the decree on the ground that he did not engage the pleader and that he never authorized the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing On appeal it was argued in the High Court that there was no section in the Code which entitled the party to ask the Court to reopen the suit and set aside the decree in a summary manner. Chandavarkar, J., in upholding the contention of the respondent, said as follows: "What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented, and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it

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has been misled." A similar view has been taken in the Madras High Court [see *Vilakathala* v. *Vayalil*(1)]. These decisions, though not binding on this Court, are entitled to the greatest respect, and we have been referred to no decision which lays down a contrary rule in cases where it is asserted by a party, not that the consent was obtained from him by fraud, but that there was no consent in fact on his part. As I have said before, a distinction has been made in the Indian Courts between the cases where a party comes to Court and complains that he never consented to the order at all and the cases where a party comes to Court and admits that he did consent to the order but complains that his consent was obtained by fraud. In the one case the fraud is upon the party; in the other case, the fraud is upon the Court; and it is well-established, so far as the Indian Courts are concerned, that the Court has inherent jurisdiction to set aside the order when it is apprised of the fact that it was induced to sign the decree on a fraudulent representation of facts made to it.

In my opinion the order passed by the Court below is right and I would dismiss this appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

SURAJDEO NARAYAN SINGH

v.

PARTAP RAI.*

1923.

May, 15.

Appeal—dismissal of, for default—fresh appeal, whether barred—Code of Civil Procedure, 1908 (*Act V of* 1908),

*Appeal from Appellate Order No. 245 of 1922, from an Order of Babu Brajendra Kumar Ghosh, Subordinate Judge of Muzaffarpur, dated the 10th July, 1923, confirming an order of Babu Devi Prasad, Munsif of Hajipur, dated the 14th May, 1921.

(1) (1914) 27 Mad. L. J. 172.