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FAZL
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to me by both sides in this case is that although the petitioner as well as the Subordinate Judge proceeded under the misapprehension that the objection of the petitioner was one governed by Order XXI, rule 58, yet in the light of the authorities on the point, I must hold that the objection filed by the petitioner was one under section 47 of the Code of Civil Procedure and the order being appealable the petitioner was incompetent to prefer an application by way of revision before this Court.

The application must therefore be dismissed, but in the circumstances without costs.

It will be open to the petitioner to prefer an appeal against the order and it will be for the Court before whom the appeal is preferred to consider whether having regard to the special circumstances of the case, this is not a fit case in which time should be extended if the appeal is found to be time-barred. This matter, however, must be left entirely to the discretion of that Court, which I have no doubt, will be exercised with due regard to the equities of the case and which I do not wish to fetter in any way.

S. A. K.

Application dismissed.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

SINGHASAN MISSER

v.

JADUNANDAN MISSER.*

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Jan., 14, 18.

Compromise decree—mortgage suit—compromise—commissioners appointed to carry agreement into effect—agreement partially given effect to—final decree not representing the agreement of the parties—suit to set aside decree, whether maintainable.

*Appeal from Original Decree no. 123 of 1926, from a decision of M. Wali Mohammad, Subordinate Judge of Motihari, dated the 30th of November, 1925.

A suit to enforce a mortgage of a share in tauzi no. 658 was compromised on the following terms, viz.—

“ that the defendants are to make over to the plaintiffs 25 bighas out of the mortgaged lands bearing tauzi nos. 1368, 1369 and 1371 in lieu of the entire amount claimed.....”

and commissioners were appointed to carry out the necessary partition. Out of tauzi no. 1368 the commissioners allotted about 10 bighas to the plaintiffs but owing to various difficulties they were unable to make any allotment out of nos. 1369 and 1371. In the result a final decree was passed awarding to the plaintiffs the 10 bighas allotted to them by the commissioners out of tauzi no. 1368. An application for amendment of the decree having failed, the plaintiffs sued for a declaration that the final decree was contrary to the terms of the compromise and praying that a fresh pattibandi should be made.

The defendants contended (i) that the suit was not maintainable and (ii) that the Court was incompetent to disturb the entire allotment which, as to 10 bighas, had become final.

Held, that the final decree did not represent the agreement between the parties and, therefore, the suit was maintainable but that the allotment made by the Commissioners of 10 bighas out of no. 1368 should not be disturbed.

Appeal by the defendants.

The plaintiffs brought a suit on a mortgage against the defendants. The mortgaged property was 2-annas and odd share in tauzi no. 658. The suit was compromised by a petition of the 18th of March, 1922, on the terms :

“ that the defendants are to make over to the plaintiffs 25 bighas out of the mortgaged lands bearing tauzi nos. 1368, 1369 and 1371 in lieu of the entire amount claimed with costs in the court due to them amounting to Rs. 7,500. The parties shall get a separate patti of 25 bighas comprising proportionate zerait, orchard and raiyati lands carved out according to the share in each of the three tauzis through Babu Bireswar Mukharji and Surujbal Prasad, pleaders, and the plaintiffs shall get into possession and occupation of the said patti. The pattibandi formed shall be filed in the said court and it will be treated as a part of this compromise petition. Should any party fail to appear on the 18th April, 1922, to have the Pattibandi made, both the pleaders

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Under this agreement the commissioners proceeded to ascertain the lands. The plaintiffs did not appear before them and they found some difficulty in making the allotment. Tauzi no. 658 had been partitioned into the three tauzis mentioned in the compromise. So far as tauzi no. 1368 was concerned the defendants in that suit who were interested in that tauzi, being defendants nos. 6 to 15 appeared before the commissioners and the commissioners allotted 10 bighas, 3 kathas, 9 dhurs of land to the plaintiffs as representing the proportion of the 25 bighas that these defendants were liable for. But in the case of the other tauzis, difficulties were raised. In tauzi no. 1369 defendant no. 26 of that suit filed a petition on behalf of all the defendants owning that tauzi, from which it appeared that they did not want any allotment in favour of the plaintiffs out of the mortgaged lands in this tauzi; and, in the case of tauzi no. 1371, the defendant no. 16 who had a share therein appeared before the commissioners; but, as his share was joint with those of other maliks and his lands were not separate, the commissioners were unable to make any allotment in that tauzi. In accordance with the commissioner's report a decree was passed the result of which was that the plaintiffs got only 10 bighas, 3 katahs and 9 dhurs instead of 25 bighas. They applied unsuccessfully for amendment of the decree and then instituted the present suit for a declaration that the final decree, dated the 1st of May, 1922, on the basis of the commissioners' report was contrary to the terms of the compromise and that a fresh pattibandi might be made. The learned Subordinate Judge has decreed the suit and the defendants

appeal and contend in the first place that the suit is not maintainable and, secondly, that even if it was maintainable, the Court was incompetent to disturb the entire allotment which as to 10 bighas and odd had become final.

Sambhu Saran and *C. P. Sinha*, for the appellants.

S. N. Rai and *B. Prosad*, for the respondents.

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Ross, J. (after stating the facts set out above, proceeded as follows :) It was conceded by the learned Advocate for the appellants that a consent decree can be set aside on the same grounds as an agreement and this is well established. But he contended that so far as mistake is concerned, these grounds are limited to the cases of mutual mistake or mistake induced by the opposite party; and he referred to the decision in *Stewart v. Kennedy*⁽¹⁾. That case decided that a party is not entitled to have a contract reduced because he has misunderstood its terms and it was pointed out by Lord Herschell that the authorities showed that in the case of bilateral obligations it was considered essential that the error which was sought to be taken advantage of by one party to reduce the contract should have been induced by the other party to it. In *Wilding v. Sanderson*⁽²⁾ it was laid down that mistake is one of the grounds for setting aside an agreement. Lindley, L. J. observed: "It was conceded, and in my opinion it is clear, that the order of November 23rd, 1894, being a consent order based on and intended to carry out an agreement come to between the parties, ought to be treated as an agreement which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside. Mistake is one of such grounds." Then, after referring to *Stewart v. Kennedy*⁽¹⁾ his Lordship pointed out that mistake as to the meaning of the words used might be accompanied by another mistake as to the subject-matter dealt with by the

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(1) (1890) 15 A. C. 108.

(2) (1897) 2 Ch. D. 594.

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contract; and, if the parties are not ad idem as to the subject-matter about which they were negotiating, there was no real agreement between them. Now the decree in the mortgage suit must be looked at as based on an intention to carry out an agreement between the parties. That agreement was that the plaintiffs should get 25 bighas, but by the order as drawn up on the commissioners' report they have not got 25 bighas, but only 10; and this is sufficient ground for setting aside the decree, because the order in the form in which it was drawn up was never consented to by the plaintiffs and it does not represent their agreement at all. Further it is clear from the commissioners' report that the mistake was induced by the opposite party so far as tauzi no. 1369 was concerned by the defendants going back on the contract and refusing to allow any allotment after agreeing to do so; and, so far as tauzi no. 1371 was concerned, by the failure of the defendant no. 16 to separate his lands from those of the other co-sharers, a course which he must be assumed to have undertaken to adopt, if it was necessary, in order to give effect to his contract. A large number of cases was cited in the argument, but it is unnecessary to refer to them as the principles governing the decision in this case are free from any doubt and indeed there is no difference between the parties on this point.

While, however, I hold that the suit is maintainable, I think the decree passed by the Subordinate Judge goes too far. He has ordered a fresh pattibandi to be made; but so far as the pattibandi in tauzi no. 1368 is concerned, this was effected by the commissioners under the powers given to them by the terms of the compromise and this is not liable to be disturbed.

I would therefore allow this appeal in part and modify the decree of the Subordinate Judge by declaring that when the new pattibandi is made the allotment already made by the commissioners on the

22nd of April, 1922, of 10 bighas, 3 katahs and 9 dhurs in tauzi no. 1368 is not to be disturbed. There will be no costs of the appeal.

CHATTERJI, J. : I agree.

Decree modified.

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REVISIONAL CRIMINAL.

Before Adami and Chatterji, JJ.

DAMODAR RAM MAHURI

v.

KING-EMPEROR.*

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Jan., 22.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 236 and 239—Joinder of charges—accused charged under sections 380 and 414, Penal Code, 1860 (Act XLV of 1860)—trial whether bad.

A trial is not vitiated by reason of the fact that an accused person has been charged substantively under sections 380 and 414, Penal Code, 1860.

Emperor v. Wassanji Dayal (1), distinguished.

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

A. D. Patel and *G. P. Singh*, for the petitioners.

G. P. Cammiade, for Assistant Government Advocate, for the Crown.

CHATTERJI, J. : The petitioner Damodar Ram was charged along with another person Narain Ram under section 380 and section 414 of the Penal Code in

*Criminal Revision no. 818 of 1928, against an order of R. B. Beavor, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 5th December, 1928, modifying the order of Babu M. K. Chatterji, Deputy Magistrate, 1st class, of Bihar Sharif, dated the 16th October, 1928.