

## APPELLATE CIVIL.

*Before Jwala Prasad and Wort. JJ.*

SRIMATY SABITRI THAKURAIN

1928.

Dec., 17.

v.

F. A. SAVI.\*

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII, rule 3—Order directing compromise to be recorded—appeal, right of, whether lost by reason of a decree having been passed in accordance with the order.*

The right of appeal against an order passed under Order XXIII, rule 3, Code of Civil Procedure, 1908, directing a compromise to be recorded, is not lost by reason of a decree having been passed in accordance with the order.

*Sri Toleti Satyanarayanamoorthi v. Jayanti Butchayya*(1), *The Shop of Megh Raj Tej Bhan v. The Shop of Tulsiram Devi Duttamal*(2) and *Paban Sardar v. Bhupendra Nath Nag*(3), followed.

*The Bengal Coal Company, Limited, v. Apcar Collieries, Limited*(4), dissented from.

*Nanibala v. Ichhamoyee*(5), *Madhu Sudan v. Kamini Kanta*(6), *Mackenzie v. Narsingh Sahai*(7), *Ram Nath v. Basanta*(8), *Govindaswami Kadavaran v. Kaliaperumal Muniyathiriyar*(9) and *Alamelu Ammal v. Rama Iyer*(10), referred to.

The facts of the case material to this report are stated in the order of the Court.

*Pugh* (with him *L. K. Jha* and *A. C. Roy*), for the appellant.

*S. C. Bose* (with him *Jyotirmoy Ghose*), for the respondents.

JWALA PRASAD and WORT, JJ.—This miscellaneous appeal has come up on account of the report of the Stamp Reporter. According to him the appeal

\*Miscellaneous Appeal no. 156 of 1928.

(1) (1925) 48 Mad. L. J. 249.	(6) (1905) I. L. R. 32 Cal. 1023.
(2) (1924) A. I. R. (Lah.) 466.	(7) (1909) I. L. R. 36 Cal. 726.
(3) (1916) I. L. R. 43 Cal. 85.	(8) (1912-13) 17 Cal. W. N. 868.
(4) (1924-25) 29 Cal. W. N. 928.	(9) (1922) 66 Ind. Cas. 837.
(5) (1924) 40 Cal. L. J. 291.	(10) (1922) 70 Ind. Cas. 425.

is incompetent against the order of the Subordinate Judge directing the compromise to be recorded and a decree to be passed in accordance therewith under Order XXIII, rule 3, inasmuch as the decree was already drawn up. The case of the *Bengal Coal Company, Limited*, v. *Apear Collieries, Limited*,<sup>(1)</sup> has been cited by the Stamp Reporter in support of his view. The decision in that case is based upon the authorities of the Calcutta High Court cited therein: *Nanibala v. Ichhamoyee*<sup>(2)</sup>, *Madhu Sudan v. Kamini Kanta*<sup>(3)</sup>, *Mackenzie v. Narsingh Sahai*<sup>(4)</sup> and *Ram Nath v. Basanta*<sup>(5)</sup>. Most of these cases, if not all, relate to preliminary and final decrees referred to in section 97 of the Code of Civil Procedure. That section says

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The learned Judges of the Calcutta High Court have drawn an analogy between a preliminary and a final decree such as are referred to in section 97, and an order directing a compromise to be recorded passed under Order XXIII, rule 3, and the decree passed in terms of the compromise; and they record their view in the following words: "that the appeal was incompetent in that a decree having been passed before the appeal was filed an appeal lay from the decree and not from the order which was superseded by the decree." The ratio decidendi, according to the learned Judges, is that if the order passed under Order XXIII, rule 3, is set aside in appeal, the decree not appealed against may remain which would be an anomaly. The net conclusion arrived at is that though an order passed under Order XXIII, rule 3, is expressly appealable under Order XLIII, rule 1(m), it becomes unappealable the moment a decree is formally recorded in pursuance of the order passed under Order XXIII,

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(1) (1924-25) 29 Cal. W. N. 928. (3) (1905) I. L. R. 32 Cal. 1028.

(2) (1924) 40 Cal. L. J. 291. (4) (1909) I. L. R. 36 Cal. 726.

(5) (1912-13) 17 Cal. W. N. 868.

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rule 3. Undisputedly an express right of appeal has been conferred against an order directing a compromise to be recorded passed under Order XXIII, rule 3. Order XLIII, rule 1(m), says

“An appeal shall lie from an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction.”

Rule 3 of Order XXIII makes it imperative upon a Court to forthwith pass a decree when it orders that the agreement, compromise or satisfaction shall be recorded. The words in that rule pertinent to the question in hand are as follows :

“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.”

The date of the decree is always under the Code the date of judgment or the order upon which the decree is founded, and it is presumed that no delay chronologically should happen between the passing of the judgment or the order and the decree which follows it. The delay which happens in actually signing a decree is due to the time taken up in its preparation in office, but that is not the real date of the decree. The real date of the decree is the date when the judgment is pronounced. In fact, the decree in the present case, as evidently the decree states, that the suit coming on the 30th day of July, 1928, for final disposal, etc., bears the same date and the case was disposed of upon the date upon which the order was passed. We have not to take into account the ministerial delays caused in the preparation of the decree. Ordinarily within the terms of the section the order and the decree should be simultaneous. If that is so, the right of appeal from the order that the agreement, compromise or satisfaction be recorded can be easily frustrated by preparing a decree at once, giving no time to the aggrieved party to appeal against the order recording the compromise, and in the majority of cases the time allowed for an appeal from such an order allowed by law will always be curtailed. In the present case the

order under the first part of rule 3 was passed on the 30th July, 1928. A copy of the order was forthwith applied for by the appellant and was prepared on the 4th of August; it was handed over to the appellant on the 6th of August, the 5th of August being Sunday. The decree was actually prepared and signed by the Subordinate Judge on the 9th of August, 1928. A copy of this also was applied for and obtained on the 18th of August. The decree concludes with the following words :

" Given under my hand and seal of the Court this 30th day of July, 1928. Signed H. Charan, 1st Subordinate Judge, 9-8-28."

As I have observed above, the date of the order is the date of the decree, and the delay of a few days was due to the preparation of the decree by the office. If we take the 30th of July as the date of the decree, then there was no time for the appellant to file his appeal. If 9th August be deemed to be the date of the decree being passed, then the right of appeal is curtailed from 30 days to eight or nine days. If it was the intention of the legislature that the right of appeal from the order directing a compromise to be recorded should be lost after the decree is passed, there should have been a direction to delay the passing of the decree until the time for filing the appeal had elapsed. This has not been done. On the other hand, the rule says

" The Court..... shall pass a decree in accordance therewith."

Therefore, to my mind the right of appeal against the order directing a compromise to be recorded passed under Order XXIII, rule 3, is not lost by reason of the decree having been passed in accordance with the order. Section 97 is an express provision dealing with preliminary and final decrees and says that after a final decree is prepared the right of appeal against the preliminary decree is lost. Such a clear provision has not been made in respect of an order passed under rule 3, and the decree that follows the order. I am

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not prepared to draw an analogy between an order passed under rule 3 of Order XXIII and a preliminary and a final decree referred to in section 3 of the Code. There was some conflict of views in the Madras High Court as reported in *Govindaswami Kedavaran v. Kaliaperumal Munyathiriyar*<sup>(1)</sup> and *Alamelu Ammal v. Rama Iyer*<sup>(2)</sup>. These authorities have been considered in a later decision of that Court in *Sri Toleti Satyanarayanamoorthi v. Jayanti Butchayya*<sup>(3)</sup> which inclines very much to the view that I have taken. The Lahore High Court in *The shop of Megh Raj Tej Bhan v. The shop of Tulsiram Devi Dittamal*<sup>(4)</sup> favours the same view. Sir Lawrence Jenkins, in the case of *Paban Sardar v. Bhupendra Nath Nag*<sup>(5)</sup> indirectly supports the view. Now, if the Calcutta High Court's view as expressed in the decision in the case of *Bengal Coal Company, Limited, v. Apcar Collieries, Limited*,<sup>(6)</sup> is followed in its logical consequences, the result would be that there will be no remedy left at all to a party aggrieved by an order of the Court directing a compromise to be recorded in spite of the fact that he has been repudiating the compromise from the very beginning, inasmuch as after the order of the Court directing the compromise to be recorded and a decree being passed therein, I am afraid the right of appeal may be lost altogether by reason of section 96(3) of the Code which says that

"No appeal shall lie from a decree passed by the Court with the consent of parties."

There was a difference of opinion as to whether a decree passed after an adjudication under rule 3 of Order XXIII overruling the objection of a party to the compromise would be considered to be a decree passed by consent of parties, or that such a decree should be restricted only to when the parties in Court then and there express their consent to a decree being passed. For the divergent views on this point I would

(1) (1922) 66 Ind. Cas. 897.

(2) (1922) 70 Ind. Cas. 425.

(3) (1925) 48 Mad. L. J. 249.

(4) (1924) A. I. R. (Lah.) 466.

(5) (1916) I. L. R. 43 Cal. 85.

(6) (1924-25) 29 Cal. W. N. 928.

refer to *Govindaswami Kadavaran v. Kaliaperumal Munayathiriyar*<sup>(1)</sup>. The Calcutta High Court also has not gone so far, inasmuch as it is of the view that the aggrieved party though he may not be able to appeal against the order recording the compromise, may nevertheless appeal against the decree passed in accordance with that order; and in that case the appeal preferred against the order directing the compromise to be recorded was treated as an appeal against the decree itself upon payment of proper court-fee. In trying to get rid of the anomaly under section 97 of the Code of Civil Procedure to my mind the Calcutta High Court's decision, with great respect to the learned Judges who decided that case, has created another anomaly as regards the right of appeal against the decree passed by consent under section 96, clause (3), of the Code.

In the present case the appellant has also filed a pauper appeal against the final decree.

The order that I would propose to make in the present case is that the miscellaneous appeal with which we are dealing at present be admitted.

S. A. K.

*Appeal admitted.*

## REVISIONAL CIVIL.

*Before Ross and Chatterji, JJ.*

MUFTI REAZUDDIN

*v.*

LALA MAHESHANAND.\*

*Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rule 13, and Order XLIII, rule 1(d)—application to set aside ex parte decree dismissed for default—whether any appeal lies.*

An appeal lies, under Order XLIII, rule 1(d), Code of Civil Procedure, 1908, from an order dismissing for default an application to set aside an ex parte decree.

\*Civil Revision nos. 91, 166 and 167 of 1928, from an order of A. C. Davies, Esq., i.c.s., District Judge of Shahabad, dated the 14th of January 1928.

(1) (1922) 66 Ind. Cas. 837.

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