

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

SHEODHAR PRASAD SINGH

v.

RAMDEO PRASAD SINGH.*

1933.

November,
17.

Fraud—compromise decree—application for amendment on the ground of fraud practised on the court—application, whether maintainable—remedy by way of suit, when lies—Code of Civil Procedure, 1908 (Act V of 1908), section 151 and Order XLVII—rejection of review application, whether is a bar to exercise of inherent power.

A decree based on a compromise can be altered or set aside on the ground of fraud in a suit properly framed as well as by way of a summary application.

In the case where fraud is practised upon the court it is always within the inherent power of the court to correct its own proceedings. But where a consent has been obtained by the practice of fraud between the parties the remedy lies by way of suit and not by way of an application.

Sadho Saran Rai v. Anant Rai(1), followed.

The rejection of an application for review under the provisions of Order XLVII of the Code is no bar to the exercise of the inherent power under section 151, when the application for review was rejected on the ground that it did not lie.

Application by the defendants.

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

S. N. Rai and *B. N. Rai*, for the petitioners.

A. B. Mukharji and *K. P. Upadhyaya*, for the opposite party.

KULWANT SAHAY, J.—This is an application on behalf of the respondents in First Appeal no. 145 of

* Miscellaneous Judicial Case no. 7 of 1933.

(1) (1923) I. L. R. 2 Pat. 731.

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1928 for the amendment of the decree made in the appeal. The appeal arose out of a suit for partition instituted in the court of the Subordinate Judge by the appellant Ram Deo Prasad Singh and others. The petitioner Sheodhar Prasad Singh filed a written statement in the suit objecting to the partition on the ground that there had been a previous private partition. The suit was dismissed by the Subordinate Judge and the appeal had been filed in this court by the plaintiff. During the pendency of the appeal a compromise was admittedly arrived at by the parties whereby the petitioners agreed to give a certain piece of land in the basti portion of the village to the plaintiff and also a right of way over a small strip of land in exchange for a piece of agricultural land which the plaintiff agreed to give to the petitioners. It is stated that a petition of compromise stating the real terms arrived at between the parties was written out and an affidavit was sworn but the petition could not be filed in court on the date on which it was written and sworn and the petitioners had to go away on the same day to Gaya leaving the original petition in the custody of Ramdeo Prasad Singh. The allegation then is that Ramdeo Prasad Singh altered certain pages of the petition of compromise as originally written and sworn to and changed some of the terms and the changed petition was filed in court on the 26th February, 1929, and as the petitioner did not know of these changes the decree was ordered to be drawn up in terms of that petition. The petitioner alleges that after some time he came to know that the petition as filed in Court did not contain the actual terms arrived at between the parties but that there was some alteration and on further inquiry he learnt that the piece of land which the plaintiff was to give to the petitioner-defendants and which was agreed to be 1 bigha 8 cottahs 10 dhurs out of plot no. 398 had been altered into 8 cottahs 10 dhurs only omitting the figure of 1 bigha. It is further stated that the piece of land which was

agreed to be given by the petitioner-defendants to the plaintiff had also been altered and that instead of the right of way over a certain strip of land which was agreed some additional land was also included over which the plaintiff was alleged to have a right of way.

Upon this discovery the petitioners filed an application to this Court for review of the judgment and for correction of the petition of compromise in the manner in which he stated it ought to have stood. That application was rejected on the ground that no application for review lay in the circumstances of the case. The petitioners also made an application for a complaint being made by this Court against Ramdeo Prasad Singh under certain sections of the Indian Penal Code. A complaint was made by this Court and it appears that Ramdeo Prasad Singh was prosecuted under certain provisions of the Indian Penal Code, found guilty and sentenced to five years rigorous imprisonment.

The present application is now made to correct the decree so as to bring it into conformity with the actual terms and settlement arrived at between the parties. The terms which the petitioners allege were actually arrived at are set out in detail in paragraphs 18 and 19 of the present application. It is further stated that at the time the appeal was pending in this court a suit had been instituted by the present petitioners in the court of the Munsif at Barh which related to certain basti lands which it was alleged the plaintiff had encroached upon. It was agreed between the parties that that suit also should be compromised on the same terms as the appeal in this Court was going to be compromised and a petition for compromise was actually filed in the court of the Munsif setting out the terms which were agreed between the parties and it is stated that the terms there stated were exactly the same as those settled between the parties which were intended to be filed in the appeal in this court.

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On going into the matter I feel no doubt that the allegations of the petitioners are correct and that the actual terms arrived at between the parties were as set out in paragraphs 18 and 19 of the present application. There is no counter-affidavit on the side of the opposite party and there is no denial that these were the actual terms arrived at between them. It is stated that there is some difference between the present application and the application filed previously for review of the decree. The only difference is that there was no mention in the previous application as regards the additional land, the basti portion, to which the plaintiff claimed a right of way under the compromise. But there was a general allegation that the actual compromise was not as stated in the petition filed in Court. On comparing the terms as contained in paragraphs 18 and 19 of the present application with the application filed in the court of the Munsif of Barh it appears that the terms were as are now alleged to have been settled. In this case, therefore, I have absolutely no doubt that the original terms of the agreement were as set out in paragraphs 18 and 19 and the compromise decree prepared in terms of the agreement ought to be as set out in those paragraphs, that is to say, the figures in the compromise petition and the map attached to it " 8 cottahs 10 dhurs " should be altered into " 1 bigha 8 cottahs 10 dhurs " and the piece of land marked red on the north-west corner of plot no. 364 be deleted from the petition and the map.

A point has been raised on behalf of the opposite party that the proper remedy is not by way of an application under section 151 of the Code of Civil Procedure but by way of suit as a decree based on a compromise can be set aside on the ground of fraud only in a suit properly framed and not by way of a summary application. It is further contended that the application for review having been rejected the present application is not maintainable. As regards

the first objection of bar it is sufficient to refer to the decision in *Sadho Saran Rai v. Anant Rai*(1). The distinction of the proper remedy in respect of an application in amendment on the ground of fraud practised on the court and on the ground of fraud practised upon the parties by means of which fraud the consent was obtained by one of the parties was pointed out. In the case where fraud is practised upon the court it is always within the inherent power of the court to correct its own proceedings. But where a consent has been obtained by the practice of fraud between the parties in that case the remedy lies by way of suit and not by way of an application.

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As regards the objection that this point was raised in the application for review and rejected it is sufficient to say that the only ground upon which the application was rejected on the previous occasion was that the proper remedy was not by way of review. A review can only be granted on the grounds set out in Order XLVII of the Code of Civil Procedure and the circumstances set out in the application did not come within the purview of the provisions for review. The learned Judges who heard the application in review did not say that the proper remedy was by way of suit only. In fact they simply rejected the application for review as in their opinion the application for review did not lie.

I would, therefore, allow this application and direct that the amendment be made as indicated above. The petitioner is entitled to his costs. Hearing fee three gold mohurs.

COURTNEY TERRELL, C.J.—I agree.

Application allowed.