APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Campbell.

GURCHARAN SINGH (PLAINTIFF)—*Appellant,*

versus

SHIBDEV SINGH AND OTHERS (DEFENDANTS)—*Respondents.*

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Dec. 7.

Civil Appeal No. 3387 of 1917.

Civil Procedure Code, Act V of 1908, sections 96 (3), 100, 104 (2) Order XXIII rule 3 and Order XLIII, rule 1(m)—Appeal from decree passed in accordance with the terms of a compromise notwithstanding objections by some of the parties—whether competent.

Two suits were brought against S. S. and others, Managers of the Khalsa High School, Sialkot, for possession of certain land, the site of the school In one suit the plaintiff was the Mahant of the *Durbar* of Ber Baba Nanak Sahib, who alleged that he had sold the site on certain conditions which had not been fulfilled by the defendants. In the second suit the plaintiffs were two *Pujaris* of the same shrine, who challenged the right of the *Mahant* to alienate the property of the *Durbar*. While the suits were pending in the Court of the Subordinate Judge the defendants petitioned the Court that the dispute in each case had been settled by a compromise. The two plaintiff-*Pujaris* denied having been parties to any compromise. The Subordinate Judge decided that this was so and refused to record the compromise.

The defendants appealed to the District Judge, who found that all the parties had consented to the compromise and returned both cases to the Subordinate Judge with instructions to decide them in accordance with the terms of the compromise. Both sets of plaintiffs appealed to the Chief Court, and the Chief Court directed the District Judge to dispose of the cases himself by recording the compromise and passing decrees in accordance with it. This was done and the plaintiffs then appealed to the High Court against the decrees of the District Judge.

Held, that the order of the District Judge on appeal to the effect that all the parties had agreed to the compromise and reversing the order of the first Court refusing to record it was final under section 104 (2) of the Code of Civil Procedure.

Held also that a decree, passed in accordance with a compromise under Order XXIII rule 3, is one passed " with the consent of the parties " within the meaning of section 96 (3) and therefore no appeal lies from such a decree.

Ayyagari v. Kovvuri (1), and *Renuka v. Onkar* (2), dissented from.

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Dalip Singh for the appellants—The plaintiff appellants did not consent to the decree passed by the District Judge, and therefore section 96 (3), Civil Procedure Code, is no bar to the present appeal—*Ayyagari* v. *Kovvuri* (1), and *Renuka* v. *Onkar* (2). The Chief Court when remanding the case ordered the District Judge to record the compromise and to pass a decree himself instead of sending back the case to the Subordinate Judge. There is thus only one decree in each of these cases, and the present appeals are from the orders of the District Judge recording a compromise. They are therefore not barred under section 104 (2).

Tirath Ram for the respondents—An order recording a compromise is appealable under Order XLIII, rule 1 (*m*). There is only one appeal from such order and no second appeal is competent, see section 104 (2). The plaintiffs cannot in second appeal attack the order of the District Judge recording a compromise, and cannot, therefore, challenge a decree passed in accordance with the terms of the compromise. The appellants are in reality trying to get a second appeal from an order, and this is strictly forbidden by the Code of Civil Procedure. *Ayyagari v. Kovvuri* (1) is not a correct exposition of law.

Dalip Singh replied.

Second appeal from the decree of P. L. Barker, Esquire, District Judge Sialkot, dated the 31st July 1917, reversing that of Mir Ibad Ullah, Subordinate Judge 1st Class, Sialkot, dated the 26th June 1916 and dismissing plaintiff's suit.

The judgment of the Court was delivered by—

CAMPBELL J.—This judgment will dispose of appeals Nos. 3387 and 3388 which have been referred to a Division Bench for disposal on account of the law-point involved.

Two suits were brought against *Sardar* Shibdev Singh and others, managers of the *Khalsa* High School, Sialkot, in respect of 54 *kanals* 11 *marlas* of land the site of the High School. In one the plaintiff was Harnam Singh, *Mahant* of the *Durbar Ber Baba* Nanak

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Sahib. He alleged that he had been induced to part with the land, which originally belonged to his shrine, under false pretences, that the defendants had not fulfilled an agreement to give other land in exchange for it, and that they should be dispossessed. The plaintiffs in the second suit were Hazura Singh and Fateh Singh, two *pujaris* of the same shrine. They also sued for dispossession of the defendants, and they further challenged the right of *Mahant* Harnam Singh to alienate. *Mahant* Harnam Singh as a defendant admitted the claim of these plaintiffs, but the other defendants contested both suits.

The suits were in the Court of the Subordinate Judge. On the 2nd May 1916 two of the contesting defendants, Shibdev Singh and Gurbakhsh Singh, petitioned the Court that the dispute in each case had been settled by oral compromise. Harnam Singh and Fateh Singh denied having been parties to any compromise and, after framing an issue on the point and recording evidence, the Subordinate Judge decided that Harnam Singh and Fateh Singh were neither present nor represented when the alleged settlement was arrived at, and that they had not ratified it subsequently. Accordingly he refused to record the compromise.

Shibdev Singh, Kharak Singh and Gurbakhsh Singh appealed to the District Judge, who found that there had been a valid compromise to which all parties to both suits had assented, set aside the order of the Subordinate Judge, and returned both cases with instructions to him to decide them in accordance with the compromise, the terms of which he held to be those stated by Shibdev Singh and Gurbakhsh Singh in their petition.

Both sets of plaintiffs appealed again to the Chief Court. The learned Judge before whom the appeals were placed held that no appeals lay by reason of section 104 (2), Civil Procedure Code, but in exercise of revisional powers set aside the District Judge's orders of remand and directed him to dispose of the cases himself by recording the compromise and passing decrees in accordance with it.

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This accordingly was done, and the plaintiffs have appealed once more to this Court against the decrees of the District Judge.

The first point for decision is that dealt with in the order of reference to a Division Bench, whether or not the appeals are barred by section 96 (3), which lays down that no appeal shall lie from a decree passed with the consent of parties.

The learned counsel for the plaintiffs has commenced by pointing out that section 375 of the old Code of Civil Procedure has not been reproduced in entirety in the present Code and by distinguishing certain early authorities on that ground. Section 375 ran as follows :—

> ' If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith so far as it relates to the suit, *and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction.*

This section, with the words italicised omitted, with the substitution for the first four words of the words : "where it is proved to the satisfaction of the Court that a suit has been," and with one or two other unimportant verbal alterations appears in the 1908 Code as rule 3 of Order XXIII.

The portion italicised has been replaced by section 96 (3)—

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

Counsel next cites the discussion of the law in *Renuka* v. *Onkar* (1) (a case admittedly differing in its facts from the present cases) to support an argument that the alteration of the old law has the result that decrees made in pursuance of Order XXIII rule 3 are not necessarily final, and that the right of appeal conferred by sections 96 (1) and (2) and 100 is only withheld

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by section 96 (3) when the *decree* is passed with the consent of the parties; compromise, recording of compromise, and decree being three separate proceedings. He has quoted a decision of the Madras High Court reported as *Ayyagari* v. *Kovvuri* (1), as one exactly in point. That case dealt with a situation similar to the present situation except that there was no previous appeal under order XLIII (1) (*m*). A written compromise was presented to a Subordinate Judge who recorded it and passed a decree, which the High Court held to be in accordance with it, in the face of objection by the defendant that he had agreed only to execute a sale deed to the plaintiff outside the Court on the plaintiff withdrawing the suit and had not consented to a decree being passed (as it appears from the report was done) compelling him to execute the sale deed. The defendant appealed unsuccessfully against the decree to the District Judge, and then preferred a second appeal to the High Court.

The High Court overruled two preliminary objections, (1) that the second appeal was in effect against an order by the District Judge, in appeal, confirming an order by the first Court recording a compromise and was barred by Order XLIII, rule (1) (*m*) and section 104 (2), and (2) that section 96 (3) prohibited an appeal from a decree passed with the consent of parties. On the first point the High Court ruled that the first and second appeals were respectively from the decree of the Subordinate Judge passed in accordance with the compromise, after recording it, and from the decree of the District Judge on appeal against the Subordinate Judge's decree, and that there had been no appeal to the District Court against the order recording the compromise. The answer to the second objection was held to be that the decree itself was not passed with the consent of the parties, "but the Court held that there was a consent of parties to the terms of a compromise agreement which was recorded and it passed a decree in accordance therewith notwithstanding the objection of one of the parties."

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The appeal was then dismissed on the merits, the defendant's objection being dealt with in the following terms :—

"The appellant's learned counsel contended that under the compromise agreement the first defendant agreed only to execute a sale deed to plaintiff outside the Court in consideration of the plaintiff's withdrawing the suit, and that he did not agree to a decree being passed compelling him (the second defendant (*sic*)) to execute such a sale deed. Whether he agreed to the Court's passing a decree, or not, compelling him to execute a sale deed is not relevant. The real question is whether the suit was adjusted by a compromise, one of the terms of which was that the first defendant should execute such a sale deed and whether a decree can be passed in accordance with such a term. We think that it could be done."

Our view of the law as applied to the facts of the cases before us is this. Under Order XXIII, rule 3 the first Court had to see whether the suits were proved to its satisfaction to have been adjusted by a lawful compromise. There is no question of the lawfulness of this particular compromise, but the first Court held that adjustment was not so proved because two of the parties had not agreed to the compromise, and it refused to record the compromise. Appeal was made under Order XLIII, rule 1 (*m*), and the District Judge held that all the parties had agreed to the compromise, and reversed the order refusing to record it. This order of the District Judge was final under section 104 (2). There was thus a final decision that all the parties had consented to the compromise. Again under Order XXIII rule 3 a decree in accordance with a recorded compromise *must* follow it. There is no doubt that the present decrees are in accordance with the recorded compromise, which has been held finally to have been made with the consent of the parties. Those parties at the time of that consent must have contemplated the issue of the decrees, which are mere formal expressions of the compromise ; in that view these decrees are decrees passed with the consent of the parties within the meaning of section 96 (3). No appeal lies against them.

Mr. Dalip Singh for the appellants relies strongly upon the decision on the second preliminary objection

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in *Ayyagari* v. *Kovvuri* (1) and we suppose that we must be taken to dissent from it. Nevertheless the ultimate result of that case seems to uphold our view. The appeal failed and the learned Judges, although asked specifically to go behind the finding of the Court which recorded the compromise that it was agreed to by the appellant, did not do so (we have quoted the actual words of the judgment purposely) and indeed appear to have ignored the request altogether.

It will be seen also that we differ from the learned Additional Judicial Commissioner who decided *Renuka* v. *Onkar* (2) in his interpretation of the law and we do so with all respect for what he has written.

Mr. Dalip Singh's further contention that under section 105, Civil Procedure Code, if appeals lie, the correctness of the order on which the decrees are based can be attacked, even if that order is not appealable, need not be dealt with since we hold that appeals do not lie.

We, therefore, dismiss both appeals with costs.

A. R. *Appeals dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Martineau.

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Jan. 6.

JAGIR SINGH (PLAINTIFF)—*Appellant,*

versus

Mst. SANTI (DEFENDANT)—*Respondent.*

Civil Appeal No. 3306 of 1917.

Custom—Succession—son and daughter in-law—Jats *of Raowal, Tahsil Jagraon, District Ludhiana*—Riwaj-i-am—Onus probandi.

Held, that the entry in the *Riwaj-i-am* of the Ludhiana District, being in favour of a sonless daughter-in-law succeeding along with a son, the *onus* of proving that he is entitled to succeed to the exclusion of the daughter-in-law was on him, and that he had failed to discharge that *onus*.

(1) (1914) 25 Indian Cases 56. (2) (1914) 46 Indian Cases 775.