

Second appeal from the decree of Rai Sahib Lala Fopun Ram, District Judge, Ludhiana, dated the 10th May 1923, affirming that of Lala Sakhir Chand, Subordinate Judge, 2nd class, Ludhiana, dated the 3rd February 1923, dismissing the plaintiff's su

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DUNI CHAND
v.
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SLEEM, for Appellants.

BISHAN NARAIN, for Respondents.

JUDGMENT.

TEK CHAND J.—Mota Singh defendant-respondent instituted a suit for pre-emption of a site which had been purchased jointly by Achhru Ram and Duni Chand. On the 12th of 1921, all the parties, viz., Mota Singh, Achhru Ram and Duni Chand, were present in Court. A compromise was made on the joint request of the parties and the case was adjourned to the next day to have the compromise filed in Court. On the 13th of 1921, Mota Singh pre-emptor and Achhru Ram only appeared, Duni Chand being absent. A petition embodied the request signed by Mota Singh and Achhru Ram praying that a decree be made in favour of Mota Singh against the vendor. On the 14th of 1921, before the 12th of May 1923, Mota Singh applied that Duni Chand's brother Achhru Ram should appear on behalf of the respondent. The court ordered that Achhru Ram should appear on behalf of the respondent.

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Two days later, on the 12th of May, 1922, the other vendee Duni Chand filed an application under section 141 of the Civil Procedure Code stating that he had not authorised Achhru Ram to file the compromise on his behalf, and he was not bound by it, and praying that the decree passed against him be set aside. This application was rejected as being incompetent.

On the 19th of December, 1922, Duni Chand instituted the present suit for a declaration that the compromise dated the 27th of April, 1922, and the decrees passed thereon were obtained "without his authority fraudulently and unlawfully" and set aside. The trial Court dismissed the application against him. The trial Court disbelieving that though Achhru Ram was a member of a joint Hindu family with Duni Chand, he had not been authorised by the latter to file the compromise and that no fraud had been practised by him, affirmed the decree of the trial Court. It expressed the opinion that Achhru Ram, by absenting himself on the day the compromise was made, and the money had been withdrawn, was guilty of fraud. The trial Court affirmed the decree of the trial Court. The suit was not maintained. The proper remedy was by application under Order IX, rule 13 of the Civil Procedure Code for review.

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maintainable as the compromise had not been authorised by Duni Chand appellant and is not binding upon him.

In answer to the second of these contentions, reference may be made to a Division Bench decision of this Court in *Jhanda Singh v. Mst. Lachmi* (1), where under somewhat similar circumstances, it was held that a fresh suit does not lie to set aside a decree passed on a compromise, on the mere ground that the plaintiffs who were *sui juris* were not consenting parties to the compromise. The following observations of the learned Chief Justice, who delivered the judgment of the Court in that case, may be usefully quoted:—

“ It is further contended that the plaintiffs were not present at the time when the compromise was arrived at and did not give their consent to the terms of the compromise. The decree was consequently *ex-parte* so far as they were concerned and should not adversely affect their interests in the estate. The simple answer to this contention is that the proper remedy to impeach a decree is by an appropriate proceeding taken in the suit in which the decree was passed, *e.g.*, an application under Order IX rule 13, Civil Procedure Code, to set aside the *ex-parte* decree, or an application for review, or an appeal to the superior Court. But if the decree is not tainted with fraud, no suit lies to set it aside—*vide inter-alia Sadho Misser v. Golab Singh* (2) ”.

I am not unmindful of the rulings of the other High Courts based on the dictum of Vaughan Williams J., in *Huddersfield Banking Co. v. Henry Lister* (3), which are not in strict accord with this

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(1) (1920) I. L. R. 1 Lah. 344, 346. (2) (1897) 3 Cal. W. N. 375.

(3) (1895) 2 Ch. 273.

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decision, see *Sarbesh Chandra Basu v. Hari Dayal Singh* (1), *Kshetra Moni Dasi v. Amodini Dasi* (2), and *Shami Nath v. Ramjas* (3), but the facts of those cases were distinguishable, and in any case, having regard to the finding that the plaintiff's own conduct has not been above board in this case, I do not think it necessary to discuss this point any further.

Mr. Sleem for the appellant relies on *Ashutosh v. Tara Prasanna* (4), *Surendra Nath Ghose v. Hemangini Dasi* (5), and *Manohar Lal v. Jadunath Singh* (6), but none of these cases is in point. In each of them, the plaintiffs were minors at the time when the compromise in the previous litigation was filed in Court and the requirements of Order XXXII, rule 7 or the corresponding sections of the former Code had not been fulfilled. It is well known that the case of a minor plaintiff stands on an entirely different footing and such cases have no bearing on the question before us. I must, therefore, hold that Duni Chand plaintiff could maintain the present suit only on the ground that the compromise or the decree based thereon was obtained by fraud.

Coming now to the first point, it is urged that the facts found by the lower Court amount to fraud but I am unable to accept this contention. In the application embodying the terms of the compromise, all the facts were clearly and correctly stated and nothing was concealed either from the opposite party or the Court. It was specifically mentioned that Duni Chand plaintiff was not present at the time and Achhru Ram undertook responsibility for him. In ascertaining what should be established before a

(1) (1910) 5 I. C. 236.

(2) (1912) 16 I. C. 611.

(3) (1912) I. L. R. 34 All. 143.

(4) (1884) I. L. R. 10 Cal. 612.

(5) (1907) I. L. R. 34 Cal. 83, 88.

(6) (1906) I. L. R. 28 All. 582 (P.C.).

decree passed by a Court of competent jurisdiction could be set aside in a separate action on the ground of fraud, it is necessary to keep, in view the following remarks of Cairns L. J. in *Patch v. Ward* (1).

“ Now it is necessary to bear in mind what is meant, and what must be meant by fraud, when it is said that you may impeach a decree, signed and enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject. *The Duchess of Kingston's case*, where the judges being consulted by the House of Lords replied to one of the questions: ‘ Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal ’. The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.

* * * * *. I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or over-estimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled ”. It is obvious that the plaintiff's allegations even if true fall short of fraud as described above. I would, therefore, hold with the lower

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(1) (1867) L. R. 3 Ch. 203, 206.

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Courts that the plaintiff has failed to establish fraud and his suit must fail.

I may also remark that even if fraud had been established in this case it was not incumbent on the Court to pass a decree in the plaintiff's favour. It is well-settled that the power of a Court to set aside a judgment on the ground of fraud is discretionary and the party who wants a judgment to be vacated must show reasons why he did not assert and enforce his rights at the proper time. He must explain the whole course of his conduct throughout the previous litigation and must free himself from all imputation. See *Chinnayya v. Ramanna* (1).

In this case, as pointed out already, the plaintiff Duni Chand was present in Court when the compromise was talked about on the 26th April. He absented himself on the 27th, when the compromise was filed and decree passed in accordance with its terms. He then kept quiet till the pre-emptor had paid the money in Court. It was after the money had been withdrawn by his brother and co-vendee, that he for the first time alleged that he was not bound by the compromise. His own conduct is not above board and the Court will not exercise its discretion in favour of such a person, unless absolutely compelled to do so.

For the foregoing reasons, I dismiss the appeal with costs.

AGHA HAIDAR J.

AGHA HAIDAR J.—I was inclined to follow the law as laid down in *Shami Nath Chaudhri v. Ramjas* (2), which permits a suit for setting aside a decree on grounds other than that of fraud. But a Division Bench of this Court has expressed a different opinion

(1) (1915) I. L. R. 33 Mad. 203, 220. (2) (1912) I. L. R. 34 All. 143.

in *Jhanda Singh v. Mt. Lachmi* (1), which my learned brother has followed. Under these circumstances I concur in the order passed by him and agree in dismissing the appeal with costs.

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Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tek Chand.

MUHAMMAD KHAN AND ANOTHER—Petitioners

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versus

THE CROWN—Respondent.

June 28.

Criminal Revision No. 377 of 1927.

Public Gambling Act, III of 1867, section 13—Public place—meaning of.

Held, that a public place within the meaning of section 13 of the Gambling Act is a place where the public actually and in fact go, without let or hindrance no matter whether they have a legal right to go or not.

Emperor v. Sukhnandan Singh (2), *Gajju v. Emperor* (3), and *The Queen v. Wellard* (4), followed.

Emperor v. Hussein Noor Mahomed (5), *Kanshi Ram v. The Empress* (6), and *Mul Singh v. The Empress* (7), distinguished.

Held also, that a person who offends against this section can be punished either with imprisonment or with fine but not with both.

Empress v. Gokal (8), followed.

Application for revision of the order of R. J. S. Dodd, Esquire, District Magistrate, Ferozepore, dated the 13th February 1927, affirming that of

(1) (1920) I. L. R. 1 Lah. 344. (5) (1906) I. L. R. 30 Bom. 348.

(2) (1922) I. L. R. 44 All. 265. (6) 17 P. R. (Cr.) 1882.

(3) (1918) 47 I. C. 493. (7) 11 P. R. (Cr.) 1890.

(4) (1884) L. R. 14 Q. B. D. 63. (8) 25 P. R. (Cr.) 1880.