urged that in light of the rules framed by the Court and the interpretation put on them by the legal advisers of the applicants, the applicants did not think that they were bound to come to Court and they have taken out this summons as a matter of precaution. If their contention as to the construction of the rules is incorrect, the applicants should not suffer for the advice tendered to them by the legal advisers and their claim should not be prejudiced. I think this argument cannot be disregarded. There is thus a sufficient cause under the circumstances of this case and the abatement is therefore set aside. The summons is made absolute. The applicants to pay the costs of the summons and bear the costs of the amendment of the title of the written statement and the consequential amendments. Leave granted to the plaintiffs to amend the title of their reply to the counter-claim. The time to amend the third party proceedings extended up to July 10, 1939. Counsel certified.

Attorneys for plaintiffs : Messrs. *Pandia & Co.*

Attorneys for defendants : Messrs. *Ferreira & Vallabhdas.*

Summons made absolute.

N. K. A.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

THE WESTERN ELECTRIC CO. LTD., PLAINTIFFS *v.* KAILAS CHAND AND ANOTHER, DEFENDANTS.*

1939
July 20

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Lawful agreement, meaning of—Power of Court in recording compromise.

On an application under O. XXIII, r. 3, to record a compromise, it is not open to the Court, in determining whether the agreement is lawful, to inquire if the agreement is liable to be set aside or avoided.

* O. C. J. Suit No. 1915 of 1938.

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Lawful agreement or compromise includes all agreements except those which are on the face of themselves unlawful and those which are on their face void and therefore not capable of being enforced.

Qadri Jahan Begam v. *Fazal Ahmad*,[1] considered and *Husain Yar Beg* v. *Radha Kishan*,[2] followed.

DEFENDANTS' Notice of Motion for recording a compromise.

The material facts and contentions appear sufficiently in the judgment.

M. C. Setalvad, Advocate General, for defendant No. 1.

C. K. Daphtary, for the plaintiffs.

KANIA J. This is a motion for recording a compromise. The terms of the compromise, which are reduced to writing, are not disputed. They are found in two letters which are annexed to the affidavit filed in support of the motion. On behalf of the plaintiffs, who oppose this application, it is urged that their consent was obtained on a representation that the Northern India Development Corporation Ltd., who were to pass a writing under the agreed terms promising to pay Rs. 6,500 to the plaintiffs by monthly instalments of Rs. 200 and Rs. 300, was in a sound financial condition. It is alleged that that representation was false to the knowledge of the agent of the defendants who came to effect the compromise. It is alleged that the corporation held a meeting in the middle of April, 1939, and passed a resolution to go into voluntary liquidation. The company later on has been ordered to be wound up subject to the supervision of the Court. Having regard to the short period within which the company went into liquidation it is contended that the representation was false to the knowledge of the agent and therefore the compromise is voidable at the instance of the plaintiffs. The alleged representation is denied. The dispute is whether on this application the plaintiffs should be allowed to go into that question at all.

[1] (1928) 50 All. 748. [2] (1934) 57 All. 426.

The notice of motion to record the compromise is taken out under O. XXIII, r. 3, of the Civil Procedure Code, which (omitting the words which are inapplicable) states "where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit". The words of that rule show that the Court has to be satisfied on two points: first, that there was an agreement between the parties, and, secondly, that it was lawful. The document put forward in the present case is not disputed and the agreement is thus proved. The other question is whether it is lawful. On behalf of the defendants it is urged that "lawful" means "according to law". The learned Advocate General for the defendants in the course of the argument drew my attention to *Qadri Jahan Begam* v. *Fazal Ahmad*[1] and *Husein Yar Beg* v. *Radha Kishan*.[2] In those cases the proceedings were adopted under O. XXIII, r. 3, and the contention of the opponents was that the agreements were voidable by reason of facts extraneous to the terms of the agreements themselves. The observations of the learned judges in those cases show that an enquiry showing that the agreements were voidable is not within the purview of O. XXIII, r. 3. In the former case it was observed as follows (pp. 751-52):—

"... the word 'lawful' in O. XXIII, r. 3, does not merely mean binding or enforceable ... the word 'lawful' ... refers to agreements which in their very terms or nature are not 'unlawful', and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about by undue influence, coersion or fraud."

With respect I am unable to accept the full meaning of the words used there. If an agreement put before the Court as a compromise on the face of it was a wagering agreement and therefore void under s. 30 of the Indian

[1] (1928) 50 All. 748. [2] (1934) 57 All. 426.

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Contract Act, in my opinion, it will not be a lawful agreement because on the face of it it is an agreement which the Court will not enforce. The provisions of O. XXIII, r. 3, require the Court to record a lawful agreement and it has no option but to pass a decree in accordance with it. A compromise which is so put forward stands on the same footing as a contract between the parties. If at the *ex-parte* hearing of a suit filed to enforce an agreement, it appeared to the Court on the face of it to be void, I think the Court would refuse to pass a decree, to enforce that contract. In the same way, if a wagering agreement was put forward as a compromise to the suit, I see no reason why the Court should not hold that it is not a lawful agreement and thus refrain from recording it or passing a decree in accordance with it. Therefore, the term " lawful agreement " as used in O. XXIII, r. 3, excludes not only unlawful agreements, i.e. the object or consideration for which are unlawful as defined in the Indian Contract Act, but all the agreements which on the face of them are void and therefore will not be enforced by the Court. For this purpose no inquiry is necessary because the terms of the agreement themselves will show the defect. The Court therefore has to consider whether on the face of the agreement it is lawful or not as stated above. With that reservation I respectfully agree with the two Allahabad decisions mentioned above.

An application under O. XXIII, r. 3, is in the nature of an interlocutory proceeding and normally it will certainly be inconvenient to treat it as if it were a suit where all evidence which will make the agreement voidable by reason of the provisions of the Indian Contract Act will be led. But that will not be a sufficient answer to refuse to take into consideration the plea whether an agreement is voidable or not. That contention must stand or fall by reason of the wording of O. XXIII, r. 3. I am unable to construe the word " lawful " as wide enough to include an enquiry whether the agreement is voidable at the instance

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of one party. In my opinion it includes only two classes of agreements: those which are unlawful and those which on their face are void and therefore not capable of being enforced. Under the circumstances the opposition fails. If the plaintiffs have any grievance in respect of the agreement their remedy is to file a suit to set aside the agreement and the decree. They are not prevented from doing so by this judgment.

The agreement which is contained in the letters of March 10 and 12, 1939, which are put in and marked No. 1 is recorded, and a decree is passed in accordance therewith. Plaintiffs to pay the costs of this motion and decree.

Attorneys for plaintiffs: Messrs. *Crawford, Bayley & Co.*

Attorneys for defendant No. 1: Messrs. *Bhaishankar, Kanga & Girdharlal.*

Order accordingly.

N. K. A.

APPELLATE CIVIL.

Before the Hon'ble Mr. R. S. Broomfield, Acting Chief Justice, and Mr. Justice Sen.

UMABAI BHRATAR SHANKAR HARI BORGAONKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* SHANKAR HARI BORGAONKAR (ORIGINAL DEFENDANT), RESPONDENT.*

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Civil Procedure Code (Act V of 1908), O. XXXIII, r. 15—Application to sue in forma pauperis*—Application rejected—Applicant ordered to pay costs of opponent—Plaintiff instituting a suit in ordinary manner without paying defendant's costs in pauper application—Defendant not mentioning bar of Rule 15—Suit decreed—Appeal by defendant—By a subsequent application defendant raising a point of jurisdiction—Whether plea of waiver permissible—Failure to comply with prior payment of costs an irregularity.*

A failure to comply with the condition in O. XXXIII, r. 15 of the Civil Procedure Code, 1908, as to prior payment of costs is an irregularity in the initial procedure

* Second Appeal No 511 of 1936.