PATNA HIGH COURT

Girdharan Prasad

Vs

Bholi Ram

(Harries CJ. and Fazl Ali, J.)

22.04.1941

ORDER

Fazl Ali, J.

1. This is an application in review by the respondents in a Letters Patent Appeal who ask us to vacate the compromise decree passed in that appeal on 16th August 1940, on the ground that in fact they had not consented to the terms of the compromise and that the advocates who appear, ed for them had consented to those terms against their instructions.

2. The subject-matter of the litigation which had given rise to the Letters Patent Appeal was 1 bigha 15 dhurs of raiyati land in village Narainpur appertaining to khata No. 37. This land consisted of plots Nos. 457 and 465 which originally belonged to one Mt. Dulari Kuer. Dulari Kuer mortgaged plot No. 457 to defendant 7 for ₹ 25/- and plot No. 465 to defendant 8 for ₹ 40/-. The present petitioners subsequently purchased from defendants 9 and 10, who are alleged to be the daughters of Mt. Dulari Kuer, the two disputed plots and some other lands for a sum of ₹ 200/- on 25th May 1936, and subsequently instituted a suit for the redemption and recovery of possession of the disputed plots against defendants 7 and 8 to whom Dulari Kuer had mortgaged the land and also impleaded in the suit the appellants in the Letters Patent Appeal, who were described in the plaint as defendants first party, as they had purchased the land subsequently by a registered sale deed from defendants 7 and 8 and thereafter put up certain structures and machinery upon it and also constructed a railway siding thereon. Their case was that defendants 7 and 8 had not the full right of ownership and could not transfer the land to the defendants first party. On the other hand the defence in the suit was that the land originally belonged to one Jadhubans Gir, but as he had no wife or issue, he had surrendered the land to the landlord and there, after the land had been settled by the landlord with defendants 7 and 8, the vendors of defendants first party.

3. The first Court decreed the plaintiffs' suit but the decree was reversed in appeal and the plaintiffs' prayer for recovery of possession of the land and the demolition of the structure standing thereupon was refused. A decree, however, was passed in favour of the plaintiffs directing the defendants first party to pay them a sum of ₹ 210-8-0/- as the value of the land, the appellate Court observing that as the plaintiffs had acted maliciously, they were not entitled to

any cost. The plaintiffs thereupon preferred a second appeal to this Court and the learned Judge who heard the appeal set aside the judgment of the Subordinate Judge and passed a preliminary decree for redemption in accordance with Order 34, Rule 7. Then there was a Letters Patent Appeal in which a consent decree was passed in the following terms:

> If the defendants first party pay to the plaintiffs within a period of two months from to-day a sum of ₹ 5500/- the plaintifis' claim will stand dismissed in its entirety. On the other hand, if the defendants fail to pay the plaintiffs the said sum within the said period this appeal will stand dismissed and the decree of the learned Single Judge affirmed. The said sum of ₹ 5500/- must be deposited in this Court within the stated period.

4. Before this order was made, we had on the oral application made on behalf of the parties given them leave to compromise the appeal as in our opinion the compromise was for the benefit of the minor plaintiffs. At the time of the compromise the plaintiffs who were respondents in the appeal were represented by Dr. Dwarika Nath Mitter and Mr. G.P. Shahi, and the defendants first party who were appellants were represented by Mr. P.R. Das, Mr. Hem Chandra Mitter and Mr. Kameshwas Dayal. In order to avoid confusion the plaintiffs (respondents in the Letters Patent Appeal) will be hereafter referred to as the petitioners and the defendants first party (the appellants in the Letters Patent Appeal) will be referred to as the opposite party.

5. Now the allegations upon which the present application is based may be summarized as follows: On 15th August; 1940, a day before the Letters Patent Appeal was taken up, petitioners 1 and 3 had definitely instructed their advocates, Dr. Dwarika Nath Mitter and Mr. G.P. Shahi, not to compromise the appeal in any event. On the morning of 16th August 1940 Mr. Kameshwar Dayal, one of the advocates appearing for the opposite party, accompanied by some of their servants had gone to the house of Mr. G.P. Shahi, one of the advocates appearing in the case on behalf of the petitioners. At the house of Mr. Shahi, Pandit Ram Chandra Sukla on behalf of the opposite party made a proposal to Chandra Bhukhan Prasad Missir that the appeal might be compromised and offered a sum of ₹ 10,000/- as one of the terms of the compromise. Chandra Bhukhan Missir, however did not agree. Thereafter when the appeal was taken up in Court Mr. G.P. Shahi called Chandra Bhukhan Prasad Missir and asked him whether he was willing to compromise the appeal to which he replied in the negative. Some time later Chandra Bhukhan Missir told Mr. Shahi that petitioner 3 Girdharan Prasad Missir was also not willing to compromise the appeal.

6. Later on, petitioners 1 and 3 came to know about the compromise and then they asked their advocates as to why the appeal had been compromised against their specific instructions and requested them to inform the Court that they had not given their consent to the terms of the compromise, but the advocates did not listen to this request. The petitioners 1 and 3 then wanted to inform the Court personllay after 2 P.M. as to what had happened, but as the Court was hearing arguments in another case, they could not do so. At 4 P.M. when the Court was rising, they informed the Court that they had not consented to the compromise, whereupon the Court ordered them to file a petition to that effect. The petitioners accordingly filed an application for review on 30th September 1910.

7. Now if these facts were admitted or there were prima facie grounds for believing them to be true, we might have been inclined to consider this application. But the petitioners have come to Court with a strange story and the opposite party whose case is that this petition is only an attempt to blackmail them, strongly challenge the truth of the main part of the story.

8. In such circumstances we can review the order, only if after an investigation, which must be more or less like the trial of a suit, we are satisfied that the allegations made in the petition are correct. In our opinion, therefore, this application must be rejected on the ground that the petitioners have, as they themselves admit, an alternative remedy by way of a suit, which is undoubtedly the more appropriate remedy in this case, inasmuch as the matters raised before us require an elaborate investigation.

9. We are also not fully satisfied on the materials before us that this is a bona fide application. Dr. Dwarika Nath Mitter, the leading counsel for the petitioners was a Judge of the Calcutta High Court for many years and is one of the most distinguished and highly respected members of the local Bar. It seems to us incredible that Dr. Dwarika Nath Mitter would have compromised the case, if, as is alleged, he had been given clear and specific instructions not to compromise it. The other advocate, Mr. Shahi, who appeared for the petitioners has been practising in this Court for many years and we see no reason why this learned advocate should have also acted contrary to what the petitioners allege to have told him not only on 15th August but also at the time when the arguments in the case were in progress. If these learned advocates had appeared before us and made a statement at the Bar that there was some misunderstanding on their part in regard to the instructions given to them, we would have been inclined to consider his application. But these advocates are not before us and the petitioners have filed this petition through an advocate, who did not represent them at the time of the hearing of the appeal and who has no personal knowledge of what happened at the time of the hearing.

10. It is practically admitted that two of the petitioners, that is to say, petitioners 1 and 8 who were apparently in charge of this litigation were present in Court on the day the appeal was heard. We find it somewhat difficult to believe that if the compromise had been recorded without their consent, they would not have then and there brought the fact to the notice of the Court. The story put forward in the petition that the petitioners came to know much later that the appeal had been compromised and they tried to bring the matter to our notice at 2 P.M. but refrained from doing so as another case had started does not appear to us to be at all a probable one.

11. However that may be, there is a clear misstatement at the end of the petition. Though it is a fact that when the Court was rising one of the petitioners told us that he was not satisfied with the compromise, yet after we had risen, we were informed by the Reader that that petitioner did not want to press the matter further. It is significant that though the order was recorded and signed by us on 16th August the application for review was not filed until 30th September 1940.

12. There was considerable discussion before us as to whether an application for review lies at all in the circumstances of this case. In *Nathu Lal v. Raghubir Singh,*[1] it was held that when a compromise has been incorporated into a decree, the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion.

13. In *J.C. Galstaun v. Pramatha Nath Roy*[2]*,* Rankin C. J. expressed the opinion that if a party desires to have a consent decree amended or vacated upon the ground that it was fraudulently

pro-cured, his proper course and indeed the only course is to proceed by separate suit for the purpose, because the matter is certainly grave enough to deserve a separate suit. The learned Chief Justice then proceeded to deal with the question as to whether Order 47, Civil Procedure Code, was applicable to such a case and observed as folllows:

> The authorities in this Court ate not uniform, but putting the matter at the highest in favour of the respondents, it may be said that there is some difference of opinion upon the question whether, and in what circumstances, a consent decree may be reviewed under Order 47 of the Code. It was said in *Golab Koer v. Badshah Bahadur*[3] that 'while it must be conceded that a large preponderance of authority is against the contention that a consent decree cannot on any ground be challenged upon an application for review of judgment, there is no foundation for the suggestion that there is a preponderance of authority in favour of the contention that a consent decree may be reviewed on the ground of fraud.' The main proposition decided in that case was that a party who had applied unsuccessfully under Order 47 for review of a consent decree on the ground that it has been obtained by fraud was entitled, notwithstanding his failure to prosecute a remedy by suit. This decision was contrary to a previous decision in *Ram Gopal v. Prasanna Kumar*[4] and I desire to reserve my opinion upon the point. In *Golab Koer v. Badshah Bahadur*[5] it was pointed out that there are weighty reason why a regular suit should be regarded as a more appropriate remedy in such cases. Now, I desire to say that, in my opinion, it is not competent under Order 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. It appears to me that before such a doctrine can be taken as authorized by the Code, it is very necessary to lay one's finger upon some enactment which is clearly intended to make so large and inconvenient an exception to the general principles which govern this matter. Rule 1 of Order 47, after speaking of a case where a party has discovered new and' important matter which was not within his knowledge or could not be produced by him at the time when the decree was passed, and of mistake or error apparent on the face of the record, introduces the words 'or for any other sufficient reason'. In *Chajju Ram v. Neki*[6] the Judicial Committee had occasion to point out that these words were not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. It appears to me that if mistake or error is prima facie intended to be beyond the scope of the rule, unless the mistake or error be apparent on the face of the record it is curious, to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud. In my opinion, the correct doctrine under the Civil P. 0. is in no way different upon this point from that which is laid down for England in Daniel's Chancery Practice, 8th Edn., p. 709. The authorities in this Court to the oontrary are neither numerous nor impressive and had not infrequently been challenged: *cf. Barhamdeo v. Banersi Prasad*[7]. On principle, and as a matter of construction of Order 47 of the Code, I approve of the view taken in *Ramlagan Sahu v. Ram Birich Kori*[8] and were it necessary I should desire to refer the matter to a Full Bench.

14. The learned advocate for the petitioners tried at first to bring the present case under Order 47, Rule 1 on the ground that there is a mistake or error apparent on the face of the record. This ground, however, had to be abandoned, and the learned advocate proceeded to contend that the petitioners were entitled to apply for a review on the ground that they had discovered a new and important matter. The new and important matter is said to be the fact that the advocates for the petitioners had consented to the petition of compromise though they had been told not to give such consent.

15. In our opinion the case cannot be brought under Order 47, without straining the meaning of the words used in that rule; but even if it can be brought under it, it is difficult to hold that petitioners 1 and 3, who were undoubtedly present in Court at the time of the hearing of the appeal, could not with exercise of due diligence have prevented their advocates from consenting to a decree on terms which they were not prepared to accept. If their case is that the consent decree was due to some kind of fraud practised upon them by their advocates, the case is directly hit by the decision in *Nathu Lal v. Raghubir Singh*[9],

16. In any event we agree with Rankin C.J. that the matter "is important enough to deserve a separate suit" and we accordingly reject this application with costs.

Cases Referred.

1AIR 1926 All 50 : (1926) ILR 48 All 160
2AIR 1929 Cal 470
313 C.W.N. 1197
410 C.W.N. 529
513 C.W.N. 1197
6A.I.R. 1922 P.C. 112
7(06) 3 C.L.J. 119
8A.I.R. 1919 Pat. 232
9AIR 1926 All 50: (1926) ILR 48 All 160