

# PATNA HIGH COURT

Mangal Mahton

Vs

Behari Mahton

A.F.O.O. No. 66 of 1961

(U.N. Sinha and R.J. Bahadur, JJ.)

06.04.1964

## JUDGMENT

### **R.J. Bahadur, JJ.**

1. This appeal has been filed by the plaintiff and it is directed against an order passed in Miscellaneous Case No. 9 of 1960, by which the learned Additional Subordinate judge has refused to set aside a compromise decree passed in Title Suit No. 2 of 1949, upon an application filed by the plaintiff-appellant.

2. The facts are as follows : On the 7th of February, 1959, the plaintiff had filed a suit, which was numbered as Title Suit No. 2 of 1959. It appears that on the 14th of September, 1960, a petition of compromise was filed in Court, which purported to be a petition en behalf of all the parties to the litigation. On the same day, an order was recorded by the Court to the effect that the suit was decreed in terms of the petition of compromise. The decree was prepared and notified on the 15th of September, and it was sealed and signed on the 19th of September, 1960. It appears that on the 19th of September, 1960, an application was filed by the plaintiff, without mentioning any provision of law under which it was filed, praying that the Court may be pleased to set aside the "compromise petition filed on 14-9-60 and the consequent decree based upon it in Title Suit No. 2 of 1959." This case was registered as Miscellaneous Case No. 9 of 1960. Upon hearing the parties, the learned Additional Subordinate Judge has rejected the plaintiff's case on merit and he has also held that the application before him was not tenable. The plaintiff has this come up in appeal to this Court.

3. A preliminary objection has been taken by learned Counsel for the respondents urging that the learned Judge was right in stating, at the beginning of his order, that the application filed by the plaintiff was one under Section 151 of the Code of Civil Procedure , and, therefore, the order passed thereon cannot be made the subject-matter of an appeal under Order 43 of the Code. It is argued that the order which was appealable, under Order 43 Rule 1(m) of the Code, was that passed on the 14th of September, 1960, by which the suit was decreed in terms of the petition of compromise. It is contended that if the plaintiff was desirous of appealing to this Court, he should have come up against that order. It is argued that assuming, but not admitting, that an application

could have been filed on the 19th of September to set aside the compromise decree under the inherent powers of the Court, the order passed was final and no appeal lies against that order. In reply to the preliminary objection taken, learned counsel for the appellant has argued that the order passed on the 14th of September, 1960, was passed ex parte, and instead of passing that ex parte order, notice should have been issued to the plaintiff upon the petition filed on that date. It is argued that the order passed on the 14th of September was really not the final order within the meaning of Order 23 Rule 3 of the Code of Civil Procedure, but the final order was passed on the 18th of February, 1961 on the plaintiffs application, which order is now the subject-matter of this appeal. According to the learned counsel, before the Court could pass the order dated the 14th September, 1960, it was incumbent upon the Court to be satisfied that all the parties to the alleged compromise had really compromised the suit so that a decree could be passed in terms of the compromise. Learned counsel for the appellant has, further, urged that as soon as the plaintiff alleged by his application dated the 19th of September, that the order passed on the 14th of September, 1960 was an ex parte order so far as the plaintiff was concerned, the Court should have set aside that order on that ground alone. Having heard learned counsel for the parties on this preliminary point, it appears to its that the objection taken to the maintainability of the appeal by learned counsel for the respondents is valid and must be accepted. It is clear to our mind that the order that was passed by the Court on the 14th of September, 1960, was an order recording the compromise within the meaning of Order 23 Rule 3 of the Code of Civil Procedure. That order was an appealable order. If it was open to the plaintiff to file a fresh application on the 19th of September, 1960, praying that the compromise decree be set aside, that application fell within the purview of Section 151 of the Code, invoking the inherent jurisdiction of the Court. The order passed on such an application cannot be made the subject-matter of an appeal under Order 43 Rule 1(m) of the Code.

Reading Order 23 with Order 43 Rule 1(m) of the Code of Civil Procedure, we are of the view that these two provisions of law do not contemplate that an appeal will lie against an order passed subsequently, on an application asking the Court to set aside the order recording the compromise. The same proposition was laid down on exactly contrary facts in the case of *Bindeshwari Prasad Choudhary v. Debendra Prasad Singh*, reported in<sup>1</sup> It was held there that these provisions of law do not envisage that an appeal will be against an order passed subsequently, setting aside the order recording the compromise. If it is held that an appeal does not lie from a subsequent order setting aside an order recording the compromise, it is clear that no appeal will lie from an order refusing to set aside the order recording the compromise. In our opinion, the learned Judge was right in stating, at the beginning of his order, that the application considered by him was one under Section 151 of the Code of Civil Procedure . In that view of the matter, no appeal is maintainable and no other point requires any consideration. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Cases Referred.

<sup>1</sup> AIR 1958 Pat 618