# Audh Behari Lal And Ors. vs Faqir Rai And Anr. on 5 December, 1950

## Equivalent citations: AIR1950ALL236, AIR 1951 ALLAHABAD 236

## Author: V. Bhargava

## Bench: V. Bhargava

JUDGMENT

V. Bhargava, J.

1. These two appeals arise out of two suits brought by the pltf.-resp. against the deft.-resp. in the two appeals for possession over certain plots of land & for demolition of constructions put up on them by the applts. Both the suits were dismissed by the trial Ct. & appeals were filed by the pltf.-resp. which came up for hearing before the lower appellate Ct. on 15-10-1947. An appln. was presented by the pltf.-resp. that a compromise had been arrived at between the parties, that the compromise be recorded & the appeals be decided in terms of that compromise. The lower appellate Ct. made enquiries as to whether a compromise had been entered into & held that there had been a compromise which was binding between the parties to the appeals. It directed that the compromise be recorded & decided both the appeals in terms of the compromise. It is against the decree thus passed by the lower appellate Ct. that the applts. have come up in these second appeals.

2. When these appeals came up for hearing, a preliminary objection was taken by the learned counsel for the resps. that no second appeal lay because the applts. should have appealed from the order recording the compromise & not from the decree itself. The learned counsel for the resp. based this argument on Sub-section (3) of Section 96, C. P. C. which says that no appeal shall lie from a decree passed with the consent of the parties. Sub-section (3) of Section 96, C. P. C. is obviously not applicable because in the present case the decree passed by the con-sent of the parties has been passed by the appellate Ct. & not by a Ct. exercising original jurisdiction. Section 96, C. P. C. deals with appeals from decrees passed by Cts. exercising original jurisdiction. Appeals from decrees passed by appellate Cts. are governed by Section 100, C. P. C. & this section has no such provision as has been made in Sub-section (3) of Section 96. Consequently an appeal from a consent decree passed by an appellate Ct would lie Section 105, C. P. C. makes it clear that in filing such an appeal it is open to the applt. to include in his ground of appeal any error, defect or irregularity in any order which might itself have been appeal-able under Order 43, Rule l, C. P. C. Sub-section (2) of Section 105, C. P. C. precludes a ground being taken against an order of remand from which an appeal lies, but no such restriction is placed on all other orders from which an appeal might have lain. In this Case, therefore, it is clear that these second appeals competently lie on the grounds taken by the applts. & the preliminary objection fails. It may also be mentioned that, in the

alternative, even if no second appeal had lain, these appeals could have been treated as first appeals from orders because the order recording the compromise as well as the order granting a decree in the appeal was one single order &, since an appeal has been filed against that order it could be treated as an appeal from the order recording the compromise & dealt with as a first appeal from order.

3. The main ground urged in these appeals on behalf of the applts. is that the compromise embodied in the appln. of 15-10-1947 was not an adjustment of the suit in whole or in part &, therefore, the lower Ct. was wrong in recording it & passing a decree in accordance with it under Order 23, Rule 3, C. P. C. This contention appears to be perfectly correct. The terms of the compromise show that under it the applts. were to transfer some land to the resps. in lieu of continuing in possession of the land to which the suite related. Such a transfer could only be made with the sanction of the Asst. Collector in charge of the sub-division under Section 24, Regulation of Agricultural Credit Act (U. P. Act 14 [XIV] of 1940). The compromise itself contained a term that both parties would apply for sanction of the exchange to the Asst. Collector. It was laid down that the appln. must be made within one month of the compromise. The applts. were to give the land mentioned in the compromise & thereupon the appeals were to be dismissed. On the other hand, it was laid down that if the resps. did not apply for transfer of the land which was to be given to them by the applts. the appeals were to be allowed It is obvious that the agreement contained a term which was beyond the control of the parties. The fulfilment of the agreement was contingent on an order to be passed by the Asst Collector in charge of the sub-division. All that the parties could do was to apply to the Asst. Collector for permission to transfer. They could not compel the Asst. Collector to grant the sanction. The compromise as it stood, therefore, included a contingency where both the parties might have fully complied with the requirements of the compromise & yet no transfer of the land could be made by the applts to the resps. because of want of sanction by the Asst. Collector. No provision was made in the compromise as to what would happen to the appeals if such a contingency arose. If both the parties did apply for transfer & the transfer was sanctioned there was a provision that the appeals would stand dismissed. There was a further provision laying down penalty on one party or the other for failure to apply for transfer. There was, however, no provision at all as to what would happen in case both the parties had applied for transfer but the Asst. Collector refused to sanction the transfer. On the happening of that Contingency, the lower appellate Ct. would have had to proceed to decide the appeals on merits. The compromise was, therefore, in a form in which there was a possible contingency in which it might have been necessary for the lower appellate Ct. to hear the appeals on merits & in such circumstances it cannot be held that the compromise had the result of adjusting the appeals in whole or in part. In this light that compromise did not satisfy the requirements of Order 23, Rule 3, C. P C. & should not be recorded & followed up by a decree.

4. This point can be dealt with from an alternative angle which was argued by the I earned counsel for applts. His point was that, since the compromise was contingent on an action to be performed by some other person beyond the control of the parties, the compromise should not be treated as an adjustment under Order 23, Rule 3, C.P.C. In support of the proposition, the learned counsel for the applt. relied on Muhammad Zahur v. Cheda Lal, 14 ALL. 141 : (1892 A. W. N. 3) and Mt. Maqboolan v. Habib Ullah, A. I. R. (14) 1927 Oudh 222 : (102 I. C. 470). The Oudh case appears to be very much applicable to the facts of the present case. In that case also the adjustment sought to be recorded &

followed up by a decree was one in which some action had to be done by other persons beyond the control of the parties. The following words occurring in the judgment of the case may be quoted with advantage : "Here again the contingency of his appearance in Ct. on the next day was one over which neither of the parties had any control. When a decision of Ct. of Justice depends on an agreement of such a nature it is obviously not an adjustment within the meaning of Order 23, Rule 3, C. P. C."

In the present case also there was a contingency over which neither of the parties had any control and, therefore, this particular compromise should not be treated as an adjustment at all under Order 23, Rule 3, C. P. C. The learned counsel for the resp. referred me to the case of Ram Sunder v. Jai Karan, 1925 (23) A. L. J. 251: (A.I.R. (12) 1925 ALL. 271) in support of his proposition that the Ct. should act on such a compromise. It was also a gued by him that this later case of this Ct. had the effect of over, ruling the earlier case of Mahammad Zahur v. Cheda Lal, 14 ALL. 141 : (1892 A.W.N. 3). In my opinion, this later case of Ram Sunder Misra v. Jai Karan Singh, 1925 (23) A. L. J. 251: (A.I.R. (12) 1925 ALL. 271) in no way over, rules the view expressed by the same Ct. in the earlier case of Muhammad Zahur v. Cheda Lal, 14 ALL. 141 : (1892 A.W.N. 3). On the other hand it actually affirms that view, because in this case also it was held that an agreement in which something had yet to be done by the witnesses did not amount to an adjustment under Order 23, Rule 3, C. P. C. All that was held in this later case was that such an agreement could be enforced by the Ct. as an agreement apart from being followed up as an adjustment under Order 23, Rule 3, C. P. C. In the present case the compromise relied upon by the resps. could not be enforced even as an agreement. The agreement itself was repudiated by the resps. Further the agreement was not entered into by or on behalf of all the applts. Even the resp.'s own case was that the compromise had been arrived at between him & Jhinku Rai deft. in one suit & Nepal Rai deft, in the other suit. The contention on behalf of the pltf.-resp. was that Nepal Rai & Jhinku Rai had entered into the compromise as kartas of the joint Hindu families of which all the defts. to the suits were members An examination of the two suits, however, shows that the suits were not brought by the pltfs. against the defts. as a joint Hindu family. The suits were for the wrongful act of making constructions on the land of the pltfs.

The wrongful acts could not be said to have been committed by the family as such. The plaints themselves nowhere disclose that there was any intention at all to sue the joint family as such. All the defts. were impleaded as wrongdoers in their own individual capacity. In these circumstances the agreement could not be enforced even as an agreement. Further this would be another ground for not enforcing this agreement as an adjustment under Order 23, Rule 3, C. P. C. also. For these reasons it is to be held that the lower Ct. wrongly decreed both the suits on the basis of the compromise.

5. I allow the appeals with costs, set aside the decree passed by the lower Ct. in these appeals & remand the appeals to the lower Ct. for a fresh decision on merits.

6. Leave to appeal to a D.B. is refused.