MOHAMMED RASUL

v.

HAZARA SINGH

[SUPREME COURT, 1962 (Hammett P.J.), 7th, 14th June]

Civil Jurisdiction

Action—compromise—terms of settlement filed in court and action discontinued—fresh action on same issue— incompetent unless compromise first set aside in action brought for that purpose.

Court—inherent jurisdiction—previous action on same issue settled and discontinued—stay of proceedings—abuse of court process.

Moneylending—action settled and discontinued—terms of settlement filed in court —subsequent action on same issue incompetent unless compromise first set aside by action—Moneylenders Ordinance (Cap. 207).

The plaintiff brought the present action against the defendant, a licensed moneylender, for a declaration that transactions between them were unenforceable and for consequent relief. In the previous year the plaintiff had brought an action against the defendant claiming virtually the same relief on the same grounds. That action was settled and a signed copy of the terms of settlement was filed in court; the presiding judge endorsed the record accordingly and the suit was discontinued.

Held: 1. The earlier action having been settled and discontinued the same issue could not be made the subject of a fresh action until the compromise in the first action had been set aside in an action brought for that express purpose.

2. The action would be dismissed.

Per Curiam : If the court had been of the view that it had no power to dismiss the action it would have been appropriate to exercise the inherent jurisdiction to stay the proceedings as an abuse of court process, until the compromise had been set aside.

Cases referred to : *Dixon v. Evans* (1872) 5 L.R.H.L. 606; 42 L.J.Ch. 139: *Emeris v. Woodward* (1889) 43 Ch.D. 185; 61 L.T. 666 : *Gilbert v. Endean* (1878) 9 Ch. D. 259; 39 L.T. 404 : *Pryer v. Gribble* (1875) L.R. 10 Ch. 534.

Action in the Supreme Court for a declaration in relation to moneylending transactions.

K. C. Ramrakha for the plaintiff.

A. I. N. Deoki for the defendant.

The facts sufficiently appear from the judgment.

HAMMETT P.J. : [14th June, 1962]—

The Defendant is a licensed moneylender. In 1955 he lent money to the Plaintiff who gave him a bill of sale and a mortgage over Crown Lease No. 2093 to secure the sum of £600 and interest at the rate of 8 per cent. per annum, and any further advances which were made. Subsequently other advances were made. In this action the Plaintiff claims, on a number of grounds, a declaration that the transactions between the Plaintiff and the Defendant are unforceable in law and for consequential relief including the delivery up and cancellation of the said securities, together with an order that an account be taken of all dealings between the Plaintiff and the Defendant under the Moneylenders Ordinance, and similar further relief.

The allegations made by the Plaintiff in his statement of claim have all been substantially denied by the defence, of which paragraph 18 reads:

> "18. That on the 5th day of November, 1960, the Plaintiff and the Defendant entered into terms of settlement which is binding and therefore this action cannot be sustained."

When this action came up for hearing Counsel for the Defendant intimated that he wished to raise a preliminary objection based upon paragraph 18 of the statement of defence. I have heard both Counsel on this matter, and the facts in this connection which are not in dispute are as follows.

On the 28th April, 1960, in Civil Action No. 65 of 1960, the Plaintiff brought a similar action in this Court to that now before the Court in which virtually the same relief that is now claimed was sought on virtually the same grounds. On the 7th November, 1960, when that action was called, on the date fixed for hearing, Counsel for both sides appeared and informed the Court that the action had been settled on terms which had been reduced to writing and signed both by the parties' respective solicitors and by themselves in person on the 5th November, 1960. A signed copy of these terms of settlement was filed with the Court and Mr. Justice Knox-Mawer, Acting Puisne Judge, the presiding Judge at the time, endorsed the record —

> "Suit is settled and discontinued upon the terms therein."

The terms of settlement signed by the parties read as follows:

> "
>
> *TERMS OF SETTLEMENT*
>
> The Plaintiff and the Defendant mutually agree as follows:—
>
> 1. The amount owing by the Plaintiff to the Defendant as at 13th February 1960 is £2614.5.3 (Two Thousand six hundred and fourteen pounds five shillings and three pence).
>
> 2. The Plaintiff shall pay the said debt of £2614.5.3 by monthly instalments of £25.0.0 (Twentyfive Pounds) each, the first such payment shall be made on the 2nd day of January 1961 and thereafter on the last day of each and every month until the said debt is paid in full.

3. The said instalments shall be applied firstly in payment of interest on the said sum of £2614.5.3 at the rate of 8% per annum computed from the 14th day of February 1960 and secondly in reduction of the said principal debt.

4. If the Plaintiff shall make default in the payment of any one instalment as aforesaid and if such default shall continue for the space of two months then the whole of the balance of the said debt and interest then due and owing shall become payable immediatetly UPON DEMAND.

5. Each party to this action shall bear his own costs.

6. The said action is hereby settled and discontinued upon the terms herein contained.

DATED this 5th day of November 1960.

(sgd.) Devendra Pathik
Solicitor for the Plaintiff.

(sgd.) T. Madhoji
for DEOKI & CO.,
Solicitors for the Defendant.

We agree to the above terms of settlement and the same were read over and explained to us in the Hindustani language.

(sgd.) Moh'd Rasul
Plaintiff.

(sgd.) M. Singh
Defendant."

Following this settlement the Plaintiff made two payments to the Defendant of £25 each on the 6th January, 1961, and the 7th March, 1961.

It is the contention of Counsel for the Defendant that unless and until this compromise agreed to by both the parties has been set aside, this further action by the Plaintiff against the Defendant over the same subject matter and upon virtually the same grounds as those raised in action No. 65 of 1960 cannot be sustained. It is the contention of Counsel for the Plaintiff, who is not the same Counsel that appeared for the Plaintiff in the previous action, that since the terms of settlement previously reached were not expressly made an order of the Court, nor formally and expressly approved by the Court, the Plaintiff is entitled to bring a fresh action on the same subject matter, claiming the same relief that was originally sought.

The statement of the law on this matter in *Halsbury's Laws of England* 3rd Ed. Vol. 30 at p. 403 reads as follows:

> "All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and, if such compromise is *bona fide* and validly entered into, the court does not allow the question so settled to be again litigrated between the parties to the settlement."

In the case of *Dixon v. Evans* (1872) 5 L.R: H.L. 606, referred to in Halsbury, Lord Westbury said, at p. 618:

> "In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a Court of justice has to do is to ascertain that the claim or the representation on the one side is *bona fide* and truly made, and that on the other side, the answer, or defence, or counter claim, is also *bona fide* and truly made. I mean by *bona fides* . . . that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or collateral purpose, but that the thing sought to be done is within the very terms of the compromise — that all that the parties contemplate and desire to effect and to deal with is, whether the claim on the one side or the defence on the other side shall be admitted or not; or whether, if both things are *bona fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so to arrive at terms of agreement, which, if honestly made, is an honest settlement of any existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultra vires* of the parties, it is one that a Court of justice ought to respect, and ought not to permit to be questioned."

In that case the compromise under consideration by the House of Lords was one which had been made before action and not, as in this case, after action and in settlement of the action. It appears to me that if the considerations referred to by Lord Westbury apply to a compromise reached between parties before action, such considerations must apply with equal, if not greater, force to a compromise reached after an action has been brought and in settlement of that action and the terms agreed upon actually filed in Court.

In *Emeris v. Woodward* (1889) 43 Ch. D. 185, the parties entered into an agreement compromising the action on certain terms recorded in the agreement. This agreement was made subject to its being approved by the Judge in another action and that approval was afterwards obtained. Some 18 months later the Plaintiff applied to the Court on a summons in the same action to set aside the agreement made for the compromise of the action. The summons was opposed by way of a preliminary objection that a compromise of an action cannot be set aside upon a summons. In support of this contention the cases of *Gilbert v. Endean* (1878) 9 Ch. D. 259 and *Pryer v. Gribble* (1875) L.R. 10 Ch. 534 were cited. North J. upheld the objection and said:

> "In my opinion the objection must prevail. I think that the Plaintiff's proper course is to bring a new action to set aside the compromise, and that he cannot by means of a summons set aside the agreement and re-open the controversy."

As in that case, so in this case, in view of the fact that the Defendant pleaded the compromise in his defence, I do not consider that he has by his conduct in this action waived the objection. It does not appear to me to be material that whereas in the case of *Emeris v. Woodward* one of the terms of the compromise was that the agreement of compromise was made subject to its being approved

by the Judge in another action, the compromise in this action was not made subject to the approval of the Court. But notwithstanding that view I think it must be inferred that this being an action arising out of a moneylending transaction in which the Moneylenders Ordinance (Cap. 207) had been pleaded, the Judge did approve the terms of settlement when he agreed to place on the file, at the request of the parties, a signed copy of those terms. But even if he had not approved the terms of settlement by which the action was compromised, I do not consider the resulting effect would have been any different.

In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in Court the terms upon which the action has been settled and the Plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.

Counsel for the Plaintiff has asked that if I should rule against him in this objection he should be permitted to amend his statement of claim in order to include a prayer to set aside the compromise dated 5th November, 1960. It is not at all clear to me the grounds upon which he would base such a claim and he has not reduced the amendments sought to writing. His application is strongly opposed by the Defendant. I do not consider that such an amendment which would radically change the nature of the Plaintiff's claim is one which should be lightly entertained at this late stage under the particular circumstances of this case. I am also in some doubt as to whether if I granted the application it would be effective to give the Plaintiff what he really seeks. After giving the matter careful consideration, the application for an adjournment for leave to amend is refused.

In my opinion the objection raised by the defence is a sound one and this action cannot be sustained. In my view the action should be dismissed with costs to the Defendant.

I would add that if I had not considered the Defendant's preliminary objection was sound or if I had been of the view that I had no power to dismiss the action, I would have considered that this was a proper case in which I should exercise the inherent jurisdiction of the Court to stay these proceedings, as being an abuse of Court process, unless and until proceedings have been taken successfully to set aside the compromise, freely reached between these parties in the previous action between them, over the same subject matter with the consent and advice of their own legal advisers, well over a year prior to the institution of this present action. For these reasons the Plaintiff's claim is dismissed with costs which are fixed at £42. Should the Plaintiff bring yet a further action arising out of the same subject matter, the Defendant will be entitled to apply for a stay of such proceedings until the costs of this action have been paid in full.

Action dismissed.