**(1922) 08 CAL CK 0047**

**Calcutta High Court**

**Case No:** None

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| Major A.Y. Reily | | APPELLANT |
| | Vs | |
| Rajkumari | | RESPONDENT |

**Date of Decision:** Aug. 17, 1922

**Citation:** 74 Ind. Cas. 770

**Hon'ble Judges:** Chotzner, J; Asutosh Mookerjee, J

**Bench:** Division Bench

**Judgement**

1. This is an appeal by the plaintiff in a suit for partial cancellation of a decree in a previous litigation, for reinvestigation of the boundary between two disputed tracts of land, for recovery of possession, and for incidental reliefs. The facts material for the determination of the questions raised before us may be briefly recited.

2. On the 18th February 1857 the Commissioner of the Sunderbans notified in the Calcutta Gazette that various lots situated within the limits of the Jessore and Baker-ganj portions of the Sundarbans would be exposed for sale, in order that settlement might be made with the highest bidder, lot No. 5 was purchased by Kamalkumari Chaudhurani, mother of the present respondent, in the name of her officer Nilmadhab Ray and a patta was granted on the 12th May 1857. Lot No. 6 was purchased by George Maxwell Reily, father of the present plaintiff, and patta was granted to him on the 15th September 1862. The southern boundary of plot No. 5 was identical with the northern boundary of plot No. 6, and the common boundary line wa9 described in the following terms in both the pattas:

An imaginary line drawn from the mouth of a khal three miles and 1168 feet south of Rajapur khal on the Bhola river to the junction of the Bharani khal with Rainda khal and the Rainda khal from this point-to its junction with the Baliswar river.

3. It may be stated here that in the Notification published by the Commissioner of Sunderbans, there was a note in the remark column against lots Nos. 4 and 5 to the following effect: "the boundaries of these two lots have been re-adjusted, so as to

give both the river-facing on the Bales war river. A map showing their respective boundaries may be seen at the Commissioner''s office. The two lots will be sold separately, and their respective areas will be notified on the day of sale." Lot No. 4 was purchased by the Morels who obtained a patta on the 1st May 1857, later on, that lot came into the hands of General Douglas and ultimately vested in Raja Durga Charan Law for self and his brothers. The history of lot No. 4 in the hands of the Laws will require mention hereafter.

4. On the 29th January 1880 Reily instituted a suit against Kamalkumari for demarcation of the boundary between lots Nos. 5 and 6 and for recovery of possession of such area as might have been wrongfully seized by her. On the 16th March 1880 Kamalkumari filed her written statement. She repudiated the allegation that she had annexed any lands of lot No. 6 to lot No. 5, and also raised three points in bar, namely, first, that the claim was barred by limitation, as Reily had not been in possession of the disputed tract within twelve years prior to suit while she had been, in adverse possession for more than the statutory period; secondly, that Reily could not maintain his claim in respect of land which had not been included in a previous suit instituted by him in 1872; and thirdly, that the claim could not be maintained in respect of the land included in the suit of 1872, which had been improperly withdrawn. Issues were fixed on the 19th March 1880 and raised all the substantial points in controversy. On the same date, an order was made for local investigation, and the Amin was directed to prepare a map showing clearly the boundary between the estates, taking as his data the maps put in by the parties and the terms of their pattas. The Amin submitted his report in due course, and its contents were discussed before the Judge by the Pleaders on both sides, with the result that the suit was dismissed as speculative on the 14th June 1880. On the 24th July 1880 Reily applied for review of judgment. The contesting parties apparently came to a mutual arrangement, for we find that or the 16th and 17th August 1880 two applications were filed by Kamalkumari and Reily. They were not identical in terms, but the parties agreed in substance. Kamalkumari stated that if at the local investigation, on determination of the boundary of lot No. 5 as stated in her patta it was found that she had cultivated lands of lot No. 6 belonging to Reily, she would abide by the rules and orders that might be passed by the Court. Reily similarly stated that, after determination northern boundary of his location on local investigator and the map filed by his to such order as might regarding the possession land as should be found in the possession of Kamalkumari. The review was thereupon granted on the 18th August 1880 and the suit was restored. On the 23rd September 1880 Reily petitioned to the Court that, if the District Judge could not himself hold the local investigation, a Subordinate Judicial Officer or some other officer of the Court might be asked to undertake the work. On the 2nd December 1880 Mr. Manmathanath Chatterjee, Munsif of Bagerhat, who had been appointed Commissioner, filed his report. On the, 7th February 1881 Kamalkumari lodged her objections to the report. On the 30th March 1881 the District Judge pronounced his decision. The judgment

stated that the parties had agreed to abide by his decision as well on question of trespass as on that of compensation. The District Judge determined the boundary line and directed the plaintiff to grant to the defendant a mourasi lease of a triangular piece of land to be held on payment of a premium of Rs. 2,500 and an annual rent of Rs. 250. The decree was drawn up accordingly, and was signed by the District Judge on the 30th April 1881. On the 8th July 1881 Reily appealed to this Court against this decree, and on the 1st August 1881 Kamalkumari filed a petition of cross-appeal. The appeal and cross-appeal were heard on the 16th February 1883 by Wilson and Maclean, J.J. Wilson, J., reviewed the history of the litigation in minute detail, and came to the conclusion that, as regards the main part of the case, no appeal lay, as the parties had agreed to abide by the decision of the Judge on the matter stated in the order of the 18th August 1880 (based on the petitions of Kamalkumari and Reily dated 16th and 17th August 1880) and subsequently modified by the order on the petition of Reily dated 23rd September 1880. The Judges expressed a doubt, however, whether the lower Court had not, in respect of a comparatively unimportant part of the disputed land, exceeded the power conferred by the consent of the parties. The respondent thereupon agreed (sic) portion of the property. (sic) consequently dismissed to the small variation (sic) of the Amin''s map (sic) Annexed to the decree showing clearly the effect of the order of the High Court. The decree was drawn up accordingly and stated as follows:

The defendant having abandoned her claim in favour of the plaintiff to the jungle land coloured green in the map hereunto annexed, it is ordered and decreed that the decree of the lower Court, in so far a9 the said jungle land is concerned, be set aside, and that, with this modification, the said decree be affirmed and the appeal dismissed with costs''. The present suit was instituted on the 8th September 1913 by Alexander Yates Reily, son of George Maxwell Reily, against Rajkumari, the daughter of Kamalkumari, for cancellation of the decree of the High Court dated 16th February 1883, in so far as that decree had refused relief to the then plaintiff in respect of lands excluded from the mourasi lease taken by Kamalkumari from Reily. The decree is attacked on the ground that it was based on an erroneous map which had been produced by Reily himself in support of the claim then put forward. It has now been established that there were two maps of the locality in the Collectorate, one prepared in 1857, the other in 1862. Both were prepared by or under the direction of A.D.B. Gomess, Government Surveyor. The map of 1857 has been designated in the present suit as the B map and that of 1862 as the E map. It is incontrovertible that the Notification of the 18th February 1857 could not have referred to the B map, which was not in existence till a later date. Reily, however, in his litigation produced in support of his claim, not the B map but the F map, and the case for the present plaintiff is that if the B map had been produced, Reily would have been able to establish his claim in respect of a larger area than what was decreed to him. In the plaint in the present suit, as originally framed, relief was claimed on the ground of this mistake. But, subsequently, the plaint was amended,

and relief was claimed on the ground of fraud, on the allegation that Kamalkumari knew that Reily had produced the wrong map and yet did not apprise the Court of the mistake which her opponent had committed. The defendant resisted, on every conceivable ground, this attempt to re-open the decree of the High Court after the laps of 30 years. Seven points thereupon emerged for consideration, namely:

(i) Whether Reily filed the E map or the B map?

(ii) Whether the E map or the B map was the "sale map"?

(iii) Did Reily file the E map under a bona fide mistake?

(iv) When did the present plaintiff become aware of the mistake?

(v) Did Kamalkumari know of the existence of the B map or that Reily had filed the wrong map?

(vi) Was Kamalkumari guilty of fraud?

(vii) Was the decree based on the E map on the erroneous assumption that it was the sale map?

5. The Subordinate Judge has found that the B map was the map mentiond in the sale Notification, and that Reily relied upon the E map in the mistaken belief that it was the sale map. These conclusions cannot be and have not been challenged. The Subordinate Judge has further held that Kamalkumari was not aware of the existence of the B map, when the litigation commenced by Reily against her was in progress, and that she became aware of it in the course of a proceeding against her carried up to the Board of Revenue some years later by the Laws. It appears that, thereafter, on the 24th November 1887, the Laws sued Kamalkumari for recovery of possession of land claimed by them as appertaining to lot No. 4. Kamalkumari filed her written statement on the 20th January 1888. The Subordinate Judge decreed the suit on the 31st August 1889. On the 5th December 1889 Kamalkumari appealed to the High Court. On the 9th June 1892 Petheram, C.J., and Ghose, J., reversed the decision of the Trial Court and dismissed the suit. It was in the course of the proceeding before the Revenue Authorities which preceded this litigation that the boundaries of lot No. 4 held by the Laws and of lot No. 5 held by Kamalkumari were investigated, and the fact transpired that the map mentioned in the leases was not the E map but the B map. The Subordinate Judge is right in his view that this became clear only when Mr. James Ellison, Deputy Collector, submitted his report on the 30th March 1886 which formed the basis of the decision of the Board of Revenue pronounced on the 28th July 1885. There can thus be no doubt that, during the pendency of the litigation commenced by Reily against Kamalkumari, neither of the contestants was aware of the existence of the B map, and both parties acted on the assumption that the map produced by Reily, the E map, was the basis of the grants. This is not surprising. There is no question that the disputed boundary as given in the B map was different from the boundary as given in the E map, and according to

the B map there would be more land included in lot No. 6 than would follow from the E map; still, the difference was not very marked. Both the maps had been prepared on the basis of investigations made more or less contemporaneously, and the description appearing on the face of each map did not make the distinction manifest. It is significant that Gomess himself, when examined as a witness in the previous suit, took the E map as the basis of the leases. There is, consequently, no question of fraud or deception, Reily produced the map in the honest belief that it was the map mentioned in the sale Notification as well as the lease; Kamalkumari acted on the assumption that what had been produced wm the correct map. Indeed, neither of them even suspected that 11another map was in existence. We are thus not called upon to discuss in detail the interesting question raised in argument, namely, whether in the course of litigation, a duty is cast upon the defendant to set the plaintiff right when the defendant discovers that the plaintiff has acted under an erroneous impression. The decisions in Joy Chandra v. Sreenath Chatterjee 32 C. 357 : 1 C.L.J. 23; Jakhomull Mehera v. Saroda Prosad Dey 7 C.L.J. 604.; Harendra Lal Roy v. Purna Chandra Chatterjee 14 Ind. Cas. 368 : 15 C.L.J. 132 which show that a duty to speak arises wherever and only where silence can be construed as having an active property, namely, that of misleading, may render an affirmative answer difficult. They rather support the view that the law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment; and not to close their eyes to the means of information which are accessible to them. Where two parties are at arm''s length, either of them may Prima facie remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence, and the novel proposition that a duty is cast upon every litigant to speak out and set right his adversary whenever he discovers that his opponent has made a mistake, requires very careful scrutiny. We need not, however, pursue the matter further. We have next to consider, whether the decree in the previous suit was based on the E map, on the erroneous assumption that it was the map mentioned in the sale Notification and the grants. The Subordinate Judge has given ample reasons in support of his conclusion that the decree could not be said to have been based on this map, though the map was part of the evidence placed before the Court. The Subordinate Judge felt himself hampered in his decision of this point, because the proceedings relating to local investigation by Mr. Chatterjee, when the suit was reopened after review, were not produced before him. Those proceedings are, however, set out In the paper-book which was prepared in this Court when the appeal was heard fey Wilson and Maclean, JJ., and they confirm the view taken fey the lower Court as to the scope and method of the enquiry made by Mr. Chatterjee. The map produced by Reily was part of the evidence and is mentioned in his report. But witnesses were examined including Gomess himself, and Mr. Chatterjee made every endeavour to locate the common boundary, as set out in the leases, by investigation on the spot and by reference to prominent landmarks. It is impossible

to say how far the map actually influenced and affected his determination of the boundary line; but his report and proceedings and the record of the oral and documentary evidence produced before him, leave no room for doubt that the map was a small part of the materials which formed the foundation of the decision. We have, consequently, to consider whether, in such circumstances, the plaintiff is entitled to maintain this suit for cancellation of the decree in so far as the decision proved adverse to his claim.

6. It cannot be disputed that the decree made by the primary Court in the previous litigation on the 30th March 1881 was in essence a consent decree; It was so held by Wilson and Maclean, J.J., and that was the reason why they decline to entertain the appeal on the merits of the controversy, applying 1 le rule, since then frequently invoked, that no appeal lies against a consent decree: Biraj Mohini Dasi v. Srimati Chinta Moni Dasi 5 C.W.N. 877; Bahir Das chakravarti v. Nobin Chunder Pal 29 C. 306 : 6 C.W.N. 121; Shahzadi Begam v. Muhammad Ibrahim 59 Ind. Cas. 787 : 43 A. 266 : 19 A.L.J. 14. Consequently, the decree can be set aside only on a ground which would justify a cancellation of the agreement; for, as stated by Parke, J., in Wentworth v. Bullen (1829) 9 B. & C. 840 : 33 R.R. 353 : 9 L.J.(o.s.) K.B. 30 : 109 E.R. 313 the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded to it the command of a Judge. To put the matter differently, a consent decree can not have greater validity than the compromise itself, and the Court has jurisdiction to set aside the order founded upon the agreement when it is established that the agreement was invalid by reason of fraud, mistake or any other similar circumstance. The real truth of the matter is, that a consent order is a mere creature of the agreement and that if greater sanctity were attributed; to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree: The Bellcairn (1885) 10 P.D. 161 : 55 L.J.P. 3 : 53 L.T. 686 : 34 W.R. 55 : Huddersfield Banking Co. v. Lister (1895) 2 Ch. 273 : 64 L.J. Ch. 523 : 12 R. 331 : 72 L.T. 703 : 43 W.R. 567; Ainsworth v. Wilding (1896) 1 Ch. 673 : 65 L.J. Ch. 432 : 74 L.T. 193 : 44 W.R. 540; Wilding v. Sunder son (1895) 2 Ch. 534 : 77 L.T. 57 : 66 L.J. Ch. 684 : 45 W.R. 675. It follows accordingly that though, as ruled in Kusadhaj v. Broja Mohan 31 Ind. Cas. 13 : 43 C. 217 : 19 C.W.N. 1228 and Bepin Krishna Ray v. Jogeshwar Ray 66 Ind. Cas. 345 : 34 C.L.J. 256 at p. 271 : 26 C.W.N. 36, dissenting from Jogeswar Atha v. Ganga Bishun 8 C.W.N. 473 a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake, yet an agreement may be, rectified for an appropriate mistake, so may also the consent decree based upon such agreement-see also Rameswar Pershad Singh v. Ram Bahadur Singh 34 C. 70 : 5 C.L.J. 175 : 2 M.L.T. 165 : 11 C.W.N. 178 : 17 M.L.J. 59 : 2 M.L.T. 165(P.C.) Sreenath Das v. Ghana shyam Naik 46 Ind. Cas. 534 : 3 P.L.J. 465.

7. Tested from this point of view, the claim for cancellation of the former decreecompletely breaks down. Reily and Kamal kumari agreed to abide by the decision of the District Judge, as regards the determination of the boundary and the

form of the relief to be granted on the result thereof. No doubt, Reily in his petition mentioned his lease as also the map filed by him along with his plaint, whereas Kamal kumari in her petition referred only to her lease. The District Judge thereupon made an oader in the following terms: "Acting on some suggestions which I threw out, the parties have come to what is virtually a compromise. It is left to this Court to determine finally what is the boundary line and to pass such orders as may seem-to it fit with regard to the possession or restitution of any land as to which trespass may be found to have taken place, and with regard to compensation in any form. The plaintiff asks that I should go personally to the locality and the defendant echoes the request. I will, if I can. The order I now pass is that the review be granted and the case remain on the file for settlement in accordance with the terms agreed to as above indicated."

8. The parties accepted this as a substantially correct statement of the position, and the re-trial proceeded accordingly, subject to the modification made by consent on the 23rd September 1880, that the local investigation be made by Mr. Chatterjee assisted by the Civil Court Amin. There was thus no mistake either in the formation or in the expression of the agreement of the parties. There was no mistake which would preclude the formation of a valid contract, such as happens when there is a mutual mistake as to the subject-matter of the contract, or a mistake is made as to the identity of one of the parties where, such identity is an inducement to the other to enter into the contract, or where the mistake, relates.to the nature of the contract under such circumstances as would justify a plea of non est factum. The mistake made by the plaintiff was in respect of a portion of the evidence to be placed before the Court for determination of the boundary as described in his title-deed. It is difficult to see how, in such circumstances, a mistake on the part of one party only, not caused or actively assisted by the act of the other party, can invalidate the agreement Smith v. Hughes (1871) 6 Q.B. 597 : 40 L.J.Q.B. 221 : 25 L.T. 329 : 19 W.R. 1059 Morley v. Clavering, (1860) 29 Beav. 84 : 7 Jur.904 : 30 Bea v. 108 : 131 R.R. 463 : 54 E.R. 558 and 830 Tamplin v. James (1880) 15 Ch. D. 215 at pp. 217, 221 : 43 L.T. 520 : 29 W.R. 311; Eastes v. Russ (1914) 1 Ch. 468 : 83 L.J. Ch. 329 : 110 L.T. 296 : 58 S.J. 234 : 30 T.L.R. 237 We need not consider what the position would have been, if the other party knew of the mistake and knew also that, but for the mistake the contract would not have been entered into, or if the other party had contributed to the mistake: Bascomb v. Beckwith (1869) 8 Eq. 100 : 38 L.J. Ch. 536 : 29 L.T. 862 : 17 W.R. 812; Caballero v. Henty (1874) 9 Ch. 447 : 43 L.J. Ch. 635 : 30 L.T. 314 : 22 W.R. 446. If, in circumstances like these, the mistake made by a disappointed litigant is to furnish him with a fresh starting point for keeping his opponent in Court, the misfortune of the unfortunate adversary would be gravely incieased to the public detriment.

9. Apart from these considerations, there is another weighty reason why the plaintiff should not succeed in this litigation. He seeks, as we have observed, not to set aside the former decree in its entirety, but to reopen matters only in so far as judgment

went against him. Now, as was pointed out by Sir James Colvile when the case of Khajooroonissa v Rowshan Jehan ) 2 C. 184 : 3 I.A. 291 : 26 W.R. 36 : 1 Ind. Dec.412 was argued before the Judicial Commttee, when a consent decree is set aside, the effect is to revive the original suit which was term nated by the compromise decree. This, rule is manifestly just and has been repeatedly applied: Bibee Solomon v. Abdool Azeez 6 C. 687 : 8 C.L.R. 169 : 3 Ind. Dec. 446; Sharat Chundar Ghose v. Kartik Chunder Mitter 9 C. 810 : 12 C.L.R. 453 : 4 Ind. Dec.1188; Sarbesh Chandra'' Basu v. Hari Dayal Singh 5 Ind. Cas. 236 : 11 C.L.J. 346 : 14 C.W.N. 451; Raj Kumar Roy v. Hara Krishna Chakravarty 10 Ind. Cas. 355 : 15 C.L.J. 217; Fateh Chand v. Narsingh Das 16 Ind. Cas. 988 : 22 C.L.J. 383.; Chatterjee Brahmin v. Durgadutt Agarwalla 34 Ind. Cas. 394 : 23 C.L.J. 436 : 20 C.W.N.943.; Dharanidhar Aditya v. Hemanga Chandra Jana 41 Ind. Cas. 956 : 27 C.L.J. 592 : 21 C. W. N. 1087., Refer-encemay also be made to the decisions in Neale v. Gordon Lennox (1902) A.C. 465 : 71 L.J.K.B. 939 : 87 L.T. 341 : 51 W.R. 140 : 66 J.P. 757 : 18 T.L.R. 791.; Manohar Lal v. Jadunath 33 I.A. 128 : 28 A. 585 : 4 C.L.J. 8 : 8 Bom. L.R. 489 : 10 C.W.N. 898 : 9 O.C. 219 : 1 M.L.T. 210 : 16 M.L.J. 291 : 3 A.L.J. 710(P.C.),; Partab Singh v. Bhabuti Singh 21 Ind. Cas. 288 : 40 I.A. 182 : 35 A. 487 : 18 C.L.J. 384 : 17 C.W.N. 1165 : (1913) M.W.N. 785 : 14 M.L.T. 299 : 25 M.L.J. 492 : 11 A.L.J. 901 : 16 O.C. 247 : 15 Bom. L.R. 1001; Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao 32 Ind. Cas. 881 : 39 M. 853 : 30 M.L.J. 465.; Venkata Row v. Tuljaram Row 74 Ind. Cas. 765 : 49 I.A. 91 : 30 M.L.T. 272 : 26 C.W.N. 646 : 45 M. 298 : 4 U.P.L.R.(P.C.) 33 :A.I.R. 1922 P.C. 69 : (1922) M.W.N. 392 : 43 M.L.J. 298 : 24 Bom. L.R. 1191 : 20 A.L.J. 833 : 36 C.L.J. 319(P.C) reversing Venkata Row v. Tuljaram Rao 38 Ind. Cas. 270 : (1917) M.W.N. 30 : 5 L.W. 482. The justice of this rule is manifest; a party litigant cannot be permitted to retain the benefit of a compromise in part and repudiate it as to the remainder. In the case before us, there was, on the previous trial, a substantial defence in bar, narhely, the plea of limitation. The plea was abandoned by consent, and, as pointed out by Lord Buckmaster, this made the decree a nonappealable consent decree: Ramachandra Deo Garu v. Chaitana Sahu 56 Ind. Cas. 539 : 24 C.W.N. 1055 : 18 A.L.J. 625 : (1920) M.W.N. 366 : 39 M.L.J. 68 : 28 M.L.T. 97 : 12 L.W. 260 : 2 U.P.L.R.(P.C.) 122 : 22 Bom. L.R. 1313 : 47 I.A. 200(P.C.). The plaintiff cannot now be permitted to retain the benefit of that decree to the extent of his success and to re-open matters in controversy in respect of his defeat. If the decree was set aside in its entirety, the suit would be restored and then the defendant would be entitled to urge that the claim was hope-lesly barred by limitation. This is a contingency which the plaintiff does not wish to face, as is abundantly indicated by the restricted scope of this litigation. We are of opinion that the Subordinate Judge rightly refused to set aside the prevous decree of the High Court in the limited form stated in the plaint.

10. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.