

(1925) 12 BOM CK 0044

In the Bombay High Court

Case No : O.C.J. Appeal No. 50 of 1925 and Suit No. 896 of 1923

Dhairyasingh Gordhandas

APPELLANT

Vs

Kissandas Tribhovandas Mangaldas

RESPONDENT

Date of Decision : 25-12-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 7

Citation : (1926) 28 BOMLR 362 : 94 Ind. Cas. 104

Hon'ble Judges : Marten, J;Madgavkar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Marten J.

1. This is an appeal from the judgment of Mr. Justice Shah dismissing the suit of the minor plaintiffs, who sought to set aside a compromise decree passed in four suits by Mr. Justice Fawcett on December 13, 1922. The plaintiffs are the minor sons of Gordhandas, defendant No. 2, and were concerned in disputes between Gordhandas and his sons on the one hand and his brother Kissondas on the other hand as to various assets in which his father Tribhovandas and his grandfather Sir Mangaldas had been interested. One main point of controversy was whether these assets were ancestral or self-acquired. Sir Mangaldas died on March 9, 1890, and Tribhovandas on April 5, 1920. It is material to observe that Kissondas was born in Sir Mangaldas's life-time, but that Gordhandas was not born until after the death of Sir Mangaldas, and further that the eldest son of Gordhandas was born in 1914. Kissondas has no son.

2. Sir Mangaldas had two other sons Purshottamdas and Jag-mohandas, but for the purposes of the present case it is sufficient to say that their interests have been otherwise provided for, and that we are solely concerned with Tribhovandas and his branch, Similarly two deceased sons of Tribhovandas. namely, Jamnadas, who died in 1907, and Amidas who died in infancy, may be mentioned and

passed by.

3. The parties are all Hindus, and the papers before us show a melancholy record of family disputes and litigation extending over some forty years, namely, from the agreement of June 29, 1881, Ex. A, which Sir Mangaldas entered into with his sons Tribhovandas and Purshottamdas down to December 13, 1922, when the above compromise was approved by Mr. Justice Fawcett, on behalf of the infant sons of Gordhandas in the four suits to which I have alluded.

4. In the earlier part of Tribhovandas's life-time the parties had been at least four times up to the Court of Appeal, and the various decisions of that Court will be found in 10 Bom. 528 and Ex. L. In the latter part of Tribhovandas's lifetime there appears to have been a comparative lull, but on his death in 1920 disputes broke out again, and by 1922 four suits were filed, namely, two by Gordhandas and two by Kissondas. Those four suits are: (1) Suit No. 3386 of 1920 relating to what is known as the Charni Road Property, (2) Suit No. 663 of 1921 relating to what is known as the Worli Property, (3) Suit No. 2017 of 1921 for the administration of the estate of Tribhovandas, and (4) Suit No. 1354 of 1922 relating to the Girgaum Property Nos. 1 and 2 were brought by Gordhandas and Nos. 3 and 4 by Kissondas.

5. On December 12, 1922, the first three of these suits were on the board for hearing. The first of them, viz, Suit No. 3389 of 1920 relating to the Charni Road Property was opened by Mr. Ooltman, counsel for the plaintiff Gordhandas, and was continued the next day; December 13. The parties then proceeded to negotiate, and the Judge was asked to retire. The negotiations resulted in provisional terms being arrived at, and accordingly the Judge returned to Court. These terms related not only to the three suits then on board, but also to the fourth suit No. 1354 of 1922 relating to the Girgaum Property. It was accordingly arranged that the fourth suit should be forthwith placed on board, and also that the three infant sons of Gordhandas should be added as parties and should appear by their father Gordhandas as their guardian ad litem.

6. That was done, and thereupon Sir Thomas Strangman, who led Mr. Ooltman and Mr. Setalvad for Gordhandas and his sons, explained the proposed compromise to the Court. I may mention here that Kissondas was represented by the Advocate General (Mr. Kanga), who led Mr. B. J. Desai and Mr. Taraporewala. Mr. Kanga has acted and Mr. Taraporewala is acting as a Judge of this High Court. Sir Thomas Strangman had been Advocate General for over twelve years and while he was in Bombay had been practically in every case of importance on the Original Side of this High Court for many years past. Accordingly, in my opinion, Mr Justice Fawcett had every right to depend on the ability, fairness, and experience, of the counsel before him.

7. The terms of the compromise will be found in Ex. 9, and the Judge's notes of what took place are Ex. 11. It is common ground that the Girgaum Property was the most valuable of the properties, and with reference to that the Judge's notes

of what Sir Thomas Strangman stated are in part as follows :-

Question is whether it is joint property or not, Point also of limitation arises Girgaum property is the most valuable ...Gordhandas is satisfied with consent terms and I as counsel am also. Litigation would probably last ten years, and Gordhandas runs risk of getting nothing out of Girgaum property, if limitation point good, and would at most get one-third of Worli Property which I think is exceedingly small as against one-fourth he gets of Girgaum property. So I have no hesitation in saying the terms are for benefit of the minors.

8. Then, after the Judge had questioned Gordhandas and Kisson-das, the former of whom stated that he considered the terms beneficial to the minors, the Judge's note concludes as follows:-

In view of the above I think it is for the benefit of the minor sons that the litigation, which is bound to be very costly should be settled, and the terms seem to me to be reasonable and good for the interests of Gordhandas and his sons. Any affidavit as to decree being for their benefit is dispensed with.

I therefore sanction the compromise. Consent Decree in terms signed by Counsel and handed in.

By consent the four suits are consolidated and one decree to issue accordingly.

9. Now before us Mr. Ooltman, the counsel for the infants, does not contend that this compromise was not for their benefit, He told us he did not propose to argue that point. The real question was whether the essential conditions for obtaining the Court's sanction to a compromise were in fact satisfied, or as he put it to us in reply, "Was the settled law on this point given effect to 1 that is the whole point in the case. Must you put before the Court all material facts ? Does Order XXXII, Rule 7, mean that the Court is to apply its own mind or may it delegate its authority to counsel ?" It was accordingly argued that material documents were not before Mr. Justice Fawcett: that he was not in a position to exercise his own discretion: and that apart from that the compromise was left vague and unenforceable by reason of the appointment of an arbitrator without a time limit for making his award, and also in the non-joinder of the mortgagees of Kissondas.

10. Counsel concentrated his attack on the fourth suit, which dealt with the valuable Girgaum Property. So far as the other three suits were concerned he advanced no special arguments to us against the validity of the compromise apart of course from his general arguments affecting all four suits. But in his reply he did refer to a difficulty about a right of passage in connection with the Charni Road Property, which appears to have arisen when proceedings were taken before the arbitrator in pursuance of the terms of the consent decree. I can understand counsel taking this course, because it is clear that as regards the first three suits, they were all before the Court. Counsel had got their briefs, and as far as the Charni Road Property was concerned, the case had been opened

and a witness examined and many details placed before the Court as appears from Judge's notes, It could not, therefore, be contended that counsel, at any rate, was not in full possession of the material facts of the case. And as regards the Charni Road Property the Judge had by the second day of the trial obtained sufficient acquaintance with the case to have, at any rate, a clear idea as to what the important points in the controversy were. I accordingly do not propose to go into any detail as regards those particular properties, It is sufficient to say that as regards the Charni Road Property Gordhandas had advanced certain moneys to his father Tribhovandas under an alleged agreement, but had not obtained the particular lease, which he claimed to be entitled to under the arrangement with his father, and that in particular a proposed document had not in fact been executed before Tribhovandas's death.

11. As regards the Worli properties Kissondas claimed those as survivor under an agreement that had been entered into between him and Tribhovandas. On the other hand Gordhandas claimed to be entitled to one-half of the two-thirds share, which passed under that agreement to Tribhovandas.

12. The third suit was for the administration of the estate of Tribhovandas. A compromise would only tend to prevent the necessity of costly enquiries extending probably over many years.

13. I may here mention a most important clause in the consent terms Ex. 9, viz., Clause 9, which runs "Any property coming to Gordhandas under this decree of whatever nature shall as between himself and his sons be joint property." So there was no question of there being any contest between Gordhandas and his sons with reference to any property he was acquiring under the compromise. The general effect of the terms was that as regards the first three suits Gordhandas and his sons took the Charni Road Property and Kissondas took the Worli Property subject to an arrangement about certain mortgages, and the Receiver in the third suit was discharged.

14. Returning to the Girgaum Property, the subject of the fourth suit, the compromise provided that it was to be divided between Kissondas and Gordhandas in the proportion of 3 to 1. It was argued that before the Judge could properly sanction the compromise as being for the benefit of the infants, it was his duty to go into the whole history of the family disputes for the past forty years including all the documents in the case, and that in particular he was not entitled to rely on the statement of counsel for Gordhandas and the infants that there was a point of limitation in their way of which the counsel took a serious view.

15. In the first place I entirely decline to hold that Mr. Justice Fawcett's note of what was said represents everything that Sir Thomas Strangman said to him on the point of limitation, To my mind that would be making a most unfair use of the learned Judge's notes, and none the less so because the evidence shows that counsel took about three-fourths of an hour to explain the matter to the Judge

and to obtain his sanction Indeed I do not think it is seriously contended that that is all Sir Thomas Strangman said on the point, but if it is, then I reject the contention. Next as to the point that it was obligatory on the Judge to investigate the past history and all the documents, I may observe that the appeal paper book before us runs to 419 printed pages. In my judgment that argument is equally unfounded, I think the true rule is that how far the Judge should go into the facts and the law of each case before he makes up his mind to sanction a compromise on behalf of minors must depend on the circumstances of each case, and that provided he exercises his discretion in a judicial manner, it is not one which can be afterwards called in question in subsequent proceedings I again repeat that there the learned Judge had several of the leading counsel in Bombay before him. Further, Sir Thomas Strangman had had all the details of this case before him for many months. It is shown in the evidence that Gordhandas proposed to bring a suit in respect of this very Qirgaum Property, but that he had been anticipated in this respect by Kissondas's suit. But if Gordhandas had eventually brought his suit, or had made a counter-claim in Kissondas's suit, then the infant children of Gordhandas would necessarily have been parties, as indeed is pleaded in Gordhandas' written statement in Kissondas' suit.

16. Certain authorities were cited to us by counsel for the minors to support the proposition which he asked us to adopt, but to my mind they fall far short of the length to which he asks us to go. In *Sakinabai v. Shirinbai* (1919) 22 Bom. L.R. 652. which was a case before the Privy Council, I agree that the following portion of the headnote is entirely wrong and misleading, viz , " the Courts in India should ordinarily accept as sufficient the assurance of the minor's counsel that the compromise which is proposed is for his benefit." Their lordships of the Privy Council never decided anything of the sort. But it is noteworthy that in that case there was a compromise of an appeal to their lord ships; and the Board relied not only on the oral statement of Mr. Ken worthy Brown, the counsel for the minor in the Privy Council, but they also relied on the certificate of Mr. Kanga and Mr. Taraporewala, who were the counsel for the minor in the Court below that the compromise was for the benefit of the minor. I may mention that the two latter counsel were the same as those who appeared for Kissondas in the present proceedings. Their lordships in that particular case sanctioned the compromise. There is nothing there, so far as I can see, to support the case for the present plaintiffs. On the contrary it shows that the Court is entitled to rely on the opinion of counsel. I do not mean exclusively rely, but to base their opinion in part at any rate on the opinion of counsel that the compromise is for the benefit of the infants.

17. Then in *Virupakshappa v. Shidappa*, ILR (1901) 26 Bom. 109 : Section c. 3 Bom. L.R. 565 Sir Lawrence Jenkins and Mr. Justice Chandavarkar held that the lower Court had not before it the materials necessary to enable it to arrive at a judicial conclusion with respect to the compromise. If that was the case here I quite follow that the case would be an authority in point. But in the case cited, no sanction at all had been given to the compromise, nor did the Court have before

it the materials on which it could give its sanction. I fail to see, therefore, that that case is of any assistance to us in the present case.

18. *Bibee Solomon v. Abdool Azeez* I.L.R.(1881) Cal. 687 a decision of Sir Richard Garth and Mr. Justice Pontifex, was also cited. The clue to that decision will be found at page 696, where the Court pointed out that after the compromise had been sanctioned by the Court, the executors who had obtained this sanction suddenly discovered that property of at least the value of three lacs, and possibly of nine lacs, belonging to the estate in question had not been mentioned in the application for probate or in the petition for the Court's approval. The Court, therefore, held that the compromise was entered into by the parties and sanctioned by the Court under a serious misapprehension of material facts; and that this misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty, of the executors, sufficient, as the Court thought, to amount to fraud in the view of a Court of Equity (see page 705). There is however nothing of that sort in the present case.

19. If one turns to *Brooke v. Lord Mostyn* (1864) 2 De G. J. & S373 it will be found that Lord Justice Turner states the English Law as follows (p. 416) :-

It is to be considered, then, what are the circumstances which will furnish sufficient ground for impeaching a compromise made under the order of the Court, and I think they must be such as to amount to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud, but what in the eye of this Court is considered as amounting to fraud. A compromise of doubtful rights between adult parties cannot, as I conceive, be set aside on any other ground. If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed, but if there is knowledge on one side which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts in the view of a Court of Equity to fraud. The rule which applies between adults seems to me to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside the transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties would in all cases be sufficient to set it aside when sanctioned by this Court, I do not think it necessary for us in this case to determine.

20. In that particular case the Lords Justices set aside the particular compromise, which had been sanctioned on behalf of an infant, on the ground that material facts as to the value of the property were not laid before the Master in Chancery, On the facts that decision was reversed in the House of Lords (1866) L.R. 4 H. L. 304; where the report expressly states that the reversal did not affect the law as laid down by the Lords Justices.

21. I do not think it necessary for us to say that what Lord Justice Turner's judgment states is also the law of this Court, It may be that he has stated the

law rather too widely against those who are interested in getting aside a compromise. It is accordingly unnecessary for the respondents in the present case to rely on that judgment of Lord Justice Turner as being entirely correct in the broad principles which it lays down.

22. Then there is another case of *Ilameswar Per shad Singh v. Earn Bahadur Singh* I.L.R(1906) . Cal. 70. in the Privy Council, the head-note of which begins as follows :-

In this case the appellant sued to set aside a compromise and decree in accordance therewith in a former suit, which had been made on his behalf by the adult members of a joint family, of which he was an infant member, and for other reliefs. The High Court held that under the circumstances the com. promise was valid and binding, and on appeal the Judicial Committee were of opinion that he could not obtain the other relief prayed for without first setting aside the compromise and held that there were no grounds for setting it aside.

23. In delivering their lordships' judgment Lord Macnaghten said (p, 71):-

The suit in which it (the compromise) was made had progressed up to a certain stage; it had been opened on behalf of the plaintiff; witnesses had been examined, and the Court know very much more about the question in dispute than the Court generally does know when it is asked to confirm a compromise of pending litigation. The infant had no separate interest; the adult members of the family, who were presumably competent to judge of their own interests had taken part in this compromise and assented to it, and the Court pronounced that it was for the benefit of the infant, who was made a party for the purpose of binding his interest, such as it was. It scorns to their Lordships to attempt to set it aside.

24. There are of course distinctions of fact between that case and this, but it is important to note that an equity Judge of such great experience and eminence as Lord Macnaghten was aware that in many cases where the Court sanctions a compromise, it necessarily does not know as much about the questions in dispute as if they had been argued in whole or in part before it, This to my mind exposes one of the fallacies of the appellant's arguments, for what he really asks us to do is to lay down a rule of practice, which is nowhere to be found in any statute or decided authority, but which if carried out would inflict hardships on many litigants in this Court and would cause serious difficulties in the way of compromising suits.

25. We have on the Original Side a large number of suits in which minors are engaged. There are, for instance, a large number of suits in which "Marwadi Hindu trading firms are engaged, and in which it frequently happens that minors are technically parties to what is a mere commercial transaction, e. g, for the sale of cotton or piece goods, Supposing then there is a dispute between two trading firms with minors on either side and after prolonged negotiations between the adult parties these hard headed business-men arrive at a certain

figure by way of compromise of their respective claims is it seriously to be supposed that the Court is bound to refuse to sanction the compromise unless it is taken through all the books and documents and hears the rival arguments based on all the material facts. I unhesitatingly say that this is a proposition which is wholly untenable. Nor again is it practicable to lay down a definite or hard and fast rule as to what particular materials a judge may call for before he is satisfied that the compromise is one for the benefit of the minors. It must be left to his discretion, and that discretion may vary in different cases and it may even vary as regards the practice of different judges,

26. Without going further into the case, the result, in my opinion, is that there is nothing wrong in law in the course which Mr. Justice Fawcett took. There is no such rule as counsel for the appellants has contended, and under all the circumstances of the case the learned Judge was entitled to rely on the statement of counsel as to this point of limitation and that in counsel's opinion it was in the interests of the father and his infant sons that the compromise should be sanctioned.

27. [At this point his lordship went into the merits of the case at great length, and concluded :]-I also wish to mention one other matter. To those familiar with Chancery practice it may seem strange that the Judge did not require the infants to obtain the consent of the Judge in Chambers to the compromise. In England I do not recollect any express clause in the Annual Practice corresponding to Order XXXII, Rule 7, here. But in, say, a contested witness action which is provisionally settled it is not unusual for a Chancery Judge to give an adjournment in order to enable the terms to be approved in Chambers on behalf of the infants. In normal cases that application would go not before that particular Judge, but before the Judge who was taking Chamber business. And there is this good reason for that course, namely, that a Judge who is trying a suit between A and B may be prejudiced in the eventual determination of that suit, if half way through he is asked to approve a compromise on behalf of the minors and is told quite frankly what the difficulties of their own particular legal situation are. Moreover, counsel for the infant may at times be embarrassed in telling the Court frankly in the presence of his opponents exactly what his weak points are. It follows that if the compromise is not approved by the Judge on behalf of the minors, their position may conceivably be prejudiced in the subsequent proceedings in the case.

28. But I also wish to say that it is not the general practice in this High Court to send a case to Chambers so far as the infants are concerned, One reason may be, as I have already mentioned, that the suits in which infants are involved are numerous and that litigation is as expensive or more expensive, particularly as regards counsel fees nowadays, than is the case in England, Accordingly, to send perhaps two or three sets of minors to the Chamber Judge to obtain his consent would in many cases be a hardship to the parties. Moreover, we have the express provisions of the Code in Order XXXII, Rule 7, which at any rate contemplate that the Judge hearing the case shall have jurisdiction to sanction a compromise

on behalf of the infants. Further, in mofussil Courts there might be no other judge for the infant to go to to obtain sanction. I may even go further as illustrating a different opinion as to the practice on this point. In a case, which was before me as triaj Judge, I was asked informally by a Registrar of this Court, who had been appointed guardian ad litem and who proposed to compromise the suit, whether he should make his application to myself as trial Judge or whether he should take it to the Chamber Judge. As the amount involved was substantial, and I felt I might be embarassed in the subsequent hearing of the trial if I refused to sanction the compromise, I advised him to go to the Chamber Judge, and he did so, But the Chamber Judge of the day, who I think was the Chief Justice, took a different view of the matter and I think it was only because the guardian ad litem had gone on my advice that he escaped paying the costs of the application in Chambers,

29. I also wish to say that in a large number of cases I have sanctioned compromises on behalf of infants where practically the same course has been adopted as was taken by Mr. Justice Fawcett in the present case. It is a common occurrence for litigants to compromise not only the one or more suits before a Judge, but also pending suits as well. In that event it is common practice to have all the suits placed on board Moreover, I consider myself entitled to rely on the assurance of counsel for the minors, not exclusively, but sufficiently, at any rate, to enable me to rest assured that the proposed compromise is in the best interests of the infants. What particular explanations I require, and what details I go into depends very largely on the particular case.

30. I only refer to all this not because we are not familiar with the practice in this particular Court, but because it is conceivable that to those who are not fumilar with our practice, some of the matters that have taken place may require explanation. As far as I can see, what happened here was really normal every day practice, and there was nothing really exceptional except the value of the property and the complexity of the disputes and the fondness for litigation shown by the family.

31. If, however, it is material to go into the past history of the case I agree with the conclusion which Mr. Justice Shah arrived at p, 124, namely :-

I have examined the materials with a view to see whether there is anything therein which would clearly show that if they had been placed before the learned Judge he could not have come to the conclusion that the compromise was for the benefit of the minors, On the materials, which have been placed before me, there is nothing so far as I am see to show that the learned Judge could not have come to the conclusion at which he arrived.

32. My opinion is that Mr. Justice Fawcett rightly satisfied himself that the compromise was for the benefit of the minors. And as regards the suggestion that before the compromise was sanctioned there should have baen a formal valuation of the property, it may be pointed out that these properties had been in

the family for years and that as regards the Girgaum Property it was to be divided by fractions and not by value. It seems to me, therefore, there is nothing in that point either.

33. In the result I would dismiss the appeal and dismiss it with costs.

Madgavkar, J.—This is an appeal by the minor plaintiffs, represented in this suit by their mother, against the dismissal of their claim to avoid a compromise decree against them and their father, defendant-respondent No. 2 Gordhandas, appointed guardian ad litem by the Court in Suit No. 1354 of 1922 and sanctioned under Order XXXII, Rule 7, of the Code of Civil Procedure. the compromise had been effected by Gordhandas and his brother Kissonadas, the contesting defendant in respect of this suit and three other pending suits between them.

2. The salient facts regarding the family disputes to the estates " of their ancestor Sir Mingaldas during his lifetime and afterwards as to whether the properties, particularly the Girgaum property, were ancestral or self-acquired, the subject matter of the suit in which the minors were added as parties, are detailed in the judgment appealed against. The appellants rely on six grounds to avoid the compromise,

3. Firstly, the interests of the minors were not identical with the interest of Gordhandas, their father. And there was even a conflict particularly as regarded the question of limitation, and Gordhandas was guilty of gross negligence in not putting this distinction forward expressly before the Judge, who sanctioned the compromise and in not placing before him the essential materials recited in paragraph 62 of the plaint, particularly the will of Sir Mangaldas, the agreement of 1881, and other documents bearing on the question of the nature of the property and on limitation.

4. Secondly, in consequence of the absence of these materials, the learned Judge was not in a position to bring his mind to bear on the essential questions, before he could sanction the compromise. Reliance is placed on certain observations in *Virupakshappa v. Shidappa* I.L.R,(1901) 28 Born. 109

5. Thirdly, the reference to arbitration being a part of the compromise decree, the compromise is void because the Court did not fix the time for the making of the award under schedule II, paragraph 8, of the Code of Civil Procedure.

6. Fourthly, the mortgagees, defendant respondents Nos. 4, 5, and 6 were not parties to the compromise and only ratified it two years afterwards before Shah J. in the present suit,

7. Fifthly, Gordhandas" solicitor, Mr, Captain, who was conversant with the matter and the interests of Gordhandas, was away and the interests of the minors were not placed before the Court.

8. And, lastly, the compromise was hastily effected and hastily sanctioned,

9. The third ground is new. On the other grounds the trial Court upheld the contentions of the defendant, respondent No. 1 Kissandas, that the interests of Gordkandas and the minors were identical and that all necessary and sufficient materials were placed before the Court when Faweett J. considered and sanctioned the compromise, and no gross negligence was proved on the part of Gordhandas or his legal advisers. It was argued further for the respondents in this Court that the question of the validity of the reference was never raised in the lower Court and has not even found a place in the grounds of appeal and is merely due to counsel's ingenuity in argument.

10. Order XXXII, Rule 7 nowhere prescribes the materials necessary for the Court before it can sanction a compromise. And it is even doubtful if an appeal exists against such a sanction : *Rakhal Moni Dassi v. Adwyta Prosad Roy* I.L.R, (1903) Cal. 613. No decided case has been brought to our notice laying down such rules in respect of the necessary materials. All that the law requires is, firstly, that there should be a compromise, secondly, that the Court should be in possession of its terms, thirdly, that the Court should bring its mind to bear on the terms from the point of view of the minors and judge if it is for their benefit, and, lastly, that it should grant or withhold its sanction. Clearly if the terms of the compromise are not before the Court, it is impossible for the Court to apply its mind to grant or withhold the sanction the law requires. This, and no further is, I think, the extent of the decision in *Virupakshappa v. Shidappa*. ILR (1901) 26 Bom. 109

11. In that case the compromise itself and its terms were not at all before the Court, as they were in the present case. that case is, therefore, of no avail to the appellants.

12. In the present case the compromise in terms was before the Court. Counsel on both sides laid before it the facts they thought necessary. The Court applied its mind and sanctioned it. It is conceded by both sides in this appeal that it is not for this Court now to consider for itself whether the compromise was or was not for the benefit of the minors. But for the appellants it is argued that it was impossible for the Court to decide whether it was or was not for the benefit of the minors without the materials in paragraph 62 of their plaint.

13. This impossibility is not a psychological impossibility, since Faweett J. was able to arrive at the conclusion he did. And therefore it appears to me that the contention of the appellants amounts, in fact to this, that, if these materials had been placed before Fawcett J., then he would or might have arrived at a different conclusion.

14. The considerations, however, in deciding the question of sanction are entirely different from the considerations in deciding the issues and the reliefs in a contested suit, It is of the essence of a compromise that each party gives up some portion of his claim. How much or how little of the claim is right is a matter which the Court is usually not in a position to judge, least of all at an early stage

of the case. No authority is shown for the proposition, and, speaking for myself, I cannot agree that before sanction the Judge is in law bound to gauge the chances of success of the minors and--a necessary corollary--weigh against them the chances of the opposite party and sanction only if the chances of the minors appear to him slender,

15. I say so not only because such a process, whether one calls it guess-work or speculation or nice calculation of probabilities, appears to me foreign, almost repellent, to the judicial mind, but also because it is in fact impossible, unless the Judge calls upon the parties not only for some, but for all, the main data on both sides such as the evidence not only documentary but also oral, and then finally tries to arrive without argument at a rough and hasty, conjectural quasi-judgment on the merits of the case. From the arguments here, the course suggested by the appellants in the present case could hardly have occupied less than two days, And if I may judge by the result on my own mind, speaking with all humility and without disrespect to counsel on either side, it would not, I think, have advanced further the issue as to sanction or benefit of the minors, much less the question whether the Girgaum Property was ancestral or joint or the question of limitation.

16. If among the materials in para 62 of the plaint there had been one or two documents or facts, so decisive in favour of the present ancestral character of the Girgaum property, and Gordhandas had deliberately omitted or even perhaps failed to bring them to the notice of the Court, when it considered the question of sanction, then possibly it might have been a plausible contention for the appellants that Gordhandas's action fell within the rule of culpable or wilful negligence tantamount to fraud or misrepresentation on material facts, which alone in law would enable the minors to avoid the compromise sanctioned.

17. For these, I think, are the only grounds laid down by the Courts in England and in India. It was expressly laid down in *Brooke v. Lord Mostyn* (1864) 2 De G.J. & S 373 that a compromise can be set aside only if there has been conduct amounting to fraud. This case was followed in India in *Bibee Solomon v. Abdool Azeez* ILR (1881) Cal. 687 where gross and deliberate omission with regard to the value of the property materially affected the sanction. But it has been held that a compromise of a doubtful right is a sufficient foundation for an agreement amongst the members of a family and is binding on them : *Itameshwar Prosad Singh v. Lachmi Prosad Singh* I.L.R (1903) Cal 111 distinguishing the case above, and confirmed in appeal by the Privy Council: *Rameswar Pershad Singh v. Ram Bahadur Singh* ILR (1906) Cal. 70 .

18. Into the general powers of a joint Hindu father acting for his minor sons, it is not necessary to enter in detail. But ordinarily, a bonafide compromise or reference by him in regard to joint family property is binding on the minors: *Chaudhri Ujagar Singh v. Chaudhri Pitam Singh* (1881) L.R. 81. A. 190 : Section c. ILR 4 All. 120 confirming the decision of the Allahabad High Court in *Pitam Singh v. Ujagar Singh*. I.L.R.(1878) All. 651 A Hindu father and the joint family

manager can refer to arbitration on a question of joint property partition: *Jagan Nath v. Manna*, Lal ILR (1894) All. 231; and the minors are bound : *Balaji v. Nana* I.L.R.(1903) 27 Bom. 287 and *Dwarka Das v. Kriahan Kishore* ILR (1921) Lah, 114 .

19. At the same time it must be conceded in favour of the appellants that when a joint father is appointed guardian ad litem, his powers as the managing member relating to the minor's interests are controlled by Order XXXII, Rule 7, and that agreement by compromise on behalf of the minors infants must be sanctioned : *Ganesha Row v. Tuljaram Row* (1913) L.R. 40 I. A1 132 : Section c. 15 Bom. L.R. 626 . As regards the consent of counsel, the case referred to for the appellants, *Sahinbai v. Sirinbai* (1919) L.Rule 47 I.a. 88 : Section c. 22 Bom. L.R. 552 was subsequently considered by the Privy Council in AIR 1922 186 (Privy Council) which laid down that it was only in rare cases such as *Sakinabai's* case, that leave to withdraw for a minor would be given on counsel's certificate; usually a certificate from the High Court will be required that the agreement is for the benefit of the minors.

20. In the present case I am quite unable to see any conflict of interest between the minors and their father. It appears to me that the minors were added as parties pro majore cautela to place the matter beyond doubt, and perhaps in view of *Gordhandas'* written statement that they were necessary parties.

21. With regard to the question of limitation, the position is far from clear. The difficulties appear to me to be the same as in the question of the ancestral or the self-acquired character of the property. When adverse possession in favour of *Kissondas* and as against *Gordhandas* arose and time began to run against him, and how far that possession was adverse to the minors also by reason of *Gordhandas* being the joint family father and the manager, are questions on which I for one am not able to form an opinion one way or the other. Nor am I able to say that this outstanding fact was not mentioned before *Fawcett J.* or that all necessary documents were not laid by *Sir Thomas Strangman* before him, The materials alleged to be not before the Court as mentioned in para 62 of the plaint are detailed in the judgment of *Shah J.* and have been referred to by my learned brother in his judgment just delivered, together with the history of the litigation between the parties and their ancestors. It is clear that the records and proceedings in all the three suits were before *Fawcett J.* and he was equally well aware of the fact that in the fourth suit in regard to the *Girgaum Property Gordhandas* and his sons claimed a half share, on the ground that it was ancestral property. It is clear to me that unless he was prepared to go into the merits, if not in all four suits, at least in the fourth suit, the materials mentioned in para 62 of the plaint had small bearing on the question of sanction. The terms of the compromise were before him, He knew that apart from the admitted half share of *Kissondas*, each party in fact gave up half his claim by virtue of the compromise. He knew how old, complex and bitter the dispute was. He knew the delay, expense and uncertainty of the final result and he knew that the *Girgaum*

Property was of far greater value than the other properties. He knew the identity of interests of Gordhandas and the minor. He knew that this deplorable litigation was wasting the substance of Sir Mangal-das, lowering the reputation of his family, keeping alive the most bitter feelings among the brothers, and that negotiations had been going on for years. And he had the assurance from the eminent counsel that the compromise was in the interests of Gordhandas and his sons. Last, but not least, he had the fact before him of the consent of Gordhandas, a man of adult age, a graduate, perfectly conversant with his family affairs and perfectly able to judge how far, if at all, the compromise was beneficial to himself and his sons. It was not alleged then, and is not alleged now, that Gordhandas has been lacking as a father. In my opinion these materials were ample before Fawcett J. to enable him to decide the question of sanction and to decline to prolong this litigation between the brothers. To say that these materials were not sufficient is, I repeat, in fact, to invite Fawcett J. either to form a hasty and immature judgment on the merits on insufficient materials or to a decision after contest on the merits, which might have occupied not days but weeks, if the question of limitation or the nature of the joint family property was at all to be gone into. In my opinion no negligence-much less gross negligence-least of all misrepresentation or fraud, on the part of Gordhandas, is proved in the materials or the sanction obtained.

22. As regards the solicitor, it is clear that in the absence of Mr. Captain, his partners Mr. Merchant and Mr. Vaidya, who advised Gordhandas, were perfectly able to act in the matter. For all practical purposes I am unable, I confess, to distinguish the present suit from an ill-advised attempt by Gordhandas himself to rescind from the compromise decree under colour of the name of his wife and children.

23. This disposes, I think, of the main contentions in the suit.

24. The next contention is as to the reference. In my opinion the reference is perfectly separable from the main part of the decree and would not affect the main question as to the portion of the Girgaum Property awarded to Gordhandas and the minors, as is clear from the decree, which only refers, "any" question arising as to the carrying out of the terms of this decree and any disputes not covered by this decree arising out of any of the above suite," This reference to arbitration and the arbitrators" award necessitated no further appeal to the Court to embody in its judgment and decree under schedule II, paragraph 16; and if so, it does not follow on the ratio decidendi in *Raja Har Narain Singh v. Chaudrain Bhagwant Kuar*, (1891) L.R. 18 IndAp 66 that the reference was necessarily bad. It would rather fall under Order XXIII, Rule 3, of the Code of Civil Procedure, as an adjustment which the Court was competent to grant: *Manilal Motilal v. Gohaldas Rowji* I.L. R.(1920) . 45 Bom. 245 Section c. 22 Bom. L.R. 1048. This contention of the appellants, therefore, fails.

25. The remaining contentions may briefly be disposed of. The mortgagees ratified the agreement later and the delay is not shown to have prejudiced the

minors in any way and it is not therefore a ground which would enable the minors to avoid the decree.

26. With the question of the speed of the compromise, my learned brother with his large experience of the Chancery Division and of the Original Side of this Court has already dealt. Speaking for myself, the question of speed of the sanction in Court is not necessarily a test of the speed of the actual compromise. In this case, the record shows that negotiations had been going on or at least had been in the air, for years, and had been attempted by Sir Thomas Strangman since a long time before. Further, as far as the minors were concerned, they were only added to the fourth suit at the last stage, and there was no necessity whatever for Fawcett J. further to deliberate under the circumstances.

27. In the result, therefore, without reiterating what had been said by Shah J. and by my learned brother, I agree that the appeal has no merits and must be dismissed with costs.

P.G. Marten, J.

28. In the special circumstances of this case, we think that the trustees are entitled to a separate set of costs from those of the respondent Kissonadas.