
(1923) 02 CAL CK 0009
In the Calcutta High Court

Hemangini Dassi and Others

APPELLANT

Vs

Bhagwati Sundari Dassi and Others

RESPONDENT

Date of Decision : 08-02-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 115

Citation : AIR 1923 Cal 685 : 75 Ind. Cas. 682

Hon'ble Judges : Panton, J;C.C. Ghose, J

Bench : Division Bench

Judgement

1. The facts which have given rise to this appeal and to the connected Rules, shortly stated, areasfollows:-One Mon mohan Das,. who was possessed of considerable properties both moveable and Immovable died, on the 2nd March 1908 leaving him surviving his two widows, Hemangini Dassi and Bhagbatti Sundari Dassi, and a son alleged to be of unsound mind, named Gobind Chand Dass by the said Srinati Bhagbati Sundari Dassi, a deceased daughter's son and two unmarried daughters named Nanibala and Khudibala by the said Bhagbati Sundari and Hemangini respectively. The said Khudibala died unmarried sometime in 1320 B.S. Gobind Chand Dass died on the 10th April 1908 without any issue leaving him surviving his widow Srimati Bundeswari Dassi. Manmohan Das left a Will by which he appointed six executors and the Will directed that, in the event of there being difference of opinion between the executors in respect of any matter relating to the estate of the testator, the opinion of the majority should prevail. Application having been made by the said six executors for Probate of the said Will, the said two widows intervened and applied to be appointed as executrixes on the ground that they had been appointed impliedly so under the said Will. On the 18th January 1909, probate of the said Will was granted by the District Judge of Rajshahi to the said six executors and to the said two widows. Sometime in 1912--13 two out of the said six executors died and thereafter the estate was administered by the surviving executors and by the two widows. In 1319 Nanibala was married to one Lalit Mohan Podder and a dispute subsequently arose between the two widows regarding the adoption of a boy

named Shyamapada Das as a son to the testator. This dispute was compromised some time in Ashar 1325, when it was settled between the parties that the accumulations of the income of the estate amounting to Rs. 77,000 should be divided between the two widows, Nanibala and the grandson (Sachindra) of the testator in certain proportions and that Hemangini Dassi should execute an ekrar in favour of her co-widow acknowledging the validity of the adoption by her of the said Shyamapada Das. In Kartick 1325 the adopted son Shyamapada Das died. In 1919 Henrangini Dassi who had not been paid her portion of the said accumulations instituted a suit being Suit No. 361 of 1919, for construction of the said Will and for administration of the estate of the said testator. The defendants in that suit were no less than fourteen in number, i.e., the four surviving original executors and certain other parties, the relationship between whom appears from the following geneological table:

MOHAN			DAS			
	Bhagabati,	Hemangini,	(defendant	No. 1)	plaintiff.	

_____ | | | | Gobinda Jogmaya.
Nanibala Sachi Mohanlal, Das. defendant Sundari adopted No. 6. (died) son |
defendant | No. 14. | | Budheswari, Madan Lalit | defendant Mohan, Mohan,
| No. 6. defendant defendant | No. 3. No. 12. | | Sachindra Nath, defendant
No. 9. Dharendra Nath, defendant No. 10. 2. On the 16th September 1920, the
plaintiff, Hemangini, filed a petition praying that the suit may be disposed of in
accordance with certain terms of compromise arrived at between her of the one
part and three of the executors, namely, defendants Nos. 2, 4 and 5 of the other
p Article One of the terms of the said compromise was that a sum of Rs. 24,500
should be paid out of the estate of the said testator to Hemangini in accordance
with the terms of Settlement of Ashar 1325. Along with this petition of
compromise, an affidavit by one Rakhal Chandra Das was filed in which it was
pointed out that although the proposed compromise was beneficial to the infant
defendant No. 14 the defendant No. 1 as the guardian ad litem of the said infant
had refused to give her consent to the said settlement and that in the
circumstances it was necessary that defendant ho. 1 should be removed and
another person, namely, one Girish Chandra Das, the natural father of the infant,
should be appointed guardian ad litem in place of the defendant No. 1 Srimati
Bhagbati Dassi. The defendant ho. 14, it may be noted here, was adopted as a
son by Srimati Bhagbati after the death of Shyamapada Das who has been
referred to above. On the 18th September 1920 the said Girish Chandra Das filed
a petition praying that he may be appointed guardian ad litem of the minor
defendant No. 14 in place of Srimati Bhagbati. By the terms of the proposed
compromise the junior widow, i.e., the plaintiff, relinquished all claims to the
estate of the said testator and admitted the validity of the second adoption
recognising the minor adopted son of the senior widow namely, the defendant
No. 14, as the sole heir to the said estate; but these admissions and the

withdrawal were made conditional on the payment to the plaintiff of the said sum of Rs. 24,500. The applications referred to above were vigorously contested by the other widow Sreemati Bhagbati and the dissenting executor Madan Mohan Das before the Subordinate Judge before whom the administration suit was pending; but, meanwhile, a separate application had been brought by the plaintiff before the District Judge for permission to compromise the said suit in terms of the draft petition of the compromise filed before the Subordinate Judge and for sanction to the payment of Rs. 24,500 out of the said estate to the plaintiff. The District Judge called for a report from the Subordinate Judge. The latter reported on the 7th October 1920, that the petition of compromise should be approved of by the Court; but in disposing of the application filed by the plaintiff he recorded the following order on the 7th October 1920 in the order-sheet of the said Suit No. 361 of 1919:--"An application has been made before the District Judge for permission to compromise this suit according to the draft Solenama filed before me and for sanction for the payment of Rs. 24,500 to the plaintiff. The District Judge has called for my report which will be submitted tomorrow. It is not desirable and proper that final orders should be passed by this Court in the matter until the application pending before the District Judge is disposed of. It is necessary that the matter should be re-considered in the light of the order passed by the District Judge. Plaintiff is directed to file a certified copy of the District Judge's order. Put up on the 29th November 1920 for further hearing."

3. It appears that the learned District Judge, after perusing the report of the learned Subordinate Judge, expressed himself in the following manner on the 8th October 1920 against the acceptance of the compromise: "Circumspection is very necessary owing to the charges of maladministration urged by the junior widow herself as plaintiff. I also do not feel safe in expressing approval of the terms--the payment of Rs. 24,500 for which a somewhat dictatorial demand is made, such that it looks as if this were the *raison d'être* of the Solenama. The questionably advisable payment of Rs. 24,500 will not save the estate from litigation and the safest course is to seek for a surer basis in the determination of the administration suit in regular course." Thereafter, afresh application to compromise the suit on the terms which had already been mentioned to the Court was filed before the learned Subordinate Judge on the 4th December 1920, on behalf of the plaintiff and defendants Nos. 2, 4 and 5, containing, among others, the following prayers:--"That an order may be passed that the defendant No. 1 may be removed from the guardianship of the minor defendant No. 14 in connection with this suit for the reason of her offering opposition to the amicable settlement against the interest of the said minor defendant No. 14, and that the aforementioned Girish Chandra Das, the natural father of the minor defendant No. 14, may be appointed his guardian ad litem."

4. On the 15th December 1920, the Subordinate Judge, by his order of that date, held that there were not sufficient grounds for the removal of defendant No. 1 and for the appointment of Girish Chandra Das as guardian ad litem of defendant

No. 14 in place of defendant No. 1. He further held that, inasmuch as a second suit for administration on the said estate had already been commenced by the defendant No. 1 on behalf of herself and as next friend of her adopted son and by the dissenting executor, the proposed compromise even if given effect to, would not end the litigation relating to the estate and he accordingly dismissed the plaintiff's application. Against this last mentioned order, the present appeal from Original Order has been preferred by the plaintiffs and the defendants Nos. 2, 4 and 5. The Civil Rule No. 49 of 1921 is directed against the order of the District Judge, dated the 9th October 1920, refusing permission to make over War Bonds of the value of Rs. 15,000 to the plaintiff in part satisfaction of her claim for Rs. 24,500. The Civil Rule No. 140 of 1931 which was obtained by defendant No. 10, who is the husband of the said Nanibala, is directed against Order No. 178 in the order-sheet dated the 15th December 1930 by which the names of defendants Nos. 10 and 12 were expunged from the record of Suit No. 361 of 1919. Lastly, the Civil Rule No. 593 M of 1922 was obtained by the defendant No. 1 Sreemati Bhagwati Dassi calling upon the plaintiff and the said defendants Nos. 2, 4 and 5 to show cause why a Receiver should not be appointed of the estate of the said testator pending the hearing of the said appeal from the Original Order No. 9 of 1931.

5. On behalf of the plaintiff and the defendants Nos. 2, 4 and 5, who are the appellants before us, it has been contended, in the first place, that the findings of the Court below are inconsistent with its own findings contained in the report submitted to the District Judge on the 7th October 1920, and, in the second place that the Court below ought to have held on the facts on the record that the defendant No. 1 was acting fraudulently in opposing the said compromise and that accordingly the Court below should have removed the defendant No. 1 from the guardianship of the infant defendant and should have appointed Girish Chandra Das or some other person as guardian ad litem of the infant defendant in place of the defendant No. 1.

6. As regards the first contention, we do not think that the learned Subordinate Judge was precluded from re-considering the matter by reason of what he had said in his report to the learned District Judge on the 7th October 1920. There may, perhaps, be room for criticism as regards the terms of the order made by the District Judge on the 8th October 1920; but it must be remembered that that order was invited by the applicants themselves on their application made to the District Judge. There may also, perhaps, be room for criticism of the terms in which the order of the 7th October 1920 was expressed by the learned Subordinate Judge; but, after all said and done, what was there on the record which tied down the learned Subordinate Judge to the opinion which he had expressed in his report to the learned District Judge? It was, no doubt, irritating to the appellants when they found that in his final order, dated the 15th December 1920, the learned Subordinate Judge had expressed an opinion contrary to that contained in his report to the learned District Judge, but, in law and on the facts of this case, the learned Subordinate Judge was free to change

his opinion as often as he liked until he had definitely made a final order, which, as will be seen from the above, was not made till the 15th December 1920. There is, there fore, no substance in the appellant's first contention and it accordingly fails.

7. As regards the second contention, it is settled law that, although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian ad litem in the action. In the case of *In re Birchall, Wilson v. Birchall* (1882) 16 Ch. D. 41 : 44 I.T. 113 : 29 W.R. 27. (where Jessel, M.R., stated the practice adopted by himself and his predecessor Lord Romilly, M.R.) it was definitely ruled that no compromise can be enforced upon infants against the opinion of their guardian or next friend. No doubt, if the Court found that a guardian or next friend was acting improperly and against the infant's interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person. These being the principles to be borne in mind, can it be said in this case that the action of the learned Subordinate Judge in refusing to remove the defendant No. 1 and in refusing to appoint Girish Chandra Das in place of the defendant No. 1 is unsustainable? We have anxiously considered the whole of the record and we have come to the Conclusion that it is impossible for us to say, at this stage of the litigation, that the terms of the proposed compromise are so entirely for the benefit of the minor that no further enquiry should be made into the validity of the plaintiff's claim for Rs. 24,500 and that she should straight away get a decree for Rs. 34,500 to be paid out of the estate of the testator. Further, as has been pointed out by the lower Court, this compromise, even if given effect to, will not end the litigation relating to the estate of the said testator, for important questions, of construction of the Will of the said testator have been raised and, whether in this suit or in the suit started by the defendant No. 1, they will have to be determined by the Court. It is said, however, that the second suit for administration at the instance of the defendant No. 1 is a mala fide suit and has been instituted only with a view to prevent the compromise, referred to above, being sanctioned by the Court. It is sufficient for us to observe that allegation is not proof and that on the materials on the record at this state it is difficult to express an opinion on the merits of this accusation. We have not seen the Will of the testator, nor have we heard any argument before us as regards the rights of the various parties in this case in and to the estate of the said testator; the matters alleged by the plaintiff in paragraphs 9 to 13 of her plaint clearly call for investigation: we have no materials before us which enable us to say that an enquiry into these matters should now be burked and the disputes adjusted in the manner proposed by the plaintiff. For these reasons; in our opinion, the second contention is equally untenable. The appeal from Original Order No. 9 must, therefore, be dismissed. With it must also fail Civil Rule No. 49 of 1921. As regards Civil Rule No. 593-M of 1922 no orders are now necessary. As regards Civil Rule No. 140 of 1921 the order complained of was one under Order 1, Rule 10, Civil Procedure Code, and,

in our opinion, it does not come within the purview of Section 115, Civil Procedure Code. The result, therefore, is that appeal from Original Order is dismissed with costs which we assess at five gold mohurs. There will be no order for costs as regards Civil Rule No. 49 of 1931 and Civil Rule No. 593-M of 1922. The Civil Rule No. 140 of 1921 is discharged with costs which we assess at two gold mohurs.