

(1927) 02 PAT CK 0022
In the Patna High Court

Kumar Ganganand Singh and Others

APPELLANT

Vs

Maharaja Sir Rameshwar Singh Bahadur and Another

RESPONDENT

Date of Decision : 01-02-1927

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : AIR 1927 Patna 271 : 102 Ind. Cas. 449

Hon'ble Judges : Das, J;Adami, J

Bench : Division Bench

Judgement

Dass, J.—On the 7th May, 1900, Kumar Kamalanand and Kumar Kalikanand, proprietors of the Srinagar Raj, executed a mortgage-bond in favour of the Maharaja of Darbhanga to secure an advance of a large sum of money, partly paid and partly agreed to be paid by the Maharaja to them. Kumar Kamalanand died in 1910, leaving three sons, Ambikanand, since deceased, Ganganand and Achhutyanand and a widow Rani Satyarama. Ganganand and Achhutyanand are plaintiffs Nos. 1 and 2 in this action.

2. On the 28th April, 1916, the Maharaja-instituted a suit to enforce the mortgage security. The defendants in that suit were (1) Kumar Kalikanand, (2-4) Abhyanand, Bijayanand and Ghanand, sons of Kumar Kalikanand, (5) Ganganand, and (6) Achhutyanand Abhyanand, Bijayanand and Ghanand are the three remaining plaintiffs in the present suit. All the defendants other than Kumar Kalikanand were minors at the date of the institution of the suit, and they were sued as minors and guardians ad litem were assigned to each of them. Rani Satyarama was appointed the guardian ad litem of Ganganand and Achhutyanand the minor sons of Kumar Kamalanand and Babu Amrita Lal Mazumdar, a Pleader of the Darbhanga Court, was appointed the guardian ad litem of Abhayanand, Bijayanand and Ghanand, the minor sons of Kumar Kalikanand.

3. On the 11th December, 1916, Rani Satyarama presented a petition to the Court in seisin of the mortgage suit stating therein that Ganganand had attained

majority and that she should be discharged from further acting as the guardian of Ganganand and Achhutyand and that Ganganand should be appointed the guardian ad litem of Achhutyand. The following order was recorded by the learned Subordinate Judge in the order sheet in regard to the petition of Rani Satyarama:

Rani Satyarama guardian ad litem of minor defendants Nos. 5 and 6 files a petition stating that defendant No. 5 has attained majority and that defendant No. 5 should be appointed guardian of his brother the other minor defendant No. 6. The former fact is supported by an affidavit.

ORDER

4. The defendant No. 5 be allowed to defend his case as major and to file written statement, that the prayer for appointing defendant No. 5 as guardian of his brother defendant No. 6 be disallowed and if Rani Satayarama declines to act as the guardian of defendant No. 6 steps be taken for appointment of another guardian on the 8th December, 1916.

5. It is alleged by the Maharaja, but which allegation is denied by Ganganand that Ganganand entered appearance on the 11th July, 1917, and actually filed his written statement on the 24th July, 1917.

6. On the 17th December, 1918, the Maharaja obtained a mortgage-decree by the consent of the parties. He gave up a lac of rupees and the costs of the suit and gave the defendants in that suit a year to pay the decretal amount which by consent of parties was fixed at Rs. 7,42,131-2-3.

7. On the 15th December, 1921, the suit, out of which this appeal arises, was instituted by the plaintiffs-appellants for a declaration that the consent decree of the 17th December, 1918, was fraudulent, void and inoperative "and for an injunction restraining the Maharaja from executing his decree against the plaintiffs. The two important defendants in this suit are the Maharaja and Kumar Kalikanand, the Maharaja being defendant No. 1 and Kumar Kalikanand being defendant No. 2.

8. The learned Subordinate Judge has dismissed the suit, hence this appeal to this Court.

9. Shortly stated, the allegations made in the plaint as grounds for the reliefs claimed are as follows: Ganganand plaintiff No. 1, it is alleged, was born on the 24th September, 1898, and, on the death of his father, his uncle Kumar Kalikanand applied for and obtained an order from the District Judge of Purnea appointing him the guardian of the person of Ganganand. According to him, therefore, he attained his majority under the Indian Majority Act on the 24th September, 1919. His case accordingly is that, although he had attained his majority under his personal law at the date of the consent decree, he was still a minor at that date under the Indian Majority Act by which he was governed; and he contends that the consent decree must accordingly be regarded as a void

decree so far as he is concerned, since there was no guardian ad litem in the record of the suit at that date to represent his interest. This is the most serious part of the case as set forth in the plaint. The other grounds, which are common to all the plaintiffs, are that both Kamalanand and Kalikanand were men of reckless dispositions and dissolute habits and that the Maharaja, being well aware of these facts agreed to lend money to them knowing that he would thereby enable the said, Kumar Kamalanand and defendant second party to run in their career of immorality and extravagance." The plaintiffs go on to assert that, even if there was any consideration for the mortgage-bond, the same was not executed for any valid necessity or for the benefit of the family and, there were other good and valid defences to the mortgage suit; but that the Maharaja in collusion with Kumar Kalikanand caused various steps to be taken in the suit in the name of Rani Satyarama without any knowledge on her part and ultimately caused a compromise petition to be put in fraudulently without any reference either to plaintiff No. 1 or to the guardians ad litem of the other plaintiffs and induced the guardians ad litem to sign the petition of compromise without allowing them opportunity to consider whether the settlement was for the benefit of the minors. So far as this part of the case is concerned, the plaintiffs seek to avoid the consent decree on two grounds; first, on the ground that the Maharaja and Kalikanand entered into a fraudulent conspiracy to defeat the interest of the minors; and, secondly, "on the ground, that in entering into the compromise the guardians ad litem were guilty of gross negligence sufficient in itself to avoid the consent decree. The learned Subordinate Judge while holding that Ganganand was a minor at the date of the consent decree, has dismissed the suit principally on the ground that Ganganand represented to the Court that he had attained majority and that such a misrepresentation was a fraudulent one disentitling him to the reliefs claimed by him in the suit. He has rejected the case of fraud and conspiracy as an idle one and has given effect to some of the contentions raised before him on behalf of the defendant, namely (1) that a" fresh suit does not lie to get rid of the consent decree, (2) that Ganganand is estopped from disputing the validity of the consent decree; and (3) that the suit is not maintainable since the preliminary mortgage-decree which alone is attacked in the suit has merged in the final decree which is not attacked in this suit. The plaintiffs contest the findings of the learned Subordinate Judge on each and every point decided by him against them; and the defendant while supporting the decree passed by the learned Subordinate Judge attacks the finding as to the age of Ganganand. He also supports the decree on certain grounds which were not put forward by him in the Court below. They are:

(1) That the order of the Court declaring Ganganand as an adult was an order passed by a Court which had jurisdiction to pass that order and cannot be challenged in this suit.

(2) That the position of Ganganand cannot be higher or better than that of a minor in a joint family who has not been made a party to the suit; and that, assuming that Ganganand was a minor at the date of the consent decree, he is

nevertheless bound by it as it was obtained in the presence and with the consent of the karta of the family who sufficiently represented the interests of every individual member of the joint family including those of Ganganand.

10. Before coming to the only serious question in this appeal, I will deal with some of the short points raised in the judgment of the Court below and in the arguments advanced on behalf of the respondent.

11. I will first deal with the question whether the order of the Court declaring Ganganand an adult operates as *res judicata* between the parties so as to bar the right of Ganganand in this suit to raise an issue as to whether he was a minor at the date of the consent decree. The learned Subordinate Judge has found that Ganganand was born on the 24th September, 1898. Although his finding is challenged before us on behalf of the respondent, and I shall have to deal with the arguments in the proper place, I may say at once that there is overwhelming evidence in support of the finding of the learned Subordinate Judge on this point. If the personal law by which" Ganganand was governed had any operation in his case, he was undoubtedly an adult on the 24th September, 1916, but on the 9th July, 1910, Kumar Kalikanand had obtained an order from the District Judge of Purnea appointing him the guardian of the person of Ganganand. The appointment so made had the effect of prolonging the minority of Ganganand under the Indian Majority Act; and it is not open to doubt that he attained his majority only when he completed the age of twenty-one years, that is to say, on the 24th September, 1919. On the 11th December, 1916, Rani Satyarama, who had been appointed the guardian ad litem of Ganganand in the mortgage-suit presented the following petition to the Court:

In the aforesaid suit the petitioner was appointed guardian of Kumar Gangacand Singh and Achhutanand Singh. But Kumar Ganganand Singh has attained majority. Hence it is not necessary for the petitioner to continue to work as his guardian.. It is prayed that Kumar Ganganand Singh be declared major and steps may be taken in the suit accordingly. He may be appointed guardian of Kumar Achhutanand Singh, as well and the petitioner may be discharged from the guardianship of her both sons.

12. This petition was supported by the affidavit of Gokhala Prosad in which he states that he knew "that the said Kumar Ganga nand Singh attained majority in the month of September, 1916," The Court thereupon passed the order which I have already set out in full.

13. Now, it is clear to my mind that in presenting the petition to the Court Rani Satyarama obviously overlooked the fact either that Kumar Kalikanand had been appointed the guardian of the person of Ganganand or that the appointment of Kumar Kalikanand as the guardian of the person of Ganganand had the effect of prolonging the minority of Ganganand. A mistake was undoubtedly made; and the question is whether the defendant is right in saying that the order passed by the learned Subordinate Judge on the 11th December, 1916, on the petition of

Rani Satyarama to the effect "that defendant No. 5," namely, Ganganand, "be allowed to defend his case himself as major" is final between the parties disentitling Ganganand to ask the Court to hold that he was in fact a minor at the date of the consent decree. Mr. Sultan Ahmad on behalf of the defendant contends that the learned Subordinate Judge had jurisdiction to pass that order and that the order cannot be regarded as a nullity. The question, however, is not whether the order is a nullity, but whether Ganganand is bound by it. Now it seems to me that, in order to bind Ganganand by the order of the 11th December, 1916, it must be shown that Ganganand was a party to the order or that the order was passed with notice to him. In presenting the petition to Court on the 11th December, 1916, Rani Satyarama was in no sense acting as the guardian ad litem, of Ganganand. Her position was that the order appointing her the guardian ad litem of Ganganand was no longer in force having regard to the fact that Ganganand had already attained his majority and she asked for a formal order striking out her name from the record of the suit as the guardian ad litem of Ganganand. The Court acceded to the application without serving any notice upon Ganganand; and seven days later, that is to say, on the 18th December, 1916, directed that "a summons with a copy of plaint be served on defendant No. 5," that is Ganganand "who is no longer a minor." Now in so far as the Court acted on the hypothesis that Ganganand had attained his majority, the order of the 11th December, 1916, was passed not only ex parte but without notice to Ganganand, since Ganganand did not become a party to the suit until summons was actually served on him. The learned Subordinate Judge himself took the view that Ganganand was not a party to the suit at the date of the order of the 11th December, 1916, since a week later he himself directed that summons should be served on Ganganand. In my opinion Ganganand was not a party to the order of the 11th December and is not bound by that order. Since on the hypothesis on which the learned Subordinate Judge acted Ganganand was not a party to the suit on the 11th December, 1916, the latter is in my opinion, entitled to show in this suit that he was in fact a minor at the date of that order. On the hypothesis that Ganganand was a minor at the date of the order of the 11th December, 1916, and was, therefore, properly represented by Rani Satyarama, I am of opinion that Ganganand is still entitled to ask to be relieved from the effect of that order since the guardian ad litem presented the application on the footing that she no longer represented the interest of Ganganand. Any other view would involve grave risks to minors in suits either by them or against them and I am not-prepared to accede to the arguments advanced to us on behalf of the respondent on this point.

14. I now come to the question whether the plaintiffs or any of them are entitled to avoid the consent decree having regard to the fact that it was fairly and properly obtained against Kumar Kalikanand who was the karta of the joint family and who represented the interest of the entire joint family. The answer to the argument seems to be that Kumar Kalikanand was not sued as the karta and as representing the joint family. No doubt it was open to the Maharaja to sue

Kumar Kalikanand alone in his capacity as karta of the joint family but the decree in such a suit would always be open to attacks on grounds ordinarily available to the junior members of a Mitakshara family. In order to obviate the risk of further litigation the Maharaja preferred to sue every member of the joint family. It is now too late to say, "Put me in the position which I would have occupied had I brought a suit and obtained a decree against Kumar Kalikanand in his capacity as the karta of the joint family and dismiss the plaintiffs" suit on the ground that they were not necessary parties to the mortgage suit and were effectively represented by Kumar Kalikanand." I must overrule the argument of the respondent on this point.

15. I will now deal with the question whether it is competent to the plaintiffs to institute a suit to set aside a consent decree on the ground that it was obtained by fraud. In the Court the argument was put in a somewhat different form. It was contended, to quote the actual words of the learned Subordinate Judge "that a separate suit would lie only where the Court had no jurisdiction to decide the case and not where the Court had jurisdiction, but had acted illegally or with material irregularity." The Vakil appearing on behalf of the plaintiffs had no difficulty in showing "that a separate suit lies where the previous decree is attacked on ground of fraud or collusion." As I read the judgment of the learned Subordinate Judge he did not accede to the argument put forward on behalf of the defendant but he thought that the suit was not maintainable because on an examination of the evidence he found that the allegations as to fraud and collusion were unfounded and that in regard to the question of minority Ganganand was guilty of fraudulent misrepresentation disentitling him to the reliefs claimed by him. His decision on this issue is, therefore, on merits. In this Court the argument has taken a, different form. For the purpose of his argument Mr. Sultan Ahmad has assumed, as he must, the truth of the allegations in the plaint; but he contends that on those allegations, although an application would lie in the mortgage suit itself to set, aside the compromise decree, a suit does not lie to set it aside.

16. Now on an examination of the allegations made in the plaint, it will appear that the plaintiffs are claiming reliefs substantially, on two grounds; first, so far as all the plaintiffs are concerned, on the ground that the consent decree was obtained by fraud and was the result of collusion between the Maharaja and Kumar Kalikanand and of gross negligence on the part of the guardians ad litem; and, secondly, so far as plaintiff No. 1 is concerned, on the ground that the decree is a nullity so far as he is concerned, and that, in the circumstances, he is entitled to an injunction restraining the defendant from executing the decree.

17. It is difficult to understand why a suit on these allegations is not maintainable. It has been held in cases far too numerous to mention that, although a Court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties, a suit is the proper remedy where the case is one of fraud on the party. Now, so

far as the ground common to all the plaintiffs is concerned, it is difficult to understand how that ground can be investigated except in a properly constituted suit. There is no suggestion in the plaint that, in passing the consent decree the Court was in any way misled by any of the parties. The suggestion is that a fraud was practised, not on the Court, but on the minor defendants to that suit in so far as the karta of the family colluded with the Maharaja and the guardians ad litem were prevented from considering whether the settlement was for the benefit of the minors. It is this aspect of the case which distinguishes it from *Sadho Saran Rai and Others Vs. Anant Rai and Others*, which was a case of fraud practised on the Court.

18. It was then contended that if the plaintiffs other than Ganganand were represented in the record of the suit by guardians not disqualified from so acting, they cannot impeach the decree even on the ground that there was gross negligence on the part of the guardian; and reliance was placed on. *Ram Sundar and Another Vs. Amrit Pajiyar and Another*, . In my opinion the case cited has nothing to do with the present case. In that case it was contended that a decree obtained against a minor must be considered a nullity if it appeared that the notice of the appointment of the guardian for the suit was not served on the minor and upon the guardian of the minor in terms of Order XXXII, Rule 3(4) of the Code and if it also appeared that there was a distinct violation of the statutory provision contained in Order XXXII, Rule 4(3) of the Code in so far as a guardian was assigned to a minor without the consent of the guardian. It was held by this Court that "where, on the face of the record a person qualified to act as the guardian, appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under Order XXXII, Rule 3(4) were, in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merit of the case." This Court proceeded to say: "But where the record, on the face of it, shows, that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provision of the Statute, from acting as guardian, the position is the same as if the minor were not a party to the suit, and the judgment rendered by the Court is without jurisdiction and null and void. Now, in this case so far as the plaintiffs other than Ganganand are concerned they do not ask the Court to hold that the consent decree is a nullity and, therefore, void against them. They contend, on the other hand, that it is voidable and that this Court should avoid it on the ground that there was a fraudulent conspiracy between the Maharaja and Kumar Kalikanand and that there was gross negligence on the part of their guardians ad litem. So far as Ganganand is concerned, the case cited completely supports his case, his case being that the record of the mortgage suit on the face of it shows that he was not represented by a guardian for the suit. I must overrule the argument advanced on behalf of

the respondent on this point.

19. I now come to the question whether the plaintiffs are entitled to maintain the suit in so far as they seek to set aside the consent decree since they do not attack the final decree passed under Order XXXIV, Rule 5 of the Code. The point was not taken in the written statement; but was allowed to be argued before him by the learned Subordinate Judge. A serious question of fact at once arises, namely, whether Ganganand was a party to the proceedings under Order XXXIV, Rule 5 of the Code; and I have very grave doubt whether the learned Subordinate Judge should have permitted any argument on a point which involved an examination of facts. It is contended before me on behalf of Ganganand that he was not a party to the proceedings under Order XXXIV, Rule 5 of the Code, that is to say, proceedings initiated by the Maharaja for obtaining the final mortgage decree. The learned Subordinate Judge says that "plaintiff No. 1," that is to say, Ganganand, "evidently appeared during pendency of the decree absolute proceeding and raised objections too" and he refers to Order No. 120 in the order-sheet in support of his conclusion. The order sheet of the mortgage suit is printed at page 266 of Part III of the paper-book. The orders in connection with the proceedings under Order XXXIV, Rule 5 of the Code will be found at pages 275 and 276 of the paper-book. They are Order No. 108 to Order No. 137. There is nothing, however, in the order-sheet to show that notice of the Maharaja's application was served on Ganganand. Order No. 120 to which the learned Subordinate Judge refers runs as follows: "Petition of objection filed. Let 18th November next be fixed for hearing. Parties to be ready with their evidence on that day." The order does not show that any petition of objection was filed on behalf of Ganganand. The learned Subordinate Judge then says:

But there is the evidence of Babu Jatindranath Ghosh, D.W. No. 22, that he had occasion to go to Calcutta in connection with the decree absolute proceedings to obtain instructions on behalf of his ward and when there he had met Kumar Ganganand and had some talk with him too. Therefore Kumar Ganganand was fully aware of the proceedings regarding the decree being made absolute.

20. Babu Jatindranath Ghosh was the guardian ad litem of the minor sons of Kumar Kalikanand. In his evidence he says that he had to go to Calcutta to take instructions from Kumar Kalikanand as to the defence to be filed on behalf of his minor sons. He proceeds to say as follows:

I met Kumar Ganganand Singh and my wards. Kumar Ganganand introduced the wards to me. Khetra Babu," that is to say, Babu Khetrapado Bose who was the guardian ad litem of the younger brother of Ganganand, "told Kumar Ganganand that I was one of the guardians ad litem appointed in the case and that we had gone there for instructions in connection with the decree absolute matter. Kumar Kalikanand was not there. Therefore, we could not get any instructions.

21. In his cross-examination, he said that he met Ganganand when he was "ready to go to Law College." It may be mentioned that Kumar Ganganand was a

student in Calcutta and was studying for law. The evidence of Jatindra Babu, therefore, comes to this that he went to Calcutta to see Kumar Kalikanand, that he met Ganganand as he was about to go to the Law College and Ganganand told him that Kumar Kalikanand would give him the instructions. This is all; and I cannot see how a case that Kumar Ganganand had notice of the proceedings under Order XXXIV, Rule 5 could be built on this evidence.

22. It is for the defendant, who raises this point, to establish by satisfactory evidence that Ganganand was a party to the proceedings under Order XXXIV, Rule 5 of the Code. He has not produced the notice alleged to have been served on Ganganand; he has not produced a single witness to say that Ganganand was in fact served with notice of his application; and he has not produced the petition of objection alleged to "have been filed on behalf of Kumar Ganganand. Not a single question was put to Ganganand in cross-examination to suggest that he was served with the notice of these proceedings. While there is nothing in the record to show that Ganganand was served with notice of these proceedings, a perusal of the final decree as passed by the Court shows, in my opinion, conclusively, that Ganganand was not a party to those proceedings. The final decree runs as follows:

Final Decree in Suit No. 172 of 1916.

Seal--Subordinate Judge's Court, Bhagalpur, 1 June, 1925.

Final Decree for sale.

Order XXXIV, Rule 5, Code of Civil Procedure.

District Darbhanga.

In the Court of the Subordinate Judge,

at Darbhanga.

Mortgage Suit No. 172 of 1916.

23. Maharaja Sir Rameshwar Singh Bahadur, G.C.I.E., K.B.E., son of Maharaja Maheshwar Singh Bahadur, deceased, by caste Brahman Soti, by occupation Zemindar, inhabitant of Darbhanga town, Pargana Haveli Darbhanga, District Darbhanga--Plaintiff.

versus

1. Kumar Kalikanand Singh, son of Shivanandan (sic) Singh deceased, 2. Kumar Abhyanand, 3. Kumar Bijayanand Singh, 4. Kumar Ghananand (sic) Singh, minors, sons of Kumar Kalikanand Singh, through Babu Amrit Lal Mazumdar, guardian ad litem and afterwards Babu Jatindranath Ghosh, Pleader, appointed guardian ad litem as per order dated 17th July, 1920, and Babu Amrita Lall Mazumdar removed from the guardianship, 5. Kumar Ganganand Singh, major son of Kumar Kamalanand Singh, deceased, 6. Kumar Achhyutanand Singh, minor son of Kumar Kamalanand Singh, through Babu Kshetrapado Bose,

guardian ad litem, by caste Brahman Maithil, by occupation Zemindars, inhabitants of Deorhi Srinagar, Pargana Haveli, District Purnea--Defendants 1st Party. 7. Babu Ramsumaran Prasad, son of Babu Madanmohan, deceased, by caste Agarwala Mahajan of M. Mahadeo Simaria alias Ulao, Pargana Malki, District Monghyr, 8. Raja Kalanand Singh, 9. Hon"ble Raja Kirtyanand Singh, sons of Raja Sulanandan Singh, deceased, by caste Brahman Maithil, by occupation Zemindar, inhabitants of Deohri Champaragar, District Purnea--Defendants 2nd Party.

Claim for recovery of Rs. 6,66,787-12-6, principal with interest and compound interest due on the basis of a mortgage-bond dated 7th May, 1900, executed by defendant No. 1 and father of defendants Nos. 5 and 6.

Upon reading the preliminary decree for sale made in the above suit on the 17th day of December, 1918, and the petition of the plaintiff, dated the 23rd day of December, 1919, and after hearing Babu Adwaita Charan Bose, Vakil for the plaintiff and Babu Ramkrishna Jha, Vakil for defendant No. 1, Babu Jatindranath Ghosh, Pleader guardian ad litem of defendants Nos. 2 to 4 and Babu Khetrapado Bose, Vakil guardian ad litem of defendant No. 6 and it appearing that the amount declared due by the said preliminary decree has not been paid: It is ordered that the defendants' objection be dismissed with costs and Pleader's fee Rs. 80 only and that the Immovable properties mentioned in the said decree and specified in the schedules annexed herewith, or so much thereof as may be necessary, be sold by public auction, and that the money which may be realised by such sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and that the sum of Us. 7,42,131-2 3 payable under the said preliminary decree and further interest from 17th December, 1918 (the date of the preliminary decree) up to the date of payment at the rate specified in the said decree, i.e., at Rs. 6 per cent. per annum and costs including the costs of this application amounting to Rs. 425-6-3 as specified below be paid to the plaintiff and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Given under my hand the seal of the Court, this 15th day of March, 1921.

(Sd.) Akhauri Nityanand Singh, Subordinate Judge, 22-3-1921.

24. Now, it will be noticed that Ganganand was defendant No. 5 in the mortgage suit and that, while the decree recites that the plaintiff, defendant No. 1, defendants Nos. 2 to 4 and defendant No. 6 were represented in those proceedings, the decree is wholly silent as to Kumar Ganganand. It is obvious that Ganganand was not represented before the Court in the proceedings in connection with the final decree obtained by the Maharaja; but it may be argued that he chose to stay away from the Court and that, therefore, his name does not appear on the face of the order. But the argument is an impossible one, since, if Ganganand had been served with notice of the proceedings, and if it was intended to bind him by those proceedings, the decree would have recited the

fact of the service of the notice on Ganganand. The decree does not purport to be a decree against Ganganand at all. There is certainly nothing in the record to show that Ganganand was a party to those proceedings. It is difficult to understand why it should be necessary for Ganganand to ask the Court to set aside a decree which was not passed against him either in his presence or ex parte. Had the question been raised in the written statement, it would have been open to the plaintiffs to ask the Court to amend the plaint by adding a prayer specifically directed against the final decree. The question is one of form rather than of substance; for it is not open to doubt that if the preliminary decree fails the final decree must of necessity fail; and for my own part I would unhesitatingly have passed an order for the amendment of the plaint if I thought that there was anything in the point.

25. For, there is a more serious answer to the argument. It is well-established that a final decree under Order XXXIV, Rule 5 is only necessary where there is a preliminary decree in existence under Order XXXIV, Rule 4 of the Code. Now, in my opinion, the consent decree in this case is neither in form nor in substance a decree under Order XXXIV, Rule 4 of the Code: The consent decree of the 17th December, 1918, recites the following facts: (1) Rs. 6,94,044 1 6. was due to the Maharaja at the date of the institution of the suit, (2) adding interest at the bond rate of Rs. 6,94,044-1-6 the sum due to the Maharaja on the 17th December, 1918, that is to say, the date of the consent decree, came to Rs. 8,42,131-2-3. The Maharaja gave up a lac of rupees and obtained a decree for Rs. 7,42,131-2-3 with interest thereon at 6 per cent. per annum. The Maharaja gave a year to the defendants to pay up the amount and it was agreed that in default of such payment the mortgaged property should be sold. Now, it will be noticed that there is neither a direction as to accounts being taken between the parties nor a declaration as to what sum would be due to the Maharaja at the date fixed for payment. Now, in my opinion, an order as to an account between the parties as to what would be due to the mortgagee for principal and interest on the mortgage and for his costs of the suit (if any) on the date fixed for payment or a declaration as to the amount so due constitutes the essence of a preliminary decree under Order XXXIV, Rule 2 of the Code. In this case the Court declared the amount due to the Maharaja at the date of the consent decree. It did not take the accounts itself or direct an account to be taken to ascertain what would be the sum due to the Maharaja on the date fixed for payment. The decree in this case is a consent decree and it was the obvious intention of the parties that it should be put into execution on the failure of the mortgagors to satisfy the claim of the mortgagee within the time allowed without having to go through the formality of obtaining a final decree under Order XXXIV, Rule 5 of the Code. In my opinion the plaintiff was entitled to ignore the final decree (even if he was aware of it) and to ask the Court to relieve him from the effect of the consent decree of the 17th December, 1918. The question is one of utter technicality without any merit to support it and I must overrule the argument on this point.

26. I now come to the merits of the case between the parties; and I will first

consider the case common to all the plaintiffs, namely, the case of fraud of, and conspiracy between, the Maharaja and Kumar Kalikanand. The learned Subordinate Judge has considered the evidence bearing on this point with very great care and I entirely agree with his conclusion upon it. It is, in my opinion, idle to suggest that Kalikanand entered into a conspiracy with the Maharaja to defeat the interests of the minors. The interests of Kalikanand are identical with those of the plaintiffs and it is difficult to understand why he should have entered into a fraudulent conspiracy with the Maharaj to defeat his own interest. A suggestion has been put forward in this Court that there was a secret bargain between the Maharaja and Kalikanand and that Kalikanand was out to make a profit for himself at the cost of the minors. There is some amount of evidence that there were negotiations between the Maharaja and Kalikanand for the purchase of some of the properties belonging to the joint family so that the entire debt due by the family to various creditors could be wiped off. I am satisfied on the evidence that there was no concluded agreement between the Maharaj and Kalikanand on this point and that if the negotiations ripened into a contract it would have benefited the minors as much as it would Kumar Kalikanand. It is unnecessary to pursue the point, for I am satisfied that the decision of the learned Subordinate Judge on this point is right.

27. It was, however, contended that there was gross negligence on the part of the guardians ad litem and that the plaintiffs other than Ganganand are entitled to have the consent decree set aside on this ground. The argument is founded upon the alleged admissions of the guardians ad litem that they never applied their minds to the terms of settlement but that they left the whole matter to Kalikanand.

28. As already stated Amrita Lal Mazumdar was the guardian ad litem of the minor sons of Kalikanand and Khetrapado Bose was the guardian ad litem of the younger brother of Ganganand. It appears that Amrita Lal Mazumdar left Darbhanga for good to set up a practice as Pleader in Bhanga a Sub-Division of Faridpur in Bengal. It is unfortunate that he did not consider it consistent with his duty to apply to the Court for being discharged from further acting as the guardian ad litem of his wards. What he did, however, was to give a vakalatnama to Upendra Nath Chakraverty a Vakil practising in Darbhanga to appear for him in the mortgage suit and represent the interest of his wards. Upendra Babu has been examined in this case on behalf of the Maharaja. His evidence makes very distressing reading indeed. He insists that he "fully considered what terms were beneficial to the minors" but he admits that he "did not make any enquiry about the points in the original suit at the time the compromise petition was filed." He was confessedly not present at the conferences, which met to discuss the terms of settlement and he admits that he did not know of the terms on which the suit was to be settled until the draft terms of settlement were put into his hands. He says that the petition for permission to compromise the suit on behalf of his wards "was brought ready made" to him and his whole evidence makes it perfectly clear that he put his signature to the petition of compromise because he

was asked to do so, not because he applied his mind to the question whether the terms of settlement were for the benefit of his wards and came to the conclusion that they were. The other guardian ad litem Khetrapado Bose has been examined on behalf of the plaintiffs. He admits that he had nothing to do with the settlement of the terms of compromise, but that he left the whole matter to Kalikanand as "he was at the helm of the family affairs." He says that he understood that it was part of the settlement between the parties that the Maharaja of Darbhanga would purchase part of the estate belonging to the family to enable Kalikanand to clear off the debts due by the family to various creditors and that it is this consideration which moved him to apply to the Court for permission to compromise the case on behalf of the minor whom he represented. But it is remarkable that he did not take the precaution of stating this important matter in his petition of compromise, although, according to him it was one of the terms of the consent decree that the Maharaja would purchase some of the properties belonging to the joint family in order to enable Kumar Kalikanand to pay off all the debts binding on the family. It comes to this, therefore, that he applied for permission to the Court to compromise the case on behalf of his ward in the belief that by such compromise all the debts of the family would be wiped off, "so that the rest of the estate might be saved and the Srinagar Raj may start with a clean slate" but without satisfying himself that this important matter was entered in the petition of compromise. Now these are the facts established by the evidence of these two Vakils practising in the Darbhanga Court. That they acted with entire lack of responsibility is not open to doubt, but Mr. C.C. Das goes further and contends that on the facts established by him, he is entitled to have the entire proceedings re-opened with a view to show that the Maharaja is not entitled to a mortgage-decree against his clients. Mr. Das contends that there is a fixed and unyielding rule of law to the effect that a minor is entitled to obtain the avoidance of proceedings undertaken on his behalf if he satisfies the Court that his guardian consented to a decree against him without applying his mind to the question whether the terms of settlement were for his benefit or not. For myself, I have a strong objection to anything being put as high as an inflexible rule of law which has not the sanction of the Legislature behind it. I strongly disapprove of the conduct of the guardians ad litem in this case and I hope that there are not many cases where the guardians act with such lack of responsibility. But the rule for which Mr. Das contends is a rule of prudence, not a rule of law. It is the duty of a guardian for the suit to be at least as vigilant in guarding the interest of the minor as he would be expected to be if his own interests were involved, and the Court will ordinarily relieve the minor from the effect of a consent decree and give him an opportunity to defend the suit if it is established that the guardian did no more than put his signature to a petition of compromise without considering for himself the question of benefit to the minor. But as I have said the rule is one of prudence, not one of law. In this case it has been established that the whole matter was left to Kalikanand the karta of the family, that Kalikanand had no interests adverse to those of the minors, and that Kalikanand considered that the settlement was for the benefit of the joint family.

It is idle to suggest a case of conspiracy between the Maharaja and Kalikanand and it is ridiculous to suppose that Kalikanand was out to make a secret profit for himself at the cost of the minors. The Court considered that the settlement was for the benefit of the minors and Kalikanand whose interests were identical with those of the minors put his signature on the petition of compromise. In my opinion the plaintiffs other than Ganganand are not entitled to avoid the consent decree on any of the grounds argued on their behalf by Mr. C.C. Das.

29. I now come to the case of Ganganand which stands on a footing of its own. The learned Subordinate Judge has found that he was a minor at the date of, the consent decree, but that he is not entitled to any relief as there was a fraudulent misrepresentation on his part as to his age to the Maharaja which induced the Maharaja to enter into the settlement with him. The respondent does not accept the finding of the learned Subordinate Judge on the question as to the age of Ganganand, and the first question which I have to determine is--Was Ganganand a minor at the date of the consent decree? Now, in coming to the conclusion that Ganganand was a minor at the date of the consent decree, the learned Subordinate Judge has certainly relied on some evidence which was inadmissible as against the Maharaja. For instance, the learned Subordinate Judge has relied on various letters written by Kalikanand to Mr. Weatherall who was the Manager of the Srinagar Raj at one time containing statements as to the date of birth of Ganganand. But the statements of Kalikanand are inadmissible in evidence as he is alive and did not choose to come to the witness-box. The petition of Kalikanand dated the 1st of May, 1910, applying to be appointed the guardian of the person of Ganganand must also be rejected on the same ground. The order passed by the learned District Judge on the 9th July, 1910, appointing Kalikanand to be the guardian of the person of Ganganand and stating therein that Ganganand was born on the 24th September, 1898, must also be rejected as furnishing any proof of the age of Ganganand, but it is certainly evidence of the fact that an assertion was made so far back as the 9th July, 1910, that Ganganand was born on the 24th September, 1898.

30. But even rejecting these inadmissible documents there is still overwhelming evidence in support of the learned Subordinate Judge's finding that Ganganand was born on the 24th September, 1898. In the first place, the horoscope of Ganganand is very strong evidence in his favour. It was contended that the horoscope is not admissible evidence. Now the evidence is that it was prepared by Parmeshwari Dutt Misser who was the astrologer in the service of the Srinagar Raj for nearly 40 years. Parmeshwari Dutt Misser is now dead but his son Kanti Misser was called on behalf of the plaintiffs. He proved the handwriting of his father and actually produced the horoscopes as according to his evidence these horoscopes are kept with the astrologer. The statement in the horoscope is the statement of Parmeshwari Dutt Misser who is now dead and who had special means of knowledge as to the date of the birth of Ganganand. In my opinion these horoscopes are admissible and are valuable evidence in support of the case of the plaintiffs. I may say that there are two horoscopes a janam kundali

prepared as soon as Ganganand was born and a janam yatrika prepared afterwards.

31. Then there are various entries in the rokar bahi showing that Ganganand was born in 1898. In my opinion there is no reason to take the view that all these account books were fabricated by the plaintiffs.

32. The namkaran ceremony of Ganganand took place on the 24th October, 1898, that is to say, just a month after the date of his birth. There is ample evidence that the namkaran ceremony of Ganganand took place on that day. Exhibit 5(f) is a letter dated the 20th October, 1898, addressed by Kamalanand to Mr. Weatherall. The letter runs as follows:

My dear Mr. Weatherall,

Deorhi Srinagar.

Dated 20, 10, 1898.

Received Rs. 1,000. Harjiwan Ram arrived here safely. I have received (illeg.) last bill, as for your coming it will "be better for you to come on Sunday as there will be wrestling of Surja on that day. The bungalow rooms are not fit for living and it can't be ready. You will be comfortable in katchery bungalow which will be ready for you. The namkaran will take place on Monday. If you can send some tents for yourself it will be quite good as all the tents and choldarys are occupied which come here. Please let me know on what day you all will come. More when we meet.

I am Yours ever sincerely,

Kamalanand Singha.

33. This letter is admissible in evidence as Kamalanand is now dead. Now, it will be noticed that the letter does not state whose namkaran ceremony was to take place on Monday. Mr. Weatherall was examined in this case on behalf of the Maharaja and a perusal of his evidence has satisfied me that he tried to help the Maharaja as much as he could. His evidence in the examination-in-chief was to the effect that Ganganand was an adult at the date of the consent decree. The letter, Ex. 5 (f), was put in his hand and with reference to that letter he said as follows: "It refers to the namkaran ceremony of Ganganand to take place on certain Monday towards the end of October 1898." He added "I believe that namkaran takes place a month after the birth. In re-examination he went back on his statement but I have no doubt whatever that he is an unreliable witness and was trying to assist the Maharaja in every way he could. Exhibit 5 is a letter from Kamalanand Maniramji, dated the 30th October, 1898. The letter runs thus:

Srinagar,

The 30th October 1898.

Sri Yut Maniramji,

With your blessings the namkaran (name giving) ceremony of the boy was peacefully performed on the 24th October.

The boy has been named Sri Ganga Nand Singh; may he live long.

I received the articles sent by you through Babu Harjiwan Ram and Madho Ramji. These men too had come in time. Every thing is all right. I wish your welfare. Finis.

Yours

Kamalananda Singha.

34. On the 26th August, 1907, Ganganand entered the Monghyr Zillah School. Ex. 1(a) is the entry No. 79 in the register of the school. It gives the date of birth of Ganganand as the 25th September, 1898. The man who actually made the entry is dead, but the plaintiffs have examined Ganesh Jha who signed the entry in column 11. Now it has been contended that the date of birth given in the entry is admittedly wrong even on the case of Ganganand his case being that he was born on the 24th September, 1898. Ganesh Jha explained how the mistake was made. He says that he accompanied Ganganand when he went to obtain admission into the school. The Head Master asked him to produce the janam kundalis and made calculations with reference to those kundalis to find out the date of birth of Ganganand. In the janam kundalis, Hindi date of birth is given and a mistake was obviously made by the Head Master in putting down the date of birth as the 25th September, 1898. The important point about this entry is that so far back as the 26th August, 1907, it was stated to the Monghyr Zillah School that Ganganand was born on the 25th September, 1898. Ganganand was removed from Monghyr Zillah School to Purnea School on the 13th July, 1910. Exhibit 1 is the entry No. 70 in the admission register of the Purnea Zillah School and that entry also gives the date of birth of Ganganand as the 25th September, 1898. Nothing much turns upon Ex. 1 for it is obvious that it was taken from Ex 1(a) without further investigation. Then there is Ex. 14(a) which is the entry in the Calcutta Gazette of 1915 showing the age of Ganganand on the 1st of March, 1915 as 16 years 5 months when he passed the Entrance Examination of the Calcutta University. Then there are various other pieces of evidence in support of the conclusion of the learned Subordinate Judge. It is not necessary to deal with them in detail for I am satisfied that Ganganand has established conclusively that he was born on the 24th September, 1898. That being so he was undoubtedly a minor at the date of the consent decree inasmuch as the certificate of guardianship issued to Kalikanand had the effect of prolonging his minority by three years.

35. Now the important question arises whether Ganganand is entitled to any relief in this case. It is not open to doubt that a consent decree does not stand on a higher footing than a contract between the parties, and that the Court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties. The Indian Contract Act makes it

essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of this Act. It follows, therefore, that the contract between Ganganand and the Maharaja as contained in the petition of compromise is entirely void and cannot be given effect to in a Court of Law.

36. This is not disputed by Mr. Sultan Ahmad but he contends that in this matter Ganganand was guilty of a fraudulent misrepresentation to the Court as a result of which the Maharaja entered into the compromise decree with him and he contends that the principle invariably acted upon by the Courts of Equity is that an infant shall not take advantage of his own wrong. But what is Ganganand taking advantage of? Ganganand is merely asking to be put in the position which he occupied before the consent decree was passed so that he may be in a position to contend that the Maharaja is not entitled to a mortgage-decree against him. It is not a case where Ganganand obtained property by means of fraudulent misrepresentation as to his age compelling a Court of Equity to interfere to prevent the fraud of the infant from working injustice. As I understand the position, no injustice has been done to the Maharaja. He instituted a suit to enforce his mortgage. It is true he has obtained a consent decree by which he has given up a lac of rupees and the costs of his suit but if Ganganand succeeds in this suit, the Maharaja's suit will be restored and if his claim be well-founded he will be entitled to a full decree against all the defendants. The legal doctrine that an infant cannot make a contract was carried to the extent that he was not bound at law even if he induced the other party to enter into the contract by a fraudulent representation that he was of age. In equity, however, the view has always been taken that if an infant be old enough to commit a fraud by inducing others to think that he is of age, he cannot take advantage of it, and, if the Court cannot restore the parties to their original footing, the infant will be bound as if he were an adult. But in this case the lac of rupees which the Maharaja has given up has not gone to the pocket of any defendants to the mortgage suit, and the Court is in a position to restore the parties to their original footing in all respects. In my opinion this is not a case like those upon which Mr. Sultan Ahmad relied where an infant obtained an advantage by falsely stating himself to be of full age and equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud. Whether the cases upon which Mr. Sultan Ahmad relied have any application since the decision of the Court of Appeal in *Leslie Ltd. v. Shiell* (1914) 3 K.B. 607 : 83 L.J.K.B. 1145 : 111 L.T. 106 : 58 S.J. 453 : 30 T.L.R. 460 approved as it was by the Privy Council in *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* 39 Ind. Cas. 401; (1916) 2 A.C. 575 : 21 C.W.N. 257 : (1917) M.W.N. 162 : 19 Bom. L.R. 157 : 86 L.J.P.C. 15 : 115 L.T. 564 : 32 T.L.R. 678 : 43 I.A. 256 (P.C.) it is not necessary for me to discuss for I am satisfied that this is not a case which would attract the operation of the equitable principles upon which Mr. Sultan Ahmad relied.

37. For, in my opinion, there is no evidence of any fraudulent misrepresentation in this case. Now, in the first place there is no plea of fraudulent misrepresentation in the written statement filed on behalf of the Maharaja. In the second place, the representation must in order to create the liability be an express representation and will not be constituted by mere inferences suggested by, or drawn from, the infant's conduct. It is a question of some difficulty to determine what constitutes a fraudulent misrepresentation by an infant; but it is well-established that allowing another person to deal with him as if he were an adult or doing acts which only an adult can properly do is not sufficient:

38. *Stikeman v. Dawson* (1847) 1 De G. & Sm. 90 : 4 ind. Cas. 585 : 16 L.J. Ch. 205 : 11 Jur. 214 : 63 E.R. 984 : 75 R.R. 47 and *Ex parte Jones*; *In re Jones* (1881) 18 Ch. D. 109 : 29 W.R. 747. It is not pretended that, in this case, there was any declaration by Ganganand that he was of age; but it is said that there were various acts by Ganganand which lead to the inference that he held himself out to the Maharaja as an adult and thereby induced him to enter into the compromise with Ganganand, and it is contended that those acts by themselves bring Ganganand within the ambit of the rule of equity upon which Mr. Sultan Ahmad relied.

39. Now, what are these acts? It will be remembered that the learned Subordinate Judge in seisin of the mortgage suit passed an order on the 11th December, 1916, directing that Ganganand should defend the suit as an adult. A week later he directed that Ganganand should be served with summons.

40. It is alleged that Ganganand was served with summons on the 4th July, 1917. The first act relied upon is that, notwithstanding the fact that he was served with summons, he not only did not at once indicate to the Court that he was a minor, but actually gave a vakalatnama on the 7th July, 1917, authorizing Harnandan Das and Kaliprasad Jha to appear in the suit on his behalf. The other acts relied upon are as follows: On the 24th July, 1917, Ganganand is alleged to have filed a written statement in the mortgage suit on the footing that he was an adult, and on the 14th December, 1918, he is alleged to have executed a special vakalatnama in favour of Ramanandan Misser and Kaliprasad Jha authorizing them to sign the petition of compromise on his behalf. The defendant Maharaja contends that each and every one of these acts constituted a representation on the part of Ganganand that he was of age and that, as he must have known that he had not attained his majority, such representations must be considered to be fraudulent misrepresentations within the meaning of the cases upon which Mr. Sultan Ahmad relied. Ganganand disputes the fact that he was ever served with summons and denies that he executed either of the vakalatnamas or signed the written statement alleged to have been filed on his behalf. The learned Subordinate Judge considered the matter and found in favour of the Maharaja. On the question whether Ganganand was served with summons, I have no doubt that the conclusion at which the learned Subordinate Judge arrived is right. On the question whether he executed the vakalatnama and signed the written

statement, I have some doubt whether the finding of the learned Subordinate Judge is correct; but on a prolonged consideration of the matter, I have come to the conclusion that I ought not to differ from the learned Subordinate Judge on a question of this nature. But all these acts, taken individually and collectively, did not amount to a representation that he was of age. There was certainly no express representation in any of them. But it was argued that if a person, who is a minor, simply executes a vakalatnama and files a written statement, without making any express representation that he is of age, that of itself amounts to a fraudulent representation that he is of age. The answer is in the words of Jessel, M.R. "you must not invent fraud in that way" [Ex parte Jones, In re Jones (1881) 18 Ch. D. 109 : 29 W.R. 747].

41. In that case, the infant had himself filed a liquidation petition which he could only do if he was of age. The liquidation proceedings had dropped, and a bankruptcy petition was afterwards presented by a creditor founded on the act of bankruptcy committed by the filing of the liquidation petition. Now the filing of the written statement stands exactly on the same footing as the filing of the liquidation petition. With reference to the argument then advanced, Lush, L.J., said as follows: "How the filing of the liquidation petition could in any way alter the infant's status of infancy I am utterly unable to conceive, and, in my opinion, he might have raised the objection of infancy at any stage of the proceedings. The filing of the petition had no effect on his status. An infant cannot by any false pleading, or by any mistake in pleading, alter his status; his immunity remains notwithstanding." If his immunity remains notwithstanding he has filed a pleading in the case which he could only do if he was of age, is that immunity at an end because, apart from filing the written statement, he executed two vakalatnamas by which he authorized certain Pleaders to appear for him and represent his interest? I think not, and I must respectfully adopt the view of Lush, L.J., that "according to the decisions the representation must, in order to create the liability, be an express representation" [Ex parte Jones, In re Jones (1881) 18 Ch. D. 109 : 29 W.R. 747].

42. But in truth the difficulty of the Maharaja does not end here. Assuming that there was a misrepresentation by Ganganand as to his age, the question still remains,--was there a fraudulent misrepresentation by him? Now it is not open to doubt that there may be a false representation which is not fraudulent; for untruth does not of itself import a dishonest mind. In *Derry v. Peek* (1889) 14 A.C. 337 at p. 374 : 58 L.J. Ch. 864 : 61 L.T. 265 : 38 W.R. 33 : 1 Meg. 292 : 54 J.P. 148 Lord Herschell, after reviewing the authorities on the question deduced the following results: "Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false". Lord Herschell proceeded to say as follows: "Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an

honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief". It will appear then that proof of this absence of the actual and honest belief is necessary, but, on the other hand, is sufficient, to satisfy the requirements of the law.

43. The question then is, has the Maharaja established that there was an absence of the honest belief in the truth of the representation which I am assuming Ganganand made that he was of age when he executed the vakalatnamas in question and signed the written statement in the mortgage suit?

44. Now it must be remembered that at the date when these documents were executed by him, Ganganand was of age according to his personal law. This is the point which must be kept in view in considering whether he had an honest belief in the truth of the representation which he is alleged to have made. He was a minor at the date of these documents only because the order of the District Judge appointing Kalikanand as the guardian of his person had the effect of prolonging his minority by three years. It is obvious that the parties overlooked the fact of the appointment of Kalikanand as the guardian of Ganganand. There are two findings of the learned Subordinate Judge on this point which are inconsistent with each other. His conclusion as to fraudulent misrepresentation is based on the view that Ganganand did not come forward to say that he was still a minor, but that on the other hand he "accepted the summons issued at the instance of defendant No. 1 treating him as a major, put in his defence subsequently as a major and the Pleader appointed by him signed the petition of compromise knowing him to be a major". The learned Subordinate Judge then says: "The filing of the application of the 11th December, 1916, which led to the removal of the guardian and the representation of Kumar Ganganand as a major was a deliberate act for which the plaintiffs and defendant No. 2 are responsible and not the defendant No. 1" It is difficult to see how Ganganand was responsible for the application of the 11th December, 1916, which was filed by his mother Rani Satyarama. It may be mentioned that throughout this period Ganganand was a student in Calcutta and used to come to Srinagar only during vacation. How Ganganand could be responsible for the application of the 11th December, 1916, it is difficult to understand. But the view of the learned Subordinate Judge is that "the filing of the application of the 11th December, 1916, was a deliberate plan to thwart the Maharaja's efforts in enjoying the fruits of his decree in future and a plan in which Kumar Kalikanand, Kumar Ganganand and his mother all make a common cause". This is the finding at page 211 of Part I of the paper-book. At page 215, however, the learned Subordinate Judge took an entirely different view of the application of the 11th December, 1916. He says as follows: "It is clear now that even the petition, Ex. B-10, is above all suspicion". Exhibit B 10 is the petition of Rani Satyarama dated the 14th November presented before the learned Subordinate Judge on the 11th December, 1916. The learned Subordinate Judge goes on to say as follows: "The petitions were filed by Rani Satyarama because in her opinion Ganganand Singh

having completed 18 years of age, had become a major and it was no more necessary for her to represent him. And in fact the date stated by her was the date on which Kumar Ganganand would have attained majority if Kumar Kalikanand had not been appointed his guardian by the District Judge of Purnea under the Guardians and Wards Act of 1890. The petition under consideration might, therefore, be a bona fide and honest expression of the Rani's opinion". I think the opinion of the learned Subordinate Judge recorded at page 215 of the paper-book is correct. When once it is realized that Ganganand was of age according to his personal law, but was a minor only by the application of the Indian Majority Act to him, it becomes impossible to say that he had no actual and honest belief in the truth of the representation which he is alleged to have made by signing the documents in question. I am of opinion that fraud has not been established and the plaintiff Ganganand is entitled to a declaration that the consent decree obtained against him is a nullity and that the defendant should be restrained by an injunction of the Court from executing the consent decree against him.

45. It only remains to consider the plea of estoppel. I have very grave doubt whether Section 115 of the Evidence Act applies to infants; In *Dhurmo Das Ghose v. Brahma Dutt* 25 C. 616 : 2 C.W.N. 330 : 13 Ind. Dec. 405 Mr. Justice Jenkins (as he then was) examined all the cases bearing on the point and came to the conclusion that in order to support the plea of estoppel in the case of infants, fraud operating to deceive must be found as a fact. The case went up to Privy Council and although the Privy Council decided the case on the ground; that the section did not apply in the particular case before them, as the statement relied upon was made to a person who knew the real facts and was not misled by the untrue statements there is nothing in the judgment of their Lordships to indicate that they did not agree with the view expressed by Mr. Justice Jenkins. The rule of estoppel is a rule of evidence and it must be taken subject to the Indian Contract Act. Even if I am wrong in this view there is, in my opinion, no case of estoppel to be tried. I can find no evidence of the fact that Ganganand intentionally caused or permitted the Maharaja to believe a thing to be true which was in fact untrue. There is no declaration that he was an adult when in fact he was a minor and there was no unequivocal act on his part to that effect. I must overrule the plea of the defendant on this point.

46. The result is that I must allow the appeal of Ganganand, set aside the decree passed by the Court below and give Ganganand a decree declaring that the compromise decree passed by the learned Subordinate Judge in Suit No. 172 of 1916 is void as against him. I must also issue a permanent injunction restraining defendant No. 1 from executing the decree against the interest of Ganganand in any of the properties. It is obvious that the entire consent decree must go as Ganganand has no interest in it capable of being separated from the interests of the other members of the family. The learned Subordinate Judge will now restore the suit and proceed with it in accordance with law. As the mortgage suit was instituted so far back as the 28th April, 1916, it is obvious that there must be no

further delay in trying the suit. We think that the learned Subordinate Judge should not give the parties more than two months" time to be ready with their evidence and he should then proceed with the hearing of the suit. In the circumstances I make no order for costs either in this Court or in the Court below.

Adami, J.

47. I agree.