

(1947) 05 PAT CK 0005

In the Patna High Court

Rai Kumar Singh and Another

APPELLANT

Vs

Abhai Kumar Singh and Others

RESPONDENT

Date of Decision : 08-05-1947

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Transfer of Property Act, 1882 — Section 43, 6(a)

Citation : AIR 1948 Patna 362

Hon'ble Judges : Mukharji, J; Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.—These two appeals and the connected civil revision which has been filed ex acutely in case it is held that the appeal is not maintainable have been heard together at great length and arise out of an order passed in execution proceedings. The question for decision is difficult and interesting and has kept learned Counsel on both sides engaged in strenuous, able and exhaustive arguments for four days before us. The question in the main is the applicability of Section 6(a), T.P. Act, to a term in a compromise decree.

2. Fortunately, the facts are not in dispute at all. Rai Bahadur Sukhraj Bay by his marriage with Kiran Kumari Devi had two sons, Abhai Kumar and Jai Kumar. Rai Kumar is his son from a predeceased wife. This well-known family of Bbagalpur was possessed of considerable moveable and immovable property and had large money-lending transaction. In the year 1926, Rai Kumar Singh and his minor son Sujas Kumar Singh filed a partition suit in the Court of the Subordinate Judge at Bbagalpur. The defendants were Rai Bahadur Sukhraj Ray, the father, and Abhai Kumar and Jai Kumar, the brothers, and Kiran Kumari Devi, the step-mother of the plaintiff. Mt. Genda Kumari, the mother of Rai Bahadur Sukhraj Ray, was also made defendant 5 in the action.

3. The plaintiffs in the plaint alleged that by reason of a special custom prevailing in this family, the females were excluded from inheritance or participation in any share in the event of a partition of the joint family property, but were only

entitled to maintenance. On this allegation the share of the plaintiffs was claimed to be one-fourth. On behalf of the defendants and specially on behalf of Kiran Kumari Devi and Mt. Genda Kumari the existence and validity of the alleged custom was stoutly denied. They also raised disputes as to the extent of the jewellery which could be treated as joint family property. Various other disputes and differences arose between the parties, but they were all settled by a compromise petition filed in the Court on 4-8-1927. By that compromise inter alia the share of the plaintiffs which was claimed by them to be one-fourth in the plaint, but which might have been reduced considerably after prolonged investigation, was agreed to be $\frac{3}{4}$ th for the reason given that Mt. Genda Kumari was relinquishing her share in lieu of maintenance and the plaintiffs were relinquishing their share in the properties which would be open to inheritance after the death of defendant 4, the step-mother. Elaborate provisions were made in the compromise petition by which the parties purported to settle the various disputes that could conceivably arise in connection with the partition of such a big joint family estate. It was provided also in para. 9 that if any dispute arose in carrying out the terms of the compromise or if any term or dispute was left out by oversight and not taken into consideration by the compromise petition, it would be brought to the notice of Babu Ranjit Singh and Babu Dharindra Sen (who effected the settlement between the parties) and each party will be bound to act according to the advice given by them in respect of any matter of difference and in case there was any difference between the said two gentlemen in their respective advices, the parties will be bound by the decision of this Court at the time of drawing the final decree in the suit. In accordance with this compromise petition, a preliminary decree for partition was passed. Order No. 202 of 4-9-1930 (Ex. 6 (c) p. 22) shows that after this compromise a dispute arose between the parties as to the share which the plaintiffs had been given in the jewellery of the joint family the defendants alleging that the plaintiffs were not entitled to $\frac{3}{4}$ th share in the jewellery but only one-fifth share. The learned Subordinate Judge decided that out of the jewellery, after handing over jewellery worth Rs. 6000 to defendant 4, the balance was agreed to be, treated as joint family property and so the plaintiffs were entitled to $\frac{3}{4}$ th share in the jewellery. Various other disputes had apparently cropped up then between the parties but ultimately the Court was asked to prepare the final decree in accordance with another compromise petition which was filed on 18-9-1980. This compromise petition is at p. 29. In para. 2 reference is made to the compromise petition of 4-8-1927 by which the plaintiffs were allotted $\frac{3}{4}$ th share in all the moveable and immovable properties and to the preliminary decree passed on 8-8-1927 embodying the terms of that compromise. In para. 3 it is stated that subsequent to the passing of the preliminary decree many disputes relating to the parties and connected matters arose, but they have been finally determined either by an order of the Court or by mutual agreement amongst themselves which the parties were now accepting as final. Paragraph 4 is important and has been the subject of elaborate arguments before us and must be quoted in full:

That as regards the share of the parties by private agreement and compromise the plaintiffs have been allotted $\frac{7}{13}$ th share in all the joint family properties subject to the exceptions, mentioned in the various paragraphs of the preliminary decree referred to above and defendants 1, 2 and 3 have each been allotted $\frac{1}{15}$ th share and defendant 4 has been allotted $\frac{1}{16}$ th share and defendant 5 has relinquished her share and it has been finally agreed that on the demise of defendants 1, 2, 3 and 4 the plaintiffs or their heirs shall have no claim whatever to the shares allotted to the said defendants and likewise defendants 1 to 4 or their heirs shall have no claim whatsoever to the share allotted to the plaintiffs on their demise.

By paragraph 5 it was agreed that defendant 5 would be given a monthly allowance of Rs. 250 for her life and this sum was payable by the plaintiffs and defendants 1 to 4 in proportion to their respective shares the share of the allowance payable by the plaintiffs was made a charge on village Sharfuddinpur and similarly the share of the allowance payable by defendants 1 to 4 was made a charge on village Jotram Rai.

4. The joint family had made a number of investments which were divided in the manner set out in the compromise petition, but reference in particular must be made to a certain money-lending transaction with the father of Mahashay Amarnath Ghosh. In para. 12 of the compromise petition it is stated that plaintiff 1 on behalf of the plaintiffs having exercised his right of selection regarding the investments has taken charge of the documents of securities and other papers connected therewith a list of which is attached as per schedule II etc. and the other investments not mentioned in Schedule II of this petition have been assigned to defendants 1 to 4 exclusively and they shall be entitled to realise the interest and the principal thereof. Item 6 in Schedule II which was thus selected by the plaintiffs was a sum of Rs. 2, 33, 865-9-0 due from Mahashay Taraknath Ghosh. The amounts due from the various debtors in this schedule were calculated including interest up to 8-7-1927. A few lines after it is stated:

Item 6 was selected by the plaintiffs originally but afterwards defendant 1 chose to keep the Rokka executed by Mahashay Taraknath Ghosh himself and in lieu of this, defendant 1 paid Rs. 2,56,890 to plaintiffs on 28-8-1928 including interest.

It is, therefore, clear that the plaintiffs' share of the amount due from Mahashay Tarak Nath Ghosh was realized by the plaintiffs immediately on the date of the compromise petition.

5. In accordance with the final adjustment between the parties the compromise was recorded by the Court and the final decree drawn up on the terms of this compromise petition was pronounced on 17-9-1930. Some amendment was made to this compromise decree by an order dated 11-7-1931, but this is not relevant to the present enquiry.

6. The mortgage bond executed by Mahashay Ghosh was thus allotted to the share of Rai Bahadur Sukhraj Eay and his two younger sons, defendants 2 and 3,

and to his wife, Kiran Kumari. These persons along with Nava Kumar minor son of Abhai Kumar, instituted a suit against Mahashay Amarnath Ghosh to enforce the mortgage and obtained final decree on 24-10-1944, for about Rs. 30,00,000 carrying future interest at six per cent, per annum till realization. This decree was put into execution on 21-11-1944 and during the pendency of the execution proceedings Rai Bahadur Sukhraj Rai died on 25-11-1945.

7. On 21-12-1945, a petition was filed on behalf of the two sons, the widow and the grandson of Rai Bahadur Sukhraj Rai and also by five more persons alleging to be the minor sons of Abhai Kumar and Jai Kumar praying that the name of the deceased Rai Bahadur be struck off and in his place the two sons and his widow who were already on the record should remain as decree-holders and the names of the remaining petitioners should also be added as decree-holders. It was alleged that the deceased at the time of his death represented the interest of all the petitioners as karta of the joint family and it was further alleged that he had left a will in favour of his two sons dated 24-11-1945, for which steps will be taken in probate Court for grant of letters of administration.

8. On the same day Rai Kumar Singh, the eldest son of the deceased who was plaintiff 1 in the partition suit filed a petition in which he prayed that the name of the deceased should be removed and the name of the petitioner should be added as one of the decree-holders on the allegation that the deceased Rai Bahadur died separate from his sons and grandsons as a result of the partition decrees of 1927 and 1930.

9. On 12-1-1946, the judgment-debtor also filed a petition supporting Rai Kumar Singh and raised objections regarding the addition of petitioners 5 to 9 namely the other grandsons of the deceased, but these objections were not pressed by the judgment-debtor at the time of hearing.

10. The two sons of the deceased decree-holder who were themselves co-decree-holders seriously objected to this addition of the eldest son and raised three substantial objections : (i) that the petitioner Rai Kumar Singh alone separated as the result of the partition decree, but the other members including the deceased Rai Bahadur remained joint as members of a joint Mitakshara family and, therefore, these survivors alone were now entitled to execute the mortgage decree ; (ii) that even if it is held that there was a disruption of the entire joint family of the deceased and his sons by the partition decree, Rai Kumar Singh could not claim any share in the mortgage decree as the heir of the father because Rai Kumar Singh had relinquished the same by the clear agreement embodied in para. 4 of the final compromise-decree of 1930 and that so long as that decree stood unreversed, it could not be disregarded on the ground that the agreement amounted to an encroachment on any provision of law like Section 6(a), T.P. Act; (iii) that Rai Kumar was estopped from claiming the property by the doctrine embodied in Section 43, T.P. Act.

11. On 21-1-1946, Rai Kumar filed another petition to the effect that his original

application dated 2-1-1946, that he should be added as co-decree holder should be treated as a petition u/s 47, Civil P.C. read with Order 21, Rule 16, Civil P.C.

12. The learned Subordinate Judge by Order No. 58 dated 21-1-1946 decided; overruling the objection of the decree-holders, that the petition of Rai Kumar should be treated as a petition u/s 47 read with Order 21, Rule 16, Civil P.C.

13. The main evidence adduced by the parties before the Subordinate Judge was the pleadings, the two compromise decrees and the order-sheet in the partition suit the plaintiff in the mortgage suit against Amar Nath Ghosh and certain other plaintiffs and an affidavit--the certified copies of the entries in Register D regarding the village of this joint family were also filed to show that the parties had separated as a result of the partition decree. The judgment of the learned Subordinate Judge shows that some oral evidence was also given, but that has not been printed in the paper-book before us, nor has our attention been drawn to it. It was also urged by the objectors before the learned Subordinate Judge that the compromise decree was in the nature of a family arrangement or family settlement.

14. After hearing elaborate arguments, the learned Subordinate Judge pronounced a careful and well considered judgment on 8-2-1946. He came to the conclusion that he was satisfied that there was a complete disruption of the joint family as a result of the partition decree and that thereafter the parties continued separate not only between the plaintiffs and the defendants but also between the defendants inter se--this finding has not been challenged before us on behalf of the respondents. He accepted the contention of the decree-holders that Rai Kumar was bound by the terms of para. 4 of the compromise petition as it was embodied in the compromise decree which had not been set aside and was still in full force, but he expressed the view that the agreement as embodied in the final decree had not the characteristic of a family arrangement, and that were it not for the compromise decree, which had not been set aside, he would have held that the agreement was void in view of the provisions of Section 6(a), T.P. Act.

15. He also overruled the contention of the defendants that the plaintiffs were estopped from claiming their rights to their share in the inheritance of their deceased father. In the result he dismissed the application of the plaintiffs to be joined as co-decree-holders.

16. Against this order miscellaneous appeal No. 84 of 1946 has been filed by Rai Kumar Singh. Misc. Appeal No. 117 of 1946 has been filed by the judgment-debtor and in case it is held that the appeal of Rai Kumar Singh is not maintainable he has also filed C.E. No. 173 of 1946.

17. When these appeal and the civil revision were called on for hearing, learned Counsel for the decree-holders raised a preliminary objection that the appeal of Rai Kumar was not maintainable as the question in dispute between him and the decree-holders was not a question which related to the execution, discharge or

satisfaction of the mortgage decree as between the parties to the suit. In our opinion, this objection is without any substance for two reasons, firstly because we are bound to decide the question in Misc. Appeal No. 117 of 1946 between the judgment debtor and the decree-holders, and secondly because the decision of the question affects the judgment-debtor and, "therefore, the question falls within Section 47, Civil P.C. The matter is covered by authority: see Hari Kishen Rathi Vs. Gopeswar Deghuria and Others, . Accordingly the preliminary objection is overruled.

18. Mr. P.R. Das on behalf of the appellant Rai Kumar argued (1) that the compromise decree does not require to be set aside and it must be treated as no more than an agreement between the parties even though the command of the Judge who directed the compromise to be recorded was super-added to it. He relied upon several well-known English cases in support of the view that the agreement even if embodied in a compromise decree attracted to it all its incidents and infirmities and, therefore, it was open to him to show that the agreement was void both under the Transfer of Property Act and u/s 23, Contract Act; (2) that the agreement was not a family arrangement, and that even if it was assumed to be a family arrangement it was still void as it offended the provisions of Section 6(a), T.P. Act, and Section 23, Contract Act.

19. Mr. Baldeva Sahay appearing on behalf of judgment-debtor in support of his appeal argued, while adopting the arguments of Mr. P.R. Das, in addition that under the provisions of Order 21, Rule 16, Civil P.C., the legal representatives of the deceased Rai Bahadur were his three sons under the Hindu law and, therefore, all of them should be held entitled to execute the decree as co-decree holders. He also argued that the agreement and the decree should have been registered under the provisions of Section 17, Registration Act, and this not having been done, the argument could not be enforced.

20. Mr. P.L. Banerji, who appeared on behalf of some of the respondents, submitted that the compromise decree should not be treated as void and unless it was vacated or set aside by a regular suit, the agreement contained in para 4 of the compromise decree remained binding on the parties. He also urged that the compromise decree should have been treated by the Subordinate Judge as embodying a genuine and bona fide family arrangement or family settlement and, therefore, was not hit by any of the provisions of the Transfer of Property Act or the Contract Act.

21. Dr. D.N. Mitter in support of the case of the other decree-holders adopted Mr. Banerji's argument and elaborated it by drawing attention to various authorities of their Lordships of the Judicial Committee.

22. It will be seen that the two substantial points that emerge for our decision are whether the compromise decree can be treated as binding between the parties in these proceedings, and whether the impugned agreement embodied in the compromise decree must be held to be void. It is convenient to take up the

second point for decision first. It is now well-settled on the authorities and this is not and could not be denied before us--that a transfer or an agreement to transfer by an expectant heir of his chance of succeeding to an estate--a spes successionis--is void u/s 6(a), T.P. Act. See amongst others the case in Anana Mohan Roy v. Gour Mohan Mallick AIR 1923 P.C. 189 where their Lordships approved of the view expressed by Wallace C.J. and Tyabji J., in Lakshmi Narayana Jagananda Raju v. Varaha Lakshmi Narasimha AIR 1916 Mad. 579, in which it was held that the Transfer of Property Act did not permit a person having expectations of succeeding to an estate as an heir to transfer the expectant benefits, and the oft-cited case in Amrit Narayan v. Gaya Singh AIR 1917 P.C. 95 where it was held that the next reversioner to an estate held under the Hindu law by a female for her life had no interest in present in the property; until it vested in him he had no interest which he could assign or relinquish or even transmit to his heirs," and that the guardian of a minor reversioner could not bind him by purporting on his behalf to enter into a compromise by which the female holder relinquished the estate to other relatives; nor was the minor bound by an award or decree made in pursuance thereof, and the case in Shamshuddin Goolam Husain v. Abdul (1907) 31 Bom. 165 approved by their Lordships in the equally oft-cited case in Kanhai Lal v. Brijlal AIR 1918 P.C. 70.

23. But the critical question for determination is whether the agreement embodied in the compromise decree can be regarded as a family arrangement or the settlement of a family dispute.

24. Mr. P.R. Das objected that the presentation of this aspect of the case was not open to the respondents inasmuch as it was never pleaded in any of the petitions filed on behalf of the decree-holders that the agreement in question should be treated as a family arrangement or a family settlement. I am not disposed to agree with this contention because the learned Subordinate Judge has elaborately discussed the question on hearing arguments and his judgment does not state that any such objection on behalf of the appellants was raised before him. Dr. D.N. Mitter who appearing on behalf of the respondent also appeared in the Court below, and he assures us that no objection whatsoever was raised on behalf of the appellants in the Court below. Mr. L.K. Jha who appears on behalf of the appellants here and who appeared in the Court below, was not in a position to challenge this statement. Moreover all the evidence that the parties desired to adduce was adduced (we were not informed that further evidence could be given) and the question could be and has been determined upon the pleadings and the compromise decrees and the various orders passed by the Subordinate Judge in partition suit and the admitted facts. I, therefore, overrule the preliminary objection.

25. Mr. P.R. Das then submitted that in order that an agreement between the members of the family could be treated as a family settlement, it must be shown that there was a dispute as to title between the parties and that the agreement was by way of accepting the antecedent title of the parties to the properties; and

relied in support of his argument on a number of cases and in particular on *Lalla Oudh Behari Lal v. Rane Mewar Koonwer* (68) 3 Agra H.C.E. 82, *Rani Mewar Kuwar v. Rani Hulas Kuer* (74) 1 I.A. 157, *Khunni Lal v. Govind Krishna Narain* (11) 38 I.A. 87, *Mt. Hiran Bibi v. Mt. Sohan Bibi* AIR 1914 P.C. 44 and *Mt. Diltor Koer v. Harku Singh* AIR 1917 Pat. 538.

26. I do not agree with Mr. P.R. Das that the family settlement or family arrangement must be preceded by a family dispute of title. The leading English case on the point is *Williams v. Williams* (1867) 2 Ch. 294, in which it was held that, a family arrangement may be upheld by the Court although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the Court will not consider the quantum of the consideration. *Turner L.J.* dealt with a similar argument advanced by Mr. P.R. Das, at p. 304 in these words:

It was strongly argued for the appellant that this case does not fall within the range of those authorities: that those oases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not, and could not be, any doubtful or disputed right but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much farther than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates, upon an arrangement between the father and the eldest son on his attaining twentyone, may well be considered as a branch of these oases, and certainly this Court does not in such cases inquire into the quantum of consideration.

This view has been adopted consistently in a large number of cases in the Indian High Courts and it is only necessary to refer to the judgment of that distinguished Judge, Sir Ashutosh Mukherji, in *Helan Dasi v. Durga Das* (06) 4 C.L.J. 323. See also the case in *Pokhar Singh Vs. Mt. Dulari Kunwar*, where after referring to the quotation from Lord Halsbury in his *Laws of England*, Vol. 14, 540, it was observed that the avoidance of a family dispute and not the existence of a family dispute is a ground which validates a family arrangement.

27. The case in *Mt. Diltor Koer v. Harku Singh* AIR 1917 Pat. 538, relied on by Mr. Das itself illustrates that an arrangement between the members of a family will be treated as a family settlement even though there is no dispute as to antecedent title. In that case *Khatan Kcer* with the consent of her two daughters then living had made over a third of the property to her daughter's son *Shivnandan* and this was held to be a family arrangement although "there was no claim to any antecedent title between *Khatan Koer* and her daughters or daughter's son--unlike the dispute that was settled earlier between *Khatan Koer* and *Poona Koer*. Nor do the other oases relied on by Mr. Das support his contention. In the leading case in *Khunni Lal v. Govind Krishna Narain* (11) 38 I.A. 87, which was followed in *Mt. Hiran Bibi v. Mt. Sohan Bibi* AIR 1914 P.C. 44,

the family settlement in question was held to be not an alienation by a limited owner but a settlement between several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively, and it was expressly pointed out that this arrangement did not confer any new distinct title on the parties. In this case there was actually a family dispute. But these cases do not lay down that it is essential that there should be a family dispute as to the title .before a settlement can be regarded as a family arrangement.

28. But it is unnecessary to pursue the matter in the present case as here there was a genuine dispute started by the son who actually instituted a partition suit against his father and step-brothers. In that suit he disputed that any share could be given to the stepmother and the grand-mother, and it was in bona fide settlement of this and other disputes that eropped up between the members of the family that the agreement in question was entered into. I must, therefore, hold that this was a family settlement in which the plaintiffs took a larger share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other party defendants. It can also be treated as a compromise of a doubtful claim set up by the plaintiffs with regard to their share in the properties which would have gone to the step-mother and the grand-mother.

29. For these reasons, I am of opinion that the learned Subordinate Judge was wrong in coming to the conclusion that the agreement in question was not in the nature of a family arrangement or a family settlement. This arrangement was undoubtedly for consideration, and even if it was open to us to scan the quantum of the consideration--which the Courts do not ordinarily do in family arrangement--I would be prepared to hold that the agreement 1 was for good consideration, it stifled a ruinous litigation, preserved the honour and peace amongst this well-known family of Bhagalpur, and gave to each of the parties benefit in prasenti also.

30. Mr. P.R. Das then contended that even if it was held that the agreement was a family settlement, the family settlement has offended the rule of law and, therefore, Section 6(a), T.P. Act, comes into play to render the agreement void; Mr. P.H. Banerji on the other hand contended that the agreement in question does not offend the rule of Section 6(a), T.P. Act, as the impugned agreement is attached to the very property which is being allocated to the parties and that the agreement does not deal with any other property which was not then the subject of partition.

31. It is elementary that a family arrangement cannot be upheld if it offends any rule of law. It is enough to refer to the recent Privy Council case in AIR 1938 181 (Privy Council) , where Sir Shadi Lall considered a similar argument in these words at page 217:

It is argued, however, that the transaction should be upheld because it was a family settlement. Their Lordships cannot assent to the proposition that a party can, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract. It is true that if a compromise has been entered into in good faith by the manager of a joint Hindu family, or" by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family, and that he was, therefore, a party to the compromise. This rule does not offend against any law governing a contract.

32. It will be also observed from the facts at page 217 that in that case Gujar Singh, who adopted the role of the guardian of the minor Basant Kuar, was found to be neither appointed her guardian by any Court, nor could he claim that status under the law applicable to her.

33. Has the family arrangement then offend-ed any rule of law? A large number of cases bearing on the point have been cited before us, but I do not wish to examine all these as the question before us can be satisfactorily decided by relying on two cases of our own High Court. I would also notice some important cases of other High Courts that appear to be in point.

34. I have already referred to the case in *Mt. Diltor Koer v. Harku Singh* AIR 1917 Pat. 538, where the learned Chief Justice upheld the family arrangement by which the daughters of Khatan Kuer on obtaining possession in 1891 were found entitled to make any agreement with each other that they pleased regarding the property in their possession; the arrangement was that each of the daughters and Shivanandan would be the malik of his or her share for their lives.

35. *Jagdam Sahay v. Rup Narain Mahton* AIR 1924 Pat. 736, contains an exhaustive discussion of the Indian and English cases that are usually cited in this connection--including the cases cited before us. It was held at page 398 following the ease in *Mahomed Hashmat Ali v. Kaniz Fatima* AIR 1915 All. 486, that there was nothing illegal in a person for good consideration contracting not to claim a share in a property in the event of his becoming entitled to it on the decease of a living person and that Section 6, T.P. Act, did not affect such a contract. The Privy Council cases in *Kanhai Lal v. Brijlal* AIR 1918 P.C. 70, *Khunni Lal v. Govind Krishna Narain* (11) 33 All. 356 and *Mt. Hiran Bibi v. Mt. Sohan Bibi* AIR 1914 P.C. 44 were referred to as examples of the distinction between possibilities coupled with interest and bare or naked possibility such as the hope of inheritance entertained by the heir.

36. Allahabad cases: *Kanti Chandra v. Ali Nabi* (11) 33 All. 414 upheld the family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving bro-ther. The

argument based upon Section 6(a), T.P. Act is thus dealt with at page 418:

Durga Shankar was not dealing with an expectant interest in property. Ha and the other parties to the agreement of compromise were dealing with the property, which at the time belonged to them, and we are unable to hold that a provision, whereby, upon a family settlement such as this was, brothers agreed that upon the death of any of them without male issue the share to which he should be entitled, should go to the other brothers, is in contravention of Hindu law, or obnoxious to the provisions of the Transfer of Property Act.

37. In *Nazir-ul-Huq v. Fyaz-ul-Rahman* (11) 33 ALL. 457 a similar conclusion was reached in the case of parties governed by the Mahomedan law. An important passage occurs in the judgment at page 462:

Section 6(a), T.P. Act merely provides that "the chance of an heir apparent succeeding to an estate or any other mere possibility of a like nature cannot be transferred." This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any Interest or growing out of any existing property. It does not for example strike at agreement by expectant heirs, such as an agreement to divide a particular property in a certain way on the happening of a particular contingency: *Ram Nirunjan v. Prayag Singh* (1982) 8 Cal. 138.

The words underlined by me in the quotation apply to the situation in the present case.

38. In *Uma Shankar v. Ramcharan* ILR (1939) All. 950 it was similarly held that the transfer or relinquishment for consideration of the interest of a Hindu law or would be void u/s 6(a), T.P. Act as the transfer of a mere spes successions, but such a transfer or relinquishment would be valid where it was a part and parcel of the family settlement or of a compromise in a dispute between rival claimants to property,

39. These cases support me in the view that the impugned agreement is not a violation of the principle of any Hindu law or of Section 6(a), T.P. Act the agreement was one of the terms upon which the plaintiffs obtained a larger share in the properties of his family than to which a they would have been entitled if the ordinary rule of law was applied. They got the possession of their respective shares thus defined and in order to secure to them and their branches for all times the properties so allotted it was also agreed that neither party would claim any right in the properties allotted to the other in case the person or persons dies or die. How can this be called a transfer of a spes succession is or an agreement to transfer or sell the reversionary right? It is an agreement regarding an actual property in existence. It does not deal with any other property which was not the subject of partition.

40. Mr. P.R. Das in the course of an elaborate argument tried to distinguish these cases and pointed to the observations of Piggot J. in *Chabli Vs. Parmal*, . He relied strongly on the decision of their Lordships of the Judicial Committee in the

well-known cases in *Amrit Narayan v. Gaya Singh* AIR 1917 P.C. 95; *Rani Mewa Kuwar v. Rani Hulas Kuer* (74) 1 I.A. 157; *Mt. Hiran Bibi v. Mt. Sohan Bibi* AIR 1914 P.C. 44 and *Kanhai Lal v. Brijlal* AIR 1918 P.C. 70. But I have already dealt with the principle enunciated in these cases.

41. Mr. P.R. Das also drew attention to the decision of their Lordships of the Judicial Committee in AIR 1936 304 (Privy Council) which reversed the decision of this Court in *Lalita Prasad v. Sarnam Singh* AIR 1933 Pat. 165. The facts in that case are somewhat complicated, but the dispute between the parties can be clearly gathered if the pedigree given at p. 638 is kept in view. The question was the effect of the compromise entered into between Ganesh and Naurangi Lal on 6th April 1868. Their Lordships held that in 1868 the plaintiffs if any of them were born, had not interest whatever in the estate of Bajrangi Lal and even if Ganesh had been their guardian he would not have had authority to enter into any transaction with regard to the plaintiff's prospects of succeeding to Bajrangi Lal's estate. It was in this view that their Lordships made these observations, which were strongly relied on by Mr. Das at page 644:

Their Lordships are aware of the favour shown by the Courts to family arrangements." Per Viscount Cave in *Mt. Kardei v. Bhagwan* AIR 1933 Pat. 165, and it is doubtless good that family disputes should be settled and that those who agree to settle should be held to their agreement. But Ganesh in the present case can have had little chance in ordinary course of surviving Amola and when he bargained away the chance of his descendants in general in order to obtain for himself an immediate share in the estate of Narain, he was making an agreement which calls for no special favour from the Courts. In 1885 Jairam may have had equally little difficulty in preferring the bird in the hand. The plaintiffs had neither right nor power to interfere with their kinsmen's choice. Unless the plaintiffs' individual conduct makes it unjust that they should have a place among Bajrangi Lal's reversioners their legal right should have effect. Their Lordships do not consider that the defendants have succeeded in showing that the compromise of 1868 or the acting of the plaintiffs or their kinsmen there under stop the plaintiffs from asserting that they are entitled as reversioners of Bajrangi Lal.

None of these observations apply to the facts of the present case. Here on the date of the agreement the plaintiffs had a title to the properties, though the extent of their title was disputed. They entered into immediate possession of the properties and as a result of a family arrangement all the parties agreed that they would not claim any share which would otherwise have accrued to them on the death of either of the parties in these properties. The parties did not deal with any future rights in any other property. As I said before, they were anxious that the property which was being allotted to either of the parties should never go out of that branch. I do not see anything unjust in the agreement.

42. For these reasons I come to the conclusion that the impugned agreement is not hit by any rule of Hindu law or by the provisions of Section 6(a), T.P. Act. No

argument was advanced before us that the agreement offends any other rule of law.

43. It now remains to consider the objection of the respondents that the impugned agreement being embodied in the compromise decree cannot be challenged so long as the compromise decree is not set aside. This view commended itself to the Subordinate Judge.

44. The cases strongly relied upon by Mr. P.R. Das in support of his contention are *Huadersfeld Banking Co., Ltd. v. Lister* (1895) 2 Ch. 273, *Lakshman Swami Naidu v. Rangamma* (03) 26 Mad. 31, *Ramasami Naik v. Ramaswami Chetty* (07) 30 Mad. 255 and *Shamshuddin Goolam Husain v. Abdul* (7) 31 Bom. 165, and he relies upon the principle referred to by Mulla in his *Commentary on the Code of Civil Procedure*, nth Edn. at p. 969 that:

Where a decree is based on an agreement or compromise the Court must be taken to adopt the agreement with all its incidents, the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge.

On the other hand, Mr. P.L. Banerji and Dr. D.N. Mitter argued that so long as the compromise decree is not vacated by a suit, the decree retains its full force and reliance *inter alia* is placed upon *Charles Herbert Kinch v. Edward Keith Wallcott* AIR 1929 P.C. 289, *Linsworth v. Wilding* (1896) 1 Ch. 673, *Wilding v. Sanderson* (1897) 2 Ch. 534 *Basan Gouda Giriyeppa Gouda v. Basalingappa Mallan Gouda* AIR 1936 Bom. 301, *Cowasji v. Kisonadas* (11) 35 Bom. 371, *Basangouda v. Irgowadati Kallangouda* AIR 1923 Bom. 276 and many other English and Indian cases. Mr. P.L. Banerji also relied upon the provisions of Section 44, Evidence Act, which provides that any party to a suit or other proceedings can show that any judgment or decree which is relevant was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. He argues that unless the impugned decree is set aside by a proper suit, the appellants can only ignore its effect if they can show that the Subordinate Judge who passed the compromise decree was not competent to deliver it or that the decree was obtained by fraud or collusion. If it was necessary to decide the question, I would be inclined to agree with? the argument of Mr. P.R. Das.

45. The case in *Lakshman Swami Naidu v. Rangamma* (03) 26 Mad. 31 clearly lays down that even where the decree is based upon a compromise and there is nothing more on the part of the Court than a mere adoption of the contract, the Court must be taken to have adopted; it with all its incidents, and if any terms of the contract are opposed to public policy, this will not be enforced by the Courts. In that case the executing Court was held entitled to refuse to execute the compromise decree which directed the sale of an office attached to a temple.

46. The case in *Charles Herbert Kinch v. Edward Keith Wallcott* AIR 1929 P.C. 289 relied on strongly by the respondents does not take a different view. In that case it was held, that:

An order by consent, not discharged by mutual agreement and remaining unreduced is as effective an order of the Court made otherwise than by (Consent and not discharged on appeal. A party bound by a consent order must when once it has been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose.

But the observations of their Lordships at P. 294 should be noticed where they dealt with the argument of the appellant that it was no-answer to say that he wants to be allowed to prove that the consent order was and had been nullity and observed:

At the best, so far as the appellant is concerned the order embodied an agreement which possibly may still remain voidable at his instance. But that means-that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant case only be so set aside in an action or proceeding directed to that special end.

In truth, the decision of the question will depend upon the nature and character of the objection which is taken against the compromise order or decree. If the objection is that the decree or order on the face of it is a nullity, the objection must be allowed to be taken in any proceeding. But if the objection is that on proof of certain facts like mutual mistake or fraud, the consent decree is voidable, then a separate suit or proceeding must be taken to have the order or decree set aside.

47. Mr. P.R. Das strongly relied upon the observation of Lindely L.J. in *Huadersfeld Banking Co., Ltd. v. Lister* (1895) 2 Ch. 273:

I take it that an agreement founded upon a common mistake, which mistake if impliedly treated as a, consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside, and as invalid without any process or proceedings to do so.

But it will be observed that these observations were made while dealing with the effect of a consent order in a separate proceeding which, was an action brought by the Banking Company against the defendant company, the liquidator, and the plaintiffs in the decree-holders action in which evidence was given to show that the consent of the Banking Company to the order of 1892 given under a mistake as to material facts.

48. The effect of the decision in *Huadersfeld Banking Co., Ltd. v. Lister* (1895) 2 Ch. 273 was expressed by Batchelor J. in *Cowasji v. Kisonadas* (11) 35 Bom 371;

That was an action brought by the Banking Company for the specific purpose of setting aside a consent order as having been obtained under a mistake as to material facts, and the Court of appeal, affirming Vaughan Williams J. set aside the order. The decision might assist the plaintiffs if they were suing to at aside the consent decree, but as we have said, that is not their suit, and the consent

decree is still outstanding against them. That being so, their case upon this point is exposed to the observations of Lindley L.J. where he says; "A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that.

49. Dr. Mitter relied upon the observations of the Lord Chancellor in *In re South American and Mexican Co.* (1895) 1 Ch. 37:

The truth is, a judgment by Consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action.

But this, in my opinion, would have been of help to the respondents if the question of the validity of the impugned agreement was itself the subject of dispute in the partition action and then the decree of the Court, even though based upon a compromise, would have been binding on the parties until a regular suit was instituted to set it aside upon the ground of mutual mistake, collusion or fraud. But this was not the situation here.

50. Dr. Mitter also referred to the P.C. case in *G.N.W.C. Rly. Co. v. Charlebois* 1899 A.C. 114 and drew attention to the observation of Lord Hobhouse at pp. 123-124, but this observation makes a distinction which I have attempted to draw namely, if the legality of the act, which is impugned was one of the points substantially in dispute even though that may be a fair subject of compromise in Court like any other disputed matter, and where the contract on the face of it was quite regular and its infirmity depended on extraneous facts which were disclosed by nobody, there was no reason whatever why the Court should not decree that which the parties asked it to decree and such a judgment cannot be of more validity than the invalid contract on which it was founded. In the present case, the infirmity of the agreement does not depend upon the proof of any extraneous facts, but is patent on the face of it, if it is assumed that the agreement is hit by Section 6(a), T.P. Act.

51. Dr. Mitter also drew attention to the case in *Linsworth v. Wilding* (1896) 1 Ch. 673 where it was held by Romer J. that a judgment taken by consent and under a mistake cannot be set aside otherwise than in a fresh action brought for the purpose unless there has been a clerical mistake or an error arising from an accidental slip or omission, or the judgment as drawn up does not correctly state what the Court actually decided and intended to decide.

52. In *Wilding v. Sanderson* (1897) 2 Ch. 534 the Court of appeal affirmed the judgment of Byrne J. by which a consent order was set aside made upon settled minutes in an action after the order had been passed entered and partially acted upon. Lindley L.J. pointed out at P. 550 that it was clear that the consent order

being based upon and intended to. carry out an agreement come to between the parties, ought to be treated as an agreement which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside and that mistake was one of such grounds.

53. It is unnecessary to multiply citation of further authorities. It is clear to me that here the appellants do not seek to set aside the consent order or the compromise decree. What they say is that the consent order or decree is no more than an agreement which is hit by the rule of law and that the validity of the agreement was never the subject-matter of dispute in the partition action.

54. In my opinion the appellants are entitled to show that without bringing a suit to set aside the consent decree the impugned agreement though embodied in a compromise decree cannot be enforced in a Court of law.

55. For these reasons, I am of opinion that it is open to the appellants to show that the impugned agreement and the compromise decree violate the clear provisions of Section 6(a), T.P. Act. The question however, has become academic as I have held above that the impugned agreement does not offend the rule of Section 6(a), T.P. Act.

56. It is necessary to observe, as we pointed out in the course of the argument, that we do " not agree with the contention of Mr. Baldeva Sahay that the impugned agreement and the compromise decree cannot be enforced as the decree or agreement was not registered. The provisions of Section 17(2)(b) are clear and negative the contention advanced. The agreement did not relate to any immovable property which was beyond the scope of the partition suit.

57. Before parting with this case I wish to observe that every attempt was made by the Court that the parties in this appeal should settle their differences, but unfortunately no compromise could be arrived at between the contending decree-holders.

58. We are indebted to the learned advocates for both sides for their interesting elaborate and able arguments with which they assisted the Court.

59. I would dismiss the two appeals with costs. The civil revision is also dismissed but without costs.

Mukharji, J.

60. I agree.