Nibaran Chandra Saha Vs Matilal Shaha and Others

Court: Calcutta High Court

Date of Decision: Jan. 3, 1935

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 9 Rule 13

Citation: 164 Ind. Cas. 561

Hon'ble Judges: R.C. Mitter, J

Bench: Single Bench

Judgement

R.C. Mitter, J.
This appeal is on behalf of plaintiff No. 1 and arises out of a suit (Title Suit No. 99 of 1929) instituted by him and another

person named Aditya Prosad Shaha for a declaration that the compromise decree passed in Title Suit No. 503 of 1923 is fraudulent, collusive and

illegal, that defendants Nos. 1 to 3 have acquired no rights thereunder for enabling them to receive rent or profits of the land (Dag No. 2213)

covered by the said decree from defendants Nos. 4 to 6 and for confirmation of their possession therein. One or two other reliefs of an incidental

nature is also asked but it is not necessary to detail them for the purpose of this appeal. To the suit one Sadanand has been made a pro forma

defendant (pro forma defendant No. 7). This suit will be called hereinafter as the title suit and whenever the words plaintiffs or defendants are used,

they shall be deemed to be the persons named as plaintiffs or defendants in this title suit.

2. Defendants Nos. 1 to 3 instituted a suit being money Suit No. 1 of 1929 (hereafter called the Money Suit) against defendants Nos. 4 to 6 for

recovery of rent or profits from them of the lands described in Dag No. 2213. To this suit the plaintiffs and pro forma defendant No. 7 have been

impleaded as pro forma defendants Nos. 5 to 7. No relief has been claimed against them.

3. It appears that the plaintiffs and pro forma defendant No. 7 held a howla named Howla Jiban Krishna Shaha which include Dag No. 2213. The

said Dag was formerly held under them by some boatman on a service tenure. The boatmen sold the plot to one Brojobashi Shaha, the father of

defendants Nos. 1 and 2 and grandfather of defendant No. 3. Defendants Nos. 4 to 6 had been subtenants under the boatmen.

4. After the purchase by Brojobashi Shaha the plaintiffs and pro forma defendant No. 7 sued defendant Nos. 1 and 2 and the father of defendant

No. 3 in 1920 for khas possession and got a decree. Thereafter they realised rent directly for some time from defendants Nos. 4 to 6. In the year

1923 defendants Nos. 1 and 2 and the father of defendant No. 3 sued the plaintiffs and pro forma defendant No. 7 for specific performance of an

alleged contract. This suit was numbered 506 of 1923 to which defendants Nos. 4 to 6 were also parties. The contract set up and in respect of

which specific performance was sought was one by which the plaintiffs and pro forma defendant No. 7 is said to have promised a nim howla

interest to defendants Nos. 1 to 3 in respect of Dag No. 2213. The plaintiffs and pro forma defendant No. 7 entered appearance separately, one

vakalatnama having been executed jointly by plaintiff No. 2 and pro forma defendant No. 7 (Ex. Q) and another by plaintiff No. 1 [Ex. Q (1)].

These vakalatnamas were accepted by a pleader. Mr. K. Sen, but the case was conducted by another Pleader Mr. Monmohan Shaba whose

name appeared in the body of the vakalatnamas but who did not accept them in writing and probably he was assisted by Mr. K. Sen. The

vakalatnamas authorised the Pleaders to sign compromise petitions on behalf of the clients and to file them in Court. April 20, 1925, was fixed for

hearing. On that date an application for a long adjournment was prayed for but the Court refused it and fixed April 21, 1925, for the hearing. On

that date a petition of compromise was filed by which defendants Nos. 1 to 3 were recognised as tenants in Kayem Karsha right, and the other

terms of the tenancy defined. This petition was signed by defendants Nos. 1 to 3, by plaintiff No. 2 and pro forma defendant No. 7. It was also

signed and filed by Mr. Monmohan Shaha on behalf of plaintiff No. 1 plaintiff No. 2 and pro forma defendant No. 7. It has been found that plaintiff

No. 2 and pro forma defendant No. 7 were actually present in Court, but plaintiff No. 1 was away at some place in the District of Bakarganj and

was not consulted about the terms and was totally ignorant about the solenamah, till he learnt about it a few days after, when a decree had already

been passed on the basis of the same. It has also been found that pro forma defendant No. 7 who looked after the case on behalf of plaintiff No. 1

had no authority from him to compromise the suit and that plaintiff No, 1 did not ratify the compromise. These are findings of fact binding on me in

second appeal. It has also been found that plaintiff No. 1 came to know of the compromise decree beyond three years of the suit and this finding

has not been challenged, nor could it be, by the appellant. On April 27, April 1929, the plaintiffs filed the suit out of which this appeal arises. They

stated that pro forma defendant No. 7 was won over by defendants Nos. 1 to 3 by fraudulent ways and means and the solenamah was filed on

collusion with him. The plaint also states that neither pro forma defendant No. 7 nor Mr. Monmohan Shaha had any authority to enter into a

compromise on behalf of the plaintiffs. The learned Munsif found that that pro forma defendant No. 7 had authority from the plaintiff No. 1 to enter

into the compromise, that he, plaintiff No. 1, came to know of the consent decree beyond three years of the suit, that plaintiff No. 2 was himself

present in Court and signed the solenamah. He held that the solenamah was binding on the plaintiffs and the suit, moreover, was barred by

limitation. The money suit was tried along with the title suit, inasmuch as defendants Nos. 1 to 3 claimed relief against defendants Nos. 4 to 6 on

the basis of a title acquired by them on the basis of the aforesaid consent decree. The money suit was decreed against defendants Nos. 4 to 6.

Two appeals were preferred before the Subordinate Judge; one by the plaintiffs (Title Appeal No. 252 of 1930) and the other by defendants Nos.

4 to 6 (Money Appeal No. 253 of 1930). The two appeals were heard together and both of them dismissed by the Subordinate Judge.

5. The Subordinate Judge held that fraud or collusion in respect or the compromise had not been established and the Pleader Monmohan Babu or

pro forma defendant No. 7 had no authority to compromise on behalf of plaintiff No. 1, and the plaintiff No. 1 had not ratified the compromise. He

held, however, that as the plaintiff No. 1 had known of the compromise decree at least in June 1925 (that is beyond three years of the suit) the suit

was barred under Article 91 or Article 95 of the Limitation Act. He also held that the case of fraud having failed the suit was not maintainable. The

findings of the trial Court relating to plaintiff No. 2 was affirmed. The Money Appeal was also dismissed as the compromise decree was not set

aside. It is admitted that plaintiff No. 1 has 4 annas share, plaintiff No. 2, 8 annas share and pro forma defendant No. 7, 4 annas share in the

Howla Jiban Krishna Shaha.

6. Plaintiff No. 1 alone has filed this appeal against the decree passed in title suit. There is no appeal against the decree passed in the Money

Appeal.

7. The appellant urges before me the following points.

(1) that the learned Subordinate Judge is wrong in holding that the suit is not maintainable, as fraud has not been established.

(2) that the Subordinate Judge is wrong in holding that the suit is barred by limitation either under Articles 91 or 95 of the Limitation Act. He ought

to have held that Article 120 was the appropriate Article.

8. Mr. Jogesh Chandra Roy who appears on behalf of the respondents besides supporting the reasons of the Subordinate Judge urges before me

three further points namely:

(1) that the suit is barred by res judicata, and

(2) that on the construction of the vakalatnama Ex. Q (1) the Subordinate Judge ought to have held that Monmohan Babu had authority to

compromise on behalf of plaintiff No. 1 and that the act of Monmohan Babu binds him and

(3) that a Pleader has implied authority to compromise on behalf of his client and the compromise put through by a Pleader is binding on the client,

unless it is proved that the former acted fraudulently.

9. Both parties have cited before me a large number of rulings in support of their respective contentions but it would not be profitable to deal in

detail with all the cases cited before me.

10. With regard to the first point, the appellant has contended before me that the preponderance of authority is in favour of maintainability of a suit

to set aside a compromise decree even when fraud is not alleged or proved. Mr. Roy on the other hand contends that in this respect there should

not be any distinction between a decree based on. adjudication (in which expression he includes ex parte decrees) and decree passed on consent.

It is, no doubt now well established that a suit to set aside a decree passed on adjudication would not lie unless the decree is attacked on the

ground of fraud, and Mr. Roy contends that the same rule ought to apply to consent decrees.

11. To support his contention he placed before me two decisions of the Lahore High Court Jhanda Singh v. Lachmi : 1 Lah. 341 : 56 Ind. Cas.

878 : AIR 1920 Lah. 408 : 22 PWR 1920 : 68 PLR 1920 : LLJ 623 and Duni Chand v. Mota Singh 9 Lah. 248 : 103 Ind. Cas. 759 : AIR 1927

Lah. 602 . These decisions do support his contention and therefore it is necessary to examine the correctness of the said decisions and to

determine whether they should be followed in this Court. In my judgment the said cases have not been correctly decided and are, moreover,

against the cursus decisions of this Court. In Duni Chand''s case 9 Lah. 248 : 103 Ind. Cas. 759 : AIR 1927 Lah. 602 , there is really the judgment

of a Single Judge on the point in question, because, although Agha Haidar, J. agreed with Tek Chand J. in dismissing the appeal, his view was in

favour of the maintainability of such a suit but he only agreed with the result being pressed very much by the decision of a Division Bench of the

Lahore High Court in Jhanda, Singh''s case 1 Lah. 341 : 56 Ind. Cas. 878 : AIR 1920 Lah. 408 : 22 PWR 1920 : 68 PLR 1920 : 2 L LJ 623 . It

would therefore be necessary to examine the decision in Jhanda Singh''s case 1 Lah. 341 : 56 Ind. Cas. 878 : AIR 1920 Lah. 408 : 22 PWR 1920

: 68 PLR 1920 : 2 L LJ 623, first. In that case a compromise was effected in a suit in which adults and minors were parties. A suit was brought to

set aside the compromise on behalf of the minors and also on behalf of one of the adult parties. Fraud was alleged but negatived. As a second line

of defence the adult challenged the. compromise on the ground he had not consented and the minors alleged that sanction of the Court to the

compromise applied for by their guardians had been given under a misapprehension. The Court gave effect to the minor''s contention and held that

the sanction having been given under a misapprehension, the compromise was not binding on them and a suit would lie at their instance for avoiding

the compromise decree. With regard to the adult plaintiff the Court held that he not having given his consent to the terms of the compromise the

decree was really an ex parte decree against him, and his remedy was either to set aside the decree by an application under Order IX, Rule 13 of

the Code, or by way of review or appeal from the decree itself but a suit at his instance was not maintainable. In so deciding the Court followed

the case Sadho Misser v. Gulab Singh 3 CWN 375. In Sadho Misser''s case 3 CWN 375, however, the decree was not compromise decree. A

prior mortgagee instituted a foreclosure suit impleading the puisne mortgagee also as party defendant. The plaint as originally filed contained a

defective description of the mortgaged properties''. The puisne mortgagee did not appear in the suit. Before the hearing the plaint was amended

whereby the misdescription was corrected. Thereafter an ex parte decree was passed. The puisne mortgagee brought a suit for redemption

contending that by the ex parte amendment of the plaint the properties included in his security was included in the foreclosure suit. The Court held

that the ex parte decree against him was binding on him and his prayer, if allowed, would have the effect of setting aside the ex parte foreclosure

decree which the Court said could not be done in a suit unless the decree was obtained by fraud. Jhanda Singh''s case 1 Lah. 341 : 56 Ind. Cas.

878 : AIR 1920 Lah. 408 : 22 PWR 1920 : 68 PLR 1920 : 2 Lah. LJ 623, therefore extended the procedure for obtaining relief against a decree

passed on adjudication to consent decree. If consent decrees stand on a different footing the authority of this decision would be of a doubtful

character.

12. In Duni Chand''s case 9 Lah. 248 : 103 Ind. Cas. 759 : AIR 1927 Lah. 602, Tek Chand, J. followed Jhanda Singh''s case 1 Lah. 341 : 56

Ind. Cas. 878 : AIR 1920 Lah. 408 : 22 PWR 1920 : 68 PLR 1920 : 2 Lah. LJ 623. He admitted, however, that other High Courts had taken a

different view and merely stated that decisions of this Court cited before him were distinguishable on facts. Some of them were no doubt suits

brought on behalf of minors to set aside compromise decrees.

13. In my judgment consent decrees stand on an entirely different footing such decrees derive their force primarily from the consent of the parties.

If in fact no consent was given, or if the parties had not been consensus ad idem, or if consent of one was procured by misrepresentation, under

influence or coercion the foundation of the decree is shaken. See Hudderfield Banking Co. v. Henry Loster & Sons, Ltd. (1895) 2 Ch. 273 : 64

LJCh. 523 : 12 R 331 : 72 LT 703 : 43 WR 567 . But the name of the aggrieved party appears in the decree itself he has to get rid of the decree,

and that he can do only by getting rid of the compromise, on which the decree is based, on any of the grounds on which a contract can be avoided,

and this relief he can also obtain in a suit.

14. In Hudderfield Banking Co."s case (1895) 2 Ch. 273 : 64 LJCh. 523 : 12 R 331 : 72 LT 703 : 43 WR 567, an action was brought to set

aside a consent order on the ground of common mistake of the parties. The action was held maintainable and relief granted on the principle which

has been often quoted. In Wilding v. Sanderson (1897) 2 Ch. 534 : 66 LJCh. 684 : 77 LT 57 : 45 WR 675 , relief was also granted in a suit. The

observations of Byrne, J., are very pertinent to the case before me and in my judgment lay down the correct principles to be applied in such cases.

At pp. 543 Pages of (1897) Ch.2-[Ed.] and 544 Pages of (1897) Ch. 2-[Ed.] of the report the learned Judge observes:

A consent judgment or order is meant to be formal result and expression of an agreement already arrived at between the parties to proceedings

embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have

simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is

entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect

of which he desires to be relieved. He 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. In my opinion there was no agreement in the present case between the parties prior to the judgment being passed and

entered, their minds never having been ad idem in respect of the subject-matter which they were dealing. It also appears to me that the divergence

of their minds was in respect of an essential or fundamental point. If there was no agreement, there was no consent upon which judgment could be

founded. And just as a consent order may be set aside upon any of the grounds upon which an agreement can be set a side, so it appears to me to

follow that such an order may be set aside if it can be clearly proved that there was no agreement and consequently, no true consent to the order

made : when it is once ascertained that there was no actual agreement arrived at before the judgment was completed, and that the consent upon

which it purports to be founded never existed, the actual judgment pronounced does not, I think, in itself constitute or represent an agreement, but

stands as a judgment of the Court made in pursuance of a supposed agreement or consent which both parties believed to exist, but which did not

in fact exist.

15. In this Court there is a series of cases beginning from 1871 reviewed in Ashutosh v. Taraprosanna 10 C 612 , which have treated consent

decrees on a different footing from decrees passed on adjudication. In Ashtosh v. Taraprosanna 10 C 612 , a compromise decree made in the

High Court was sought to be set aside on motion. It was pointed out that the proper remedy was by review or suit. In Surendra Nath Ghosh v.

Hemangini 34 C 83 , where a suit was brought on the ground that the guardian of a minor had not consented to a compromise, Ghosh and

Casperz, JJ., held that the suit was maintainable and observed that there was nothing said in the later cases to justify the least departure from the

principles laid down in Ashutosh v. Taraprosanna 10 C 612 . In Sarbesh Chandra Bose v. Hari Dayal Singh 14 C W N 451 , a suit to set aside a

compromise decree based on the ground that the plaintiff who was an administrator to the estate of his deceased brother had entered into the

compromise in excess of authority was held maintainable. In Kusodhaj Bhakta v. Braja Mohan 19 CWN 1228 : 31 Ind. Cas. 13 : AIR 1916 Cal.

816 : 43 C 217 , which was a suit to set aside by a suit a decree passed on adjudication on the ground that the Judge had committed a mistake,

Sir Lawrence Jenkins, C.J. pointed out that there is a well founded distinction between a decree passed on adjudication and a decree passed on

consent and that in the former case no suit would lie except on the ground of fraud, but in the latter case a suit would lie on any ground which

would invalidate the agreement. In Gulab Koer v. Badshah Bahadur 13 CWN 1197 : 2 Ind. Cas. 129 , Sir Ashutosh Mookerjee after an

exhaustive examination of the authorities reaffirmed the dictum pronounced in Ashutosh v. Taraprosanna 10 C 612 and although it has been held in

some cases that where no fraud is alleged or proved, a party who had unsuccessfully prosecuted an application for review cannot be again allowed

to attack the consent decree by a suit; Ram Gopal v. Prosanna 2 CLJ 508 , Kailash Chandra v. Gopal Chandra 18 CWN 1204 : 26 Ind. Cas.

125 : AIR 1915 Cal. 161 , no case of this Court has held that a suit would not be maintainable to set aside a consent decree where fraud is not

alleged and proved. I hold accordingly the suit is maintainable.

16. Before I take up the other contentions raised by the parties before me, it would be convenient to decide the other issue raised in bar, e. g. the

issue of res judicata. Mr. Roy contends that the decree in the money suit has now become final, and inasmuch as the judgment in that suit is based

on the validity of the consent decree passed in Title Suit No. 506 of 1923, the question about the validity of the said consent decree cannot be

reagitated. One of the questions involved in this contention is whether findings in a suit inter partes tried analogously with another suit between the

same parties is res judicata, when an appeal is preferred from the decree of one of the suit only. On this point there is difference of opinion and

nearly all the cases are reviewed in Man Mohan Das Vs. Shib Chandra Saha and Another, . If it had been necessary to decide the said question in

this case, I would have followed the decision in Isup Ali v. Gour Chandra Deb 37 CLJ 184 : 74 Ind. Cas. 591 : AIR 1923 Cal. 496 and Oates v.

D''Silva 12 Pat. 139 : 141 Ind. Cas. 762 : AIR 1933 Pat 78 : 13 PLT 793 : (1933) Pat. 79.

17. On the facts of this case I cannot, however, give effect to the plea of res judicata. No relief was claimed in the money suit against the plaintiffs.

They were not necessary parties at all to that suit and although it may have been thought desirable to have them as parties defendants their position

was that of pro forma defendants only. In these circumstances the findings in the money suit cannot conclude the plaintiffs Braja Behari Mitter v.

Kedar Nath Mazumdar 12 C 580 . I accordingly overrule the plea of res judicata.

18. The next question that falls to be determined is the question of limitation. On the principles formulated by Byrne, J. in Wilding v. Sanderson

(1897) 2 Ch. 534 : 66 LJCh. 684 : 77 LT 57 : 45 WR 675 , the consent decree has to be set aside. The plaintiff No. 1 cannot treat it as a void

decree which he can ignore altogether. The question, therefore, is what the Article of the Limitation Act would be applicable. Article 95 is out of

the way as fraud has been negatived. Nor can Article 91, be invoked as by no stretch of language a decree can be called an instrument. The

alleged agreement evidenced by the petition of compromise has no independent existence, it has merged in the decree. In this view of the matter I

would hold that Article 120 of the Limitation Act would be the proper Article to apply. In suits instituted by minors to set aside compromise

decrees not on the ground of fraud but on other grounds, Article 120 has been applied on the principle that Articles 91 or 95 being inapplicable,

the residuary Article would apply Phulwanti Kunwar v. Janeshar Dass 46 A 475 : 83 Ind. Cas. 782 : AIR 1924 All. 625 : 22 ALJ 521 . The suit

being instituted within six years of the date of the compromise decree I hold it is not barred by limitation. I now take up the question of the Pleader

Monmohan Babu''s authority to bind plaintiff No. 1 by the compromise. He had not accepted the vakalatnama in writing, but his name appeared in

the vakalatnama and was allowed to appear and conduct the case. Under these circumstances there was an acceptance of the vakalatnama by him

Mohesh Chandra v. Panchu Mudali 20 CWN 287 : 32 Ind. Cas. 395 : AIR 1916 Cal 979 : 43 C 884 : 23 CLJ 297 , (and he had all the powers

which had been mentioned in the vakalatnama). On a fair construction of the vakalatnama Ex. Q (1). I hold that plaintiff No. 1 is bound by the act

of Monmohan Babu. In some of the cases it has been held no doubt that the authority to file a compromise petition does not authorise the Pleader

to compromise, but in my judgment that would be giving more weight to form than to substance. A Pleader does require an express authority to

simply file a petition of compromise. His position as Pleader of a party authorises him to ""file"" any petition on behalf of his client. In the case

before me this Pleader is also authorised to sign the petition of compromise on behalf of his client. His signature on the petition of compromise is in

law the signature of his client. I hold accordingly that the'' act of the Pleader Monmohan Babu binds the plaintiff No. 1 and he is bound by the

compromise decree. In this view of the matter it is not necessary to decide the question whether a Pleader has implied authority to compromise a

suit on behalf of his client, when there is no express instruction by the client not to compromise. The cases decided by the High Courts draw a

distinction between the position of a Counsel and a Pleader in this respect, but in my judgment the authority of these decisions has been

considerably shaken by the observations of the Judicial Committee in the case of AIR 1930 158 (Privy Council) . Lord Atkin ''no doubt reserved

the question of Pleaders acting with written authority but the observations at pp. 139 and 140 Pages of 57 I.A.--[Ed.] of the report would be

applicable to them also. A Pleader has as much responsibility in conducting a suit as a Counsel, the same duty to watch and protect the interest of

his client and to make the best of a case. But as I have held in favour of the respondents on the construction of the vakalatnama Ex. Q (i), this point

does not require further discussion.

19. The result is that this appeal is dismissed with costs.

20. Leave to appeal under the Letters Patent asked for is refused.