PRIVY COUNCIL.

SHEONANDAN PRASAD SINGH

v.

HAKIM ABDUL FATEH MOHAMMAD REZA.

J. C.* 1935.

May, 21.

(On Appeal from the High Court at Patna.)

Advocate—Authority to compromise Suit—Limitation of authority—Matter collateral to Suit—Code of Civil Procedure (Act V of 1908), Order xxiii, *r.* 3—*Form of Decree.*

The authority of an advocate to compromise an action does not extend to matters collateral to a suit and in such cases a decree under Order xxiii, r. 3, should not be made.

Where there is no separate record of a compromise, the decree ought to recite the fact of a compromise and its terms and then proceed to set out the orders made by the Court to enforce the decree under Order xxiii, r. 3.

Decrees of the High Court reversed.

Appeal (no. 86 of 1933) from decrees of the High Court (March 8 and November 28, 1932).

The facts appear from the judgment of the Judicial Committee.

1935. May 2. *DeGruyther K. C.* and *Krishna Menon* for the appellants.

The matter compromised was collateral to the suit. Advocates of High Courts have the same authority to compromise a suit as Counsel in England: *Sourendra Nath Mitra* v. *Tarubala Dasi*(1). The authority is limited to issues in the action and matters involved in the suit and does not extend to collateral matters: *Swinfen* v. *Lord Chelmsford*(2). [Reference was also made to *Shepherd* v. *Robinson*(3), *Neale* v. *Gordon Lannox*(4), *Thomas* v. *Hewes*(5), *Prestwich* v. *Poley*(6), and *Johurmull Bhutra* v. *Kedarnath Bhutra*(7)].

The respondents did not appear.

*PRESENT: Lord Atkin, Sir John Wallis and Sir Shadi Lal.

(1) (1930) I. L. R. 57 Cal. 1311; L. R. 57 I. A. 133.
(2) (1860) 5 H. & N. 890; 29 L. J. Ex. 382.
(3) (1919) 1 K. B. 474.
(4) (1902) A. C. 465.
(5) (1834) 2 Cr. & M. 519; 149 E. R. 866.
(6) (1865) 18 C. B. (N. S.) 806; 144 E. R. 662.
(7) (1927) I. L. R. 55 Cal. 113, 121.

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May, 21. The judgment of their Lordships was delivered by—

LORD ATKIN :—This is an appeal from the High Court of Patna and raises a question as to the validity of an alleged compromise on appeal of a suit in which the present appellants were plaintiffs and the respondents who were not represented before the Board were defendants. It is unnecessary to go into the details of the case. The relevant facts appear to be that before the transaction in question the appellants were owners of an 8 annas share in the mauza Alapur and the second defendant Imdad Ali owned a 2 annas share in the same mauza. By registered deeds dated July 12 and October 27, 1921, the second defendant conveyed a 2 annas share in the mauza to the plaintiffs for a total consideration of Rs. 10,896. The plaintiffs subsequently discovered that on June 25, 1921, the second defendant had executed a mortgage in favour of defendant no. 1 of the whole of his interest for a loan of Rs. 2,500. There was some dispute as to the registration of this mortgage but it was finally registered on July 29, 1922. On October 2, 1926, the plaintiffs commenced the present suit against the two defendants alleging that the mortgage was collusive and fraudulent and its registration invalid and asking for a declaration that their interests in the property were not affected by the mortgage. The first defendant traversed the allegations against the mortgage and set up that the sales to the plaintiffs were collusive and fraudulent: the second defendant alleged that the mortgage was obtained by fraud of the first defendant and also alleged that the sales to the plaintiffs were collusive and fraudulent.

The trial Judge, the Subordinate Judge at Monghyr, decided both issues in favour of the plaintiffs, i.e., that the sale deeds were good and the mortgage was bad. Defendant no. 1 appealed to the High Court at Patna. Though the notice of appeal

challenges the findings of the Judge on both points it would appear that there was no substantial attack in the High Court on the plaintiffs' title. As far as the first defendant was concerned it was obvious that his mortgage if good was prior in date to the sale to the plaintiffs; as to the second defendant the Judges of the High Court had no difficulty in affirming the decision of the trial Judge as to the plaintiffs' title, saying that counsel had adduced no reason for differing from it.

The question in the present appeal arises as between the plaintiffs and the first defendant the mortgagee. It appears that at the trial the mortgagee had offered to buy the plaintiff's interest in the mortgaged property for Rs. 20,000 but this had been refused by the plaintiffs. On the appeal the plaintiffs had sent their karpardaz as their representative to attend the appeal. Their counsel were Mr. Mullick and Mr. Roy. The mortgagee was himself present at the hearing, his leading counsel was Mr. Husnain. In the course of the argument Mr. Husnain offered on behalf of his client to pay Rs. 20,000 if the appellants gave up all claims to the property purchased by them. This offer was put before the karpardaz who was at first unwilling to accept it in the absence of his principal but eventually accepted. This was communicated through Mr. Husnain to his client the mortgagee. A little later Mr. Husnain informed the Court that his client was no longer willing to pay Rs. 20,000. The argument then proceeded and Mr. Husnain made a second offer that his client would pay Rs. 10,860 if the plaintiffs gave up their claim. The karpardaz refused this offer. The Court appear to have favoured a compromise. The karpardaz was again approached he again refused but at last reluctantly consented believing as it is said that the case was a weak one and that his master was going to lose. The above facts are taken from the statement of junior counsel Mr. Roy. Accordingly a decree was drawn

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up dated March 8, 1932. It is the only document in the record, and if it is in fact the only document brought into existence at the time it seems clear that it does not comply with the provisions of O.xxiii, which require that the compromise shall be recorded, and that a decree shall be made in accordance with its provisions. If there is no separate record of the compromise the decree ought to recite the fact of a compromise and its terms and then proceed to set out the orders made by the Court to enforce the decree. Their Lordships however were not asked to treat this matter as one of the grounds of appeal.

The appellants applied in review to set aside the decree on the ground that the compromise was made without their authority. At the hearing of this application it seems to have been agreed that the case should be determined by reference only to the implied authority of the advocates to make the compromise. In the petition for leave to appeal to His Majesty in Council it is stated that counsel for the mortgagee gave up the actual authority of the karpardaz to effect the compromise: but whether this is so or not it seems plain that the case should proceed on the footing that no actual authority in the karpardaz was established. On this footing their Lordships have no difficulty in coming to the conclusion that the compromise cannot be supported by reference only to the implied authority of the advocates. As was laid down by this Board in *Sourendra Nath Mitra* v. *Tarubala Dasi*(1), counsel in India have the same implied authority to compromise an action as have counsel in the English Courts. But if such authority is invoked to support an agreement of compromise the circumstances must be carefully examined. In the first instance the authority is an actual authority implied from the employment as counsel. It may however be withdrawn or limited by the client;

(1) (1930) I. L. R. 57 Cal. 1311; L. R. 57 I. A. 133.

in such a case the actual authority is destroyed or restricted: and the other party if in ignorance of the limitation could only rely upon ostensible authority. In this particular class of contract however the possibility of successfully alleging ostensible authority has been much restricted by the authorities, such as, *Neale* v. *Gordon Lennox*(1) and *Shepherd* v. *Robinson*(2) which make it plain that if in fact counsel has had his authority withdrawn or restricted the Courts will not feel bound to enforce a compromise made by him contrary to the restriction even though the lack of actual authority is not known to the other party.

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But whatever may be the authority of counsel whether actual or ostensible it frequently happens that actions are compromised without reference to the implied authority of counsel at all. In these days communication with actual principals is much easier and quicker than in the days when the authority of counsel was first established. In their Lordships' experience both in this country and in India it constantly happens, indeed it may be said, that it more often happens that counsel do not take upon themselves to compromise a case without receiving express authority from their clients for the particular terms: and that this position in each particular case is mutually known between the parties.

In such cases the parties are relying not on implied but on an express authority given *ad hoc* by the client. It appears to their Lordships plain that such was the position in the present case. Each offer emanated from the client: and was refused or accepted by the client or his lay representative. In the circumstances neither counsel was attempting to exercise any authority of his own, nor would he reasonably have been believed to be exercising his own authority. He was

(1) (1902) A. C. 465.
(2) (1919) 1 K. B. 474.

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merely, as so often happens, a messenger between the two clients. As therefore the case has been rested on the implied authority of counsel alone, and the authority of the karpardaz to agree on behalf of the appellants to the particular agreement is not established, the compromise must fail.

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Their Lordships however think it advisable to say that if the facts are as they suppose them to be, viz., that the attack on the plaintiffs' title was not seriously made in the Court of Appeal counsel's authority could not in any circumstances extend to an agreement to part with the plaintiffs' rights in the property over which the mortgage was claimed which the plaintiffs were seeking to get rid of. In those circumstances the case would be very similar to that suggested by Pollock C. B. in the well known case of *Swinfen* v. *Lord Chelmsford*(1). "The other complaint made in the first count is, that the defendant agreed, on the plaintiff's behalf, that the estate should be given up and a conveyance of it be executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement, that it was not binding, and that the agreement was a nullity; and we are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the owners of adjoining land—however desirable it may be that litigation should cease by one of the parties purchasing the

(1) 5 H. & N. 890, 922; 29 L. J. Ex. 382.

property of the other, we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

Substitute mortgage for nuisance, a substitution which some would readily make, and the analogy is very close. In the cases cited in the judgment of the High Court *Prestwich* v. *Poley*(1) was an action for the price of a piano in which it was agreed to return the piano. The pleadings are unfortunately not disclosed in any report which their Lordships have seen. If as seems probable the defence went to the validity or continued existence of the contract there could be little doubt that counsel might agree to rescind. *Thomas* v. *Hewes*(2) was an action for trespass settled on the terms that the alleged trespasser took over the property. Such an action might well have involved the title of the plaintiff to the whole property: but their Lordships fail to find in the actual decision any statement of the law affirming the authority of the plaintiff's attorney in case the title were not in dispute.

If the facts are as their Lordships assume the matter compromised was in their opinion collateral to the suit and not only would it not be binding on the parties: but it would in any case be a matter in respect of which the Court in pursuance of O. xxiii, r. 3, should not make a decree.

In the result the order made in review should be reversed and the decree dated March 8, 1932, should be set aside. There does not appear to be any other record of the compromise but if there is that should also be vacated. The High Court will proceed with the appeal as though there were no compromise. The costs of the application in review and of the appeal

(1) (1865) 18 C. B. (N. S.) 806; 144 E. R. 662.
(2) (1834) 2 Cr. & M. 519; 149 E. R. 866.

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to His Majesty in Council must be paid by the respondents. Their Lordships will so humbly advise His Majesty.

Solicitors for appellants: *Nehra & Co.*

PRIVY COUNCIL.

CAPTAIN MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH.

versus.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

(*On Appeal from the High Court at Patna.*)

1935.
J. C.*
May, 28.

Indian Income-tax Act (XI of 1922), ss. 2(1), (a) and 12(1)—Agricultural Income—Charge on Land—Annuity—Income, meaning of.

N transferred an estate to *B* in consideration of (*a*) the payment of a lump sum, (*b*) the discharge of certain debts, and (*c*) the payment to him for life of an annuity of Rs. 2,40,000. By a separate deed the payment of the annuity was made a charge on the lands transferred. The taxing authorities included the annuity in *N*'s assessable income.

Held, that the word "income" in s. 12(*1*) of the Indian Income-tax Act (XI of 1922) was not limited by the words "profits and gains". The annuity was not a capital sum payable in instalments, but income in the hands of the vendor.

Commissioner of Income-tax, Bengal v. Shaw, Wallace and Co., (1) followed.

The annuity was not agricultural income within s. 2(*1*) (*a*), but money payable under a contract imposing a personal liability the discharge of which was secured by a charge on land.

Judgment of the High Court affirmed.

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* PRESENT: Lord Blanesburgh, Lord Russell of Killowen and Sir Lancelot Sanderson.

(1) (1932) I. L. R. 59 Cal. 1343; L. R. 59 I. A. 206.