Before Sir Chunder Madhub Ghose, Kt., and Mr. Justice Caspersz.

SURENDRA NATH GHOSE

v.

HEMANGINI DASI.*

1906.
Dec. 13.

ners—Compromise decree—Guardian—Practice—Suit to set aside compromise

A suit was instituted for a declaration that a compromise decree made against plaintiffs in a previous suit, when they were minors, was void on the nd that the petition of compromise had been put in by the pleader engaged leir guardian in that suit against the express wishes of the latter.

Held, that the suit would lie and that the plaintiffs were entitled to show idence that the compromise was filed without the consent of their guardian vas therefore not binding upon them, although they had set up a case of id *quâ* the decree and had failed to prove it.

Held, further that in order to make the decree binding on the minors it was not ugh to show that the sanction of the Court to the compromise was obtained.

Where a decree is passed upon adjudication, no separate suit would lie to set le the decree except on the ground of fraud, but where the decree is passed ply upon a compromise, a suit should lie to set aside the decree upon grounds than that of fraud.

Aushootosh Chandra v. *Taraprasanna Roy*(1), *Lalji Sahu* v. *The Collector irhut*(2), *Mewalall Thakoor* v. *Bhujhun Jha*(3), *Ramgopal Majumdar* v. *sanna Kumar Samad*(4), *Barhamdeo Prasad* v. *Banarsi Prasad*(5) and *ohar Lal* v. *Jadunath Singh*(6) referred to.

ECOND APPEAL by the plaintiffs Surendra Nath Ghose and :her.

Appeal from Appellate Decree No. 1206 of 1905, against the decree of Pope, District Judge of 24-Parganas, dated the 4th May 1905, confirming lecree of Bhagabati Charan Mitter, Subordinate Judge of Alipore, dated the March 1904.

1) (1884) I. L. R. 10 Calc. 612.
2) (1871) 6 B L R. 648; 15 W. R. P. C. 23.
3) (1874) 13 B. L. R. App. 11; 22 W. R. 213.
(4) (1903) 2 C. L. J. 508.
(5) (1901) 3 C. L. J. 119.
(6) (1906) I. L. R. 28 All. 585.

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The material allegations in the plaint in the suit, out of w this appeal arose, were these—

That the defendant Hemangini Dasi had brought a suit partition claiming a share in certain properties, which were self-acquired properties of the father of the plaintiffs; that in said suit Hemangini Dasi fraudulently caused a *solenama* to filed knowing that their mother, Mehermoni Dasi, who was tl guardian for the suit, had refused to consent to the terms of said *solenama* and that a decree was passed on the 25th 1901 on the terms of the *solenama;* that the said *solenam* prejudicial to the interests of the plaintiffs and was not bind on them. They prayed for a decree declaring the *solenama* decree to be invalid, inoperative, null and void.

The plaint stated that an application had been made f review of the compromise decree, but that it was withdrawn that a previous suit for the setting aside of the decree had been withdrawn with permission to institute a fresh suit.

At the institution of the suit the plaintiffs were minors were represented by their mother Mehermoni Dasi.

The defendant pleaded that the plaintiffs had no caus action and had no right to sue; that the terms of the *solen* were settled after much discussion and that the *solenama* was with the consent of the next friend of the plaintiffs; tha terms were beneficial to them and that the allegations of f made in the plaint were unfounded.

The Subordinate Judge, who tried the suit, laid down se issues for trial, of which the principal were—

1st.—Have the plaintiffs any cause of action and is the maintainable in its present form?

5th.—Whether any fraud was practised by the defendar her men in respect of the filing of the *solenama*?

6th.—Is the decree based on the *solenama* valid and bin on the plaintiffs? and

8th.—Was the minor's mother and guardian fully cogn of the contents of the *solenama* and did she give her co to it?

He decided the first issue in favour of the plaintiffs. O other three issues he held that the charge of fraud had no

proved; that the mother of the plaintiffs was not a consenting party to the compromise and that she had actually withheld her consent to the *solenama*, but that as her pleader in filing the *solenama* had acted within the scope of his authority the *solenama* and the decree were binding on the plaintiffs.

On appeal by the plaintiffs the District Judge held that whether the *solenama* was binding on the plaintiffs or not the decree could not be set aside except on the ground of fraud, and as fraud was not proved the suit had been rightly dismissed.

The plaintiffs appealed to the High Court.

Dr. Sarat Chandra Banerjee for the appellants. The Court below was in error in holding that a suit would not lie to set aside a compromise decree except on the ground of fraud. [GHOSE J. referred to *Sadho Misser* v. *Golab Singh* (1).] The decree there was not a compromise decree. It is no doubt the law that when a decree is passed after adjudication it cannot be questioned in a separate suit except on the ground that it was obtained by fraud, but the same rule does not hold in the case of a compromise decree. Such a decree can be set aside on any ground on which a contract may be set aside: *Wilding* v. *Sanderson* (2). The cases all show that there are two modes by which a compromise decree may be set aside, namely, by review or by separate suit. *Aushootosh Chandra* v. *Tara Prasanna Roy* (3); *Rakhalmoni Dassi* v. *Adwyta Prosad Roy* (4); *Ram Gopal Majumdar* v. *Prasanna Kumar Samad* (5); in the last case it was held that a party who had elected to proceed by way of review was bound by the decision upon the questions raised and decided in the review proceedings: in the present case the application for review was withdrawn and there was no decision. The same rule was laid down in *Barhamdeo Prasad* v. *Banarsi Prasad* (6). In the recent case of *Manohar Lal* v. *Jadunath Singh* (7) a compromise decree against a minor was set aside in a separate suit on the ground

(1) (1897) 3 C. W. N. 375.
(2) (1897) 2 Ch. 534.
(3) (1884) I. L. R. 10 Calc. 612.
(4) (1903) I. L. R. 30 Calc. 613; 7 C. W. N. 419.
(5) (1905) 2 C. L. J. 508.
(6) (1901) 3 C. L. J. 119.
(7) (1906) I. L. R. 28 All. 585.

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that the sanction of the Court had not been expressly given and this decision was affirmed by the Judicial Committee and no question was raised as to the suit being not maintainable The English cases show that, where a judgment by consent is sought to be set aside on a ground such as mistake, the proper course is to bring a separate suit. *Emeris* v. *Woodward*(1). *Ainsworth* v. *Wilding*(2). Reference was also made to *Bhutnat Sircar* v. *Ram Lall Sircar*(3).

Babu Ram Chandra Majumdar for the respondent. No doubt the cases show that two remedies are available; the question is when the one remedy is to be resorted to and when the other: the tendency is that it is only in cases of fraud that the remedy by way of separate suit is to be resorted to and that in all other cases the remedy is by way of review. The two cases referred to in *Aushootosh Chandra* v. *Tara Prasanna Roy*(4), viz., *Lal Sahu* v. *The Collector of Tirhut*(5) where an application for review was regarded as the proper mode, the decree being a compromise and no fraud was alleged, and *Meera Lall Thakoor* v. *Bhujhun Jha*(6) where a suit was considered proper, the decree being impugned on the ground of fraud, show this. In *Bibi Solomon* v. *Abdool Azeez*(7), and *Mirali Rahimbhoy* v. *Rehmo bhoy Habibbhoy*(8) the decree was impugned on the groun of fraud and it was held that the proper procedure was by separate suit. *Barhamdeo Prasad* v. *Banarsi Prasad*(9) lay down the same rule. No suit would lie to set aside a decree except on the ground of fraud; there must be finality to litigation; *Flower* v. *Lloyd*(10). There is no distinction between compromise decree and a decree after adjudication; the one is binding as the other: *In re South American and Mexic Company*(11); *Nicholas* v. *Asphar*(12); *Lakshmi Shankar Vishnuram*(13). In *Manohar Lal* v. *Jadunath Singh*(14)

(1) (1889) 43 Ch. D. 185.
(2) (1896) 1 Ch. 673.
(3) (1900) 6 C. W. N. 82.
(4) (1882) I. L. R. 10 Calc. 612.
(5) (1871) 6 B. L. R. 648; 15 W. R. P. C. 23.
(6) (1874) 13 B. L. R. App. 11; 22 W. R. 213.
(7) (1881) I. L. R. 6 Calc. 687.
(8) (1891) I. L. R. 15 Bom. 595
(9) (1901) 8 C. L. J. 119.
(10) (1879) 10 Ch. D. 327.
(11) (1895) 1 Ch. 37.
(12) (1896) I L. R. 24 Calc. 216.
(13) (1899) I. L. R. 24 Bom. 77.
(14) (1906) I. L. R. 28 All. 585.

question was not raised. In *Foolcoomary Dasi* v. *Woodoy Chunder Biswas*(1) the decree was impugned on the ground of fraud, and it was held that the proper procedure would be by way of suit.

GHOSE AND CASPERSZ JJ. This is an appeal in a suit by two minors, of whom one has now attained majority. They brought their action to obtain a declaration that a certain *solenama*, dated the 24th April 1901, filed by the defendant, and the decree, dated the 25th April 1901, passed in a partition suit, on the basis of that *solenama*, were invalid, inoperative, null and void. It appears that the compromise in question was sanctioned by the Court, and the sanctioning order was signed by the pleaders on both sides. Subsequently, an application for review was filed on behalf of a certain lady acting as guardian of the minor plaintiffs in the partition suit, but that application was withdrawn without any decision being arrived at upon it. Then a regular suit was instituted, which, also, was withdrawn. After this, the litigation giving rise to this second appeal commenced.

The learned Subordinate Judge, in his decision on the 5th, 6th and 8th issues, found that there was no specific evidence of fraud against the defendant, and he held that the terms of the *solenama* having been settled after much discussion and deliberation, and they being favourable and beneficial to the interests of the minors, and the *solenama* having been filed in Court in obedience to an order of the Subordinate Judge, it was binding upon the plaintiffs. The Court of first instance also found that the guardian of the minor plaintiffs in the partition suit was not, as a matter of fact, a consenting party to the compromise; but, as she had not repudiated the same before the decree was drawn up, it held that the *solenama* was binding upon the plaintiffs.

On appeal to the District Judge, that officer has found that the present suit is not one that could be maintained; and he has refrained from deciding the only other question raised in the case, namely, whether a *solenama* put in by a pleader, who had power

(1) (1898) I. L. R. 25 Calc. 649.

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merely to file it, could be properly put in against the express wishes of his clients and be binding on them.

In this appeal by the plaintiffs, two contentions have been raised before us, and they cover the grounds dealt with by the learned District Judge. In the view that we shall adopt on the question of the maintainability of the suit, it will be necessary to send back the case for a decision of the point that has been left undecided by the learned District Judge. We proceed to consider whether a suit can lie, except on the ground of fraud to set aside a *solenama* and the decree founded upon it.

We have been referred to the principal authorities on this subject in the course of the argument, but it will not be necessary to allude to all of them. In the early case of *Aushoolosh Chundra* v. *Taraprasanna Roy*(1), a general principle was laid down that for the purpose of setting aside a decree passed in pursuance of a compromise come to out of Court, the more proper mode of procedure is by an application for review, though there is also a mode of proceeding in such cases by a suit. This principle was based on a consideration of two other cases, *Lalji Sahu* v. *The Collector of Tirhut*(2) and *Mewalall Thakoor* v. *Bhujhun Jha*(3) and there can be no doubt that, so far as the principle is concerned there is nothing in the later cases to justify the least departure from it. As was observed in the case of *Ramgopal Majumdar* v. *Prasanna Kumar Samad*(4), to which one of the members of this Bench was a party—the case of *Aushoolosh Chundra* v. *Tara prasanna Roy*(1) has never been dissented from. In *Ramgopal Majumdar* v. *Prasanna Kumar Samad*(4) the plaintiffs, failing to get the compromise decree set aside by way of review instituted a suit for the self-same relief to which their review application had been directed, and it was held that they could not be permitted to raise the same question which they had raised, or ought to have raised, in the review—the decision in the earlier proceeding being regarded as *res judicata*. But, on the facts of the case now before us, no question of *res judicata* can arise, because the application for review previous to the institution

(1) (1884) I. L. R. 10 Calc. 612.
(2) (1871) 6 B. L. R. 648; 15 W. R. P. C. 23.
(3) (1874) 13 B. L. R. App. 11; 22 W. R. 213.
(4) (1905) 2 C. L. J. 508.

of the regular suit was withdrawn, and it cannot be said that any adjudication was arrived at on the grounds stated, or which ought to have been stated, on that occasion.

The next case to which we shall refer is that of *Barhamdeo Prasad* v. *Banarsi Prasad*(1). There, the decree impugned by way of review was irregular, and, on the face of it, incorrect; and the view adopted was that such a decree could not be set aside by a suit. We observe that a compromise had been arrived at in the original suit, and the main ground on which the decree on compromise was sought to be set aside by the minor plaintiff was that the compromise was fraudulent. The learned Judge in that case made the following observations, which we think pertinent to the present enquiry:—"It will thus be seen that, although the Calcutta High Court points out that the remedy of an infant, who has been affected by a decree made upon an improper compromise entered into by his next friend or guardian, is either by a review of judgment or by a suit, no definite principle is laid down upon which it can be determined what course should be adopted in cases where the allegations are not purely based on the ground of fraud. In the present case, it is alleged that a compromise was entered into by the mother of the plaintiff with the deceased defendant," and then the judgment went on to discuss the provisions of section 462, Civil Procedure Code. The true principle, however, as it seems to us, applicable to a case like this, is— where a decree is passed by the Court upon an adjudication of the merits of the case, there no separate suit will lie, except when the decree is impugned upon the ground of fraud, and the only remedy of the minor is by an application for review; but where the Court comes to no decision, and the decree is passed simply upon the compromise, there a suit should lie to set aside the decree upon grounds other than fraud.

In the present case, the attack is really made by the plaintiffs not on the decree, but on the *solenama* of which it cannot be said that it was a judgment in itself and on the basis of which, as a matter of course, the Court gave a decree. And in a case like this, it cannot be laid down that no suit would lie to set aside such a decree except on grounds other than that of fraud.

(1) (1901) 3 C. L. J. 119.

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There is, however, a very recent ruling of their Lordships of the Judicial Committee, *Manohar Lal* v. *Jadunath Singh*(1), which is of a negative value in favour of the appellants before us. That was a case to set aside a compromise on the ground that one of the defendants was a minor and that the leave of the Court to enter into it had not been obtained under section 462 of the Code, and their Lordships, in delivering judgment, discussed the terms of the decree and, also, the question whether the attention of the Court sanctioning the compromise was directly called to the fact that a minor was a party to it. But we do not find anywhere in the judgment of the Judicial Committee any indication that, in such a case, no suit would lie on grounds other than that of fraud: in fact, it was not questioned.

Now, the precise point for our consideration is whether the plaintiffs' suit is maintainable in spite of their allegation of fraud which has been negatived by both the lower Courts. Without fraud having been established, the question of the maintainability of the suit rests entirely on other grounds. We think that it does not stand to reason why the plaintiffs having set up a case of fraud *qua* the decree, and having failed to prove it, should not be permitted to show by evidence that the compromise itself was filed without their consent and is not, therefore, binding upon them; for when their review application was not gone into, no evidence being given, it would be unjust to hold that the plaintiffs must be left entirely without remedy, even though they desire to show that the proceedings taken against them, when they were minors, were prejudicial to their interests and entered into by the pleader of their guardian contrary to her express instructions. It is not, however, enough to show that the sanction of the Court to the compromise in the present circumstances was obtained; because the learned District Judge points out that the authority of the pleader was only to *file* any compromise petition on behalf of the guardian of the minors; and, as, in our opinion, the suit is maintainable on grounds other than fraud, the case must be remitted to the Lower Appellate Court for a decision of the other question, which we have already indicated, namely, whether the pleader had the power to file the compromise against the express

(1) (1906) I. L. R. 28 All. 585.

wishes of the lady (the mother and guardian of the minors) and whether, in that event, the compromise in question was binding on the minor plaintiffs.

The result, therefore, is that the case must be sent back to the learned District Judge for a decision of the question whether the *solenama* is binding on the plaintiffs. Costs will abide the result.

Case remanded.

S. CH. B.