Privy Council Appeal No. 9 of 1948

Srimati Savitri Devi and others – – – – – *Appellants*

v.

Maharaj Bahadur Ram Ran Bijoy Prosad Singh and others – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER, 1949

Present at the Hearing :

LORD NORMAND

LORD MACDERMOTT

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal by leave of the High Court of Judicature at Fort William in Bengal from the judgment and decree of that Court in its civil appellate jurisdiction, dated the 26th August, 1946, affirming a judgment and decree of the same Court in its ordinary original civil jurisdiction, dated the 4th September, 1942, dismissing with costs the suit of the plaintiff which sought to set aside a compromise decree. No relief is claimed against respondents 2, 3 and 4 who have not appeared in the appeal.

The litigation relates to the title to an ancient impartible Raj known as the Dumraon Raj, which is said to be of the value of four crores of rupees. The original plaintiff and defendant had a common ancestor in one Parbal Singh who died in the year A.D. 1672. Parbal had a grandson, Raja Horil Singh, who founded the Dumraon branch of the family, and a grandson, Udwant Singh, who founded the Jagadishpur branch of the family. The last undisputed owner of the Dumraon Raj was Maharaja Sir Radha Prasad Singh (hereinafter referred to as " Sir Radha ").

On the 12th March, 1889, Sir Radha executed a deed poll whereby he empowered his wife, Maharani Beni Prosad Koer, to adopt a son, who might be a member of the Jagadishpur branch of the family, in the event of his dying without leaving male issue or without having adopted a son who should attain his majority.

On the 17th December, 1890, Sir Radha made a will confirming the power granted by the deed poll of 1889, and leaving the whole of his property to his wife for the term of her natural life. Sir Radha died on the 5th May, 1894, leaving him surviving his said wife, who on the death of Sir Radha entered into possession of the Dumraon Raj estate.

No action was taken by the Maharani with regard to the power to adopt a son until the 12th December, 1907, the day preceding that of her death, when it is alleged she adopted as a son to her late husband Srinivas Prasad Singh, sometimes called Jung Bahadur Singh, a member of the Jagadishpur branch of the family, who was a minor of the age of about five years, and who is hereafter referred to as " the minor ". The Maharani died on the 13th December, 1907.

Immediately after her death, Keshava Prasad Singh (hereinafter referred to as " Keshava Prasad "), a member of the Dumraon branch of the family, who claimed to be the heir of Sir Radha according to the rule of lineal primogeniture, took possession of the Dumraon Raj Estate. But on the 16th December, 1907, the Board of Revenue, Bengal, made an order under the Court of Wards Act (Act IX (B.C.) of 1879) hereinafter called " the Act ", declaring the minor to be minor under section 6B of the Act and that the said Court of Wards had determined to take under its charge the person and property of the minor and directing that possession should be taken of the said person and property on behalf of the said Court.

On the 7th March, 1908, Captain J. B. Rutherford was appointed manager of the Dumraon Raj Estate under the Court of Wards, and duly took over charge and entered into possession of the said Estate. On the 5th February, 1909, Keshava Prasad instituted suit No. 29 of 1909 in the Court of the Subordinate Judge of Shahabad. The principal defendant in the suit was the minor by his *guardian-ad-litem* J. B. Rutherford who was also made a defendant. The suit is hereinafter referred to as " the original suit ". The relief claimed was possession of the Dumraon Raj Estate and a declaration that the minor was not the adopted son of Sir Radha and had no right, title or interest in the said Raj.

On the 12th August, 1910, the learned Subordinate Judge gave judgment in the suit. He held that the Dumraon Raj was an ancient, ancestral, impartible Raj, which descended to a single male heir according to the rule of lineal primogeniture ; that females were excluded by custom ; that Keshava Prasad was the heir of Sir Radha, and that the Estate descended to him subject only to the life-estate of the Maharani. He held further that the adoption of the minor did not in fact take place. and that, if it did, the adoption would not in law have the effect of depriving Kashava Prasad of the Estate, and he expressed the view that the Court of Wards had no right to take possession of the estate. By his decree dated 13th August, 1910, he decreed that Keshava Prasad was entitled to recover possession of the Dumraon Raj estate and that the Court of Wards was liable to render accounts of all monies, moveables and immoveables, etc., of which it took possession at the time of its assumption of the charge of the estate and declared the said Court to be liable for mesne profits and for all the costs of the plaintiff with interest at 6 per cent. per annum up to realisation.

Keshava Prasad went into possession of the Dumraon Raj estate under the said decree on the 18th September, 1911.

On the 8th September, 1910, the minor, through his guardian, J. A. M. Wilson, who had replaced J. B. Rutherford as manager, as more particularly mentioned hereafter, together with the collector of Shahabad, filed an appeal to the High Court at Calcutta, against the judgment and decree of the said Subordinate Judge.

Even before the filing of the said appeal, proposals had been made for the settlement of the dispute. The course of the negotiations was traced in detail by the Courts in India, and no useful purpose will be served in going over the ground again. Suffice it to say that the negotiations were conducted on behalf of the minor by the Revenue Board, Bengal, as representing the Court of Wards, assisted by the legal Remembrancer, and with the advice of Mr. Sinha (afterwards Lord Sinha), and Dr. Rash Behary Ghosh, who were counsel for the minor. The Lieutenant Governor of Bengal also advised upon the proposals for the settlement, as he was entitled to do under section 69 of the Act.

On the 12th March, 1912, the negotiations then proceeding broke down. Up to that point the proposals had involved that the minor should be paid an annuity for his life of Rs.50,000 a year, afterwards increased to Rs.60,000, with certain benefits to his widow, and that the title of Keshava Prasad to the estate should be confirmed. The view of counsel up to that point had been that there was a good chance of success in the appeal

on the matters of law decided by the learned Subordinate Judge, but that it was impossible to say with confidence what view the Court of Appeal would take as to the fact of the adoption.

On the 28th March, 1912, it had been announced that the appeal would be heard by a Board presided over by the Chief Justice of Bengal, Sir Lawrence Jenkins. The Chief Justice was regarded as a judge who tended to support the decisions of inferior courts on questions of fact, and the advisors of the minor became nervous, and the opponents confident, as to the prospects of the appeal. On the 1st April, 1912, a new province of Behar and Orissa was established, containing within its territories the Dumraon Raj. Thereafter the affairs of the minor were taken over by the Court of Wards, Behar and Orissa, and futher negotiations were conducted by the Revenue Board and the legal Remembrancer of the new Province assisted by Sir Charles Bayley as the Governor of such Province.

No compromise of the appeal had been reached when the hearing commenced on the 10th April, 1912. On the next day, that is the 11th April, the learned Chief Justice on his own behalf and on behalf of his colleagues expressed the view that the case was one for compromise, and the case was adjourned for two weeks to give an opportunity for further negotiations.

Further negotiations then proceeded and on the 11th May, 1912, terms were finally arranged on behalf of the minor at the house of Mr. Sinha, who had opened the appeal, and had taken a very active part in arranging the terms of compromise, and who strongly advised their acceptance.

The terms of compromise shortly were:—

(1) The decree of the Subordinate Judge so far as it concerned the Court of Wards was to be set aside ;

(2) Keshava Prasad was to be declared entitled to all the properties of the Dumraon Raj ;

(3) Keshava Prasad was to pay to the minor the sum of Rs.10 lakhs by the instalments arranged and provision was made for securing this sum ;

(4) Keshava Prasad was to pay to the Collector of Shahabad the sum of Rs.60,000 for the expenses paid by the Court of Wards on behalf of the minor.

On the 14th May, 1912, the minor by Angus Ogilvy, who had become his *guardian-ad-litem*, as hereinafter mentioned, filed a petition in the appeal, which, after setting out the facts leading up to the appeal, stated that having regard on the one hand to the adverse finding of the lower Court on the difficult questions of law and complex questions of fact involved in the suit, the heavy costs that would have to be incurred in prosecuting the appeal and the doubt and uncertainty of ultimate success, and on the other hand to the certain benefits set forth in the said terms of settlement that would ensue, the minor's next friend was advised and submitted that it would be to the benefit of the minor to compromise the appeal on the said terms. The petition then prayed that leave might be granted to the next friend of the minor to enter into such compromise and that the Judges in the appeal might be pleased to certify that the said compromise was for the benefit of the minor and that a decree might be passed in terms of the settlement. This petition was verified on oath by Angus Ogilvy.

On the 17th May, 1912, the petition of compromise was presented to the High Court and the learned Judges of the Court of Appeal, after suggesting certain minor modifications which were accepted by counsel for the parties, gave the following certificate:—

> " We certify that this compromise is for the benefit of the infant appellant, and direct that a decree be drawn in accordance with the proposed terms that means the terms as about to be altered by counsel on both sides in the way we have indicated, to which they agree on behalf of their respective clients."

On the same date a decree in the terms of the compromise was duly made.

On the 30th July, 1923, the minor attained his majority, and on the 12th June, 1926, the present suit was instituted in the High Court at Calcutta in its ordinary original civil jurisdiction by the minor, the defendants being Keshava Prasad, the Hon. Mr. B. Foley or other the hon. member constituting the Board of Revenue, Behar and Orissa, and as such forming the Court of Wards of the said Province; and P. W. Murphy, I.C.S., the former collector of Shahabad, then Deputy Commissioner, Hazaribagh, and the collector of Shahabad representing the Court of Wards. The relief claimed was for a declaration that the compromise decree dated 17th May, 1912, was invalid and not binding on the plaintiff; that the said decree might be set aside, annulled and vacated; and for a declaration that upon the said decree being set aside the plaintiff was entitled to be remitted to his original rights in the said appeal, and that it might be ordered that the said appeal be reheard by a Court competent to hear the same. The plaintiff in the suit, that is the minor, died in the year 1939 and the appellants represent him. Keshava Prasad died in the year 1933 and respondents 1 (A) and 1 (B) represent him.

The suit was heard by Mr. Justice Edgeley, who on the 4th September, 1942, dismissed the suit with costs. An appeal from the decree of Mr. Justice Edgeley was dismissed by an appellate bench of the said High Court consisting of Mr. Justice Mitter and Mr. Justice Mukerjee. Leave to appeal to His Majesty in Council was given by the said High Court on the 19th March, 1947.

The first ground upon which the compromise was attacked before the Board by Mr. Rewcastle on behalf of the appellants was that the Court of Wards had no power on the death of the said Maharani to declare the minor a disqualified person and to take possession of the estate, since, so the argument ran, the minor was not the proprietor of an estate within section 7 of the Act. If this argument were to prevail, the consequence in law would be that the minor was never represented in the original suit, and that all the proceedings in that suit were void as against him. In the opinion of their Lordships this point is not open to the appellants; it is not merely not raised by, but is inconsistent with the plaint, which accepts the validity of the suit up to the date when the appeal was compromised and claims relief on that basis. Mr. Rewcastle sought to rely on cases in which a party before the Board has been allowed to raise a point of law not raised in the Courts in India. That is a very different thing from allowing a claim to be brought forward for the first time before the Board which is altogether outside the framework of the suit, as is the claim under consideration.

The next point urged was that there was at the time of the compromise of the appeal no *guardian-ad-litem* validly appointed in the original suit, and that if there was, such guardian was so negligent in the discharge of his duties as to entitle the minor to repudiate the compromise. In considering this question it is desirable in the first instance to notice the relevant provisions of the Act. Section 51, which is contained in Part vii, provides that:—

> "In every suit brought by or against any ward he shall be therein described as a ward of Court; and the manager of such ward's property, or, if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending."

Section 52 provides:—

> "The Court of Wards may, by an order, nominate or substitute any other person to be next friend or guardian for any such suit; and upon receiving a copy of any such order of substitution, the

> Civil Court in which such suit is pending shall substitute the name of the next friend or guardian for the suit so appointed for the name of the manager or Collector."

The argument for the appellants was that the manager at the date of the suit is to be named as *guardian-ad-litem,* so much is clear, and that no other *guardian-ad-litem* can be appointed unless an order is made by the Court of Wards under section 52. This, their Lordships think, is not the meaning of the section. They think that the manager for the time being, or if there is none the Collector for the time being of the district in which the greater part of the property is situated, is to be the *guardian-ad-litem* and that the Civil Court is bound to make the necessary appointment on evidence of a change in the holder of the office. Section 52 comes into operation when the Court of Wards nominates or substitutes any other person, other, that is, than the manager or Collector referred to in section 51, to be *guardian-ad-litem.* Sections 51 and 52 applied to the original suit whilst it was pending in the Court of the Subordinate Judge ; but after the appeal was filed in the High Court, section 56, which is also contained in Part VII, came into operation. That section enacts that:—

> " Nothing contained in this part shall apply to any suit instituted or pending in the High Court."

Mr. Rewcastle's contention was that that section applies only to suits instituted in the High Court, or which were pending in the High Court at the date when the Act was passed. Their Lordships see no reason for restricting the section in that way. Normally a suit is pending between the date of its institution and of its final determination, and after the appeal was filed the original suit was pending in the High Court. In this connection it is necessary also to notice section 4 of the Act which provides that:—

> " Nothing contained in this Act shall affect the jurisdiction as respects infants of any High Court of Judicature."

Whatever the exact scope of that section may be it seems clear that it operates to prevent section 51 of the Act depriving the High Court of the right to appoint any *guardian-ad-litem* it chose under Order 32, rule 3, even apart from section 56.

The case of *Nakimo Dewani* v. *Pemba Dichen* (L.R. 48 I.A. 27) upon which the appellants relied as showing that the terms of Order 32 have no application to a minor under the Court of Wards is not in point since the compromise in question in that case was made in the District Court and not in the High Court. Their Lordships therefore hold that after the appeal in the original suit was filed in the High Court, that Court could appoint such *guardian-ad-litem* for the minor as it thought fit.

Those being the provisions of the Act relevant to the case, it is necessary to consider who was the *guardian-ad-litem* at the date of the compromise. At the date of the original suit Captain Rutherford was the guardian appointed by the Court of Wards and he was properly named in the suit as guardian of the minor, and this is not disputed.

On the 5th July, 1910, J. A. M. Wilson was appointed manager by the Court of Wards in place of Rutherford. On the 8th September, 1910, by a petition presented to the High Court in its civil appellate jurisdiction, Wilson was appointed *guardian-ad-litem* of the minor in place of Rutherford, and was given leave to prefer and prosecute an appeal on behalf of the minor. This appointment was challenged by the appellants on the ground that Wilson had not been appointed guardian by the Court of Wards under section 52 of the Act. For the reasons already given no such appointment was necessary. A criticism which may legitimately be made upon this appointment is that it ought to have been made by the Subordinate Judge since the suit had not reached the High Court. However, Mr. Wilson thereafter acted as *guardian-ad-litem* in the appeal and the fact that his appointment may have been premature is of no significance.

(See *Mst. Bibi Walian* v. *Banke Behari Pershad Singh* L.R. 30 I.A. 182 and *Raja Braja Sunder Deb* v. *Raja Rajendra Narayan Bhanj Deo* L.R. 65 I.A. 57). In any case Wilson's actions were not the subject of any claim.

On the 19th February, 1912, Angus Ogilvy, who had been appointed by the Court of Wards tutor and co-guardian of the minor, was appointed by the High Court as *guardian-ad-litem* of the minor in substitution for Wilson. The objection urged against the appointment was that Ogilvy could not be substituted for Wilson if Wilson had not been validly appointed. This their Lordships regard as an idle criticism ; if there was any irregularity in Wilson's appointment, that would afford an additional reason for appointing someone in his place. In their Lordships' opinion there can be no doubt that at the date of the compromise of the appeal Ogilvy was the validly appointed *guardian-ad-litem* of the minor.

The charge of negligence preferred against Ogilvy is that he did not bring his mind to bear on the terms of the compromise, but acted merely on the orders of the Court of Wards. The learned Judges in the Appeal Court in India, whose attention does not seem to have been drawn to section 56 of the Act, took the view that it was for the Court of Wards to arrange the terms of the compromise, and, having arranged them, Ogilvy was in effect the nominee of the Court of Wards, and was bound to carry out the orders of such Court, and could not act upon his own judgment. Their Lordships would be disposed to agree with this view but for the fact that section 56 had destroyed the power of the Court of Wards to appoint a *guardian-ad-litem*. A guardian appointed by the Civil Court must undoubtedly bring his mind to bear upon any matter in which he represents the minor. At the same time it is plain that under the Act it is the Court of Wards which is responsible for the control of the person and the estate of the minor, and their Lordships have no doubt that under section 18 of the Act the Court has power to arrange a compromise of a suit on behalf of a minor. A *guardian-ad-litem* would be bound to pay close attention to any views of the Court of Wards upon any compromise proposed for the minor.

When Ogilvy arrived in Calcutta in May, 1912, for the purpose of carrying through the compromise, he was confronted first with the advice of the very eminent counsel who were acting for the minor that the appeal was likely to fail, which would involve the ruin of the minor, and that the proposed compromise was very beneficial to the minor ; and secondly with the fact that the Court of Wards had been negotiating terms over many months, and were satisfied, and indeed pleased, with the terms arranged. The first question to which Ogilvy had to address his mind was therefore whether there was any ground upon which he, a layman, could properly refuse to accept the advice tendered to him. Their Lordships cannot conceive that any *guardian-ad-litem* honestly considering the interest of the minor and with the materials which Ogilvy had, could have refused to support the compromise. The fact that the judges in the Court of Appeal approved the compromise as beneficial to the minor affords strong justification for the action of Ogilvy. Apart from one piece of evidence there is no reason whatever for thinking that Ogilvy did not himself consider and approve the terms of compromise. That piece of evidence is Ex. P, a statement made by Ogilvy in London in the year 1926 to a witness, Mahabir Prasad. In this statement Ogilvy does not suggest that the compromise was not beneficial, but he says that he had no independent advice and considered himself the instrument of the Court of Wards. This statement was received by the trial judge under Section 32 (3) of the Evidence Act on the ground that it might have exposed Ogilvy to a suit for damages. The principle upon which hearsay evidence is admitted under section 32 (3) is that a man is not likely to make a statement against his own interest unless true, but this sanction does not arise unless the party knows the statement to be against his interest. There is no reason whatever for thinking that Ogilvy supposed that he was exposing himself to a suit for damages. In their Lordships' opinion this statement ought not to have been admitted in evidence. However, if it be admitted, it is of very slight evidential value. No attempt

was made to take the evidence of Ogilvy on commission, though he lived for 18 months after making his statement, and the statement cannot outweigh the sworn petition which Ogilvy presented to the Court. Their Lordships see no ground whatever for imputing any negligence to Ogilvy. That being so it becomes unnecessary to consider the point of law discussed by Mr. Justice Edgeley, but not argued in the Court of Appeal, namely, whether negligence, however gross, on the part of Ogilvy, would afford any ground in law for depriving the innocent plaintiff of the fruits of his decree. It is not suggested that Keshava Prasad was responsible for any action or inaction on the part of Ogilvy.

The only other point upon which the appellants have challenged the compromise is the allegation that there was such a conflict of interest between the minor and the Court of Wards as to disentitle the Court of Wards from acting on behalf of the minor, and to make it impossible to rely on any arrangements made by them. The appellants rely on the general principle stated in *Aberdeen Railway Co.* v. *Blaikie Brothers* (MacQueen's, Vol. 1, p. 461) that it is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect. Two points were argued ; first that the Court of Wards were primarily concerned with getting rid of their own liability under the decree appealed from, and secondly that they were concerned with matters of general policy rather than with the interest of the minor. It is true that under the decree of the Subordinate Judge the Court of Wards might have been rendered liable directly or indirectly to make certain payments, though they were not parties to the suit, and they were anxious undoubtedly to get rid of this part of the decree. It is also apparent from the documents on record that in considering the compromise they were not unmindful of its effect upon questions of policy, but their Lordships are entirely satisfied, as were both the Courts in India, that the Court of Wards always most scrupulously regarded the interests of the minor as the foremost consideration, and that they allowed no other matter to influence their judgment. There was no conflict of interest between the minor and the Court of Wards. Both were anxious to succeed in the appeal, and, if that were impossible, then, in the compromise, to get as much as they could from the opposite party. The Court of Wards were abundantly justified in requiring that the expenses incurred by them on behalf of the minor should be discharged under the compromise by the opposite party, and this term of the compromise was for the benefit of the minor. In this respect the position of the Court of Wards was analogous to that of a solicitor who advises his client to accept a compromise one term of which is that the costs of the solicitor shall be paid by the opposite party. It has never been suggested that the inclusion of such a term would enable the client to repudiate the compromise.

In the opinion of their Lordships the appeal fails on every point.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs of respondents 1 (A) and 1 (B).

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In the Privy Council

SRIMATI SAVITRI DEVI AND OTHERS

v.

MAHARAJ BAHADUR RAM RAN
BIJOY PROSAD SINGH AND OTHERS

DELIVERED BY SIR JOHN BEAUMONT

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