

Privy Council Appeal No. 81 of 1921.

Bengal Appeal No. 10 of 1920.

Srimati Saratkumari Dasi - - - - - *Appellant*

v.

Amullyadhan Kundu 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 1ST DECEMBER, 1922.

Present at the Hearing :

LORD ATKINSON.

LORD SUMNER.

LORD CARSON.

MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree dated the 27th February, 1920, of the High Court of Judicature at Fort William in Bengal which reversed a judgment and decree dated the 17th April, 1919, of the Additional Subordinate Judge of Howrah. The main question for determination by the Board is whether or not the compromise of a certain suit instituted by the appellant to recover possession of certain lands theretofore purchased by her from one Dharma Das Kundu, since deceased, purporting to have been made and entered into on the 7th February, 1917, had in fact been so made and entered with her full knowledge and consent or the contrary. The appellant is a purdanashin lady aged about 43 years. She has two sons, Raman and Srish, the latter of whom appears to be competent to some extent to transact business, and two brothers named Satish, about 47 years of age and the other, Sailadhar, who is younger. She can write and read in Bengali; can sign her name, and from her evidence would appear to be a person of some intelligence. The Trial Judge found on the evidence before him that

this compromise was not made and entered into with the knowledge and consent of the appellant. The appellate tribunal found on the evidence the affirmative proposition that it was so made, though that proposition was denied by the appellant and not proved directly by any document or by any witness. Their Lordships are not for the reasons to be stated hereafter able to take the view of the evidence upon this point which commended itself to the appellate Court. They think this latter view was erroneous and incline to think that this was due to the fact that the two learned Judges, Richardson and Shamsul Huda, dealt with the case without keeping sufficiently before their minds that an affirmative proposition is not established by showing that the evidence of witnesses who depose to a contradictory negative proposition is not reliable. The proposition that the appellant consented to the compromise entered into is an affirmative proposition. She and one of her brothers practically deny that she ever consented to it. No witness gives direct and positive evidence that she did consent to it. Yet these learned Judges consider that as the circumstantial evidence given in the case would go to show that the evidence of the appellant and her brother on this point was not reliable, they are therefore entitled to hold the affirmative proposition that she did give her consent to the compromise was proved. Of course, if there was a conflict of evidence on this point, some witnesses asserting that the appellant did consent to this compromise, some the contrary, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witness was true and that of the second false. But on this case, as will presently be shown, there is no conflict of evidence of this kind. The facts of the case may be shortly stated as follows.

On the 15th November, 1913, the appellant bought from the said Dharma Das Kumari certain land for the sum of Rs. 9,500. He died on the 6th of February following. He left three sons and three grandsons him surviving who are all respondents in this appeal. The appellant did not get possession of the land she purchased, and on the 11th July, 1914, she instituted against the above-mentioned sons and grandsons of Dharma Das Kumari a suit for a declaration of her title to the land purchased and for the recovery of the possession thereof. The eldest son of the deceased, Amullyadhan, and the three grandsons denied her claim and contested the validity of the sale, but the two younger of the vendor's sons filed a written statement admitting that her claim was just and well founded. The Subordinate Judge of Howrah who tried the case made on the 23rd August, 1915, a decree allowing the appellant's claim with mesne profits and costs. From that decree the eldest son Amullyadhan and the three grandsons of the deceased appealed to the High Court at Fort William in Bengal. The appellant executed a power of attorney appointing several persons, namely, Babu Probodh Kumar Das amongst others her vakils to argue her case

to inspect the records, execute documents and deposit and withdraw monies and do all such other acts, the same to be accepted and ratified as acts done by her. It has been well established and is not, as their Lordships understand, questioned in this case, that a vakil appointed under such a power of attorney as this is not endowed with power or authority to compromise the suit he is thus retained to argue. The appeal came on in the High Court before Fletcher and Richardson JJ. on the 6th February, 1917. One Babu Haradhan Chatterjee appeared as vakil for the respondents, and the appellant appears to have been represented in addition to Vakil Probodh Kumar Das by a well-known barrister, Mr. B. Chakravarti. After the hearing had proceeded for some time the learned Judges suggested that the appeal might well be compromised. The appellant's vakil at this juncture desired to consult her Counsel, Mr. Chakravarti, but that gentleman's attendance could not be procured, apparently because he was engaged in another Court. The vakil then asked for time to consider the suggestion made, and in compliance with that request the terms of the compromise were embodied in the following document, written in English, which was on the 7th February, 1917, signed by the vakils of both parties and duly filed in Court. It ran thus :--

It may be ordered by consent that defendant No. 1, Amullyadhan Kundu, do pay to the plaintiff, Saratkumari Dasi, Rs. 13,500 (thirteen thousand and five hundred only) within 22nd February, 1917. On such payment being tendered and deposited in this Honourable High Court to the credit of the said Saratkumari Dasi on the said date, the plaintiff, the said Saratkumari Dasi, do convey to the defendant No. 1, the said Amullyadhan Kundu, at the defendant No. 1's cost, the property in dispute in this appeal, free from all encumbrances, if any, created by the plaintiff since the purchase of the said property by her on the 15th November, 1913, and subject to all encumbrances existing before the date of purchase by the plaintiff (Sm. Saratkumari Dasi). If such payment be not tendered within 22nd February, 1917, the appeal stands dismissed with costs.

It is not pretended that the effect of this document was ever explained to the appellant by her vakil or by any other person. She never signed it, or a copy of it, or any document which would show that she was acquainted with its existence, contents or effect. It is written in the English language, which neither the lady nor her vakil understand. She positively swears that she never authorized a compromise of her suit to be entered into, and, as will presently be shown, when she ultimately was informed that this had been done her conduct and action were much more like that of a woman who felt that her confidence had been betrayed, and her interests sacrificed, than that of one who was struggling to break a bargain made on her behalf of the nature of which she was well aware and of which she at first approved.

Being a purdanashin lady she apparently authorized her brother Satish Chandra to attend the Court in which her action was about to be heard and look after the proceedings in the suit, but as will presently be shown there is no evidence to establish

that she either expressly or impliedly clothed him with plenary authority to compromise, on her behalf, this suit which she had instituted to recover possession of the land she had purchased.

On the 21st February, 1917, the principal defendant, the eldest son of the vendor, tendered to the appellant's vakil Babu Probodh Kumar Das the sum mentioned in the document of compromise, Rs. 13,500. He refused to receive it. The matter was brought before the High Court on the following day, the 22nd February, 1917, when it was by that Court ordered that the money should be brought into Court. This has been done. On this same day, the 22nd February, 1917, she states in her evidence that she first heard of the compromise of her suit. In her evidence in the present suit she gives the following account of the way in which she came to know of it. She says: "My brother Satish not having come to my house for 15 or 16 days I sent for him through my son Srish. He came to see me on the 10 Falgun, 1323 (*i.e.*, the 22nd February, 1917). I having inquired of him about the case, he said that the case had been compromised. On hearing that news I had a quarrel with my brother. After that I filed through my son a petition to the High Court for setting aside the compromise." She adds, "since the quarrel with my brother he did not come to my house. I would suffer loss if I made the compromise for Rs.13,500 because Rs.17,000 or Rs.18,000 have been spent by me on account of the purchase of the land and litigation expenses."

On the 28th March, 1917, one month and six days after she had, as she swears, first heard of the compromise she took the proceedings indicated in the foregoing passage of her evidence. She had an application made to the High Court to a review of the proceedings in the suit in which the compromise had been entered into, with the view of having the latter set aside on the ground that it had been entered into without her authority or consent. This application was, on the 11th May, 1917, for some reason not fully explained, refused. Whereupon the appellant on the 25th July, 1917, instituted the present suit. The grounds upon which the High Court apparently based their decree which is appealed from are expressed concisely in the following two passages from their judgments. Mr. Justice Richardson said: "I am satisfied that the respondent's brother Satish acted as her accredited agent throughout, and that the compromise of the 7th February was entered into on her behalf and with her consent. The respondent agreed at the time to a settlement not unjust to her but changed her mind afterwards. The bargain cannot be undone. *Neal v. Lennox*, L.R., 1902, A.C. 465"; and Mr. Justice Huda said: "As I have said before the evidence of Probodh Babu and Haradhan Babu place the fact of her consent to the compromise beyond any doubt. I therefore hold that Sarat Kumari did consent to the compromise and now has come forward to repudiate it falsely." It will be observed that the conclusions at which the learned Judges

have arrived do not agree. Mr. Justice Richardson held that the appellant's consent to the compromise was given, not by the appellant directly, but by her brother, her agent, fully authorized on that behalf. In the case of the second learned Judge it is very doubtful whether he comes to the same conclusion as does his brother Judge, or to the conclusion that though as he admits there is no direct evidence of consent by the appellant, the circumstantial evidence of it is very strong. He says he rejects the evidence of Satish and Saila, the appellant's brothers, as wholly unreliable. He then deals with the circumstantial evidence upon which he relies in this fashion. He says :—

Satish, as I have said, was acting in the interest of his sister. On the 6th he and his brother were both present in Court. When the Court suggested a compromise, time was given to enable Satish to consult his sister. They were not living far off. Satish was living at Pataldanga and Saratkumari at Bagbazar. The distance between the two places is only about a mile. It is inconceivable that neither of the two brothers went to Saratkumari to take instructions from her about the compromise. According to Probodh Babu, Satish saw him in the evening and told him his sister would like to get a little more money, that accordingly the next day he was able to induce the learned Vakil on the other side to raise his offer to Rs. 13,500. Admittedly both Satish and Saila were present in Court and I have no doubt they consented to the compromise on behalf of their sister.

This line of reasoning is directed to show that Satish and Saila sought for and obtained from their sister on the 6th February authority to consent to the compromise after they had duly informed her of the suggestion that had been made, while Mr. Justice Richardson held, to use his own words, that " Satish was the accredited agent of his sister throughout " (which their Lordships presume means from the first) and that the compromise of the 7th of February was entered into by him on her behalf and with her consent."

The very fact that time was given to consider the compromise suggested by the Court is the best proof that Satish was not given from the first and not taken to have been so given such dominion and control over the litigation as would have entitled him to compromise the suit without consulting his sister.

Such being the apparently inconsistent conclusions at which the two learned judges arrived, it is necessary to examine the evidence to endeavour to discover whether there was any evidence before them from which these conclusions as inferences from established facts, not mere conjectures or suspicions, or surmises could legitimately be drawn. Turning to the evidence of the appellant one finds that in her evidence in chief she deposes as follows :—

My name is Saratkumari Dasi. My husband's name is Beni Madhab Dawn. My age is 43 or 44 years. The house in which I have been giving deposition is my own house. I, plaintiff, have instituted suit in the Howrah Court. Amullya filed, in the Honorable High Court, Appeal No. 393 of 1915 against me. Satish Dutt is my eldest uterine brother. He used to look after the said appeal case of mine. I gave no authority to my said uterine brother to compromise the said appeal. I made no Solehnama in the case at High Court. I did not give to my said brother consent to file any Solehnama,

relinquishing the property on taking Rs. 13,500. I did not give to the Vakils, who were engaged on my behalf in High Court, any authority to compromise the said appeal case. My eldest brother Satish or youngest brother Saila or my son Srish did not show any Solehnama to me, nor read out the same to me. I did never, through my brother Saila and Satish or my son Srish, apprise my Vakils at High Court of my consent to make Solehnama. I did never, through those persons, tell them to make Solehnama on taking Rs. 16,000 or on taking Rs. 13,500 exclusive of the amount due under the mortgage to Prandhan Babu. My eldest brother Satish never brought and read out the draft of any Solehnama to me, nor showed the same to me. My eldest brother Satish never informed me of the fact that a talk of compromise was going on in High Court. If I had heard of the Solehnama, I would not have given consent to same.

She was subjected to a long, tedious and mainly irrelevant cross-examination. Nothing discrediting her evidence in chief was elicited, while she added that her brother and sons engaged her vakils ; that she had no interviews with any of them and that the quarrel with her brother Satish to which she referred was not "very abusive between brother and sister, but an altercation," that she said to him, "Why did you do this without my consent?" Their Lordships find nothing in any part of her evidence to sustain the suggestion of the second learned Judge that this lady got sorry for having consented to the compromise, changed her mind and came forward to repudiate it falsely.

Satish, when examined, proved that he was a trader, accustomed to look after his sister's case upon appeal, and then alleged that the compromise was made without reference to her ; that on the morning of the 6th of February Dr. Mitter commenced his argument about noon, that about 2.30 or 3 p.m. Probodh Babu (the appellant's vakil) spoke to him on the verandah of the Court, saying that the Judges had suggested that the case should be amicably settled, that he was not agreeable to this, and then this vakil asked him to come to his, the vakil's, residence at night when he would speak about the matter. The Court was adjourned, but he says he does not know whether that was before or after the conversation. He says that he did not communicate (*i.e.*, about the proposal) with his sister, that he went to the vakil's residence that night and told him (the Babu) he was not willing to compromise ; that this Babu then asked him to come to Court on the following day, the 7th, which he did. The appellant's sons, he says, were not present in Court on the 6th of February ; that Dr. Mitter resumed his argument on the 7th ; that about 1 o'clock this same vakil asked his brother Saila who was with him to call on Mr. Chakravarti, which his brother went to do. The witness further says that Probodh Babu asked him to come to the verandah of the Court, which he, the witness, then did, when the former told him that if the suit was dismissed by Mr. Justice Fletcher they would be put in a great difficulty, so it would be better to compromise it. That he, the witness, replied he could not say anything about the matter ; that he, the vakil, might do what he thought best ; that he, the witness, did not agree to the vakil compromising the case. When witness's brother had returned he said the vakil

had gone back to the Court Room and talked there with Dr. Mitter and Haradhan Babu when Dr. Mitter took a paper and wrote down something in English, which language the witness does not understand; that Probodh Babu then asked the witness to sign it, which he, the witness, refused to do, saying that before he could sign it, it was necessary his sister should consent to it. That the paper was then signed by the two vakils and filed by Dr. Mitter. The appellant's sons were not, the witness says, in the Court on the 7th, and then he states that he, the witness, did not go to inform the appellant of the compromise as he apprehended she would disapprove of what had been done. He is cross-examined, but nothing to shake his evidence in chief would appear to their Lordships to have been elicited from him. He adds that he did not inquire what had been written by Dr. Mitter, that the terms of the compromise were not read over or explained to him, but that Probodh Babu told him that on the defendant in the suit paying Rs. 13,500. the case would be compromised. If this witness had from the first plenary authority to compromise this suit, as Mr. Justice Richardson apparently holds, or if during the adjournment he had obtained from his sister authority to consent to the compromise, as apparently Mr. Justice Huda holds, it is difficult, if not impossible, to suggest any rational explanation of his refusal to sign the document. Owing to the secluded life purdanashin ladies live, and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them.

In the case of *Tacoordeen Tewarry v. Nawab Syed Ali Hossein Khan*, L.R. I.A. 192, Sir Montague Smith stated the law upon the point thus. According to the principles which have always guided the Courts in dealing with sales or gifts made by purdanashin ladies the strongest and most satisfactory proof ought to be given by the person, who claims under a sale or gift from them, that the transaction was a real and *bona-fide* one and was fully understood by the lady whose property is dealt with. In *Shambati Koeri v. Jago Bibi* 29 I.A. 131, Sir Andrew Scoble said: "It is a well-known rule of this Committee that in the case of deeds and powers executed by purdanashin ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them." And in *Sunitabala Dibi v. Dhara Sundari Debi Chowdhurain and another* 46 I.A. 272, this principle was applied to an agreement to compromise litigation, but it was held to be sufficient to show that the general result of the compromise, as distinct from the details and legal technicalities involved, was understood by her, and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

Nothing of this kind was shown in this case. There is no proof that the lady knows English. Satish proves that the document filed was written in English. He is not contradicted on this point. The lady's vakil, it appears to their Lordships, failed in his duty towards her; he never saw her, never spoke to her in

reference to this compromise, nor had he any communication with her touching it. Had he acted properly and explained this compromise to her, after which she approved of and consented to it, she would in all probability have signed it, and all this litigation would have been avoided.

The learned Judge also says in his judgment, "the evidence both of Probodh Babu and Haradhan Babus places the fact of the appellant's consent to the compromise above any doubt." It is essential then to examine the evidence of these witnesses with great care. They were examined by the Court and not by the vakils of the parties.

The evidence of Babu Haradhan Chatterjee ran as follows :—

"Q.—Will you state as shortly as possible your recollection as to what happened on the 6th and what happened on the 7th February ?

"A.—Dr. Mitter, who was leading me, was arguing and discussing the evidence.

"Q.—Were you addressing the Court ?

"A.—No. Dr. Mitter was addressing. I was present. I was seated by his side. I was instructing him. Then Mr. Justice Fletcher threw out a suggestion, whether my client is willing to purchase the whole property, that is to say, the defendant No. 1. Dr. Mitter asked me whether the client was willing to do so. Previously we thought that if there was a suggestion to purchase the property, we would accept it. Dr. Mitter said 'we are agreeable to purchase the property.' Upon that, Mr. Justice Fletcher asked the other side, Probodh Kumar Das, whether he is agreeable to compromise the suit, and asked Dr. Mitter what the terms will be. Dr. Mitter suggested that we were agreeable to pay the purchase-money with compound interest and that was the suggestion asked by Mr. Justice Fletcher, whether that would be agreeable to the other side. Probodh Babu said 'I cannot say without asking my clients.' Both the brothers Satish and Saila were standing behind him and they held a consultation amongst themselves. After that they said, 'we cannot say anything to that, we shall speak about this matter to-morrow; unless we consult the client we cannot say anything to it.' On that day it was arranged for 13,000 plus the mortgage money. This matter was adjourned at that time. Satish was standing behind Probodh Babu, and Mr. Justice Fletcher addressing him, told him, 'tell your sister that the compromise will be to her benefit. I have thoroughly understood the case, and in my opinion it is a benami transaction.

"Q.—We want to know exactly what happened on the 7th ?

"A.—On the 7th they wanted more. Afterwards it was settled at 13,500.

"Q.—Afterwards—when? On the same day or the next day ?

"A.—On the 7th, after some consultation with Dr. Mitter, myself on one side and Probodh Babu and Satish and Saila on the other side. Then the draft was made recording the terms. Probably I drew out the draft in consultation with Dr. Mitter and Probodh Babu. This draft was taken away by Satish to show to somebody, but I do not know to whom. He said 'I will show it to some friend of mine.'"

The evidence of Babu Probodh Kumar Das ran as follows :—

"Q.—Can you tell us as briefly as possible what took place first on the 6th and then on the 7th ?

"A.—So far as I remember the arguments were going on when there was a suggestion made by the Court, viz., Mr. Justice Fletcher, to Dr. Mitter, whether he was willing to purchase the whole property. Dr. Mitter said

that he would accept that and that he would pay compound interest. On that, Mr. Justice Fletcher asked me whether my client would be agreeable to that. I asked my client Satish and his brother Saila whether they agreed to it. They had a consultation among themselves as to whether that would be profitable to them and that did not take more than two or three minutes. After that Satish asked me to take time to consider the matter and that was also necessary because I was appearing for a purdanashin lady and had to take her instructions in the matter. I said to him, 'You had better go and consult about the matter and come to me at night at my house.' So he went away and came at night on that very day at my house and told me that his sister would like to have a little more than was offered. I said that I would ask Dr. Mitter whether his client is agreeable to that. The next morning when the case was called on at 11 a.m., then I told Dr. Mitter that my client would require something more because the amount which was offered was barely sufficient to cover expenses. Then Dr. Mitter consulted or did something and then within a few minutes Dr. Mitter said, "we can offer so much." I told my client that that was the utmost that he could get. He could do what he liked. Then Dr. Mitter asked for some time from the Court. Time was given. I went away on another case which was called on at that time.

" Q.—That was on the 6th ?

" A.—That was the next day, the 7th.

" Q.—On the 6th night your clients came and told you that they required something more ?

" A.—Yes, on the 7th when I came to Court they told me to try and get something more. I said to Dr. Mitter that unless something more was offered my client was not agreeable to the compromise.

" Q.—And Rs. 500 more was offered ?

" A.—Yes.

" Q.—Did you ask your client to go and fetch Mr. Chakravarti ?

" A.—I do not remember if I did.

" Q.—No occasion arose for any argument ?

" A.—So far as I remember no occasion arose for argument on the 7th.

" Q.—Were you present at 2.30 when the petition was put in ?

" A.—Yes. Dr. Mitter handed something to Haradhan Babu. He read out and I handed it over to my client who took it away and went away.

" Q.—You distinctly remember you never sent for Mr. Chakravarti ?

" A.—I cannot be positive about it, it is so old."

Nothing of importance beyond this was elicited.

The Appellate Court insisted quite properly upon the examination of these two vakils. They treat their evidence as so much in conflict with the evidence not only of the two brothers of the appellant but of the appellant herself as to utterly discredit her and them as witnesses, and yet it never apparently occurred to the learned Judges that it would have been well if the brothers of the appellant had had an opportunity of cross-examining these vakils on the portion of their evidence in conflict with their own. No such opportunity was given. Again, the evidence of these vakils deals only with what occurred in the Court. It may show that they, the appellant's brothers, had an opportunity of informing her of the fact that a compromise was proposed and of obtaining her consent to it. It may even go so far as to raise a suspicion that she was informed of

it and did consent to it. It may tend to discredit the evidence of the brothers which was in conflict with it. It is, however, inconsistent with the assumption that Satish had from the first plenary authority from his sister to compromise the suit in any way that seemed good to him. In that case asking for her consent to the compromise proposed would have been quite unnecessary. But in their Lordships' view it is quite insufficient in face of the distinct denial of the appellant to establish the affirmative proposition that she did in fact consent to this compromise, the burden of proving which rests upon the respondents. In their Lordships' view they have failed to discharge that burden.

There is one matter that may account for the unbusinesslike manner in which this compromise was arranged and carried out. The appellant was cross-examined at length apparently to show either that the money she paid for the lands she purchased was not her own or that she gave or lent money to her brother Satish to purchase them for himself. Mr. Justice Fletcher suggested from the Bench that the purchase might have been a *benami* transaction, and Babu Probodh Kumar Das in his evidence calls Satish his client. At one part of his evidence he uses the words "My client Satish," at another, "I handed it (the compromise paper) to my client, who took it away with him." It may possibly be that he believed that the property was purchased for Satish, that he was the real owner of it, and that he, therefore, thought it was unnecessary to take the precautions which he probably would have taken if he had believed this purdanashin lady, the appellant, was the real owner.

The case of *Neale v. Gordon Lennox (supra)* referred to, has no application to the present case.

The respondents rely upon another point.

It is this. The appellant, after having obtained leave to appeal to His Majesty in Council, applied to the Court for, and on the 2nd of September, 1920, obtained an order that Rs. 4,000 (portion of the Rs. 13,500 paid into Court), should be held as security for the costs of the respondents in the appeal to this Board. It was contended that this transaction amounted to an adoption by the appellant of the decree while at the same time she was impeaching it, and was, therefore, estopped from doing so. If the appellant should fail in this appeal, the money lodged in Court will belong to her. If she succeeds in the appeal the money lodged in Court will be returned to the respondents, subject, however, to any claim she may successfully establish to have any costs awarded to her paid out of it. In their Lordships' view, the point is entirely unsustainable. On the whole, therefore, their Lordships are of opinion that the appeal succeeds, that the judgment and decree appealed from were erroneous and should be reversed, that the judgment and decree of the Additional Subordinate Judge was right and should be restored, and that the respondents should pay to the appellant her costs of the appeal to the High Court and of this appeal, and they will humbly advise His Majesty accordingly.



In the Privy Council.

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AMULLYADHAN KUNDU AND OTHERS.

DELIVERED BY LORD ATKINSON..

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