Privy Council Appeal No. 52 *of* 1927.
Bengal Appeal No. 50 *of* 1925.

Sourendra Nath Mitra and others - - - - - - *Appellants*

v.

Srimati Tarubala Dasi - - - - - - - - *Respondent*

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 23RD JANUARY, 1930.

Present at the Hearing:
VISCOUNT SUMNER.
LORD ATKIN.
LORD THANKERTON.
SIR JOHN WALLIS.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court of Judicature in Calcutta, who, differing from the Subordinate Judge of Hoogly, refused to record an alleged memorandum of compromise and to make a decree in accordance therewith. The disputed compromise was made in a partition suit in which the present appellants were plaintiffs and the present respondent was defendant. The question at issue is whether an agreement of compromise made between the plaintiffs and counsel for the defendant bound the defendant. It involves important considerations as to the authority of an advocate in India to bind his client. The parties are members of a Hindu family governed by the Bengal school of Hindu law. The suit related to the joint property inherited from the paternal grandfather of the plaintiffs, one Ishan Chandra Mitra, who had died in 1900. The plaintiffs were the children of the two elder sons of Ishan Chandra Mitra. The defendant was the widow of the third son, Charu Chandra Mitra, who had

succeeded to the share of their unmarried son, who had died in 1920. She was a *purdanashin* lady. The plaint filed in April, 1923, alleged that the property was in the joint possession of the three brothers, and that after the death of the eldest brother the defendant's husband Charu managed the joint estate. It further alleged that Charu had started business on his own account and had used moneys of the joint property for the purposes of this business. It claimed partition of the joint property which was scheduled to the plaint, and of any other property which should be found to be joint, and an account of the dealings of Charu with the joint estate. The defendant's written statement, filed on August 6th, 1923, denied that her late husband had conducted the alleged business on his own account, and alleged that his transactions were all joint and further alleged that she had through her attorneys proposed an amicable partition and had no objection to a partition, and that she had the right to bring a separate suit to recover her jewellery and a sum of Rs. 50,000 on account of her husband's life policy, which she said were on deposit with the plaintiffs. She further alleged that she would be entitled to demand accounts from the plaintiffs. Meantime, before filing her written statement, she had on June 4th, 1923, filed a petition for a receiver, alleging acts of waste against the plaintiffs, and that it was necessary that the books of account should be placed in independent custody, and provision made for paying her Rs. 50,000 to provide for the costs of the suit, and for payment of a monthly allowance pending the suit. On this application affidavits were filed on both sides. The date for hearing of the application was postponed by the Subordinate Judge from time to time. The first hearing in Court appears to have been on August 18th. It was adjourned to August 25th, and again was part heard. It was further heard on September 1st and September 3rd, and on the latter day the possibility of a compromise was mentioned to the Judge, and it was adjourned to September 5th. On September 5th it appears that the defendant filed a petition assented to by the plaintiffs, praying for time for amicable settlement of the suit, and the Judge ordered an adjournment to September 15th, and that "parties do file the petition of compromise on that date." On the 3rd and 4th, memoranda of compromise were signed by the plaintiffs and counsel for the defendant. On September 15th the plaintiffs alleged that a compromise had been arrived at, while the defendant said that there was no concluded agreement. Eventually the learned Judge, after several adjournments and after hearing oral testimony, decided on March 31st, 1924, that an agreement had been concluded, that it bound the defendant, and made a decree in accordance therewith. The High Court reversed this decision on December 18th, 1924, holding that counsel had no authority to compromise the suit without express authority, and that it had not been shown that the defendant, a *purdanashin* lady, had consented to the compromise.

The document in question was signed by Mr. Sircar as counsel for the defendant. He is a member of the English bar, admitted as an advocate of the High Court at Calcutta. He is a gentleman of the highest reputation and has since occupied the position of Advocate-General of Bengal. Against his integrity, ability and experience nothing is suggested by either side. He was briefed by Mr. K. I. Dutt to appear on behalf of the defendant and support the petition for a receiver. It does not appear to be necessary for their Lordships to decide whether a brief to appear upon an interlocutory application such as this could of itself confer authority upon counsel so briefed to settle the whole action. It is obvious that briefs on some interlocutory applications could not possibly confer such authority. In other applications, and especially in motions for a receiver in a partnership suit, or on motions for an injunction, it has been common practice in this country for counsel to settle the whole suit, but whether they derive their authority solely from the brief on the motion may be open to question. In the present suit it is plain from Mr. Sircar's evidence that settlement was under discussion between him and those representing the defendant from the very beginning. As appears from the defendant's written statement, it was the subject of complaint by her that her suggestion for an amicable settlement had been defeated by the alleged precipitate filing of the plaint by the plaintiffs. Their Lordships have no doubt from the whole course of the proceedings and the communications of the parties both with their own counsel and with one another that it was the intention to place Mr. Sircar in the same position and to arm him with the same authority as though he had received the brief to conduct the entire suit.

An agreement to compromise a suit must be established by general principles which govern the formation of contracts, though there are special rules governing its enforcement by the Courts which arise out of its intrinsic nature. If the agreement purports to be concluded on behalf of one or both the parties by their respective legal advisers, the first two questions that arise, as on the formation of any contracts by agents, are :—

1. Had the agent, the actual authority of his principal, express or implied, to conclude the contract ?
2. If no actual authority, had he ostensible authority so as to bind his principal against the other party, relying on ostensible authority ?

An agreement to compromise a suit, however, almost necessarily involves recourse to the further jurisdiction of the Court in which the suit is brought to effectuate the terms of the compromise. And in several cases in English law the Courts have refused to enforce the agreement of compromise where it has been established that the legal adviser had in fact no actual authority to settle, or acted under some serious misunderstanding, so that to allow the other party to act upon an ostensible authority

would be to impose upon the Court an exercise of jurisdiction which would in fact work substantial injustice. Hence there may arise a third question :—

3. Will the Court where the suit is compromised give effect to the terms agreed ?

Their Lordships approach the case bearing in mind that the questions in issue have to be determined in accordance with the law in India, and that it by no means follows that implications of authority which are readily inferred in other countries ought to be established in the conditions which prevail in India. The first question that thus arises is :—

1. Had Mr. Sircar actual authority of the defendant, express or implied, to conclude the agreement of compromise ?

Their Lordships did not deem it necessary to call upon the parties to discuss the question of express authority, though they must not be supposed to doubt its existence. They express no opinion one way or the other. They are of opinion that Mr. Sircar, as an advocate of the High Court, had, when briefed on behalf of the defendant in the Court of the Subordinate Judge of Hoogly, the implied authority of his client to settle the suit. Their Lordships have already said that he must be treated as though briefed on the trial of the suit. Their Lordships regard the power to compromise a suit as inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocates of England, Scotland and Ireland, apply in equal measure to India. It is a power deemed to exist because its existence is necessary to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client. The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance this argument, to withdraw that ; he must make the final decision whether evidence is to be given or not on any question of fact ; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise : one point is given up that another may prevail. But, in addition to these duties, there is from time to time thrown upon the advocate the responsible task of deciding whether in the course of a case he shall accept an offer made to him, or on his part shall make an offer on his client's behalf to receive or pay something less than the full claim or the full possible liability. Often the decision must be made at once. If further evidence is called or the advocate has to address the Court the occasion for settlement will vanish. In such circumstances, if the advocate has no authority unless he consults his client, valuable opportunities are lost to the client.

On such grounds as these advocates in England, Scotland and Ireland have long been considered to have an implied power to settle a suit in which they have received a brief. In England authority is abundant. Their Lordships will only refer to *Shepherd* v. *Robinson* [1919]. 1 K.B. 474, at p. 477, in the Court of Appeal, where Bankes L.J. says: "It is clear that counsel has an apparent authority to compromise in all matters connected with the action, and not merely collateral to it." The apparent authority is derived from the known existence of the implied authority. In Scotland the rule is no less clear, and, indeed, has been expressed on great authority to go so far as to entitle the advocate acting *bona fide* to disregard the wishes of his client in the compromise of a suit. See further Lord President Inglis in *Batchelor* v. *Pattison*, 3 R.. at p. 918 (1876), and Bell's Commentaries, S. 219, 10th Ed., p. 92. In Ireland the law is the same as in England.

Two observations may be added. First, the implied authority of counsel is not an appanage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief.

Their Lordships are unable to see why the above considerations should not apply to an advocate in India, whose duties to his client in the conduct of a suit in no wise differ from those of advocates in England, Scotland and Ireland. There are no local conditions which make it less desirable for the client to have the full benefit of an advocate's experience and judgment. One reason, indeed, for refusing to imply such a power would be a lack of confidence in the integrity or judgment of the Indian advocate. No such considerations have been or indeed could be advanced, and their Lordships mention them but to dismiss them. It does not appear to be disputed that advocates practising in the Presidency towns have such authority. It was decided in Allahabad in 1890 by Sir John Edge and the full Bench in *Jang Bahadur Singh* v. *Shankar Rai*, I.L.R. 13, All. 272, that advocates of that Court have the implied authority. Sir Francis Maclean, in Calcutta in 1900. seems to have had no doubt as to the existence of the implied authority. *Nundo Lal Bose* v. *Nistarini Dani*, I.C.R. 27, Cal. 428. The same view seems to have been taken in Patna in 1922 in *Nilmoni Chaudhuri* v. *Kedar Nath Daga*, I.C.R. 1, Patna 489. No evil results have apparently ensued in India from the existence of this power in the instances mentioned. Their Lordships desire to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derive

their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority, such as a *vakalatnama*, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion.

It follows from what has been said that Mr. Sircar, who had been briefed on the application for a receiver and had intentionally been armed with authority to act as though he had been briefed in the suit, had actual implied authority to settle the suit. He had received no instructions inconsistent with such authority, which at all relevant times must be taken to have been in existence.

2. It becomes, therefore, unnecessary to consider in this case any question of ostensible authority, which only becomes relevant where the actual authority relied on does not exist.

Their Lordships are further of opinion that the settlement signed by Mr. Sircar deals solely with matters connected with the suit and does not deal with matters collateral to it. They further think that the terms agreed are sufficiently certain to bind the parties, though it may happen that in working out the terms there may arise disputes between the parties which will require further adjustment.

It thus appears that there was concluded between the parties a valid agreement compromising the action which either party, subject to any question as to the discretion of the Court, would be entitled to enforce. It is, however, necessary to deal with the contention that the plaintiff in the action was a *purdanashin* lady, and that it was not proved that she knew and approved the agreement made on her behalf. Their Lordships are satisfied that there can be no objection to the agreement on this score. The defendant was fully and continuously advised upon the whole proceedings by her son-in-law, Anath Roy, and his father, Jitendra Nath Roy. It is unnecessary to consider whether a *purdanashin* lady who by a free and intelligent act of her own employs a professional agent in a particular transaction is not deemed to confer upon him all the authorities which are ordinarily implied in such employment, so that no further inquiry as to proof of agency is required. In the present instance their Lordships are satisfied that the lady was kept fully informed throughout of all the various stages of the negotiations, and was fully and intelligently aware that Mr. Sircar was clothed with authority to compromise the suit on her behalf, and was in fact exercising his authority in the manner now complained of. Their Lordships therefore cannot agree with the view which found favour with the learned Judges on appeal that the lady had not been proved to have authorised the agreement.

3. The only remaining question is whether the compromise should have been recorded and a decree made in accordance therewith under Order XXIII, r. 3, of the Code of Civil Procedure.

The words of the rule do not in terms appear to confer a discretion on the Court, but their Lordships desire to say nothing to prejudge a contention that the Courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice such as emerged in the case of *Neale* v. *Gordon Lennox* in [1902], A.C. 465. In the present case no injustice of any kind was established, and as it was established that the suit had been adjusted either wholly or in part by a lawful compromise, it was the duty of the Court to record the agreement and pass a decree in accordance therewith. This is what the learned Subordinate Judge did, and in their Lordships' opinion his decision was correct. The appeal should be allowed and the preliminary decree of the Subordinate Judge dated March 31st, 1924, should be restored, and their Lordships will humbly advise His Majesty accordingly. The respondent must pay the costs here and in the Court below.

In the Privy Council.

SOURENDRA NATH MITRA AND OTHERS

v.

SRIMATI TARUBALA DASI.

DELIVERED BY LORD ATKIN.

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