

Subbathal Vs. Kittammal

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Court : Chennai

Decided On : Sep-10-1968

Reported in : (1971)1MLJ293

Appellant : Subbathal

Respondent : Kittammal

Advocate for Def. : Mr. V.C. Viraraghavan

Judgement :

K.S. Ramamurti, J.

1. Defendants 2 to 4 who failed in the Courts below are the appellants in this second appeal. The main point that arises for decision is whether the consent decree in an earlier litigation, O.S. No. 152 of 1954, Sub--Court, Coimbatore, operates as res judicata as against the plaintiff.

2. The plaintiff, Kittammal, and her four sisters, Subbathal, Karupathal, Nachiammal and Fechiammal, succeeded to the properties which also included the suit properties on the death of their mother. Defendants 1 and 5 are their brothers. The second defendant is the first defendant's widow, whose children are defendants 3 and 4. In the first instance, after the death of the mother, defendants 1 and 5 purchased 3/5th share of the three sisters, Karupathal, Nachiammal and Fechiammal leaving outstanding the 1/5th share of Kittammal and 1/5th share of

her sister, Subbathal. The present defendants 2 to 4 filed the suit, O.S. No. 152 of 1954, against the present first defendant for partition and separate possession of 1/4th share of the present third defendant and also for maintenance and marriage expenses of the present second and fourth defendants respectively against Arumuga Goundan, the father of present defendants 3 and 4 and the husband of the second defendant on the ground that Arumugham was mismanaging and squandering the joint family properties. The two sisters, the present plaintiff and Subbathal, with whom the 2/5th share was outstanding were impleaded as parties to the suit. The brother of the first defendant, Paramaguru Goundan, was also impleaded as a party defendant. Arumugha, the first defendant, therein resisted the suit on the ground that the properties involved in the suit belonged to their mother and that the plaintiffs were not entitled to make any claim on the footing that they are properties belonging to the joint family of Arumugha. Paramaguru filed a written statement supporting the case of the plaintiffs therein that the properties were joint family properties. The two sisters, the plaintiff and Subbathal, did not file any written statement and remained ex parte throughout. That suit, however, was compromised and a preliminary decree (Exhibit B-1) passed treating the properties as the joint family properties ignoring the right of the plaintiff and her sister. To that compromise (Exhibit A-7), the plaintiff and her sister Subbathal were not parties. There were final decree proceedings in pursuance of the compromise decree to which the plaintiff was not a party and no notice was served upon her. The final decree is (Exhibit B-2). The plaintiff has filed the present suit for a declaration that the decree in O.S. No. 152 of 1954 is not valid and binding on her share of the properties and she has asked for partition and separate possession of her 1/5th share in the suit properties. The first defendant, father of defendants 3 and 4 has remained ex parte in the suit. The fifth defendant, Paramaguru, the brother of the first defendant as well as the sixth defendant who had since purchased the 1/5th share of the other sister Subbathal have remained ex parte. The suit was resisted on the main grounds (a) that the properties are the joint family properties and that the mother of the plaintiff was only benamidar for the family, (b) the present suit was barred by res judicata on account of the compromise decree in O.S. No. 152 of 1954. The Courts below have concurrently found that the properties belonged to the mother and this finding is supported by

ample evidence. Indeed learned Counsel did not seriously canvass the correctness on this finding which is binding in this second appeal.

3. The only point that was stressed by learned Counsel for the appellant is the question of res judicata. From the above narration of facts it will be seen that the pleadings in O.S. No. 152 of 1954 disclosed a contest as to the character of the properties, whether they belonged to the mother or to the joint family, the plaintiff therein and their uncle Paramaguru contending that the Properties are joint family properties while the managing member, the father Arumugham contending contra. It is also in evidence that at that time these two sisters, the present plaintiff and Subbathal were living in the family house and were maintained and looked after by Arumugha Goundan.

4. Learned Counsel for the appellants, Sri Gopalaswami Iyengar, contended that as the suit. S. No. 152 of 1954 was a partition suit the present plaintiff along with her sister who were made parties therein ought not to have remained ex parte but should have filed a written statement and put forward their contentions and that when once the character of the properties formed the subject matter of an issue between Arumugha's son and Arumugha's brother on the one side and Arumugham on the other, any finding rendered in that suit would operate as res judicata against all the sharers including the present plaintiff and her sister. Learned Counsel urged that in a partition action all the co--sharers are both plaintiffs and defendants, that any co-shaier who either asserts a claim or whose right to a share is denied, must put forward his claim in the said suit and that the decree for partition would operate as res judicata either as between direct parties or as between co-plaintiffs or co-defendants to the extent to which points have been expressly heard and decided and findings recorded in the suit. If the present plaintiff and her sister had entered appearance, put forward the right of her mother and a decision had been rendered on the merits, for or against them, after contest, that would unquestionably ex perate as res judicata and it is not open to the parties to reagitate the question, so heard and decided. He further urged that it would not be open to the defendants to remain ex parte and when such a hostile claim was put forward by the plaintiffs therein and a contest raised, that they must take the risk of the ex parte decision operating as res judicata and that whatever is

necessary to sustain the ex parte decree in favour of the plaintiffs therein must be deemed to have been heard and decided as against the defendants who remained ex parte.

5. It was also urged that when the plaintiffs therein were prepared to fight the case on the merits, when the contest was raised by the first defendant, the present plaintiff and her sister cannot simply remain ex parte and thereby render unnecessary a decision on the merits or virtually prevent the plaintiffs from establishing their right for which they were then quite prepared and which they could have done easily when all evidence, oral and documentary was available to them on the earlier occasion. According to learned Counsel, any other view would result in an impossible situation and protracted litigation ad infinitum, the parties waiting for better times, and there being no finality to litigation, a stalemate being created by parties remaining ex parte, fearing that if they participated in the contest, they might lose. It is for this reason, principles of res judicata apply to ex parte decrees, just like decisions in proceedings after an actual contest. All grounds of attack in respect of the actual claim made and all matters inconsistent with the plaintiff's claim which ought to have been raised by the parties are deemed to be directly and substantially in issue in the suit and heard and finally decided. The party who remains ex parte in a proceeding not only takes the risk of the decision going against him there is the further inseparable result that in subsequent litigations, he will not be permitted to re-assert or re-agitate matters which formed the necessary foundation of the ex parte decree.

6. Following upon this, learned Counsel urged that the fact that in the present case, the decree was a Compromise decree and not a decision on merits would not affect the position. The defendants who remained ex parte must take the same risk of the subject matter in dispute being settled by compromise by the parties who were actually contesting the litigation. Mr. Gopalaswami Iyengar for the appellant contended that any other view recognising the right in the party who remained ex parte to take up the question would result in a stalemate and prevent any finality in litigation. He urged that in such a situation the matter will have to be considered from the point of view of the plaintiffs, because they had come to Court quite prepared to fight and meet any challenge. When some defendants remained

ex parte and when the plaintiffs were prepared to fight and establish their rights as against the other defendants, who were till then contesting and if the latter surrendered realising that they have no case to fight and compounded the dispute with the plaintiffs, why should the plaintiffs not accept that compromise? Why should they suffer or be called upon, on a later occasion to establish their rights as against the defendants who remained ex parte when all the evidence would have been lost or unavailable to the plaintiffs?

7. Learned Counsel urged that a compromise decree is not only binding upon the parties as a contract between the parties but also operates as res judicata between the parties thereto with regard to matters which constituted the main foundation of the agreement of compromise. He urged that by the combined operation of the principle of res judicata applicable to ex parte decrees as well as compromise decree, all parties in a partition action would be bound by the doctrine of res judicata whether or not they contested or remained ex parte and whether or not some of them were parties to the compromise. In substance, learned Counsel's argument is that in a partition action which has got the special feature of the parties occupying at the same time, the rank of the plaintiffs and defendants, all the parties, i.e., every one of them who remained ex parte, must not only take the risk of a decision on the merits, but he should also take the risk of a compromise between the contesting parties, even though he is not a party to the compromise.

8. Mr. V.C. Viraraghavan, learned Counsel for the respondent, contended that a compromise is essentially an agreement or contract, only between the parties thereto, and it cannot affect other parties and that matters covered by the decree either expressly or by necessary implication can operate as res judicata only between the parties thereto and can never operate as against others. He also urged that during the material times, the present plaintiff and her sister were living under the care and protection of their brother, Arumugha they had just then attained majority, that they were not aware of the litigation at all, that everything was looked after by their brother and that the compromise was not a genuine compromise but was a result of fraud and collusion between Arumugha and his brother and the members of his family, to defeat the rights of the plaintiff and her

sister, taking advantage of the helpless position in which they were placed and the confidence and trust they had in their brother. Mr. Viraraghavan invited my attention to some of the decisions in which it has been held that a compromise decree would not be binding and would not operate as *res judicata* as against persons who are not parties to the compromise and the doctrine of *res judicata* should be confined and restricted only to the parties thereto. I have no hesitation in accepting his contentions which are sound and well-founded. If instead of the prior litigation being settled by a compromise, there had been a decision on the merits, though the present plaintiff remained *ex parte*, it cannot be seriously contended that whatever was expressly heard and decided and whatever she might and ought to have pleaded would operate as *res judicata*. In other words, if the plaintiffs in the earlier litigation had adduced evidence about the character of the properties whether or not the first defendant adduced evidence, and if the Court had rendered a decision on the merits that decision would operate as *res judicata* even as against the plaintiffs, though she remained *ex parte*. The crucial question is whether the present plaintiff is barred by *res judicata* as a result of a compromise to which she was not a party.

9. It is true that Section II, Civil Procedure Code in its terms, does not apply to consent or compromise decrees, in the sense, that the matters in issue between the parties had been heard and finally decided within the meaning of Section 11. A consent decree, however, has, for all intents and purposes, the same effect as *res judicata* as a decree passed in *invitum*. The principle is well established and beyond question. This principle that a judgment by consent or default is as effective as an estoppel between the parties or a judgment whereby the Court exercise its mind in a contested case was laid down in the leading case in *In re South American and Mexican Co. ex parte Bank of England* (1895) 1 Ch. D. 37, and has been followed in all cases in England and in India. It is sufficient to extract the following observations of Lord Vaughan Williams, J., at page 45:

Under these circumstances, I have only to consider, with reference to the second question, Mr. Nouljon's suggestion, that a judgment by consent upon which the Court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition

suggested. It has always been the law that a judgment by consent or by default raise an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.

The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be an estoppel is raised as to all matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

This view was affirmed by Lord Herschell, L.C. on appeal in the following terms:

The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results, from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments and were to allow questions that were really involved in the action to be fought over again in a subsequent action.

I may also refer to the following observations of Lord Blanesburgh in *Kinch v. Walcott* L.R. 1929 A.C. 482:

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrnes, J., in *Wilding v. Sanderson*², must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose. In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal.

10. This Court has discussed the scope of the compromise decree in all its aspects in the leading Bench decision in *Raja Kumara Venkataperumal Raja Bahadur v. Thatha Ramaswami Chetti* I.L.R. (1912) Mad. 75 : (1912) 21 M.L.J. 709, where the view taken in *In re, South American and Mexican Co. ex parte Bank of England* (1805) 1 Ch. D. 37 has been applied and followed. The Bench has pointed out that a judgment by consent of parties is more than a mere contract and that it has all the force and effect of any other judgment being conclusive and estoppel upon the parties and their purview. It was observed that if a relief granted by a compromise decree would be inconsistent with the allowing of a particular defence, the invalidity of that defence must be taken to be necessarily involved in the grant of the relief and cannot be allowed to be set up in a subsequent suit. The Bench had also pointed out that the estoppel by *res judicata* arising from a compromise decree would apply even if the compromise was made before the defendant put in his written statement, the test in all cases being that whatever is necessary to sustain the rights and obligations created under the compromise decree would be concluded once for all by the principle of *res judicata*. It is unnecessary to refer to other cases on the point and it is sufficient to refer to the following head-note in the Bench decision of the Calcutta High Court in *Secretary of State for India in Council v. Attendranath Das* I.L.R. (1936) Cal. 550.

A decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded. The point to be considered in deciding a question of *res judicata*, is whether the judgment in the judgment in the previous case could be sustained without the determination of the question at issue in the subsequent suit even though the subject-matter of the two suits are different. If the judgment in the previous suit could not be sustained without the determination of the question in the subsequent suit the previous decision operates as *res judicata* and bars the subsequent suit.

11. All these decisions have been considered and referred to with approval in the recent judgment of the Supreme Court in *Sailendra Narayan v. State of Orissa* : [1956]1SCR72 .

12. The question next arises as to how far the principle of these decisions will apply to persons, though parties to the litigation, are not parties to the compromise. Before referring to the decisions in India, it is necessary to refer to the statement of law, by Lord Penzance in *Wytcharley v. Andrews* (1871) L.R. 2 P. & D. 327, dealing with a compromise in a testamentary proceeding. In that case, one Mrs. Andrews claiming to the sole executing obtained probate in a common form of the will of Mary Ann Osborn. Later on, she was cited to bring in the probate by one Mrs. Mayrick who attacked the will on the ground of undue execution, incapacity and undue influence. Issues were joined on these pleas and when the cause came on for trial, a compromise was effected. Mrs. Mayrick withdrew her opposition on payment of her costs by Mrs. Andrews. Subsequently, the plaintiff in the action Mrs. Wytcharley, a sister of Mrs. Mayrick took out proceedings to show cause why the probate should not be revoked. On behalf of Mrs. Andrews, the executrix, it was contended that the plaintiff, Mrs. Wytcharley had been a privy to the previous proceedings and her sister Mrs. Mayrick gave instructions to the solicitor in that suit and that the plaintiff Mrs. Wytcharley herself had consented to the previous compromise which therefore bound her, even though she was not a direct party thereto. In probate proceedings, it is established law that in a Court of probate, every person need not be party to the proceedings in order to be bound by its result and that it is sufficient that all persons intended to be bound by those proceedings are cited and had opportunities of putting forward their objections to the grant of probate. If a person has any interest in the probate proceedings, he may himself intervene and become a party thereto if a person knowing what is passing is content to stand by and see his battle fought by somebody else, he would be bound by the same result and will not be allowed to reopen the case. This rule of law that a person is bound by the result of a proceeding to which he is not a party is an exception to the general rule and applies only in probate proceedings having regard to the incidents of that proceeding, for obvious practical difficulties of impleading every conceivable person, whether or not he has interest in opposing the grant of a probate. Lord Penzance held that that rule should be restricted only to a decision on the merits and not to a compromise. I cannot do better than extracting the classical statement of law at page 329:

The principle is founded on justice and commonsense, and is acted upon in Courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be reopened. That has been undoubtedly the rule also in the Prerogative Court, but I do not find that it has even been applied to cases of compromise. It is one thing to say that a person who stands by and lets another fight his battle, must be bound by the result of the contest and it is quite another thing to say that, without any notice that there was going to be a compromise, and without any knowledge that the suit was not proceeding to its natural end he must nevertheless be bound by any agreement which the parties to the suit may choose to enter into. That would be carrying the rule very far indeed. I find no authority for carrying it to that length, and I am not disposed to extend it beyond the limit within which it has been confined in former cases. In the prior suit, if the story of Mrs. Mayrick be true, the compromise was not a fair one, even as far as she was concerned but setting that aside, and assuming that she is bound by it, I see no reason why the present plaintiff should be bound by it. A bargain only binds those by whom it is made. Persons who are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise when no decision is in fact come to by the Court.

13. The principle of this decision is an effective answer to the contention of Mr. Gopalaswami Iyengar. If this is the rule applicable in the case of probate proceedings where persons other than direct parties thereto may be affected by decision on merits but not by a compromise, it would apply a fortiori in ordinary proceedings where no person would be bound unless he is a party to the proceeding. This rule was applied and his case followed in *Ritchie v. Malcolm* (1902) 2 I.R. 403, in which it was held that a person although cited to see proceedings is not estopped by judgment therein as a result of a compromise to which he was not a party and of which he knew nothing. In that decision it was observed that it would be a startling proposition if it should be held that he is bound by the result of the trial, though brought about by a compromise to which he was not a party and of which he knew nothing.

14. From the aforesaid two decisions, it is clear that a compromise only binds those by whom it is made and that persons who are willing to stand by (for example by remaining *ex parte* in a partition action) while a contest was going on are only bound by the decision of the Court on the merits, and that they cannot be compelled to abide by a compromise when no decision was come to by the Court. They will be bound by the result of the decision only if it results in its natural end, i.e., a decision by the Court on the merits. It is unnecessary to refer to further decisions rendered in probate proceedings either in England or in India as decisions in probate proceedings would result in judgment *in rem*. The reason why I have made particular reference to these two decisions is only because of the principle which emerges therefrom, i.e., even if a party who takes the risk of a decision on merits in his not participating in a proceeding, the risk is only if the decision is on the merits by the Court, and not as a result of a compromise in pursuance of an agreement between the parties. Vide also statement of Jaw in Tristram and Coote's Probate Practice 22nd Edn. P. 601, in England, there is a special provision, Order 16, Rule 9-A of the Rules of the Supreme Court which provides for a compromise in proceedings concerning the estate of deceased persons, property subject to a trust, etc., etc., the compromise would be binding upon the parties thereto as well as on absent persons provided the procedure prescribed therein is complied with. There is no corresponding provision in India.

15. I shall now refer to the decisions in India in which the same view has been taken. In a bench decision of the Calcutta High Court in *Rajalakhmi Dassee v. Katyayani Dassee* I.L.R. (1911) Cal. 639, while pointing out that the consent decree is of no effect as against persons not partice thereto, it was observed at page 674 as follows:

But the matter obviously stands on a different footing when the question is raised whether the consent decree may operate to the prejudice of persons not partice thereto. As was well observed in *Hundersfield Banking Co., Ltd. v. Lister* (1895) 2 Ch. D 273, the real truth of the matter is that a consent order is a mere creature of the agreement, and that if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Lord Justice Kay, the consent order is only the

order of the Court carrying out an agreement between the parties. We must consequently hold that the rule recognised in the long series of decisions, to which we have referred, is well-founded on principle and ought to be maintained.

Mr. V.C. Veeraraghavan, drew my attention to another Bench decision of the Calcutta High Court reported in *Gobinchandra Sardar v. Bhagavat Sardar* A.I.R. 1915 Cal. 473. In that case there was an appeal by the plaintiff in the suit against the preliminary decree for partition and in the appeal, a compromise was entered into between the plaintiff and some of the defendants; the other defendants were not represented at the hearing of the appeal and this was not brought to the notice of the appellate Court when the compromise was reorded. Thereafter, in the final decree proceedings, the defendants who were not parties to the compromise raised objections and it was held that the compromise decree would not be binding upon the defendants who had not been parties thereto nor had signed the memorandum. It was further held that the compromise would not have greater validity than the contract upon which it was based and that a consent decree based upon such a compromise would not bind those who were not parties thereto. The Bench also observed that such a compromise in a partition suit, leaving out of account some of the co-sharers will have to be ignored and a partition will have to be effected only in accordance with the preliminary decree. The same view was taken in *Sushama Roy v. Arul Krishna* : AIR1955 Cal624 . In that case there was a dispute concerning a private trust between the shebait of a deity which was also made a party. Later on, the matter was compromised between the parties but the deity did not join in the petition of the compromise and there was no mention of it in the decree of the Court. A subsequent suit was instituted by the deity represented by some other member of the family for declaration that the compromise decree would not affect the interests of the deity. The Bench held that so far as the deity which was a party to the earlier suit was concerned, the Court must be held to have passed no decree at all, and therefore, there was no question of any compromise operating as *res judicata* against the deity.

16. Reference was next made by Mr. Veeraraghavan to the Bench decision of the Patna High Court in *Manik Kanak Ratan v. Sundaramund* A.I.R. 1930 Pat 225. In that case, the plaintiff brought a suit for recovery of possession of the property

questioning the validity of a compromise in a prior litigation. The plaintiff's father and some others brought a suit, i.e., the prior litigation against certain defendants to recover possession of the property on the ground that the revenue sale concerning those properties was void. During the pendency of that suit, the plaintiff's father died and his sons who refused to join as plaintiffs in the place of their deceased father, were impleaded as pro forma defendants. The trial Court granted limited relief and on appeal therefrom, a compromise was entered into to which however, the plaintiff was not a party. The question was, as to how far, this compromise to which the plaintiff was not a party would bind him inasmuch as the other parties to the litigation who were equally interested in the properties put forward all the contentions which could have been urged on behalf of the plaintiff. The District Judge held that the second suit was barred by the compromise decree, applying the principle of *res judicata*. The Bench of the Patna High Court had no hesitation in reversing the decision of the District Judge holding that as the plaintiff was not a party to the compromise he was not bound by it and that no decree based thereon would operate as *res judicata*.

17. The next case to which reference may be made is the Bench decision in *Ramswarup v. Puttu* : AIR1960 All367 . There, two brothers sold certain property and their sons brought a suit to set aside the sale: on the ground that it was not for joint family necessity nor benefit. The vendors as well as the vendee were impleaded as defendants. The vendee remained *ex parte* and later on a compromise was entered into between the plaintiff (the sons of the vendors) and the vendee to the effect that the vendee should make some money payment to the plaintiffs. After paying that amount as specified in the compromise, the vendee brought a suit for damages for breach of covenant as against the vendors. On the question; of warranty of title, on behalf of the vendee it was contended that the prior compromise decree operated as *res judicata* because the vendor were parties--in the prior litigation. The Bench of the Allahabad High Court held that the compromise did not operate as *res judicata* as the vendors did not even put in appearance and when the suit proceeded *ex parte* against them, the plaintiffs' suit as against the vendee was disposed of only in terms of a compromise. On the other points the suit for compensation of breach of covenant of title was upheld, though on the question of *res judicata*, the issue was decided against the vendee.

18. In *Chiranjilal v. Ram Kanwar* A.I.R. 1948 M.P. 26, a Bench of that Court had to deal with a similar question. A Hindu father brought a suit for partition of joint family properties and impleaded his sons as a defendant. The father entered into a compromise with the members of the other branches and a final decree was also passed by consent, to both of which, the son was not a party. In a subsequent litigation, the question arose as to how far the compromise would preclude the son by the rule of *res judicata*. It was observed that when the son was impleaded as a defendant, no question of the father as the head of the family representing his son would arise and that the rights of the son would have to be dealt with, independently of the father. Holding that the Compromise decree would not operate as *res judicata* it was observed (at page 29):

I am not aware of any case and none has been brought to our notice in which a person actually impleaded as a defendant in the suit may have been held to be bound by a decree based on a compromise to which he was not a party and which he expressly refused to accept. Such a case does not appear to me to fall within the purview of Explanation 6 at all. A compromise of a suit is nothing more than an agreement between the parties to such compromise and a compromise decree does not stand on a footing higher than such an agreement with an order of the Court super-added to it. Such a decree cannot, therefore, bind any person who is not a party to the compromise unless of course it can be held that one of the parties to the compromise had the right or the authority to bind him by means of the same. No party can be said to have either the authority or the right to bind another party by an agreement to which such party has expressly refused to agree.

19. In a decision in *Abdul Rahim v. Abu Md.Barkat Ali* (1928) L.R. 55 IndAp 96 : (1928) 54 M.L.J. 609 : A.I.R. 1928, a somewhat similar problem arose concerning a wakf. In a prior suit which was filed under Section 92, Civil Procedure Code, by certain plaintiffs there were certain amendments by adding certain strangers and also adding other prayers and reliefs not covered by Section 92, and no sanction of the Advocate-General was obtained therefor. The suit was compromised by six out of the seven plaintiffs and a decree was passed thereon without the attention of the Court being drawn to the fact that one of the plaintiffs was not a party to the

compromise. A subsequent suit was brought under Section 92 by some of the Mohamadans in the neighbourhood questioning the alienation of the wakf property. The defendants, amongst other points, raised the objection that the second suit was barred by *res judicata* as a result of the prior compromise. The High Court differing from the trial Court upheld this objection, but on appeal, the Privy Council took a different view and allowed the appeal agreeing with the Sub-Judge that the prior decree would not operate as *res judicata*. The Privy Council observed that when the plaint was amended asking for other reliefs and when further parties were impleaded all these things were done without the sanction of the Advocate-General, the suit ceased to be a suit in a representative character so as to be governed by Section 11, Explanation 6, Civil Procedure Code, and the decision in the prior suit would have to be dealt with as a suit between individual plaintiffs ranked against individual defendants and that as the compromise was between some only of the parties, it would not bind those persons who were not parties to the compromise however much they may be binding as against the consenting parties thereto.

20. In view of this uniform course of decisions it is unnecessary to deal with the cases which, have considered the procedure to be adopted by a Court when called upon to record and pass a decree on the terms of compromise entered into between some only of the parties, particularly in a partition action. Decisions have taken the view that any compromise which deals with rights of persons who are not parties to the compromise and have not signed the same (though parties to the litigation) would not be lawful compromise within the meaning of Order 23, Rule 3, Civil Procedure Code, and Court should not pass any decree on such a compromise as the suit for all purposes both legal and factual would be pending so far as others are concerned. The reasoning in those cases is that the Court would not give its sanction to an arrangement which on its own showing affects rights of third parties. It is sufficient to refer to the headnote in *Ajoy Kumari Debi v. Manindranath Chattarjee* I.L.R. (1905) 32 Cal. 561.

After the preliminary decree in an administration suit declaring the right of a certain share in the estate the Court ought to sanction a compromise between the plaintiffs and the executors to the effect that the estate should be made over to the

plaintiffs and the executors released from further accounting, entirely ignoring the right of other defendants.

21. In that case, the objection was raised in the same suit while in the instant case, the validity of the compromise is questioned in a separate proceeding. That cannot obviously make any difference in principle, as to the binding nature of the compromise and the question as to how far, it can operate as res judicata.

22. I see no substance whatsoever in the plea of estoppel raised with reference to the purchase made by the plaintiff under Exhibit A-12. The recitals in that sale deed contain; certain pointed reference to the prior compromise decree and the Panchayat thereafter none of the conditions for the principle of estoppel to apply exist in the instant case. I may also add that I entirely agree with the reasoning of the Courts below that the prior compromise is vitiated by fraud and collusion.

23. For all these reasons, the second appeal is dismissed with costs. No leave.

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