

Nundo Lal Bose Vs. Nistarini Dassi

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Court : Kolkata

Decided On : Jan-10-1900

Reported in : (1900)ILR27Cal428

Judge : Francis W. Maclean, K.C.I.E., C.J., ;Macpherson and ;Hill, JJ.

Appellant : Nundo Lal Bose

Respondent : Nistarini Dassi

Judgement :

Francis W. Maclean, K.C.I.E., C.J.

1. This is a suit instituted by one Srimati Nistarini Dassi as the widow and heiress of one Rai Mohendra Nath Bose against Rai Nunda Lal Bose, Rai Pasupati Nath Bose his brothers, in their personal character, and also as executors of the last Will and Testament of her husband, the said late Rai Mohendra Nath Bose, and against one Srimati Kadumbini Dassi, a Hindu widow; and the object of the suit is to have a certain Trust Deed, of which the said Kadumbini Dassi was the surviving trustee, and dated the 24th of May 1877, an award dated the 16th of July 1889, and a certain decree, dated the 29th of August 1889, declared fraudulent and void as against her and in no way binding upon the plaintiff, and to have the Will of the said Rai Mohendra Nath Bose construed and the rights of all parties thereunder ascertained and declared, for the administration of his estate, and for certain consequential relief.

2. The defendant Kadumbini Dassi did not appear in this suit, but the other defendants put in written statements, and the case came on for hearing in due course before Mr. Justice Stanley, and after hearing, which occupied many days, suggestions for a compromise of this and of other litigation between the parties were made.

3. It is alleged for the respondents in the present appeal, namely, the plaintiff, and the defendant, Pasupati Nath Bose, that after certain negotiations a compromise of this suit and the other suits, to which I have referred, was effected, that the defendant Nundo Lal Bose expressly authorized his counsel to consent to this compromise on his behalf, that the terms of the compromise came before Mr. Justice Stanley, and that he made a decree in terms of the compromise so alleged to have been entered into.

4. Nundo Lal Bose, the present appellant, however, contends that though admittedly there were negotiations for a compromise, he never authorized his Counsel to agree to the compromise alleged, that his Counsel had no such authority, and that the compromise was not effective as against him. Holding that view, he, on the 15th of July 1899, gave the notice of motion, which will be found set out at page 1 of the paper book which in effect was one asking the Court to stay the drawing up of the so-called compromise decree, and to have the alleged compromise set aside.

5. Although the defendant Kadumbini Dassi did not, as I said before, appear to the suit or upon the hearing before Mr. Justice Stanley, she was served with the notice of motion, and upon that motion coming on for hearing, Mr. Justice Stanley refused to hear her by her Counsel, on the ground that as she had not previously appeared in the suit, she was not entitled to be heard on the motion.

6. The motion was supported by two affidavits of Nundo Lal Bose himself with certain documents exhibited to those affidavits and by the affidavit of Hirendra Nath Dutta, the solicitor of Nundo Lal Bose, of one Benode Behary Bose, the son of Nundo Lal Bose, and of one Nilratan Sen, who appears to have been a friend of the defendant Nundo Lal Bose, and to have been present at some of the interviews to which I shall refer in a moment, as also a joint-affidavit in reply by

Hirendra Nath Dutta and Nundo Lal Bose.

7. The respondents supported their case by an affidavit of Romesh Chunder Bose, the attorney of the plaintiff, of one Monmotho Nath Singha, a brother of the plaintiff, of the said Pasupati Nath Bose, and of his solicitor Gonesh Chunder Chunder, and by a statement made from his place at the Bar by Mr. R. Mitter, a member of the Bar and an advocate of this Court, and who was at the time leading Counsel for Nundo Lal Bose.

8. The matter was heard before Mr. Justice Stanley on three or four days during the month of last July, and, in the result, Mr. Justice Stanley dismissed the application with costs, and Nundo Lal Bose has appealed to this Court.

9. His principal ground of appeal is that he never gave Mr. Mitter any authority to settle litigation, involving not only this suit but some other four or five suits, upon the terms of the alleged compromise. He further challenges the decree made on the ground that the learned Judge in the Court below ought not to have accepted the unsworn statement of Mr. Mitter when objection was taken by the appellant's Counsel that Mr. Mitter ought to have been sworn, that the decree was made in the absence of Kadumbini Dassi who was a party, and a necessary party to the suit, and that the decree determines certain trusts and provisions relating to a portion of the property in dispute, which under the award and decree of 29th August 1889 was declared to be Debuttar, and that it was not competent to the Court with the consent only of some of the parties interested, to set aside the decree of the 29th August 1889, which was a decree of a competent Court, and in the absence of those members of the family who were, or who might be interested in maintaining the Debuttar character of such property.

10. On the present appeal, we have allowed the respondent, Kadumbini Dassi, to be heard by her Counsel, and to put in an affidavit, which she desired to put in the lower Court, but which she was unable to put in by reason of the ruling of the learned Judge that he could not hear her. In our opinion, as she was a party to the suit and had been served with notice of the application to set aside the compromise decree, she was entitled to be heard.

11. It must be obvious, from what I have said, that if we are of opinion upon the evidence--for it is a question of fact--that the present appellant did not authorize his Counsel Mr. Mitter, to consent to this compromise, the compromise decree cannot stand, and equally obvious that the other questions, except that, as to the admissibility of Mr. Mitter's statement, would become of no practical importance; and the stress of the argument adduced on behalf of the respondent's Counsel has been to show that such authority was, in fact, given by Nundo Lal Bose to Mr. Mitter.

12. There cannot, I think, be any reasonable doubt at the present day that Counsel possesses a general authority,--an apparent authority, which must be taken to continue until notice be given to the other side by the client that it has been determined--to settle and compromise the suit in which he is actually retained as Counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Here, however, the compromise extended to collateral matters, to matters quite outside the scope of the particular case in which Mr. Mitter was retained as Counsel, and, in order to bind the client, it must be shown that Mr. Mitter had, from his client, a special authority to compromise, and compromise upon the definite terms which are set up by the present respondents. This proposition was not disputed in the lower Court, nor has it been contended for before us. As to the authority of Counsel to compromise on behalf of his client, I may refer to the cases of *Strauss v. Francis* (1866) L.R..1Q.B., 379; *Sivinfen v. Swinfen* (1857) 1 C.B.N.S., 364; 2 De. Gex. and Jones, 381; and *Matthews v. Munster* (1887) L.R., 20 Q.B. Div., 141.

13. There are other authorities, but I need not refer to them as the proposition of law is not questioned.

14. Before I deal with the facts of the case, I must say a word or two as to whether or not the statement of Mr. Mitter, not being on oath, was admissible in evidence. So far as my personal experience goes, it has been the undoubted practice in the Courts in England to accept the statement of Counsel in matters of this nature, statements made from their place at the bar. I am not prepared, however, to go so

far as to say that if that course be objected to by the opposite side, the party putting forward such statement could insist upon its being made without the sanctity of an oath. In the recent case of *Wilding v. Sanderson* (1897) 2 Ch. Div., 534, it was thought prudent, as there was some doubt upon the point, to have the learned Counsel sworn, as they were, and they gave their evidence from their places at the bar. That course was not adopted in the case of *Hickman v. Berens* (1895) 2 Ch. Div., 638, 640, but there is nothing in that case to indicate that any objection was raised. I entertain great doubt whether, if there be any such objection, the other side can insist upon the statement being accepted, unless upon oath, and in making this observation, I am not unmindful of what Lord Esher is stated to have said--for we have not Lord Esher's own words--that he would never admit an affidavit in such cases. I should have thought, however, that as a matter of substance, the matter was not of much practical importance, for I can scarcely suppose that any Counsel, if he understood that the other side were not prepared to accept his statement made upon his word of honor, would not himself ask that he might be allowed to give his evidence in the usual way. I need not discuss this matter further, for we should not have been disposed to allow the appeal on this ground, but if necessary would have given the respondent the opportunity of putting in an affidavit by Mr. Mitter, saying that his statement before the Court below was a true one. In this view it becomes unnecessary to discuss whether, as the Advocate-General urged, the statement was admissible, not only under the Indian Evidence Act, but as a statement made by a quasi officer of the Court to whose word some sort of special sanctity must be taken to attach, a proposition which, before its acceptance, would require much consideration; or to deal with the argument of Sir Griffith Evans that having regard to Section 13 of the Oaths Act, it made no difference whether the statement was or was not upon oath, a proposition which is at once novel and startling, and which, if well founded, must apply to the case of every witness, and possibly to every Juryman.

15. I will now proceed to deal with the facts of the case, and, I think, I am doing no injustice to the judgment of the learned Judge in the Court below when I say that it appears to be almost entirely based upon the statement of Mr. Mitter, which the learned Judge regards as clear, cogent and convincing. Save a quite passing reference to the evidence of Benode Behary Bose and Hirendra Nath Dutta I can

find no reference to any of the affidavits on either side, nor can I discover any analysis of the statement made by Mr. Mitter himself. This, to my mind, is a case in which the evidence ought to be scrutinized with very careful attention.

16. I will now deal with Mr. Mitter's statement with the view of ascertaining and determining whether, if there were nothing but that statement in the way of evidence in the case, the respondents have satisfactorily made out that the appellant Nundo Lal did give an express, or special, authority to his Counsel to consent to the terms of the compromise.

17. It is not necessary to go back further than Monday, the 26th June, when it was mentioned to the Court that negotiations for settlement were proceeding, and the case was adjourned. It is clear from Mr. Mitter's own statement that at the consultation, which took place between Nundo Lal Bose and his Counsel, on Monday, Nundo Lal's offer was to pay Rs. 60,000 to the plaintiff as a lump sum to be paid by instalments, and that on that occasion Nundo Lal Bose never agreed to pay any of the plaintiff's costs, but was willing to pay a lump sum to cover everything. There were several other points discussed at that interview, but to cite Mr. Mitter's own words, our offer was that 'each party was to pay their costs.' It will be seen from this, that from the very outset the appellant objected to paying the plaintiff's costs of the suit, which admittedly amounted to a very large sum. According to Mr. Mitter he handed over the terms to Mr. Bonnerjee, who was the plaintiff's leading Counsel, the same day (Monday), and Mr. Bonnerjee said that his client would not take the Rs. 60,000, but she must have the costs as between party and party. It is obvious that from the very first, one of the main, if not the main points in dispute was the payment of the plaintiff's costs of the suit.

18. On Tuesday morning, the 27th, the case again stood over, and ultimately on that day Mr. Bonnerjee put down his terms in writing; and those terms were given to Mr. Mitter.

19. I may here interpose that according to the evidence of Babu Gonesh Chunder Chunder, who was the attorney for Pasupati Nath Bose (see paragraph 14 of his affidavit) Mr. Mitter, Mr. Bonnerjee and himself had on Tuesday a discussion as to the terms of the proposed compromise, and it was arranged that Mr. Mitter should

see the defendant Nundo Lal Bose and try to induce him to accept the plaintiff's terms of payment to her of Rs. 40,000, and her party and party costs of the suit, and that Mr. Mitter left that interview in order to see Nundo Lal Bose, that he came back to the Bar Library after a short time, and told Mr. Bonnerjee and Babu Gonesh Chunder Chunder that he had succeeded in inducing Nundo Lal Bose to accept the above last mentioned terms, and that thereupon Mr. Bonnerjee put the terms into writing and wrote out the Exhibit marked A. Mr. Mitter does not say a word about all this. It is, therefore, reasonably clear that the memory either of Mr. Mitter, or of Babu Gonesh Chunder Chunder, must be defective upon this point.

20. However be that as it may, Mr. Mitter saw Nundo Lal at about 1 o'clock in Mr. Chakravarti's Chambers, and there were present at that interview besides the two Counsel Mr. Mitter and Mr. Chakravarti, Nundo Lal, his two sons, his attorney, Babu Hirendranath Dutta and his friend one Nilratan Sen.

21. I may, perhaps, mention that when this motion was being heard before Mr. Justice Stanley, Counsel for Nundo Lal asked that Mr. Chakravarti should be asked to state his recollection of what passed, but the learned Judge in the Court below declined to allow that course to be pursued.

22. On the occasion of this interview on Tuesday Mr. Mitter went through with the present appellant all the terms suggested by Mr. Bonnerjee and wrote down his objections, and I will take it for the moment that the paper Exhibit B. did indicate all the objections which Nundo Lal had to Mr. Bonnerjee's terms.

23. It is perfectly clear that at that interview Nundo Lal was unwilling to pay the costs of the suit as between party and party. Mr. Mitter says so, and he also says that the only two points as to which there was any difference were the party and party costs of the suit and the costs of suit No. 68. However he sums up the result of these interviews by saying that both he and Mr. Chakravarti were perfectly certain that the only thing that stood in the way of a settlement was the plaintiff's claim to a separate house worth Rs. 10,000, or the value thereof. I confess feeling some difficulty as to how Mr. Mitter could have arrived at this conclusion, in the face of his own memorandum in writing which indicates that there were other points in dispute still open.

24. Mr. Mitter then went back to Mr. Bonnerjee, and Mr. Bonnerjee on behalf of his client refused to accept the terms as proposed by Mr. Mitter.

25. There then for the moment was an end of the matter in the sense that the negotiating parties were not at one, and that there was then no concluded agreement of compromise.

26. The only express or special authority, which Mr. Mitter then had to compromise on behalf of his client Nundo Lal Bose, was thus at an end, as Mr. Bonnerjee would not accept the terms proposed by Nundo Lal Bose through his Counsel Mr. Mitter. I am taking it that looking at Exhibit B. the words as to all parties paying their own costs applied only to suit No. 68 of 1898. That suggestion was, however, met by a direct negative from Mr. Bonnerjee, but I am not unmindful that Mr. Mitter says that he understood Nundo Lal to say that was not to stand in the way of a settlement.

27. On Tuesday then no agreement binding on either party had been arrived at. On Wednesday, the 20th, it was stated to the Court that the parties had been unable to come to terms, and the case was again adjourned in the hope of an amicable settlement. Mr. Mitter stated that there was only one very small item, which had not been settled, but, if the evidence filed on behalf of the appellant to be trustworthy, Mr. Mitter must have known on the Tuesday afternoon, that even if in his interview with Mr. Mitter on the Tuesday Nundo Lal Bose had agreed to pay the plaintiff's costs of this suit he had resiled from that position later on in the same day. It is quite clear on Mr. Mitter's own showing that Nundo Lal never agreed to contribute anything towards finding a residence for the plaintiff, and it is equally clear that on the evening of the Wednesday Mr. Mitter was expressly told that Nundo Lal was not willing to pay the plaintiff her party and party costs. On the Wednesday then the whole matter was open, for the terms offered by Nundo Lal through Mr. Mitter had not been accepted; that this was so is clear from Mr. Bonnerjee's statement on the Thursday morning to the Court: 'I am sorry to say we have been unable to settle and the case must proceed,' and the case did proceed.

28. By the Thursday morning then there was no agreement of settlement, and it is important to see what took place on that day in the way of express authority being

given to Mr. Mitter to compromise on his client's behalf. After the midday adjournment on that day Mr. Mitter mentioned to the Court that the case had been settled, the only obstacle in the way of settlement having been removed. I will quote what he says: 'I was also informed by Hirendra Nath Dutta that Gonesh Chunder and Pusupati had gone to see Nundo Lal on the subject and before the mid-day adjournment I was informed that Pusupati had consented either to buy a house worth Rs. 10,000 or to pay the Rs. 10,000 himself. The only obstacle in the way of settlement being removed your Lordship will remember that Mr. Woodroffe was putting in some Bengali accounts, which had not been translated, I said that Mr. Woodroffe would undertake to translate them, if necessary, because I had then been informed that the only obstacle had been removed, and after the mid-day adjournment I mentioned to the Court that the case had been settled. Hirendra Nath Dutta was present in Court at that time and also Binode, and the other son of Nundo Lal and also Babu Romanath Ghosa and several others. Then the terms were fair copied in Court by Mr. Shelley Bonnerjee, and whilst being copied, I was told by Hirendra Nath Dutta that Nundo Lal wanted to see the terms. I told him that the terms were the same as agreed to by him on Tuesday last. The only difference was that the plaintiff's maintenance, instead of being a charge upon moffusil properties, had been charged upon the dwelling houses of Nundo Lal and Pasupati. Hirendra Babu said that Nundo Lal was particularly anxious to see the terms.'

29. I feel some difficulty in understanding how Mr. Mitter could have thought, and told the Court that the only obstacle in the way of a settlement had been removed, when on the previous evening he had been expressly told that Nundo Lal was unwilling to pay the plaintiff's costs, or what authority he had to agree to the terms of the previous Tuesday, as in the interval, Nundo Lal had told him that he would not pay the party and party costs of the plaintiff.

30. I can only suppose that this important point has escaped his memory. Taking Mr. Mitter's statement most favourably to the plaintiff, the only special authority which Nundo Lal gave Mr. Mitter was to agree to Mr. Bonnerjee's terms in Ex. A., as modified by Ex. B. and when those modifications were rejected by Mr. Bonnerjee it seems to me that Mr. Mitter's special authority was determined, and

that in order to bind Nundo Lal, as to any fresh terms, a further special authority would be requisite.

31. We now come to the interviews of the 29th between Mr. Mitter and Nundo Lal at which the solicitor Hirendra Nath Dutta, Nundo Lal's son, Romanath Ghose, and one Nil Ratan San were present. Mr. Justice Stanley would appear to regard this as the only important part of the statement; I am unfortunately unable to share that view, for, to my mind, it is extremely important to ascertain what preceded that interviews It is quite clear that at that interview Nundo Lal objected to pay the party and party costs of the plaintiff or her costs of suit No. 68. He commenced the conversation in that way.

32. It is clear that he was determined not to pay those costs, for he had told Babu Gonesh Chunder Chunder only an hour or so before that he would not pay the plaintiff's costs. Seeing Nundo Lal in that state of mind, his solicitor very properly suggested to the Counsel that he should get the terms signed by Nundo Lal, when Mr. Mitter said that he would not insult Nundo Lal by asking him to put his signature to the paper. The suggestion of the solicitor is, to my mind, very significant by indicating that he at any rate was under the impression that there was at least great doubt whether Nundo Lal was agreeing to the terms. Nundo Lal said nothing more. He only smiled and Mr. Mitter told him, 'I am going back to Court and these terms will be put in,' and he also told him that he was going to consent on his behalf, to which Nundo Lal said nothing, and so the interview came to an end.

33. If this were all the evidence in the case I should entertain a very grave doubt whether, having regard to the fact that Nundo Lal had at the very outset of the interview of 29th said that he would not pay the party and party costs of the plaintiff in this suit, but only a specified sum, and would not pay the costs of Suit No. 68, we should be justified in holding that under the circumstances narrated by Mr. Mitter, the latter was justified in consenting to the minutes, or that we should be justified in saying that Nundo Lal gave him express authority to consent to these terms. I do not think we should be warranted under all the circumstances in inferring from the smile and the subsequent silence of Nundo Lal Bose, a tacit

acquiescence on his part to the terms proposed, or as giving any authority to Mr. Mitter to consent on his behalf.

34. It is significant that according to Mr. Mitter's own statement the solicitor Hirendra Nath Dutta followed him into Court and told him that he had no instruction from him to consent to this compromise.

35. I have hitherto dealt with the case entirely upon the statement of Mr. Mitter, but there is a great deal of evidence in the matter to which the learned Judge in the Court below has given no attention. We have the affidavits filed on behalf of the appellant, and, if the story of these witnesses is to be believed and none of them have been cross-examined, Nundo Lal Bose never did agree to the terms of this compromise or authorized his Counsel to agree to them. As regards Nundo Lal's affidavits I will only deal with those portions of them in which he speaks from his own personal knowledge. He tells us in paragraphs 18 to 20 of his affidavit, the terms upon which he was prepared to settle the matter at his interview with Mr. Mitter on Tuesday, the 27th. It is to my mind reasonably clear that, whilst he did not object to pay Rs. 20,000 towards the plaintiff's costs of this suit, which sum was subsequently raised to Rs. 25,000, he did object to an unlimited liability in respect of those costs, and he tells us that at this interview he did not give Mr. Mitter authority to settle the suit on his behalf. He tells us that at the interview at which he was present at his attorney's office at about half-past 12 on the 29th (the Thursday) he absolutely declined to settle the suit unless the costs of the plaintiff in the suit were limited to Rs. 20,000 and in this he is substantially corroborated by Gonesh Chunder Chunder himself who says that Nundo Lal said 'I won't pay any costs of the plaintiff, why should I pay any costs to her and settle this suit.' This is extremely probable as he had learnt that the costs would be very heavy, certainly exceeding 25,000 rupees.

36. And, now I come to what he says as to the interview between Mr. Mitter and himself on Thursday, the 29th, and his account of that interview will be found at paragraphs 43, 48, and 49 of his affidavit. I may perhaps here interpose the observation that Mr. Mitter, at the moment that he left the Court to see Nundo Lal on the Thursday, could scarcely have thought that he had any sufficient authority

from him to consent to the proposed compromise, for, if so, he would not have thought it necessary to go outside the precincts of the Court to the office of the attorney who was instructing him to interview his lay client. It is clear that at this interview the defendant Nundo Lal went through the proposed terms and put marks in blue pencil against those terms to which he objected, one of which admittedly was as to the payment of the party and party costs and the costs of Suit No. 68. If Nundo Lal is to be believed he pointed out other objections as well. It is, however, very unfortunate that this document is not forthcoming; its disappearance is not, I think, satisfactorily accounted for. Nundo Lal says he never authorized Mr. Mitter to accept the terms of the compromise, or to compromise or settle the suit on those terms, and it will be observed that Mr. Mitter himself does not go so far as to say that he had authorized him, but only that he honestly believed that Nundo Lal had accepted the terms. I am not desirous of making or suggesting any imputation upon Mr. Mitter in the matter: I am prepared to accept, to the fullest extent, his statement as to the honesty of his belief that Nundo Lal had authorized him to act as he did; for I should be sorry to think that any member of the bar could act as Mr. Mitter has done, unless he were under such a belief. But the question of such an honest belief in the mind of Counsel is one thing, whilst the question of whether special authority to settle were actually given by the client is quite another. As to this interview between Mr. Mitter and Nundo Lal Bose, the latter's account of it is corroborated by his solicitor Hirendra Nath Dutta, his son Benode Behary Bose, and Nilratan Sen, as to which evidence the learned Judge in the Court below has been altogether silent. It would appear from the evidence of Hirendra Nath Dutta that at the interview which took place between Mr. Mitter and Nundo Lal on Tuesday, when Mr. Bonnerjee's written terms were discussed, an assurance was given to Nundo Lal that the plaintiff's costs of the present suit would not exceed Rs. 20,000, and according to his statement the consent of Nundo Lal to pay those costs was conditional upon the other terms upon which he insisted being complied with, and that afterwards when Nundo Lal learnt from his solicitor that the costs of the suit would, in all probability, exceed Rs. 20,000, he instructed his solicitor to go to Mr. Mitter and tell him that he would not pay those costs, unless they were limited to that amount, and the solicitor says he went and told Mr. Mitter so, and if this story be true, and it is not an improbable one, Mr.

Mitter knew on the Tuesday, through his own professional client, that Nundo Lal Bose would not pay the party and party costs of the plaintiff of the suit, unless they were limited to Rs. 20,000. Anyway he knew on the Wednesday evening.

37. Nundo Lal Bose's story is corroborated in important particulars by the evidence of the witnesses he has called, and coupling that evidence with Mr. Mitter's own statement, I think it clear that Nundo Lal Bose was throughout determined not to pay these costs, if they exceeded Rs. 20,000 or Rs. 25,000.

38. I must now say a word or two as to what occurred after the interview on the Thursday. After some conversation between Nundo Lal's solicitor, and his son and his friend Nilratan Sen, the solicitor, Hirendra Nath Dutta followed Mr. Mitter into Court and made the observations which he states in paragraph 47 of his affidavit and which are corroborated by the son Benode Behary Bose. Mr. Mitter admits that something to the effect stated by Hirendra Nath Dutta passed, but he says that he does not recollect the exact words, but that something was said about responsibility in the matter is apparent, not only from the evidence filed on behalf of the appellant, but also from that filed on behalf of the respondent, and Babu Gonesh Chunder Chunder, though he denies hearing what Babu Hirendra Nath Dutta says he said as to his client not being willing to settle the suit/admits that he heard something being said about responsibility in settling the suit, but that he regarded it as a joke. It must be remembered, in this connection that only an hour or two previously Gonesh Chunder Chunder himself had heard Nundo Lal say that he would not pay the plaintiff's costs and why should he settle the suit.

39. Looking then at the evidence, as a whole, I am satisfied that Nundo Lal Bose did not authorise his Counsel Mr. Mitter to accept the terms of the proposed compromise.

40. It is contended, however, that, as the respondents were not told that Mr. Mitter had no authority to settle, the appellant is bound. I am unable to take that view. Counsel no doubt has an apparent authority to compromise the case in which he is retained, and the other side are entitled to rely upon the continuance of that apparent authority, until they receive notice that it has been determined. But that principle does not apply to the present case, where an express or special authority

was requisite. The respondent must be taken to know that as this compromise covered matters outside the scope of the suit an express authority to Mr. Mitter to settle was requisite, and if, in fact, that authority were not given, the respondents cannot avail themselves of the position that they did not know that it had not been given. They were not entitled to assume as in the case of an apparent authority that it was given and was existing. This is pointed out by Crowder, J., in the case of *Swinfen v. Swinfen* (1857) 1 C.B.N.S., 364. That learned Judge says: 'If therefore in such a case (i.e. a case of special authority given) a Counsel under a misapprehension of his client's instructions, and believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client.'

41. In this view it becomes immaterial to consider whether such a compromise, even if otherwise binding, should have been adopted by the Court in the absence of Kadumbini Dassi, though I must confess I feel considerable doubt upon the point, nor is it necessary to decide the question, whether it was competent to the Court by this compromise decree not made in the presence of all the members of the family of Nundo Lal Bose and Pasupati Nath Bose, to virtually set aside the decree of the 29th August 1889, which had declared that certain portions of the property in dispute were clothed with a Debuttar character, and to direct part of the property to be divided between Nundo Lal Bose and Pasupati Nath Bose.

42. For the reasons I have given, the appeal must succeed and the order of the Court below must be discharged, and Nundo Lal Bose must have the costs of the motion in the Court below.

43. As regards the costs of this appeal, seeing that the respondents have at the bar offered to the appellant all that, and even more than he had previously asked for with a view of putting an end to this litigation, there will be no costs of this appeal.

Macpherson, J.

44. I agree.

Hill, J.

45. I also agree.

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