Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moulvie Abdool Ali v. *Mozuffer Hossein Chowdry and others, from the High Court of Judicature at Fort William in Bengal; delivered July 3rd*, 1871.

Present:—

Sir James W. Colvile.
Lord Justice James.
Lord Justice Mellish.

Sir Lawrence Peel.

THIS is an Appeal from a decision of the High Court of Judicature in Bengal, affirming and modifying a decree of the Principal Sudder Ameen of Backurgunge, dated the 9th May, 1865. The object of the suit was to set aside a sale of the interest of the Plaintiffs in a former suit. The original suit, the sale of which was sought to be set aside, was a suit which had been brought by the guardian of the present Plaintiffs on their account against their grandfather to recover the Plaintiffs' share of their grandmother's dower. That suit had been sold to a lady, who appeared on the face of the sale to be the purchaser, for the price of 51,000 rupees. The Plaint alleges that it was a collusive and a fictitious sale. In the answer the Defendants allege that the suit is not maintainable, upon the ground that it was a valid sale; and they say secondly, which is practically the same thing, that "the guardian of the Plaintiffs having, for "their benefit and in lieu of an adequate consi-"deration, with the approval of their father and "the permission of the principal head of their "family, and their eldest paternal uncle, the said "Meer Fujummul Ali, *boná fide* sold the suit, No. "42,—any claim in respect thereof cannot lie "against me, or against any one, save their guar-

"dian, father, and paternal uncle,—and the said "valid deed of sale is on no account liable to be "set aside." It is remarkable that in this answer the Defendants do not allege either that the original decree was obtained for too much money, nor yet do they allege, except most indirectly, and their Lordships are disposed to think they do not practically allege at all, that the Defendant had ever paid the purchase money of 51,000 rupees either to the guardian on account of the infants, or to the infants after they came of age.

The next step in the present suit that appears is, that on the 9th of January, 1865, there were applications by both the parties for the postponement of the hearing of the suit, on the ground that negotiations for a compromise were going on, and it was ordered by the Judge that "time be given to the "6th of February, which day is fixed for the hear-"ing of the suit; if no settlement takes place within "that time both parties must be present with their "evidence, otherwise no objection will be ad-"mitted." It is important, with reference to the point which was subsequently raised, to observe that when the first application for postponement was made, the Judge most distinctly warned the parties that if the compromise did not take effect when the proper time came for hearing the suit, he should insist that it should be heard, and they must be ready with their evidence.

The next important matter that takes place is that in February (the native date is 20th Falgoon, 1271), a deed of compromise, called a Solenamah, was actually executed. It is unnecessary to recite the terms of it, except that it is perfectly clear on the face of it that it gives the Plaintiffs not only very much less than what the amount of the original decree was, but also very much less than the original compromise of 51,000 rupees. That Solenamah was registered on the 15th of March. There is also produced an alleged receipt, which the Plaintiffs deny, of 2000 rupees for the costs of the suit. Then on the 29th of April there is a further application by both parties for the postponement of the suit. It does not appear how it was not heard at the time originally appointed; probably, although there is no formal order, some applications must have been made in the interval for the postponement, but on

the 29th of April there is the application of both parties for a further postponement. There is this difference between them, that although it is clear that the deeds of compromise had been actually executed, and also actually registered at that time, yet the Plaintiffs do not state that the matter had been compromised, but they state that negotiations for an amicable settlement are going on between the parties, but the compromise cannot be concluded unless an extension of time be granted, and therefore, the Plaintiffs, notwithstanding that they had executed the deed of compromise, and notwithstanding the deed of compromise had been registered, clearly treat the suit as not being actually compromised, and the arrangement as not being actually made at that time. The petition of the Defendant, no doubt, is in other terms, because he says, "whereas a compromise has been come to "between both parties." On that the Judge orders that a week's time be granted, and the case be brought on for hearing on the 8th of May. Looking at the terms of his previous order, that also seems a clear warning that, when the 8th of May came if what he considered a valid compromise was not at that time effected, he should go on and hear the case. Then it also appears that on the same 29th of April a variety of witnesses were heard in Court both for the Plaintiffs and the Defendant, and that also goes to show that the parties could not possibly have conceived that the suit was finally compromised at that time, for it appears that several witnesses, as many as five, were examined for the Plaintiffs, and three were examined for the Defendants. The witnesses for the Plaintiffs depose that they were present at the time when the original compromise was made, that no portion of the Rs. 51,000 was paid, and three of them state that the Defendant said that he would pay it to the Plaintiffs when they came of age. The witnesses for the Defendant do not deny that. They speak to matters which for the most part seem immaterial as to whether the uncles of the Plaintiffs and the Plaintiffs were on amicable terms or not. That took place on the 29th April. There appears to have been one day further postponement, and on the 9th of May the suit came on for hearing, and then for the first

time an application was made by the mooktear of the Defendants to file this Solenamah on account of the Plaintiffs, and the Plaintiffs' vakeels themselves when called upon said they knew nothing at all about the matter. There was subsequently an examination of the mooktears, which did not throw very much more light upon it, but in that state of things the Judge was not satisfied, and he refused to accept the compromise, and then he went on to hear the suit. One other witness, one of the uncles of the Plaintiffs, was examined, and the Judge came to the conclusion,—and upon the evidence as before him it is hardly disputed that the conclusion would be a correct one,—that the original compromise of the first suit was a compromise which by no possibility could stand, and that it must be set aside; and the Defendant raising no defence that, if it was set aside, the decree obtained in the original suit was not a right and valid decree, the Judgment was that they should have the benefit of that decree.

From that decree there was an Appeal to the High Court, and the High Court sent a letter to the Judge below, requesting him to hear further evidence upon the question, whether the Plaintiff had assented to the filing of the Solenamah. That was all the matter that he was to inquire into, as the Judges of the High Court say, and their Lordships of course must give credit to what they say; although in the petition of Appeal a complaint is certainly made that the first Judge in the Court below had not postponed the trial for the purpose of enabling further evidence to be given by the Defendants. The Judges of the High Court, in their ultimate Judgment, say that no such application was made to them, but that the only application respecting a rehearing which was made to them, was as to whether the Solenamah had been filed with the authority of the Plaintiffs.

On that the case went down again to the Court below, and it appears by the Judgment of the learned Judge of that Court that time was again given for the parties to appear. He summoned the Plaintiffs, and he examined the Plaintiffs, and also their Mooktear, for the purpose of seeing whether they had assented to the filing of

the compromise. They deposed that they had not assented to it, that there were certain conditions to be performed before the deed was filed, that the Defendant had refused to perform those conditions, and that it had been filed by the Mooktear of the Defendant without their consent at the time and against their will. The Judge of the Court below reported that conclusion to the Supreme Court. Then the case came on again before the High Court, and they were clearly of opinion, as the Court below had been, that the original compromise had been obtained by fraud. They were also of opinion that the compromise in this suit had been improperly obtained; and then, an objection having been raised under the Statute of Limitations, in order to avoid all question that might be raised under the Statute of Limitations, they altered the form of the Decree without changing the names of the parties in the Decree, so as simply to declare that the Defendant was a trustee for the Plaintiffs, and that the Plaintiffs were entitled to the benefit of that Decree.

From that decision an Appeal has been brought, and the two questions that have been substantially argued before us (independently of the third question as to amount, which will be alluded to presently) were, first, that the Judge of the Court below had erred in not giving further time on the 9th of May for the hearing of witnesses as to the nonpayment of the 51,000 rupees; and, secondly, that he had erred in not giving the Defendant an opportunity when it came down to him the second time to hear witnesses as to the validity of the compromise in the suit itself.

Now, both these objections are really objections to matters of practice, and unless their Lordships could see, and see very clearly, that justice had not been done, they would not interfere with the decision of the Court below on a question like this.

Now, the first question is, did the Judge of the Court below act improperly in not giving the Defendants further time to produce witnesses to prove that he had paid the Rs. 51,000? Now, how does the case stand? In the first place, in his original answer he nowhere alleges he had paid it; and certainly it is very difficult indeed to believe that if he had paid it, more particularly if, which their

Lordships are disposed to think he must prove in order to have a defence to this suit, he had paid it to the Plaintiffs when they came of age, or at least that the money had reached them when they came of age, it is difficult to believe that if he really had such a defence as that he would not have plainly alleged it. Then, secondly, it appears that the learned Judge of the Court below when he consented to the postponement of the trial, did most distinctly warn the parties that when the proper time for hearing came, if the compromise was not held to be valid, he should go on and hear the case. Next, it appears that on the 29th April, a variety of witnesses were examined in Court by both sides, which seems to show most clearly that both parties understood at that time, when the compromise had apparently been effected, that still if it was not held to be valid the suit would go on to be heard.

Next, it is said by the learned Judge in the Court below that a commission had gone to Dacca, and that no witnesses had been examined under it, and that that was the fault of the Defendant; and then, besides that, the High Court say that this objection was never urged before them when the case came up before them for the first time; and if further inquiry was to be made, the Defendant ought to have insisted on that when it came up for the first time, and not have allowed it to go back for further examination on one point, and then when it comes on again, say it is to go back for another further examination on another point. And, indeed, both the Courts below appear to have been thoroughly satisfied that this alleged want of witnesses hearing was a mere excuse, and that the whole object was an object of delay, and to keep the Plaintiffs out of their just claims, and their Lordships are disposed to agree with that conclusion,—at any rate they cannot dissent from it.

Then, did the learned Judge in the Court below err on the second question by not giving the Defendants an opportunity of hearing witnesses to prove that the second compromise, the compromise of this suit itself, had been validly entered into? He gives his reasons himself. He states what he did:—"As, however, the High Court of Judica-"ture has, in accordance with the objections raised "in Appeal in consequence of Respondents not

"having been represented in letter No. 3871, dated "12th December, 1865, requested that this Court "ascertain whether the deed of Solehnamah was "filed with the cognizance and consent of the "Plaintiffs, and make a report, this Court, in com- "pliance with the said orders, so as to remove all "doubts and objections, on receipt of the order "required the personal attendance of the Plaintiffs, "who having arrived from Dacca, and having this "day, the 6th January, 1866, attended Court and "being questioned"—then he states the substance of their evidence, and of the evidence of their mooktear. Then he goes on to say,—"The De- "fendant, through his pleader Bykant Chunder "Bose, also files copy of the counterpart of the "solehnamah, and wishes also to file a list of "witnesses to establish that the compromise did "actually take place; but as the list was not "filed the 18th December, 1865, the personal "attendance of the Plaintiffs was required within "ten days, and since a further postponement was "made, this Court does not consider postponing the "report called for any longer for proofs." Therefore it appears that originally the Defendant asked for leave to file a list of witnesses to establish that the compromise did actually take place, which, as it turned out, was not a matter which the Plaintiffs denied. That list was to be filed by the 18th December. It was not filed on the 18th December. Then ten days' further time was given, that is, to the 28th December, and then it was ultimately not heard on the 28th December, but was further postponed till the 6th January. The Defendants then, apparently, were not ready with their witnesses, and when the Judge was determined to go on they asked for still further time. Then the Judge comes to the conclusion that that is all a shuffle, and that they do not really want to bring the witnesses, and that the whole proceeding was for the mere purpose of delay. It appears quite evident that their Lordships cannot dissent from that conclusion. The High Court came also to the same conclusion, and, independently of this question, of whether the learned Judge of the Court below had given a proper opportunity to the Defendant of being heard, it hardly appears to be arguable that this deed of compromise in the first suit itself can possibly

stand. The very admitted facts show that it cannot stand. Here the guardian of two infants makes what appears to be an alleged sale on the face of it, to a perfectly independent person. After that sale is made, the case goes on just the same as if no compromise had been effected at all. There is an elaborate judgment of the Court in the original suit, disposing of all the objections that had been raised in it, when in point of fact it appears now that there was no real suit at all at that time, and the whole thing was a fiction, the Defendant having brought the suit himself. It is impossible that a proceeding so obtained can possibly be supported in any Court. If there really had been an honest compromise made, the practice of the Court is quite plain as to how that compromise ought to have been carried out; it ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them. Therefore it is plain it must be set aside, and there is not the least reason to suppose that any portion of this Rs. 51,000 was paid. There is strong evidence that none of it was paid, and there is no evidence at all to the contrary. Therefore their Lordships are of opinion on the merits that this Appeal ought to be dismissed with costs.

But then a further question was raised. It was argued by the Counsel for the Appellant, though that question has never been raised in either of the Courts below at all, that on the face of the original plaint it appeared that the Judgment in the original suit had been obtained for a very much larger sum than on the facts as explained in the plaint in the original suit itself the Plaintiffs could possibly be entitled to. It was not substantially denied by the Counsel for the Defendants that, if the facts actually happened as they appear to be recited in the original plaint to have happened, the mother of the Plaintiffs instead of being entitled to one-third of the whole amount of the dower would only be entitled to one-eighth. The result of the calculation, as their Lordships have made it out, is that instead of the Plaintiffs being entitled to 62,913 rupees, with interest, which is the sum for which the original Decree was given, they would

only be entitled to 30,333 rupees with interest. Their Lordships, after consideration, are of opinion that if that is accurate the Plaintiffs, who come for equitable relief in setting aside this invalid sale, on the ground that it is fraudulent, if it appears on the original plaint that they have by a pure mistake obtained judgment for a great deal larger sum than they ought to have done, ought not to obtain the benefit of that mistake. But their Lordships cannot be perfectly certain as to how the facts in that respect really are, because it certainly seems extraordinary that this point appears never to have been raised either in the original suit or in the present suit in any of the Courts. The original plaint is not in the Record, but only the recital of it. Therefore, what their Lordships propose to do under those circumstances is to recommend to Her Majesty that the Decree of the High Court be affirmed with costs, but subject to the following proviso and declaration; that is to say, inasmuch as it has been represented by the Counsel for the Appellant on the hearing of this Appeal that, assuming the pedigree of the family to have been as stated in the plaint filed in the original suit of Meer Abdool Mujeed Chowdry, the share of Eaden Missa in the estate left by Ruheemun Nissa was, according to Mohammedan law, one-eighth only instead of one-third as stated in the said plaint, and that the share of each of the Respondents, the Plaintiffs in the present suit, in the estate left by the said Eaden Missa being according to Mohammedan law one-fourth, the said Respondents were on the face of the plaint entitled by Mohammedan law to at most one-sixteenth of the sums in question, instead of the proportion therein mentioned, that is to say, to the sum of Rs. 30,333:5:4 instead of Rs. 62,913;9:3; and inasmuch as the Record in the said Appeal does not afford sufficient grounds for determining the correctness of such representations, it is ordered that execution is not to be issued for any greater amount than the said sum of Rs. 30,333:5:4, with interest theron, from the 29th July, 1859, and the costs payable by the Appellant in the two suits, and the costs of the Appeal, unless and until the said Respondents shall show to the satisfaction of the High Court, that according to Mohammedan law, and the pedigree of

the family, they were at the time of the institution of the original suit entitled to some larger sum than the said sum of Rs. 30,333 : 5 : 4, in which case execution may be issued accordingly.