

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdool Hoosein Zenail and another v. Charles Agnew Turner, Official Assignee of Bombay, and Assignee of the Estate of Aga Mahomed Rahim Shirazee, from the High Court of Judicature at Bombay ; delivered 30th March 1887.*

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Present :

LORD WATSON.

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

The suit in which the judgement under appeal was pronounced was instituted in the year 1881 in the High Court of Bombay, Original Civil Jurisdiction, by the present Respondent as assignee of the estate and effects of Mahomed Rahim Shirazee, an insolvent, against the heirs and legal representatives of Hajee Zenail, to recover, with interest, a lac and a half of rupees, received by him under a compromise made in 1875.

The facts of the case, prior to the negotiations in 1870, may be shortly stated almost in the words of the judgement of the Appellate Court.

The suit arose out of litigation, dating as far back as 1834, between two Persian families, who, for convenience sake, may be described as the Shoosty and Shirazee families. A merchant of the Shoosty family, Mahomed Ally Khan, who

died in Bombay about 1820, left a relation as executor of his estate, who again appointed in his stead Mahomed Rahim Shirazee. A suit which had been brought by the Shoosty family against the original executor for an account was revived in 1834 against Mahomed Rahim Shirazee, and, in 1846, the Master in Equity, by his Report, found Mahomed Rahim Shirazee liable to the estate for over 11 lacs. This Report was confirmed by the Supreme Court, and a decree passed on 17th September 1847 directing Mahomed Rahim Shirazee to pay the said amount. On appeal, however, to the Privy Council, in 1847, the accounts were ordered to be retaken. In the meantime, the decree had been executed against Shirazee, who had, in consequence, become insolvent and filed his schedule. On leaving Bombay, which he was allowed to do after suffering imprisonment, he appointed the before mentioned Zenail, a merchant of Bombay, as his representative, with a power of attorney, which, after his death in Persia in 1856, was renewed by his children.

The power of attorney by the children was dated 23rd December 1857, and authorized Zenail to recover, hold, take care of, and guard all the property to which they were entitled, and to appoint any other person as attorney.

In 1858 Zenail, in his representative character, urged the then official assignee, Oswald William Ketterer, to file a suit against the representatives of the Shoosty family to have the accounts retaken in accordance with the direction of the Privy Council, and by a decree made on 24th February 1859 the suit was referred to the Master in Equity for the purpose of taking the accounts.

It may be mentioned that in the schedule filed by Shirazee, the insolvent, Mirza Mahomed Shoosty and Bebee Mariam Begum were in-

serted as creditors or claimants for Rs. 11,74,459 (the amount decreed against him in the suit of 1834), with the following remark :—“ Disputed. “ Amount due under a decree of the Supreme “ Court in a cause in the Equity side, wherein “ the detaining creditors were Complainants, “ and the insolvent was Defendant, as executor “ of the last will and testament of Aga “ Mahomed Ally Khan, deceased, whereby it “ is ordered that the said insolvent do pay into “ the hands of the Accountant General the sum “ of Rs. 11,74,459. 0. 65 reas, being the balance “ reported by the Master, in manner and at the “ periods following, that is to say, the sum of “ Rs. 1,00,000, part of such balance, on the 1st “ day of January now next ensuing the date “ hereof, and the like sum of Rs. 1,00,000 on the “ first day of each and every succeeding month “ until the sum of Rs. 6,00,000 shall have been “ so paid by the said insolvent to said Accountant “ General, and that the said insolvent do pay “ the further sum of Rs. 1,00,000 to the said “ Accountant General on the 1st day of October “ next ensuing the date hereof, and the like “ sum on the 1st day of each and every then “ succeeding month, until the sum of eleven “ lacs of rupees should have been so paid into “ Court, and the said sum of Rs. 74,459. 0. 65 “ reas, being the residue of the said balance, on “ the 1st day of March, which would be in the “ year 1848. On the 16th day of October 1847 “ a writ of attachment was issued for non- “ payment of one instalment, and executed upon “ the insolvent, and since that the other writs “ have issued, under which the whole of his “ property has been sequestered and sold, but “ the insolvent does not know what amount has “ been realized, and has therefore inserted the “ whole amount decreed to be paid.”

There is no difference of opinion between the

two Courts either as to the terms of the negotiations of 1870 or of the actual compromise which was finally arranged in 1875.

Speaking of the negotiations in 1870, the Appellate Court say,—“ The result of those negotiations was a compromise, by which the Defendants in the suit (*i.e.*, the Shoostrys) were to pay, in settlement of all claims whatsoever of the Shirazee family, out of the fund in Court, the sum of Rs. 2,25,000. Out of this sum the official assignee was to be paid, and the balance was to go to the family of Aga Mahomed Rahim (*i.e.*, Shirazee), and all the other property in litigation handed over and conveyed to the Shoostry family. Mr. Keir, the then solicitor of the Shoostry family, subsequently agreed with Mr. Gamble, who was then the official assignee of Shirazee, that he should receive Rs. 65,000 in discharge of his claims, and Rs. 10,000 in lieu of his commission. This compromise, however, was not carried out.”

It appears from the 9th paragraph of the plaint that, at the time of the compromise, there were in the hands of the Accountant General of the Court, standing to the credit of the suit of 1834, Government promissory notes and cash of the value of about four lacs of rupees, and in the hands of Mr. Gamble, the then assignee, who was also receiver in the suit, a valuable property in Bombay, known as the Mazagon dockyard, also valued at about four lacs.

To this property there were in 1870 and also at the time of the compromise in 1875 three distinct claims depending on the result of the suit. First, there was Abdool Latiff, who represented the original Plaintiff in the suit of 1834, and who had originally obtained a decree for upwards of 11 lacs of rupees. Secondly, there was Mr. Gamble, the assignee of Shirazee, who had

inserted in his schedule as a disputed item (11 lacs odd) decreed against him; and third, there was Zenail, who represented the family of Shirazee under the power of attorney which he held from them, and against whom he probably had a claim for money advanced by him to carry on the litigation, but which was a matter entirely between him and the family of Shirazee, in which the assignee or the creditors had no concern.

“At the close of 1874 (as found by the Court of Appeal) negotiations were revived by Mr. Prescott, a member of the firm of Keir, Prescott, and Winter, who had succeeded to the management of the case of Abdool Latiff Shoostry on Mr. Keir's departure for England. These negotiations led to the original compromise of 1870 being carried into effect in 1875. Rs. 75,000 (made up of the Rs. 65,000 to meet the claims of creditors, and Rs. 10,000 for Mr. Gamble's commission) were paid to Mr. Gamble, the suit was dismissed, and the balance of Rs. 1,50,000 was paid to Zenail Abadeen as representing the Shirazee family.”

In the judgement under appeal the High Court say :—

“The present suit is now brought by the official assignee of the insolvent estate of the late Aga Mahomed Rahim Shirazee to recover the above sum of Rs. 1,50,000 from the representatives of the late Zenail Abadeen, charging that the same forms part of the estate of the insolvent, on the following grounds :—

“1st, that Zenail compromised the suit as the agent and confidential adviser of the official assignee; and 2nd, that the payment to Zenail was fraudulently concealed by Zenail and his sons from this Court, and also from Mr. Gamble before and after the passing of the consent decree; but that, even if Mr. Gamble was aware of the Rs. 1,50,000 being paid to Zenail, the said pay-

ment was a fraud upon this Court and the creditors, which Mr. Gamble had no power to consent to, and such consent could not be binding on his successor.”

The tenth to the fifteenth articles of the plaint as it originally stood were as follow :—

Tenth. In the year one thousand eight hundred and seventy-five an arrangement was made for the compromise of the said suit, *i.e.*, the suit of one thousand eight hundred and fifty-eight, the said Hajee Zenail Abadeen and his son the Defendant Abdool Hoosein acting in the negotiations which resulted in such compromise as the agents or confidential advisers of the Plaintiff in the said suit.

Eleventh. By a consent decree made in the said suit on the twelfth day of July one thousand eight hundred and seventy-five, copy whereof is hereto annexed and marked C, it was ordered that, the said Accountant General should, out of the said Government promissory notes and moneys in his hands, pay to the Plaintiff in the said suit the sum of rupees seventy-five thousand and the costs of the said suit, and should make over and pay to the solicitors of the Defendant in the said suit the balance of the said Government promissory notes and moneys, and that the Plaintiff in the said suit, who was also the receiver appointed therein, should assign the said immoveable property to the Defendant therein.

Twelfth. In pursuance of the said decree the said sum of rupees seventy-five thousand was paid to the Plaintiff in the said suit.

Thirteenth. The Plaintiff has lately been informed and believes that before the passing of the said consent decree it had been agreed between the Defendant in the said suit and the said Hajee Zenail that the amount for which this suit should be compromised was the sum of rupees two lacs and twenty-five thousand, and

not rupees seventy-five thousand only, and that out of the said Government promissory notes and moneys the said sum of rupees two lacs and twenty-five thousand should be paid in full settlement of the claims of the estate of the said Shirazee in the said suit, but that rupees seventy-five thousand only out of the said sum of rupees two lacs and twenty-five thousand should be paid to the Plaintiff in the said suit, and the rupees one lac and fifty thousand, the balance thereof, should be paid to the said Hajee Zenail.

Fourteenth. After the passing of the said consent decree, namely, on or about the twenty-eighth day of August one thousand eight hundred and seventy-five, Messrs. Prescott and Winter, the solicitors for the Defendant in the said suit, paid to the said Hajee Zenail the sum of rupees one lac and fifty thousand, being the balance of the said sum of rupees two lacs and twenty five thousand after deducting the said sum of rupees seventy-five thousand paid to the Plaintiff in the said suit, and the said Hajee Zenail and his son, the said Abdool Hoosein, retained the said sum of rupees one lac and fifty thousand, and applied the same for their own purposes. A receipt for the said sum of rupees one lac and fifty thousand was given by the said Hajee Zenail, or by the first Defendant on his behalf, to the said solicitors, but the Defendants allege that the said receipt was subsequently returned to the said Hajee Zenail, and that he destroyed the same. Hereto annexed and marked D is a document which, as the Plaintiff is informed and believes, is a correct copy of the said receipt.

Fifteenth. The Plaintiff says that the fact that the said sum of rupees two lacs and twenty-five thousand was agreed to be paid for the compromise of the said suit, and that rupees one lac and fifty thousand, part thereof, was to be paid to the said Hajee Zenail, was fraudulently con-

cealed by the said Hajee Zenail and his sons, the first and second Defendants, from this Honourable Court, and also from the said Henry Gamble, before the time of and after the passing of the said consent decree.

The learned Judge in the First Court found that Zenail was not the agent of the assignee, and was at no time invested with a fiduciary character, and that he did not conceal from Mr. Gamble the fact of the payment to him of the one lac and 50,000 rupees. He said it was clear that Mr. Gamble was fully aware of all the terms of the compromise, whether of 1870 or 1875.

The learned Judge had, however, after the case had been closed, allowed the 15th article of the plaint to be amended by adding the words, "And the Plaintiff further saith that, even if the said Henry Gamble was aware of the sum of one lac and a half being paid to the said Hajee Zenail, the said payment was a fraud upon the Court, which the said Henry Gamble had no power to consent to, and such consent could not be binding on his successor." The learned Judge, therefore, went on to consider whether Zenail fraudulently concealed from the Court the fact of the payment of the one lac and 50,000 rupees. He said, "To sum up, I do not think it proved that Zenail held any official position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I think he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court."

Their Lordships concur entirely in that opinion. Zenail did not act as the agent of or in a fiduciary relation to the official assignee either at the commencement of the suit of 1858 or in the conduct of it. He, no doubt, gave very valuable



assistance, but he was acting, as was well known to the assignee throughout, on behalf of the heirs and representatives of Sheerazee, and possibly of himself as having made advances for conducting the suit, and not on behalf of the creditors. Certainly there was no fiduciary relation between him and the assignee at the time of the negotiations for the compromise of 1875 or at the time of the application for the consent decree. He was not *Dominus litis*, nor in any way connected with the Court; he owed no duty to the Court, and he was under no obligation to the creditors. Nor is it likely that the Court, even if all the facts had been brought to their notice, would have inquired whether the decree was likely to be beneficial to the creditors when all the parties to the suit consented to have it dismissed. Indeed, the Court would have had no means of forming a judicial opinion upon the subject until the accounts had been retaken, which it was the object of all parties to avoid. The brief to Counsel who appeared in Court on behalf of the assignee to consent to the compromise was prepared by the solicitor for the assignee, who was fully acquainted with all the facts of the case.

The learned Judge, however, proceeded,—“ He “ (meaning Zenail) may have got and I think he “ did get more than his share. He may also “ have appropriated to himself what was in- “ tended for those he represented. In the first “ case, a suit might have been brought within “ three years of the knowledge of the official “ assignee, but that knowledge began in 1875, “ and the suit is now barred by the Statute of “ Limitations, there being no fraud on the part “ of Zenail.”

Their Lordships do not understand what is meant by Zenail's share. It was a matter of controversy between the parties how much each should receive, and there is no ground for saying

that Zenail took any unfair advantage of Mr. Gamble. Their Lordships, however, are clearly of opinion that, under the plaint in this suit, the question cannot be entered into whether Zenail, by the terms of the compromise, got more than his share or not.

The result of the findings of the First Court was that the Plaintiffs' suit was dismissed with costs. The decree was correct, but their Lordships are of opinion that the suit ought to have been dismissed on the merits, and not upon the ground that it was barred by the Statute of Limitations.

With reference to the amendment of the plaint, by introducing a new and distinct charge of fraud after all the evidence had been given and the case closed, their Lordships feel bound to say that the allowance of it was contrary to every principle of justice, it was wholly unprecedented, and, to say the least of it, it did not exhibit a sound exercise of judicial discretion.

The Full Court, on appeal, said it was not disputed that after Mr. Prescott's evidence it must be taken as a fact that, whatever might have been the extent of Mr. Gamble's knowledge in 1870, he was in 1875 acquainted with the intention that Zenail was to receive Rs. 1,50,000 from the Shoostry family, and that he assented to it. This ought to have been an end of the suit. The Court, however, held that Zenail acted in a fiduciary relationship towards Mr. Gamble; but that even in that case the transaction could be impeached only upon the ground that Mr. Gamble's consent was obtained under circumstances amounting to fraud. They held that, under the circumstances of the case, Zenail could not derive any benefit from the suit except on condition of acting in perfect good faith to the creditors. They said his deriving any benefit to himself from the suit except upon that condition

would in their opinion be a fraud on the creditors and on the act itself, and that a Court of Equity would properly regard him as holding any such benefit as a trustee for the insolvent's estate. It is not easy to follow the reasoning of the Court of Appeal, by which they arrived at the conclusion that Mr. Gamble's consent to accept the 65,000 rupees in satisfaction of the claim of the creditors was obtained under circumstances amounting to fraud on the part of Zenail. They treated the Rs. 10,000 paid to Mr. Prescott as a payment made to him to bring pressure on Gamble to accept Rs. 65,000 in satisfaction of the claim of the creditors.

The High Court refers to the evidence of Mr. Prescott. They say, " Mr. Prescott in answer " to the question, ' When did you first know or " ' hear that you were going to get the Rs. 10,000? ' " said he could not say, but added, ' While the " ' matter was going on it was hinted to me that " ' a present would be made to me by Zenail if I " ' carried the matter through. ' "

At page 290, Mr. Prescott said, " Zenail gave " me Rs. 10,000, I suppose out of gratitude for " having got the matter through. " Looking to all the circumstances, and to the fact that Mr. Prescott's clerk, who could not have had much weight or influence with Abdool Latiff Shoostry, or in effecting the arrangement with Mr. Gamble, also received the sum of Rs. 1,000 at the same time, it is difficult to understand how the Appellate Court could possibly have arrived at the conclusion that the Rs. 10,000 were promised or paid by Zenail to Mr. Prescott with the fraudulent intent to induce him to bring pressure upon Gamble, which but for that payment he would not have done. There is no suggestion that a similar payment was promised to Mr. Keir in 1870 before he made the arrangement with Gamble to the very same effect as that made by Prescott, his successor, in 1875.

All the parties beneficially interested in the funds in Court must have been anxious to compromise their claims and to terminate the litigation as speedily as possible. In the words of the learned Judge of the First Court,—“In 16 years one “twenty-fifth part of the accounts had been investigated. At that rate, every person concerned, and the generation to follow, would “have passed away with the suit still hung “up in the Master’s office. Meanwhile, the “Shoostrys were kept out of their inheritance, “the creditors of Shirazee were deprived of all “chance of a dividend, and the family of “Shirazee were debarred from such share as “might be theirs if any sums were found due “to their father more than enough to satisfy “his creditors.” Zenail, after the negotiations of 1870, doubtless stood out for the Rs. 1,50,000, which, according to the terms of the arrangement then made, were to be paid in satisfaction of the claims represented by him. The Rs. 2,25,000 were not paid to him, nor was it agreed between Abdool Latiff and Zenail that only seventy-five thousand rupees should be paid to Gamble, as alleged in the 13th paragraph of the plaint. The Rs. 2,25,000 were to be paid in settlement of all claims whatsoever, as well of the family as of the creditors of Shirazee, The amount to be paid to Gamble, as assignee on behalf of the creditors, was settled by Prescott with Gamble himself. It was admitted by the Appellate Court that Gamble consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, but they considered that undue pressure was brought to bear upon him, in addition to the Rs. 10,000 received by him on his own account. Prescott in arranging with Gamble acted as solicitor for the Shoostry family, as Keir had done in 1870, and not for Zenail. If Gamble had insisted upon receiving a larger sum than Rs. 75,000, the amount fixed in 1870,

there was no more reason that it should come out of Zenail's Rs. 1,50,000 than out of the surplus which was to go to the Shoostry family. There was, therefore, no reason why Zenail should bribe Prescott to bring pressure on Gamble, even if Prescott was open to be bribed. It is impossible to understand how it could be held that, in the negotiation with Gamble under which he consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, Zenail was acting in a fiduciary relation to the creditors.

The Court of Appeal having dealt with the Rs. 10,000 paid to Prescott, proceeded to consider whether Mr. Gamble acted in perfect good faith towards the creditors, and upon that point they came to the conclusion that having regard, amongst other things, to his receipt of the Rs. 10,000 in lieu of commission, and that that amount exceeded 5 per cent. on the assets recovered, the gravest suspicion was raised that his conduct was not actuated by perfect good faith. In short, the Court of Appeal seem to have considered that Mr. Prescott received Rs. 10,000 to bring pressure on Gamble to consent, and that Gamble received Rs. 10,000 as an inducement to betray the creditors. The Court of Appeal took no notice of the fact that the intended receipt by Mr. Gamble of the Rs. 10,000 in lieu of commission was fully explained by Mr. Gamble's solicitor, with the reasons for the payment in the brief to Counsel to consent to the decree, and that in the decree itself it was expressly declared that it should be lawful for Mr. Gamble to retain in his own hands, and for his own use and benefit, the said sum of Rs. 10,000, the same being in respect of future commission as official assignee and receiver in the suit. Further, the decree of the Appellate Court for the payment, by Zenail's representatives to the Plaintiff in the suit, of the

Rs. 1,50,000 with interest, was founded upon the fact that that amount ought to have been paid to Gamble in addition to the Rs. 75,000, in order that the whole Rs. 2,25,000 might be administered by him. In that case the Rs. 10,000 would have been less than 5 per cent. on the Rs. 2,25,000 recovered. The result of the findings of the High Court as to the payments made to Prescott and Gamble was that, notwithstanding their finding that the fraud alleged in the plaint was not substantiated, they reversed the decree of the First Court, and, upon the principle that in Equity Zenail could derive no benefit from the transaction, ordered that the present Appellants, the Respondents in the Appellate Court, as the heirs and legal representatives of Zenail, should pay to the present Respondent and then Appellant, not merely such a sum as would be sufficient to pay the creditors the full amount of their debts with interest, but the whole sum of Rs. 1,50,000, with interest at 9 per cent., amounting to a sum exceeding two lacs and eighty thousand eight hundred and ninety-four rupees for debt, and simple interest thereon at the rate of 6 per cent. per annum from the date of the decree until payment. Their Lordships do not concur in the finding of the High Court as to the object and effect of the payments made to Mr. Prescott and to Mr. Gamble the assignee respectively. They think it right, however, to point out that the Court of Appeal, whatever might have been their opinion as regards those payments, ought to have confined themselves to the charge of fraud made in the plaint, and that they committed a serious error in deciding the case upon a charge which was not made by the Plaintiff in his original plaint, nor in the plaint as erroneously amended at the close of the case, and which does not appear to have been made at the trial. The charge in the plaint was a fraud in concealing

from the assignee the fact that by a compromise of the suit made by Abdool Latiff and Zenail Rs. 2,25,000 were to be paid, and that out of that sum Zenail was to receive Rs. 1,50,000, and the assignee only Rs. 75,000. The fraud charged in the amended plaint was, that the payment of the Rs. 1,50,000 to Zenail was a fraud upon the Court which Gamble had no power to consent to. The ground upon which the Appellate Court decided the case, though not expressed in very clear terms, was that the payment by Zenail to Prescott of Rs. 10,000 was made as an inducement to him to put pressure upon Gamble to induce him to consent to receive Rs. 65,000 on account of the claim of the creditors, and that Prescott used pressure in order to secure the acceptance of that amount by him. They also substantially treated the payment to and receipt by Gamble of the sum of Rs. 10,000 in lieu of commission, as an inducement to him to consent to receive the sum of Rs. 65,000 in satisfaction of the claims of the creditors, the Court of Appeal expressing their opinion that Gamble was not actuated by perfect good faith towards the creditors, and this, notwithstanding the evidence of Gamble's solicitor as to what actually took place, was objected to and disallowed as privileged. In short, though the fraud charged in the plaint was a fraudulent concealment from Gamble by an agent and fiduciary, the ground upon which the judgement of the Court of Appeal was founded was substantially a fraud brought about by Zenail, Prescott, and Gamble by bribery, corruption, and being corrupted respectively, and conspiracy to defraud the creditors of Shirazee. Neither of those charges appears to have been ever made in the Court of First Instance so as to have the judgement of that Court called to or expressed upon them; nor do they appear to have been particularized in the grounds of appeal to the

High Court. In short, they seem to have occurred for the first time to the High Court, and not to the Plaintiff in the suit, or to his advisers. It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it. See the case of *Montesquieu v. Sandys*, 18 Ves. Junr., Reports, 502, in which it was held, p. 314, that relief cannot be given upon circumstances which are not made a ground of relief upon the Record.

Their Lordships might have reversed the judgement of the Court of Appeal on this ground alone, but they have thought it right to say that they do not concur in the opinion expressed by the High Court as to the payments to Prescott and Gamble respectively.

It was contended, before their Lordships, that the assignee had no power to consent to the compromise without the authority of the Insolvent Court. That might possibly be a ground for setting aside altogether the arrangement by which Gamble consented to receive the Rs. 65,000 in satisfaction of the claims of the creditors, as to which their Lordships express no opinion, but it cannot form a ground for altering the terms of the compromise, and allowing the assignee to recover from one who held no fiduciary relationship to him a sum which it was never intended he should receive.

For the above reasons their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the decree of the High Court of Appeal with the costs in that Court, and to affirm the decree of the First Court. The Respondent must pay the costs of this appeal.

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