Privy Council Appeal No. 41 *of* 1941.
Bengal Appeals Nos. 9 *&* 10 *of* 1939.

Jitendra Nath Roy (since deceased)

v.

Samarendra Nath Mitter, minor, and others

Same

v.

Manik Lall Mitter, minor, and others

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1943

Present at the Hearing:
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD PORTER
SIR GEORGE RANKIN
[*Delivered by* LORD ATKIN]

These are consolidated appeals from the judgment of the High Court of Calcutta reversing a judgment of the first Subordinate Judge of Hooghly. The question was as to the right of one Jitendra now deceased whom the present appellants represent to execute a decree of which he was an assignee from the then existing decree holder. The matter arises in a suit brought in 1923 by the three surviving grandsons of Ishan Chandra Mitter against Tarubala Dassi the widow of their deceased uncle for the partition of the joint ancestral property. It is only necessary to summarise the proceedings which led to the present claim by Jitendra. In 1924 by a decree confirming a compromise agreement it was provided that the immoveables should be divided, the widow to receive one-third share, and until partition to be paid Rs.1,400 per month. Difficulties seem to have arisen in the course of the partition: the monthly payments were not duly paid, and the widow on several occasions had obtained leave to execute the decree, but without much success. In February, 1936, the widow by registered deed of surrender surrendered to the first two appellants the infant sons of her daughter Umarani all her interest in the estate including arrears of the monthly payments. On June 20, 1936, the widow died and on June 24, 1936, the two infants were substituted in the record for the widow, their father Anath being appointed their guardian *ad litem*. In September he died and in November, 1936, his widow Umarani the mother of the infants was appointed guardian *ad litem* in his place. On August 9, 1937, by a registered deed of sale Umarani as next friend and natural guardian of the infants sold to her father Jitendra for Rs.1,28,000 certain immoveable properties including some of the properties of the estate under partition, the decrees in the suit, and certain surplus sale proceeds then in Court. The deed recited that Jitendra had financed Tarubala Dassi in the litigation to the extent of Rs.3,11,969 of which 1,78,868 remained unpaid. He made an allowance of Rs.65,868 leaving a net balance of Rs.15,000 due to the transferor which was duly paid. The learned Judges in the High Court

have expressed a doubt as to whether this agreement was for the benefit of the infants, but naturally made no pronouncement about it as the question was not before the Court. Their Lordships for the same reason abstain from expressing any opinion on this topic. On February 8, 1938, the Subordinate Judge on the application of Jitendra added him as a defendant to the suit. The application was supported by the pleaders for the infants and not opposed by the plaintiffs. On February 10 and February 25, 1938, Jitendra made the two applications the subject of the consolidated appeals now before the Board. The application of February 25 which should have been made first was for leave to execute the decree for payment in respect of the execution applications then pending, and that of February 10 was to transfer the decree for execution so far as payments from May 1, 1937, to January 31, 1938, were concerned to the Court of the District Judge Twenty four Pargannas. The application was opposed by the appellants on various grounds which were disposed of by the Subordinate Judge. The only ground with which the appeal is concerned is that no leave of the Court to make the transfer had been obtained from the Court, and that the provisions therefore of Order XXXII, rules 6 and 7, were an answer to the application. The rules in question are as follows:—

> *Order XXXII., r.* 6.—(1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—(a) by way of compromise before decree or order, or (b) under a decree or order in favour of the minor.
>
> *Order XXXII., r.* 7.—(1) No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of the minor with reference to the suit in which he acts as next friend or guardian.
>
> (2) Any such agreement or compromise entered into without the leave of the Court so recorded, shall be voidable against all parties other than the minor.

The learned Judge appears only to have had rule 7 argued before him. He came to the conclusion that the transfer in question was not within the meaning of the rule " an agreement with reference to the suit ": and being satisfied that there was no other valid objection granted the application. Appeals were taken on both applications to the High Court. The learned Judges were of the same opinion as the Subordinate Judge on rule 7: and their Lordships agree with them. They took the view that in the rule in the phrase " agreement or compromise with reference to the suit " the words mean agreement with a party to the suit: and do not cover a transfer of a decree to someone then unconnected with the suit even assuming that such transfer could properly be described as an agreement. They expressed their agreement on this point with a decision of the Full Bench of the Madras High Court in *Katneni Venkatakrishnayya* v. *Garapati China Kanakayya*, I.L.R. [1938], Mad. 819, which is precisely in point. It appears to their Lordships that it cannot have been intended to require the leave of the Court to an agreement for example made with a non-party to finance a suit, whether with a stipulation to receive part of the proceeds or not. The conjunction of the word " agreement " with the word " compromise " appears to indicate the kind of agreement intended. On this part of the case the applicant succeeded: but as there was no appearance for the respondents in the present appeal their Lordships have thought it proper to consider a ground on which they might have relied to support the decision in their favour. Their Lordships however agree with the two Indian Courts on this point.

But the High Court were in favour of the present respondents on rule 6. They considered that " received by the guardian " meant received either directly or indirectly and that the object of the rule would be defeated if the guardian could assign a decree to a third party and as consideration receive money from the third party which might form part of the sum to be received by him from the judgment debtor. Their Lordships cannot agree with this view. In fact, in the present case it seems to have been overlooked that the consideration given is only in part given for the assignment of the decree and the arrears under it. But the plain position seems to be that the guardian neither received from Jitendra any money by way of compromise nor under a decree in favour

of the minor. Jitendra was to receive money under the decree if he could: and the guardian only received the price of the assignment of the decree. The plain words must prevail. The learned Judges of the High Court in their judgment stated that "most of the grounds specified in the two objection petitions would only be relevant at a later stage of the execution proceedings." There can be no doubt that they did not thereby mean to preclude the appellants from contending as they do that the grounds in question have already been determined between the parties and are *res judicata*. As appellants' counsel expressed some anxiety on this matter it may be as well to make it clear that the contention of *res judicata* is open to them in any future hearing. It should be mentioned that since the decision in the High Court Jitendra has died and the present appellants are substituted as his heirs.

For the reasons above given the appeals must be allowed, the orders of the High Court set aside, and the orders of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeals to the High Court and of the present appeals.

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In the Privy Council

JITENDRA NATH ROY (since deceased)

v.

SAMARENDRA NATH MITTER, minor, and others

Same

v.

MANIK LALL MITTER, minor, and others

DELIVERED BY LORD ATKIN

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