BOMBAY HIGH COURT

Chhotabhai Motibhai

Vs

Dadabhai Narandas

(Divatia and Murphy, JJ.)

15.01.1934

JUDGMENT

Divatia, J.

1. This appeal arises in a suit by the plaintiffs for a declaration that certain deeds of sale obtained by the defendants in respect of suit property being illegal, unauthorised, fraudulent and inoperative, are not binding on them, and that certain mortgages created by the plaintiffs' predecessor on the property in favour of the defendants' predecessors prior to the said sale-deeds were subsisting, and for an account of the said mortgages under the Dekkhan Agriculturists' Relief Act, and that the mortgaged property be released from the mortgages and handed over to the plaintiffs' possession on payment of whatever might be found due on taking account.

2. In order to understand the nature of the claim and defence, it is necessary to state the events and facts which have led to this litigation.

3. The following pedigree of the mortgagor's family is necessary to understand the relationship of the plaintiffs and other persons related to them who figure in this suit:

Bhailal (dead 1890)		Talsibhai	
Babarbhai (dead)	Jhaverbhai (dead 1909)	Chaturbhai (Exh. 112)	
Motilal (dead 1908)	= Kashiba (dead)		

Ganga	Chhotabhai	Gordhan alias Kalidas
(dead)	(Plf. No. 1)	(dead 1912)
	:	
	Purshottam	
	(Plf. No. 2)	

4. Motilal, father of plaintiff No. 1 and grandfather of plaintiff No. 2, came into possession of the suit property after the death of his father Bhailal in June, 1890, and created two mortgages, Exhs. 32 and 33, on September 27, 1896, and October 9, 1896, respectively, in favour of two persons, Dadabhai (defendant No. X who died pending the suit) and his brother Kishibhai, the father of defendants Nos. 2 and 3. The first mortgage was for Rs. 5,500 Shihasai coins corresponding roughly to Rs. 3,923-1-2 of British currency. It was for a period of five years and the mortgaged property which consists of a share in certain Narva lands was handed over to the mortgagees' possession. The second mortgage was for Rs. 3,000 of Shihasai coins corresponding roughly to Rs. 2,307-11-0 of British currency. It was for a period of ten years and was also with possession and the mortgaged property consisted of forty-one lots of lands and houses which were different from the property comprised in the first mortgage. It is recited in the latter document that out of the consideration money Rs. 1,398, Rs. 2,850, Rs. 125 and Rs. 150 had been paid to the mortgagor's creditors and Rs. 575 had been received in cash. Substantially all the ancestral property of Motilal was comprised in the two mortgages.

6. At this time Motilal had only one son Kalidas alias Gordhan who was born in 1894 and was the father of plaintiff No. 2. Plaintiff No, 1 was born later on in 1902. About a year after the mortgages were created, i.e., 1897, one Chaturbhai, a paternal uncle of the minor Kalidas' mother Kashi, wife of Motilal, acting as the next friend of the minor Kalidas, filed a suit against the father Motilal and the two mortgagees for partition and accounts of his share in the ancestral property on the ground that his father who was addicted to immoral ways had mismanaged the property and had entered into false dealings which were not binding on the minor. Exhibit 26 is the plaint and Exhs. 71 and 72 are the written statements in which the father denied any such false dealings and maintained that the mortgages were real and for valid consideration for debts some of which he had inherited from his father and the rest for necessary purposes and therefore binding on the minor. Before the suit was finally heard, the plaintiffs' pleader filed an application, Exh. 28, in the Court, on April 4, 1898, which it is necessary to set out here. It runs:I the plaintiff pray in this suit that this suit has been filed to effect a partition of our ancestral property for the reason that defendant No. 1 squanders away the same etc. But now the cause of action of that suit does not survive because defendant No. 1 having effected a compromise and having put under the trust his property including the whole suit property, has entrusted the same to the trustees. I,

therefore, do not want to proceed with this suit and want to withdraw the same. Therefore be pleased to withdraw the same from the file. That is the prayer. The costs of all the defendants have been given credit of by me privately.

7. This application is signed by the plaintiff's pleader alone and not by his next friend. The order of the Court thereon is " Application to withdraw granted."

8. It is important to see now what the compromise was in consequence of which the suit was withdrawn. It is evidenced by a trust-deed, Exh. 124, executed by Motilal on March 21, 1898, and its main provisions are these:Motilal gives up all his rights in the family property for the benefit of his minor son Kalidas and any other son who may be born to him in future and entrusts the family property to the possession and management of two trustees, one Jhaverbhai who is dead and was the paternal uncle of the minor's mother and elder brother of Chaturbhai who had filed the suit as the minor's next friend, and one Balkrishna who is defendant No. 4 in the present suit, and examined as a witness, Exh. 158. These two trustees were to pay up all the family debts including the mortgage debts due to the present defendants Nos. 1 to 3 by selling or mortgaging any of the family properties, maintain all the family members, incur suitable expenses for the marriage of Motilal's daughter, etc. If there was any difference of opinion among the trustees, they were to act according to the advice of one Chunilal Keshavlal Shah, a pleader at Ahmedabad. The trust was to be in existence till Motilal's death, and thereafter the property was to be handed over to Kalidas and his other legal heirs who may be living at the time. The deed was attested, among others, by pleaders, Mr. Shivabhai Patel, who was the minor Kalidas' pleader in the pending suit, Mr. Chunilal Shah and Mr. Maganlal Mehta who represented Motilal. The deed was registered not in the Kaira district, where almost all the trust properties were situated, but in Ahmedabad where, it was stated, there was a small piece of open land belonging to Motilal and which was included among the trust properties. Two days after the execution of the trust-deed, a registered agreement was passed by the trustees to Motilal on March 23, 1898, by which whatever trust property which might remain after the trustees would sell any property for the payment of debts was to be handed over for management on behalf of the trustees to Motilal but without any authority to incur any debt or create any burden on any property, and the income was to be used only for the benefit of the family.

9. It was on account of this arrangement that the minor's suit was with-drawn without permission on April 4, 1893, It appears that the trustees were not diligent in the execution of the trust and paying off the creditors, and an application, Exh. 85, was made to the District Court on August 22, 1899, by the minor's mother Kashiba, and not by the minor's next friend in the suit, Chaturbhai, for directing the trustees to carry out the provisions of the trust immediately, especially the marriage of her daughter and the paying off of the two mortgages. So far as the

present suit is concerned, her complaint about the latter is important and may be quoted in her own words. She says:Last year when there was a possibility of realising a very good price of land, if the debt would have been paid off, either by selling or mortgaging some of the said trust properties, I would have been greatly benefited. Patel Dadabhai Narandas of Anand gets annually Rs. 1,200-13 -0 as sara out of our properties mortgaged to him with possession. If all the debt of the said Dadabhai was satisfied, either by selling or mortgaging some of the properties out of the same, I would have got at least Rs. 400-500 for my maintenance out of the income of the remaining properties" etc.

10. Notices were issued to the trustees and this roused them to activity with the result that four sale-deeds of some of the trust properties, which are very important documents in this suit, were passed by the trustees to the mortgagees. Thus, while some of the mortgaged property became the absolute property of the mortgagees, the rest was restored to the possession of Motilal's family free from any burden. As to the contents and nature of these sale-deeds, Exhs. 125 to 128, of January 17, 1900, and April 4, 1900, I will revert to them later on. It is sufficient to note here that the sale-deeds were acted upon, and the rajinamas and kabulayats and mutations of names were effected accordingly at the instance of Motilal, and ultimately, on June 16, 1900, the minor's mother withdrew her application, Exh. 85, for the enforcement of the trust, stating that as the trustees had disposed of some of the properties by selling them at the proper price and had agreed to manage the rest of the properties, she was not willing to proceed with the matter any further.

11. It appears that even subsequent to the execution of the sale-deeds, the trustees were in want of money and they had to mortgage from time to time some of the suit properties for small amounts to the same mortgagees, Exhs. 210 to 213. It was during this period that the two plaintiffs in this suit were born, plaintiff No. 1 in 1902 and plaintiff No. 2 in 1912, the latter being the son of Kalidas who died in the same year. It appears that during the minority of plaintiff No. 1 and even before the death of Kalidas, who himself was still a minor, the Collector of Kaira was appointed guardian for the management of the minors' property in 1911 after Motilal's death in 1908, and he recognized all these subsequent mortgages and paid them off in 1916. It also appears that in 1922, the Collector as such guardian filed a suit for taking accounts of the former two mortgages even though they were paid off by the sale transactions, but the plaint being returned for presentation to the proper Court was not filed again and thereafter plaintiff No. 1 having attained majority, the management of the property was handed over to him in January, 1924, and about nine months later the plaintiffs brought the present suit on October 20, 1924, for the reliefs stated above.

12. It is now necessary to turn to the plaint and examine the allegations on which the reliefs are sought. The main relief sought is of redemption of the property mortgaged under the two

mortgages of 1896 on the ground that the mortgages, though passed without legal necessity, were subsisting and the family property which was worth about a lac of rupees was squandered away by Motilal who was addicted to vicious habits, and as a result of collusion between the mortgagees and Motilal with the dishonest intention of misappropriating the whole property, the trust-deed of 1898 was got up and the pending suit for partition was wrongly withdrawn to the detriment of the plaintiff, that the sale-deeds were passed by the trustees in collusion with the mortgagees in fraud of the plaintiffs' rights, that they were not aware of those sale-deeds, but if any were passed, they were not binding on the plaintiffs as they were not for their benefit and were fraudulent, that the trust-deed was also bad against them because no sanction of the Court was taken for the compromise when the suit was withdrawn and also because it was in fraud of registration as there was no property belonging to Motilal at Ahmedabad. The plaintiffs also prayed for account of the mortgage transactions under the Dekkhan Agriculturists' Relief Act as they were agriculturists and they prayed also that so much of the mortgaged property as was in possession of the defendants should be handed over to them, the rest of the mortgaged property being in their (i. e. the plaintiffs') possession as proprietors since a long time.

13. The defendants denied these allegations and stated that the trust-deed as well as the sale-deeds were fair and proper transactions meant in good faith for the benefit of the plaintiffs' family and for the payment of just family debts and were passed with the consent of the plaintiffs' father and mother and therefore binding on them, that there was no collusion or fraud and that the suit was not bona fide and should be dismissed.

14. Of the two trustees Jhaverbhai was dead in 1909 and the other trustee Balkrishna was joined as defendant No. 4 and his defence was on the same lines as that of the mortgagees-defendants.

15. On these pleadings, the parties went to trial on several issues. The principal issues related to the validity and binding nature of the trust-deed and the sale-deeds, and there were some subsidiary issues relating to the withdrawal of the partition suit without the Court's sanction, the maintainability of the suit in its present form, etc. All the main issues have been found on the oral as well as documentary evidence against the plaintiffs by the lower Court. It is held that the trust-deed was valid and was not fraudulently registered at a wrong place, that the sale-deeds were also valid and acted upon, that the withdrawal of the partition suit was not invalid or voidable by the plaintiffs on the ground that leave of the Court was not taken, that all those transactions were made for the benefit of the plaintiffs' family and for valuable consideration, that the plaintiffs were not, therefore, entitled to sue for redemption, and that in any case the suit for accounts under the Dekkhan Agriculturists' Relief Act was not maintainable. The suit was, therefore, dismissed with costs.

16. Against the decree dismissing the suit, the present appeal has been filed by the plaintiffs, and

their learned Counsel has argued the appeal on the following heads:

(1) The trust-deed was not binding against the plaintiffs as the compromise of the pending partition suit was not sanctioned by the Court.

(2) The trust-deed was illegal as it is a transfer of property to trustees during the pendency of a contested suit under Section 52 of the Transfer of Property Act.

(3) The trust-deed was illegal and void by reason of its being a fraud on the registration office as the Ahmedabad property included in it did not belong to the family.

(4) The trust-deed was also void against the minors under the Hindu law as Motilal as the Manager of a joint Hindu family was not competent to delegate his power of management to trustees.

(5) The sale-deeds were illegal as the trustees who passed them were not legally appointed trustees and the sales were also without legal necessity.

(6) The suit as filed for accounts under the Dekkhan Agriculturists' Relief Act is maintainable.

17. These arguments cover grounds both of fact and of lawwhether in fact the trust and sale transactions were for necessity and benefit of the family, including the plaintiffs, and whether in law they are valid and binding on the minors. It would be convenient to take the question of fact first. That Motilal inherited the property from his father with a debt of about Rs. 1,600 in 1890 is beyond doubt on the evidence: Exhs. 274 and 275. The statement in the plaint that at that time the family had no debts is untrue as is also the statement that the property was worth about a lac of rupees, in 1897 when the minor's suit was filed, the property was estimated as worth about Rs. 19,000 and. it was probably worth less in 1890. It is also clear that the debt of Rs. 1,600 rose to Rs. 2,400 in 1896, and the first mortgage was passed for Rs. 3,000 in September of that year to pay off that debt and a cash loan of about Rs. 600. The second mortgage was passed about twelve days later for Rs. 5,100 to pay off other creditors of Motilal and a cash advance of Rs. 575. The consideration of that mortgage is also satisfactorily proved by the various extracts from the mortgagees' account books summarised in paragraph 39 of the judgment of the lower Court. As to the nature of these debts, the plaintiffs have not proceeded further than making a vague allegation that they were immoral or illegal. They were very probably the result of extravagance but there is nothing to connect them with any acts of immorality or illegality. The debts being those of the father, they were binding on his minor son even though they may not be for legal necessity provided they were antecedent to the mortgages and were not immoral : Brij Narain v. Mangla Prasad (1923) L.R. 51 I.A. 129 : S.C. 26 Bom. L.R. 500. There is no doubt, therefore, that the debts and the mortgages passed to pay off those debts were also binding on the then

living minor son of Motilal. These two mortgages were with possession for a term of five and ten years respectively, and almost all the family property consisting of lands, houses, including their income, had thus gone out of the family with the result that there was very little left to maintain the family. The minor's maternal relations thought of saving the minor's share in the property from the results of his father's past as well as future extravagant life, and an attempt was made by filing the partition suit of 1897 to get a half or one-third share for the minor free from the mortgage burden. In all probability it was realized by the then plaintiff's legal advisers that it was impossible to shove the mortgages out of the way in that manner. At the same time some equitable arrangement could be devised which, while recognizing the rights of the mortgagees, would save some property with its income for the minor and at the same time ensure his share from being further imperilled by the extravagant management of the father. The trust-deed, Exh. 124, was the best solution which the lawyers of both the parties could devise. The concurrence of the mortgagees to this arrangement was necessary because they were not bound to relinquish the mortgaged property and forego its income till 1901 for the first mortgage and till 1906 for the second mortgage. If, therefore, the mortgagees were not persuaded to give up some of their rights, the family might starve or be left to the mercies of their relatives. This persuasion seems to have been secured probably by the appointment of one trustee Balkrishna (defendant No. 4) as the mortgagees' representative in the trust, the other trustee Jhaverbhai being the minor's representative. This arrangement seems to have satisfied all the parties including even the minor's mother who later on applied for the immediate enforcement of the trust and the paying off of the mortgages so that the family might get back some income-fetching property for the maintenance of the family. The lawyers of the material parties to the pending suit attested the trust-deed in token of their approval, and the suit was amicably withdrawn. What is more important to note is that Chatur-bhai, the minor plaintiff's next friend in that suit and a material witness for the plaintiffs in this suit, appears also to have been satisfied with or at least submitted to the inevitable course of acting on this compromise. Appearing as a witness to support the plaintiffs' case, he admits that he knew of the withdrawal of the suit, but says-I did not present any application to the Court in the matter. I was tired of the matter, and so I did not do anything. I thought that the trustees could do anything they liked Kashiba (minor's mother) did not come to make any complaint to me about her condition after the withdrawal of the suit as trustees were appointed. I do not know what became of the properties. The trustees did the vahivat as they liked.

18. This reluctant admission of the witness would show that he must have seen that the trust-deed was for the minor's benefit and had the concurrence of all persons interested in him. It is true that he has not signed the withdrawal application, but there is no doubt that it had either his concurrence or acquiescence.

19. The agreement, Exh. 166, which Motilal passed to the trustees as a part of the arrangement, was also in no way derogatory to the minor's rights. On the contrary by his relinquishing his own interest in the property in favour of the minor, who was thus made the beneficial owner of the whole of the family property, and by agreeing to manage the property only for the benefit of the family without creating any incura-brances, the minor got a benefit which he would not have obtained if Motilal, without submitting to the creation of a trust, had entered into further debts or even sold the property, which sale would have been binding on him at least so far as his own share was concerned.

20. During the interval of two years between the trust and the sales, the trustees had to incur debts for maintaining the family and had passed several mortgage-bonds to these very mortgagees, and, as we have seen, they were recognized by the Collector. This would show what was the state of this family then, and the only best course was to pay off the former mortgages and get back as much property as possible free from incumbrance.

21. Next come the sales. The mortgage debt under the first two mortgages then came to Rs. 8,100. There were further debts incurred by Motilal subsequently which came to about Rs. 2,000, Exhs. 286 to 294. The opinion of the lower Court on the evidence that these further debts were also binding on the minor is correct and nothing is urged here which would show that it is erroneous. The net result of these four sale transactions was that for a consideration of Rs. 10,400, a part-it was no doubt a large part-of the mortgaged property was sold to the mortgagees who retained it as absolute owners and returned to the trustees the rest of the property which consisted of nearly forty-two acres of Narva land, two houses and some pieces of open land. It is this latter property which is enjoyed by the plaintiffs' family for nearly twenty-five years before this suit in virtue of the compromise arrangement and of which they call themselves proprietors in the plaint. It is not shown at all that the sale-deeds passed to the mortgagees were for inadequate consideration.

22. It is thus clear that the trust-deed and the subsequent sales were not only meant for but actually conferred a substantial benefit to the minor son of Motilal.

23. Turning now to the legal objections against these transactions, the first point taken is that the compromise of the pending partition suit required the sanction of the Court under Section 462 of the Civil Procedure Code of 1882 corresponding to the present Order XXXII, Rule 7. It is not stated in the body of the application for withdrawal of the suit that the compromise was for the benefit of the minor plaintiff, nor does the order of the Court thereon purport to grant any sanction for the compromise on the ground that it was for the minor's benefit. The compromise is, therefore, voidable at the minor's option, and the present suit brought for recovery of possession of the property ignoring the compromise is tantamount to the exercise of that option

and no separate suit to avoid the compromise is necessary. Reliance is placed on *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy*[1], *Doraswami Pillai v. Thungasami Pillai*[2] *Sakinbai v. Shirinbai*[3] *Manohar Lal v. Jadu Nath Singh*[4] *Virupakshappa v. Shidappa*[5] *Bhiwa v. Devchand Bechar*[6] *Partab Singh v. Bhabuti Singh*[7] *Jamnabai v. Vasanta Rao: Vasanta Rao v. Sethuram*[8] *and Govindasami Naidu v. Alagirisami Naidu*[9]. On the other hand, it is urged for the respondents that the wording of the application, Exh. 28, shows that it was brought to the notice of the Court that the compromise was for the minor's benefit, that the signature of the plaintiffs' pleader on the application amounted to a certificate that it was for such benefit, that the order of withdrawal amounts to a decree which is good till it is set aside by a regular suit expressly brought for that purpose, and reliance is placed on *Cursandas Natha v. Ladkavahu*[10], *Dhairyasingh v. Kissandas*[11] *and Phulwanti Kunwar v. Janeshar Das*[12]

24. The principle deducible from these cases is this that, although Section 462 of the Civil Procedure Code of 1882 does not require that leave of the Court should be expressly recorded as is now required by Order XXXII, Rule 7, of the present Civil Procedure Code, it is. necessary that the leave should be given after attention of the Court was directly called to the fact that a minor was a party to it, and the Court should apply its mind and ascertain whether the compromise was for the minor's benefit, that the Court had to exercise its discretion and it was to be seen in each particular case from the application and order thereon as to whether the Court intended to grant such leave, but if no such leave is given, the compromise or the withdrawal of the suit in virtue of a compromise is voidable at the instance of the minor by a suit to avoid it, with the result that if the decree or order of the Court disposing of the suit is set aside, the minor is restored to his original position in that suit.

25. Now, the order of the Court here simply was " Application to withdraw granted", and in the body of the application no reference was made to the compromise being for the benefit of the minor, and although it is very probable that the Judge was aware of the terms of the trust-deed, he has not stated whether he was satisfied that they were beneficial to the minor. Therefore, taking it that his order did not comply with the provisions of law, what would be its effect? It would be that if the minor elects to avoid it, he would be restored to his original position in the suit: Manohar Lal v. Jadu Nath Singh and Partab Singh v. Bhabuti Singh. If so, can he in this suit be restored to that position? In the first place, the present plaint is not launched on that basis at all. The original minor plaintiff Kalidas in that case is dead and the present plaintiffs are his son and brother. If the former suit had been re-opened by the minor's next friend, the minor would have got a one-third share as the mother was also living, and that share would have been burdened with the two mortgages as they were binding on the family. As most of the family property was in the mortgagee's possession, the whole of his share would not also have come into the minor's possession till 1906 as the fixed period would then have expired, and that too, not without the

mortgagee being paid off by sale of the property. In any case, the mortgages would have been binding on the remaining two-thirds share. As it happened, nothing was done by the next friend, and although it is true that the minor would not be bound by his guardian's negligence, if any, and is entitled to challenge the transaction on his attaining majority, he can succeed in doing so if he satisfies the Court that the compromise has operated to his detriment especially in this case where the plaintiffs come nearly twenty-five years after the sales during which time they have reaped the benefit of the transaction. Let us look at the alteration in the circumstances. The father is dead in the meantime. His share and the minor's mother's share, i. e., a two-thirds share in the property, would have been open for the satisfaction of the mortgagee's claims, and even if the present plaintiffs had inherited that property, it would have been reduced to that extent. Now, however, the father being dead without a partition, the whole of the remaining property has come to the plaintiffs' share after the mortgages are satisfied, and what is more, while the mortgages have been discharged before their time, the plaintiffs have been enjoying the income of forty-two acres of land 'as proprietors' in their own words for nearly twenty-five years before the suit which, but for the sale-deeds, would have probably been in the enjoyment of the mortgagees till now. In short the position at the date of this suit was more favourable to the plaintiffs than it would have been if the former suit had been re-opened and proceeded to partition.

26. I may state here that there is one more point that is also to be taken into consideration here. Even if the partition suit were to be re-opened, the Court need not have necessarily decreed partition, and if it is argued that the partition suit is pending still on account of its improper withdrawal, then the difficulty is that the then minor plaintiff being dead while he was still a minor, his legal representatives are not entitled to continue the suit, for it has been held that the rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor, for in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor, and where a minor plaintiff dies during the pendency of the suit, his legal representatives are not entitled to continue the suit: *Chelimi Chetty v. Subbamma*[13]

27. I am, therefore, of opinion that there is no support in law as well as in equity for the technical objection urged on behalf of the plaintiffs, even if it be held that the Court's order did not amount to sanctioning the compromise.

28. The next important objection urged is on the ground of invalid registration, and it is put forth on these grounds. Among the properties, which are subject-matter of the trust-deed as also the deed of management, both of which are registered at Ahmedabad, is a small piece of land at Ahmedabad, about five gajas to east-west and five gajas to north-south, situated in Jamalpur locality of the city of Ahmedabad. This is the only property in the deeds which is situated in

Ahmedabad, the rest being in Kaira district. The appellants' contention is that this property did not belong to Motilal at all and that all the parties to the deeds were aware of it, but that it was so included in the trust-deed in order that registration might be secretly effected at Ahmedabad and not at Anand in Kaira district, as otherwise the minor's maternal relations might come to know of it and prevent its registration by putting forth objections, and that, therefore, the deed is invalid on the ground of fraudulent registration ; that the burden was on the defendants to prove that that property belonged to Motilal and that being not done, the deed was inoperative, and the following authorities are relied on for that purpose : *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*[14] *Biswanath Prashad v. Chandra Narayan Chowdhuri*[15] *Husensaheb v. Hasansaheb*[16] *and Ram Lal v. Tamkin Bano*[17] In order to appreciate this argument, it is necessary to examine the provisions of law on that point. Section 28 of the Indian Registration Act, 1877, provides that every document requiring to be registered shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. Various circumstances may arise in case of unwarranted inclusion of property in a deed. For instance, a property may not in fact exist at all and still be included to enable registration being effected in a particular place and may be a fictitious inclusion in that sense. In such a case registration is invalid : Harendra Lal Roy Chowdhuri v. Hari Dasi Debi. Secondly, the property may exist, but the grantor has no title to it, and neither party to the deed intends to include it as a fact as a subject-matter of the deed. In such a case also registration is invalid : Biswanath Prashad v. Chandra Narayan Chowdhuri Thirdly, the property exists, but is not proved to belong to the grantor and still there is a bona fide belief at least on the part of the grantee that it belongs to the grantor. In such a case registration is not invalid, and the burden is on the party challenging the validity to prove that the inclusion of the property was intended to be fictitious by both the parties : *Pahladi Lal v. Musammat Laraiti*[18] *Durga Prasad Sahu v. Tameshar Prasad*[19] and observations in Biswanath Prashad v. Chandra Narayan Chowdhuri.

29. Now, what is the position here? That this particular plot existed is beyond doubt. The Maintenance Surveyor in the City Survey Office, Ahmedabad, is examined, Exh. 117, and he deposes from the General Index of 1881, the Property Register of 1921, and a copy of survey sketch, that the plot was a part of survey No. 362, the whole of which stood in the name of one Manilal Himatlal in 1881, that changes in ownership of properties from 1881 to 1921 were not recorded in the survey record anywhere, and that therefore if Manilal sold it to anybody between these two years, there could not be found any record about it in their office, that in 1921 the number of that land was changed to 5659 and stood in the name of one Chandulal Keshavlal as heir of the occupant of the original survey number, that the property might have changed different hands after 1881, that no enquiry was made in the survey of 1921 as it was not a disputed number, and a sanad was given to Chandulal, the then occupant. This Chandulal, who is

the brother of the deceased Chunilal Shah, pleader for Motilal in the partition suit, is also examined, Exh. 250, and he says that this plot and the house adjoining it belonged to him, that a dehla had been built on this plot, and that he got a sanad for it in the survey of 1921, but that he cannot say how and when the land came into the possession of his family, and that except this sanad he had no title-deed with him, that he does not know in whose possession the land was from 1895 to 1903. The rest of the other evidence on this point does not carry us any further. Motilal, who could have thrown any light on this matter, is dead; so also Mr. Shivabhai Patel, the minor plaintiffs' pleader in the partition suit. Out of the two pleaders of Motilal in that suit, Mr. Chunilal Shah, who seems to have acquired interest in this plot, is also dead, and the other pleader Mr. Maganlal Mehta though alive is not called. Jhaverbhai, one of the trustees who were the grantees under this deed, is also dead, and the other surviving trustee Balkrishna who is examined (Exh. 158) says that Motilal's father Bhailal had purchased this plot ; that at the time of registration, minor's pleader Shivabhai said that the deed could be registered in Ahmedabad as there was Ahmedabad property also and that the other pleaders also agreed to it; that Motilal said that the land was purchased by his father ; that the trustees got paper possession of the properties which were managed by Motilal; and that he does not know what became of the plot subsequently. Lastly, Chaturbhai says as follows in his deposition :I say that Motibhai had no property in Ahmedabad because, Kashiba did not tell me at the time of filing the (partition) suit that he had property in Ahmedabad.

30. He further says, I did not collect full information as to Motilal's properties at the time of filing that suit.

31. On this evidence, can it be said that the plaintiffs have discharged the burden of proof which they have assumed on themselves by raising this contention? As stated in Pahladi Lal v. Musammat Laraiti (p. 27) : ' Inasmuch as it was admitted that the property was in existence and was supposed to be in the possession of the mortgagor, the onus was on the defendants to show that both parties intended the entry to be fictitious". I am of opinion that the plaintiffs have not satisfactorily discharged that burden, and even assuming that the plot did not belong to Motilal, it is not proved that the trustees were aware of his want of title and that they colluded with him in committing a fraud on the registration office. Nor is it probable that it was the intention of the parties to effect a clandestine registration at Ahmedabad. In view of the subsequent conduct of Kashiba, it is impossible to believe that she was purposely kept in ignorance of the trust-deed, or if she was aware of it, she had any objection to it. As we have seen above, Chaturbhai admits that he knew of the trust-deed soon after it was registered, but took no steps to avoid it. It is difficult to believe that he was ignorant of the negotiations which resulted in the trust-deed or of the deed itself before its registration. There was no other person interested in the minor who was likely to offer any opposition.

32. On these facts, I think the lower Court was right in holding that the plaintiffs had not proved that the registration of the trust-deed was fraudulent and therefore invalid.

33. The next argument is that the trust-deed is invalid under Hindu law as Motilal as a Hindu father had no authority to transfer his rights of management or alienation to a stranger as he as manager of a joint family was in the position of a delegate who could not delegate his powers to another by a trust deed, and any sale by such delegates would not be binding on the minor. This argument is based upon two grounds, that the trust-deed amounts to an alienation of minor's property, and that a Hindu father cannot delegate his authority to another person. The authority relied upon *is Venkatraman Mukund v. Janardhan Baburao*[20]. In my opinion, the decision in that case does not govern the facts of this case. There one Mukund executed two deeds in favour of his separated nephew Janardan, under which the latter was to manage the property, to pay fixed amounts for the maintenance of Mukund's widows and minor children, to appropriate a fixed sum for his own use, and a fixed sum was to be invested every year for the benefit of the minors, but Janardan wa free from liability of accounting and was to take the income of the property for his own benefit after annually paying a fixed sura for these disbursements. It is important to note that the second deed was termed a Chalgeni lease of the family property granted by Mukund to Janardan for thirteen years, i. e., till the eldest minor son attained majority even though Mukund might die before that date. In other words, the disposition which amounted to an alienation for at least thirteen years was to extend beyond Mukund's life-time, even though the minors took the property by survivorship on his death. In a suit by the sons to set aside these deeds after Mukund's death, it was held that the alienation being of joint property in which the father's interest ceased at the date of his ", death, it was not binding on the sons and. the father had no interest in the property which he could vest in the trustees of any settlement and that a Hindu father cannot tie up his property for what he conceives to be the benefit of his minor sons and that it was doubtful whether a Hindu father could appoint by will a testamentary guardian of the joint family property. The decision in that case was based on the facts that the deeds conferred a personal benefit on Janardan without liability of accounting, that Mukund had no right to dictate that his estate, in which he had no interest after his death, shall receive only a fixed amount of income, and it was held on the evidence that the fixed sum arrangement made by Mukund was not really fair to the minors, and the decision was expressly limited to its own facts, viz., that in the proved circumstances of that case the deeds went far beyond the powers of a Hindu Mitakshara father. Now, in the present case, it is distinctly provided in the trust-deed as follows:My trustees should execute this trust till my life. Thereafter the said properties may be handed over to my son Kalidas and to other legal heirs who are living at that time.

34. Therefore, there is one material difference here that the trust-deed did not affect the rights which the minor son would get by survivorship after Motilal's death. In fact, as we have seen, on

Motilal's death the trustees became functus officio, and the Collector was in 1911 appointed guardian of Kalidas. It is further expressly stated in the deed that " My son Kalidas and other sons living after him are the owners of the properties," and that " on my death if I had no son amongst my issues, the trustees should hand over the properties to my legal heirs". Therefore, the ratio decidendi of the case relied on by the appellants does not apply here at all. That being so, I need not refer to the cases discussed in that ruling. With regard to the power of delegation during Motilal's own life-time, the real position is this. The minor is not deprived of anything, but, on the other hand, the father gives up all his rights in the property in favour of his minor son with the result that the minor gets the whole estate from that time and not on the father's death. But the father being an extravagant one, it was agreed among all the persons interested in the estate including the creditors that he should be deprived of his vast powers of management including creating incumbrances in future and that the property should be managed by two persons for the benefit of the minor. It was agreed that the sale of some of the Rs. 95. mortgaged properties by these managers was beneficial instead of detrimental to the minor's interest as it would restore some income-fetching property for the minor. I do not think such an arrangement obviously for the benefit of the minor was beyond the powers of a Hindu father in a Mitakshara family or that the sale-deeds passed by these managers with the concurrence of the father in virtue of their powers under the trust-deed were alienations prohibited by Hindu Law. It cannot be laid down as a general rule that in no case can a Hindu father in a joint family delegate any of his powers in the management of the family property. There might conceivably be a number of circumstances in which benefit to the family itself may require that he should himself abstain from exercising and should delegate some of his powers for that purpose. Necessity or benefit to the minor has been regarded as a more important consideration than technical want of authority of an alienor, e. g., it has been recently held by a full bench of our High Court agreeing with other High Courts that under Hindu law even a de facto guardian of a minor can validly sell the property of the minor to a third person for legal necessity : Tulsidas v. Raisingji

35. I am, therefore, of opinion that this trust-deed is not void under Hindu law but at the most it is voidable by the minor if it is proved that it was detrimental to his interests, and, as I have shown above, that it was undoubtedly for the minor's benefit, I think it is not voidable either.

36. There now remains one objection to the trust-deed and it can be disposed of very shortly. It is based on lis pendens. The argument is that the trust-deed amounted to a transfer of property during the pendency of the partition suit by the father and it cannot, therefore, affect the rights of the son by the order of the withdrawal of the suit. It is only an argument in another form that the withdrawal of the suit was not binding on the minor. I do not think that this argument can prevail. As has been shown above, the trust-deed was the result of a compromise between the parties to the partition suit and it was certainly open to them to arrive at a compromise provided it was

lawful in other respects. Whether it is lawful, or not is to be judged from the circumstances of each particular Compromise, but it cannot be said that because in a pending suit parties arrive at a compromise in which one party transfers his rights to another, it is bad on the ground of Its pendens. Besides, what is the transfer or other dealing of the property here? One party gives up all his rights over his share in the suit property to the other party and enables the trustees to pay off encumbrances so that the other party may get the benefit of the unhampered enjoyment of the estate which still remains of the ownership of the other party at the date of the former party's death. This arrangement does not, in my opinion, come within the prohibition of Section 52 of the Transfer of Property Act.

37. This concludes all the objections to the trust-deed which, I hold, is binding on the present plaintiffs.

38. If the trust-deed is binding, then the four sale-deeds, which, as I have shown above, are a benefit to the estate and are not proved to have been passed for inadequate consideration, are also binding on the plaintiffs. Defendants have contended that even assuming that the trust-deed is not binding on plaintiffs, they are bound by the sale-deeds because Motilal has joined in executing the sale-deeds along with the trustees, and the sales by Motilal would be binding as they are passed for ancestral debts which are neither immoral nor illegal. Plaintiffs' case, on the other hand, is that Motilal has not joined in the sale-deeds as their executant but only as a surety for the due observance of the conditions of the sale-deeds by the trustees, and should not, therefore, be deemed to have conveyed any title especially as he has given up all his interest in the property. In view of my finding that the trust-deed is binding on the plaintiffs, the point does not expressly arise for decision, but I may, however, quote the relevant passage in the sale-deed which is to the effect that Motilal was responsible for observing and getting observed (the conditions relating to) the property sold, and it is further recited that " if anybody causes any let or hindrance or puts forth any title or claim, we (i.e. Motilal), our heirs and descendants, jointly and severally are to answer for the same." Although Motilal is not stated to be one of the vendors in the opening part of the deed, he has put his signature below the signatures of the vendors at the bottom. If it were necessary to decide the point, I am inclined to think that, assuming the trust-deed is not valid and binding on the plaintiffs, and the title, therefore, remained with Motilal, the purchasers could have as against Motilal claimed to retain possession of the property sold as owners by virtue of this clause, and the present plaintiffs would have been bound by it too and that the defendants-purchasers are, therefore, entitled to set up this defence in the present suit for re demption.

39. There now remains only one point and that is the maintainability of the suit in its present form, The suit is not an ordinary suit for redemption but is brought as a special suit under Section 15D of the Dekkhan Agriculturists' Relief Act, claiming a relief for account and re-opening the

mortgages. At the same time the substantial claim made is to recover possession of the property of which, according to the plaintiffs, they have been fraudulently deprived. The lower Court has held, relying on the Privy Council ruling in *Mt. Bachi v. Bickchand* [21]and other cases, that such a special suit under the Dekkhan Agriculturists' Relief Act does not lie where the suit, though in form one for redemption, is really one to recover property of which the plaintiff is alleged to have been deprived by fraud. It is sought to distinguish that case on the ground that in the present case there is no document passed by a next friend of the minor which requires to be set aside. But, in my opinion, the principle of that ruling does apply here. Their own case, as stated in the plaint, is that they were fraudulently deprived of the property by the compromise resulting in the trust-deed, though an unsuccessful attempt is made to draft the plaint so as to make it one for relief under the Dekkhan Agriculturists' Relief Act. I agree with the lower Court that the suit is not maintainable in the form in which it is brought. In view of the fact that the plaintiffs fail on the merits, it is not necessary to consider whether the ordinary relief of redemption can still be granted on an application being made for amendment of the plaint,

40. These are all the points urged on behalf of the appellants, and as a result of the foregoing discussion I agree with the lower Court that the plaintiffs are not entitled to claim redemption or possession of the suit property, and this appeal, therefore, will be dismissed with costs.

Murphy J.

41. The facts have been fully set out by my learned brother Divatia, and I need only refer to them in outline.

42. Motilal, plaintiff No. 1's father and plaintiff No. 2's grandfather, inherited an estate from his father in 1890. It was already burdened to some extent with his father's debts. By 1896 the debt had increased and Motilal was compelled to execute two mortgages with possession in favour of his creditors now represented by the defendants. A large portion of his estate was included in the mortgages. Motilal had had a son Jetho, who died in 1894 then about four years old. His second son Kalidas or Gordhan was born in 1894 (Kartik Sud 8th, 1951).

43. In 1897, Kalidas by his next friend sued his father for partition of the ancestral property in suit No. 393 of 1897, The suit was never tried out, for, in March, 1898, it was arranged that Motilal should transfer all the family property to two trustees with power to sell as much of it as was necessary to pay off the debts. These had increased because, though the mortgages being with possession had stopped an increase of the original debt by interest, they had left the family with an insufficient income to live on.

44. The trust-deed was executed on March 21, 1898, and the suit was withdrawn by the next

friend on April 4, 1898. Thereafter the trustees did nothing under their powers, except to make over the management of the estate to Motilal. On August 22, 1898, Motilal's wife applied to the District Court alleging that nothing had been done by the trustees, reciting the financial difficulties of the family and asking for fresh trustees. The trustees were so forced to act, and in April and May, 1900, they sold some of the property mortgaged to the mortgagees, and recovered possession of the remainder, the mortgagees being so satisfied. The application to the District Court was withdrawn on July 25, 1900, by Bai Kashi. Motilal, who had joined in by being surety for the sales, died in 1908. Plaintiff No. 1 was born in 1902. Kalidas alias Gordhan died in December, 1912. Plaintiff No. 2 was born in 1912. It is on these facts that the suit to redeem the two mortgages of 1896 was brought. It was framed under the Dekkhan Agriculturists' Relief Act, and was for setting aside the sale-deeds executed by Motilal and Kalidas' trustees in 1899. The grounds given for setting these transactions aside were that they were "illegal, un authorized, fraudulent and inoperative". Mr. Thakor, who argued the appeal, went further and said that his clients were in any case entitled to ignore the sale-deeds without having them set aside, and to ask simply to redeem the two mortgages, not under the Dekkhan Agriculturists' Relief Act. The suit failed in the lower Court.

45. The real question iswhat is the position resulting from the withdrawal of the suit of 1897 in 1898: the settlement then made by Motilal of his estate and the redemption of the mortgages by the trustees in 1900 by means of the sale of some of the property mortgaged?

46. I will first discuss three other questions which also arise indirectly out of other transactions, these being (1) Whether the mortgages, and later the sales, were entered into in order to settle and extinguish antecedent debt?

(2) Whether the trust deed of 1898 was properly registered? and (3) Whether the suit as framed under the Dekkhan Agriculturists' Relief Act is maintainable?

47. On the first point, accounts are available to show that on Bhailal's death he owed Rs. 1,609. His son, Motilal, accepted responsibility for it, and in the end this liability mounted up to Rs. 2,385 ; and Exh. 32 one of the mortgages was for this sum, with Rs. 615 taken in cash by Motilal.

48. The second mortgage, Exh. 33, was executed and the amount secured by it was borrowed to pay off debts owed by Motilal to other creditors. The facts are discussed by the learned Subordinate Judge in paragraph 39 of his judgment. I agree with his conclusions and finding that the debts were not incurred for improper or immoral purposes of which there is no evidence, but because the family having an exaggerated idea of its social importance, was forced to extravagance by social custom. There is no doubt that in 1900 Motilal could have sold the

property sold by his trustees to pay the debts and that his act would have bound his son and grandson: cf. *Brij Narain v. Mangla Prasad* [22]*and Shankar v. Tukaram*[23] The finding on the first of these preliminary issues is in the affirmative.

49. The question as to the registration of the trust-deed arises because, though the bulk of the property conveyed by it to trustees is in Anand, there is one item of very small value which is in Ahmedabad. This is a small site in the city. It was not mortgaged, and belonged to another family in 1891, and to a third one in 1921, with whom it still remains. There is no evidence of who owned it in the years between, for there are no survey records available. The present owner is the brother of Mr. Chunilal Shah, who represented one of the parties, Motilal, in the suit of 1897, but does not know how his family acquired it. The oral evidence is that Motila's father bought it for Rs. 75, and that Motilal sold it to Mr. Shah. The argument is that it never belonged to Motilal and was only mentioned as his in the trust-deed to givefor an unknown reasonjurisdiction to the Ahmedabad Sub-Registrar. There is ample authority for holding that if Motilal never owned it, and he was falsely mentioned in the document as its owner, whatever the motive, the trust-deed would have been registered in fraud of the Act: cf. *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi*[24] and Husensaheb v. Hasansaheb But the learned Subordinate Judge has accepted the explanation given, and there is no real ground for holding that there was a fraud on the registration authorityall there is being possibly suspicion. I agree with the finding that as far as one can judge, the registration was regular.

50. The third point must also, I think, be found against the appellants. The suit, as framed, involved, not only the simple question of redemption but also of the voidability or otherwise of four sale-deeds. Such a suit is not within the terms of Section 3, Clause (3), of the Dekkhan Agriculturists' Relief Act: cf. *ML Bachi v. Bickchand* [25]Chandahhai v. Ganpati and Krishanji v. Sadanand .

51. The flaw in form, it has been argued, need not necessarily be fatal to the suit, but it has been held in one decision of this Court that it sometimes may be, for by electing to sue under the Dekkhan Agriculturists' Relief Act, a plaintiff obtains the relaxation of certain rules of evidence which would otherwise bind him, and this may make an amendment of the plaint almost impossible to allow at a late stage.

52. The remaining points are those relating to the withdrawal of suit No. 393 of 1897, the execution of the trust-deed by Motilal, and the sales of 1900 by the trustees. It will be useful first to consider what Motilal's own interests and powers were. He certainly had power to sell some of the property and so to redeem the mortgages for antecedent debt; his interest in 1897 in the property was either a half or a third, according as to whether his wife Kashi claimed a share, or not. He had power to sell his own interest in any case to that extent, he also had power to

authorize his own trustees to sell or even to give a power-of-attorney to some one else to sell his own interest for him. It is clear, therefore, that though the trust-deed and the sales made under it may not have passed the plaintiff's interests and be voidable by him to that extent, they were good as regards the share of Motilal.

53. There are no precise figures as to the then value of the property sold, except those in the sale-deeds, and of the whole property, except those given in the suit of 1897. The sale-deed figures are expressed in Shihasai rupees, and the total of the four documents (Exhs. 125 to 128) is Rs. 10,400. In English currency this is about Rs. 9,000. The figures in the plaint of 1897 are Rs. 19,400, though it was then alleged that Motilal should have saved Rs. 4,000 more, and had not. On these figures Motilal, through the trustees, sold about to the value of his own interest if he had a half, and a little more if his wife had claimed a share, which, it seems, was not the then intention, so she was not a party to the suit. Had the partition taken place in 1897 or 1898, plaintiff No. 2's father would have got a share, and since plaintiff No. 1 was not born till 1902, it is clear he would have taken Motilal's share if any was left to take after the sales. Had Motilal's alienations been held to be valid in the partition suit, all the shares would have been subject to redemption of the mortgages on the property as being the family debt. In that suit it was alleged that they were void, but prayed that if they were found not to be so, they should be debited wholly to Motilal's share.

53. Be that as it may, the suit not being tried out, I must consider the other questions raised in this connection, and the first in logical order is the inherent validity of the trust-deed. The arguments against its validity are that Motilal had no power so to deal with the family property, and, pendente lite, could not deal with it so as to affect the interest of the other party to the suit, or his representative in interest.

54. The rule of Hindu Law as to trusts is that they must not divest the line of succession, but that they can be created otherwise. The conditions of the Indian Trusts Act have admittedly been complied with here, and the trust-deed does not violate the provisions of the Hindu law, since its beneficiaries were Motilal's then existing family, his son, wife and daughter who are provided for by it, in the regular order of their rights. So far as its provisions go, I think there is nothing inherently invalid in the trust-deed, and I believe that as a Hindu father and manager of his family Motilal had authority to execute it. Mr. Thakor has suggested that Motilal, though he may have had power to sell some of the family property to pay antecedent debts, had none to delegate his power to the trustees, but there is no authority for this viewand empowering trustees to sell (here with his consent for he was a party to the sale-deeds) is essentially no different, except in form, from authorizing someone to do so for him by power-of-attorney, or himself selling the property.

55. If this view is correct, Motilal had power to create the trust he did and to authorize his trustees to sell to the extent of his own interest so much as was necessary of the property in order to free it from the existing incumbrances, and has done so. The mortgages were extinguished and can no longer be redeemed. The only really surviving question, if Motilal did not have power to bind his sons, is whether more than Motilal's share passed or not.

56. The next point to consider is whether, though Motilal had the power to do what he did, his act, and the consequential acts of the trustees, are void or voidable in the circumstances. None of these acts was, I think, void. The rule of Us pendens provides that no party to a suit can alienate any of its subject-matter so as to affect another party to it. It has been suggested that that rule has no application here, for there was no transfer to a third party, since the trustees only held for the then plaintiffs' benefit. But even if there is, the result would be that the sales are voidable to the extent of the then plaintiffs' interest and no more on this ground. But the objection for Iis pendens cannot, I think, really affect the result here which ultimately depends on the finding on the first pointthe result of the alleged unauthorized withdrawal of the minor Kalidas' suit for partition against his father by his next friend.

57. The present Code Order XXXII, Rule 7, requires that a compromise made on behalf of a minor entered into by his next friend must be expressly sanctioned by the Court as being for the minor's benefit, and a compromise not so sanctioned can be set aside at the minor's instance by a suit or review. By the Code in force in 1898 (s. 462) sanction was similarly necessary, but it was not specified in the section that it must be express. The decisions, however, were that a withdrawal of a suit, as the result of a compromise, comes within the rule: cf. Karmali Rahimbhoy v. Rahimbhoy Habibbhoy (1889) I.L.R. 13 Bom. 137. In the present case it has been argued that, owing to the nature of the suit, the fact that the sole plaintiff was the minor and the statement in the application to withdraw that the minor had lost his cause of action by reason of the execution of the trust-deed, the Court must have been aware of all the circumstances and presumably sanctioned the withdrawal after due consideration as being for the minor's benefit. The cases cited on the point before us were the following ones :

Karmali Rahimbhoy v. Rahimbhoy Hobibbhoy, *Eshan Chundra Safooi v. Nundamoni Dassee*[26] *Doraswami Pillai v. Thungasami Pillai*[27] *Sakinbai v. Shrinbai* [28]*Virupakshappa v. Shidappa*[29] *Virupakshappa v. Shidappa*[30]*, Kondu bin Kahnoji v. Vishnu Moreshvar* [31]*Subramanian Cheltiar v. Rajah Rajeshwara* [32]*Jamna Bai v. Vasanta Rao : Vasanta Rao v. Selhuram*[33] *and Govindasami Naidu v. Alagirisami Naidu*[34]

58. These cases were decided on different facts and grounds, but the rule inferable from them seems to be that where the sanction is not fully expressed as being for the minor's benefit, there must be enough material on the record for a second Court to conclude that the presence of a

minor party was fully realized and that leave was granted after a full consideration and almost a formal finding that the compromise or withdrawal was for the minor's benefit.

59. I think that there is not enough material on the record so to decide in this case, and consequently that the withdrawal was an improper one as not being duly sanctioned, and I have next to consider what is the result. This is laid down in some of these cases and it is that such a compromise or agreement is voidable at the minor's instance, viz., Eshan *Chundra Safooi v. Nundamoni Dassee*[35] *Karmali Rahimbhoy v. Rahimbhoy Habibbhoy*[36] *Cursandas Natha v. Ladkavahu*[37] *Partab Singh v. Bhabuti Singh*[38] *Phul-wanti Kunwar v. Janeshar Das*[39] *and Bhiwa v. Devchand Bechar*[40]

60. The minor's remedy is to be relegated to the position he would have been in had there been no compromise at that stage, and he may avoid the compromise in three ways (1) by an application to the Court granting sanction, (2) by a regular suit to set aside the judgment, (3) by a fresh suit on the same cause.

61. The first of these courses is now impossible, for there has been a decree, as a withdrawal amounts to a dismissal of the suit under Order XXIII, Rule 1. The second and third would really be the same thing here, for setting aside the judgment would involve re-opening the partition suit which is the same thing as a fresh suit on the same cause, and since the trust-deed and the sales would in that event have taken place during the course of the suit, they would have to be considered and the ultimate partition would have to be adjusted to the extent that they were found to be valid as being within Motilal's powers, or as passing his own personal interest of the time, and this is not what the present suit sought to do, its object being to avoid these questions by a short cut via redemption.

62. I think that plaintiffs' suit does not lie as framed under the Dekkhan Agriculturists' Relief Act, or even on the facts and the evidence as an ordinary redemption suit. I think it should have been framed to set aside the compromise and to continue the partition suit and on the lines I have indicated.

63. I agree that the lower Court's decree must be affirmed and the appeal must be dismissed with costs.

Cases Referred.

1(1888) I.L.R. 13 Bom. 137
2(1903) I.L.R. 27 Mad. 377
3(1919) L.R. 47 I.A. 88 : S.C. 22 Bom. L.R. 552
4(1906) L.R. 33 I.A. 128 : S.C. 22 Bom. I.A. 489
5(1901) I.L.R. 26 Bom. 109 : S.C. 3 Bom. L.R. 565
6(1911) I.L.R. 35 Bom. 322 : S.C. 13 Bom. L.R. 280

7(1913) L.R. 40 I.A. 182 : S.C. 15 Bom. L.R. 1001
8(1916) 18 Bom.L.R.432, P.C
9(1905) I.L.R. 432, P.C
10(1895) I.L.R. 19 Bom. 571
11(1925) 28 Bom. L.R. 362
12(1924) I.L.R. 46 All. 575
13(1917) I.L.R. 41 Mad. 442
14(1914) L.R. 41 I.A. 110 : S.C. 16 Bom. L.R. 400
15(1921) L.R. 48 I.A 127
16(1925) 28 Bom. L.R. 75
17(1919) I.L.R. 41 All. 385
18(1918) I.L.R. 41 All. 22
19(1924) I.L.R. 46 All. 754
20(1927) I.L.R. 52 Bom. 16 : s.c. 29 Bom. L.R. 1522
21(1910) 13 Bom. L.R. 56, p.c
22(1923) L.R. 51 I.A. 129 : s.c. 26 Bom. L.R. 500
23(1932) 34 Bom. L.R. 808
24(1914) L.R. 41 I.A. 110 : s.c. 16 Bom. L.R. 400
25(1910) 13 Bom. L.R. 56, p.c
26(1884) I.L.R. 10Cal. 357
27(1903) I.L.R. 27 Mad. 377
28(1919) L.R. 47 I.A. 88 : s.c. 22 Bom. L.R. 552
29(1901) I.L.R. 26 Bom. 109 : s.c. 3 Bom. L.R. 565
30(1899) I.L.R. 23 Bom. 620 : s.c. 1 Bom. L.R. 82
31(1912) I.L.R. 37 Bom. 53 : s.c. 14 Bom. L.R. 801
32(1915) 18 Bom. L.R. 360, p.c
33(1916) 18 Bom. L.R. 432, p.c
34(1905) I.L.R. 29 Mad. 104, 106
35(1884) I.L.R. 10 Cal. 357
36(1888) I.L.R. 13 Bom. 137
37(1895) I.L.R. 19 Bom. 571
38(1913) L.R. 40 I.A. 182 : s.c. 15 Bom. L.R. 1001
39(1924) I.L.R. 46 All. 575
40(1911) I.L.R. 35 Bom. 322 : s.c. 13 Bom. L.R. 280