Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Lekraj Roy v. *Baboo Mahtab Chund and others, from the High Court of Judicature at Calcutta: delivered 21st December*, 1871.

Present:

Sir James W. Colvile.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THE principal facts of this case are as follows:—

Salamut Roy, a Merchant and Banker, employed Laljee Mull as the principal manager of his business. On the death of Salamut Roy, Laljee Mull continued to manage the business, which was carried on in the name of Surbeshurry, the widow, and Lekraj Roy, the infant son of Salamut Roy. Laljee Mull adopted Mahtab Chand, the infant son of his brother, Inderjeet Mull, and appointed, by will, Inderjeet Mull and Gunga Pershaud, a Gomastah in his service, the guardians of his adopted son. Laljee Mull died in August 1845, and on the 26th September, 1845, a certificate under Act 20 of 1841 was duly granted to the guardians, notwithstanding the opposition of Surbeshurry.

In January 1846, Surbeshurry, as the mother and guardian of Lekraj Roy, instituted a suit against Inderjeet Mull and Gunga Pershaud to recover from the estate of Laljee Mull the sum of 176,152 rupees 7 annas 4 pie, being the amount of alleged defalcations or misappropriations on the part of Laljee Mull. After various

proceedings had taken place in this suit, and witnesses had been examined on both sides, it was settled by a "Ruffanamah," or deed of compromise, whereby it was agreed that 74,000 rupees should be paid by the Defendants, in instalments. This "Ruffanamah" was filed on the records of the Court on the 11th of January, 1847, and confirmed by a decree.

Mahtab Chand came of age in October 1861, and on the 3rd January, 1863, commenced the present suit against Lekraj Roy, the son of Surbeshurry (who had died in 1850) to recover from him, all that had beenpaid, together with interest thereon, under the above deed of compromise, amounting to 68,753 rupees 15 annas 6 pie, on the ground that the suit of 1846 was a fictitious one, and that the compromise of it was fraudulent and collusive between Surbeshurry and the guardians of Mahtab Chaud.

Judgment was given in the Plaintiff's favour, to the full amount of this demand, in the Zillah Court; and that Judgment was subsequently affirmed in the High Court;—against this Judgment the Defendant Appeals.

There is no allegation of fraud against the Defendant, who, at the time of the transaction which is impeached, was a child of 10 years' old. The Plaintiff took upon himself the burden of establishing fraud and collusion on the part of the Defendant's mother, and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the Defendant to show that such dealing was for the infant's benefit; and the case of Hunooman persaud Panday *v.* Mussumat Babooee Munraj Koonweree (6 Moore's Indian Appeals, 393), followed by Lalla Bunseedhur *v.* Koonwur Bendeseree Dutt Singh (10 Moore's Indian Appeals, p. 444), was referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the guardian was clearly established, and that in the former, the question turned on the power of guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who

were also administrators of the estate, (having received a certificate in pursuance of Act 20 of 1841), to pay all just debts of the testator.

Their Lordships have carefully examined the evidence on the part of the Plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit or the compromise was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a Decree of the Court. The evidence by which the Plaintiff seeks to set aside that Decree which had been in force for sixteen years is, that Gunga Pershaud filled the double character of guardian of the Plaintiff and Gomastah to Surbeshurry, that Inderjeet Mull was a man of weak understanding, under the influence of Gunga Pershaud, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of Gunga Pershaud, while, on the other hand, there is a strong presumption against Inderjeet Mull entering into a conspiracy for the purpose of defrauding his own son.

Their Lordships have further examined the evidence of the Defendant, with a view to ascertain whether it supplies the defect of proof on behalf of the Plaintiff. It undoubtedly appeared that the Defendant absented himself in order to escape examination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of arbitrators, to whom the accounts of Laljee Mull were submitted before the compromise in the former suit. It is further stated by the Judge of the Zillah Court, that the accounts when produced disclosed upon the face of them only a balance of about 18,000 rupees as due from Laljee Mull, upon which two

observations arise—first, that whatever the defalcations of Luljee Mull may have been, they would not necessarily have appeared on the mere inspection of the books; and, secondly, that if a defalcation to the above amount appeared on Luljee Mull's own showing, the Defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the witness called by Gunga Pershaud, apparently with the view of contradicting the Plaintiff's case, which was that Inderjeet Mull was a tool in his (Gunga's) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon Inderjeet. Although the Plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the Defendant, still their Lordships cannot regard the case of the Defendant as supplying that proof of fraud which the Plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a Decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the Appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion that the Judge of the Zillah Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the Defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the Plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *primâ facie*

evidence of this before the burden of proof was shifted to the Defendants. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the Defendant (a mere child at the time of the transaction in question), and to his reluctance to produce the books, their Lordships consider that they are not infringing the rule above referred to by deciding in favour of the Appellants.

On these grounds their Lordships will humbly report to Her Majesty that the Decrees of the High Court and of the Zillah Court ought to be reversed, and that in lieu thereof a Decree ought to be made dismissing the Respondent's suit with costs, and their Lordships will direct that the Appellants have the costs of this Appeal.

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