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## MAHADEO SHARMA & OTHERS

*v.*

B

## CHARISSE CALDWELL

[COURT OF APPEAL, 1975 (Gould V.P., McMullin J.A., Marsack J.A.) 9th, 25th July]

Civil Jurisdiction

*Courts—Supreme Court—whether power to set aside judgment of Magistrate's Court except on appeal or by way of prerogative writ—Magistrates' Courts Ordinance (Cap. 10) ss.6, 10(2), 33, 36—Supreme Court Ordinance (Cap. 9) s. 18.*

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*Practice and procedure—judgment by consent—infant plaintiff—approval of court necessary to settlement or compromise—Rules of Supreme Court 1934 0.22 r.14(1)—Rules of Supreme Court 1968 0.80 r.10—Magistrates' Courts Rules 0.10 r.3, 0.3 r.8—Magistrates' Courts Ordinance (Cap. 10) s. 46.*

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In October 1966, the respondent then 2 years old, was involved in a collision with a bus driven by the 1st appellant and owned by the 2nd appellant. In subsequent court proceedings all parties were represented by counsel. Liability was admitted and in May 1967, by consent, the matter was settled for £125.00 to include costs. There was nothing to show that the magistrate's approval of the settlement on behalf of the infant was sought or given, and in fact, it appeared that the magistrate was never made aware of the age of the respondent.

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7 years later an originating summons was issued in the Supreme Court praying that the consent judgment be set aside on the ground that the infant's mother had never authorised her counsel to make the settlement in question.

The judge made an order setting the judgment aside. On appeal against the decision—

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*Held*: 1. In view of the fact that approval was never given by the Court to the settlement, although the respondent was a minor, the judgment by consent was invalid and the respondent was not bound by it.

2. Proceedings in the Supreme Court should have been commenced by way of appeal or by certiorari. However, institution of proceedings by originating summons was a procedural rather than a jurisdictional defect.

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3. Although there was nothing to authorise the Supreme Court setting aside a judgment of an inferior court except by the recognised methods of appeal and prerogative writs, there was nothing to prevent such an action. The orders made in the Supreme Court were within the judge's powers on appeal, and therefore, in the interests of justice could be permitted to stand.

Cases referred to:

*Marsden v. Marsden* [1972] 2 All E.R. 1162; [1972] 3 W.L.R. 136.

*Allen v. McAlpine & Sons Ltd.* [1968] 1 All E.R. 543; [1968] 2 Q.B. 229.

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*Kinch v. Walcott* [1929] A.C. 483.

*Emeris v. Woodward* (1889) 43 Ch. D. 185.

*R. v. Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 K.B. 338. [1952] 1 All E.R. 122.

*Flower v. Lloyd* (1877) 6 Ch. D. 297.

*Wilding v. Sanderson* [1897] 2 Ch. D. 534.
*Huddersfield Banking Co. Ltd. v. Henry Lister & Son* [1895] 2 Ch. D. 273. A
*Giles, in re* (1873) 43 Ch. D. 391.
*Powers, in re* (1885) 30 Ch. D. 291.

Appeal against a decision of the Supreme Court setting aside judgment by consent.

*C. L. Jamnadas* for the appellant.
*D. J. Williams* for the respondent. B

The following judgments were read :

GOULD V.P. : [25th July 1975]—

The sequence of events leading up to this appeal is as follows.

The respondent Charisse Caldwell, who has been represented throughout the proceedings by her mother as next friend, was two years old when she was involved in an accident with a bus owned by the second appellant and driven C by the first appellant. This took place on the 29th October 1966, and on the 4th April 1967, proceedings for damages for her injuries were commenced on behalf of the infant in the Magistrate's Court at Suva against the two respondents, alleging negligent driving of the bus by the first appellant. The amount claimed was £201.11.0 comprising £200 general damages plus the cost of police and medical reports. In the Magistrate's Court proceedings were brief. On the 10th May 1967 Mr Arjun for the plaintiffs and Mr Jamnadas for the defendants D requested a week's adjournment for possible settlement. This was granted and a week later the same two counsel appeared, and announced that the matter had been settled for £125 inclusive of costs. The learned magistrate entered—" By consent judgment for plaintiff for £125 inclusive of costs in full settlement of claim. " That was all. There is nothing to show that the magistrate's approval of the settlement on behalf of the infant plaintiff was sought or given, and in all the subsequent proceedings it has never been E claimed that it was brought to the notice of the magistrate that the plaintiff was an infant.

So far as the courts were concerned the next step was an Originating Summons issued in the Supreme Court on behalf of the respondent on the 22nd May 1974, praying that the consent judgment above mentioned be set aside and asking for a declaration that any action brought by the respondent F against the appellants in respect of the accident in question would not be barred by any limitation period if commenced within six years of the date upon which the respondent attains the age of 21 years.

In her affidavit in support of the summons Eleanor Caldwell, the respondent's mother, asserted that she had never instructed or authorised her then Solicitors Messrs William Scott & Co. to make the settlement in question, and that she had refused to sign a form of discharge and to collect the said sum of G £125 from Messrs Scott & Co. She later consulted another firm of solicitors Messrs. Koya & Co. but no action was taken. The deponent claimed that the respondent had suffered permanent disability which would require expensive and lengthy specialised treatment overseas, and that £125 was totally inadequate compensation.

In his judgment the learned judge held that the application must succeed. H He said—

> " Having considered all the material before me I am satisfied that the application must succeed. In my respectful opinion counsel who was acting for the plaintiff should have in the circumstances then prevailing

A sought as a matter of prudence and duty clear instructions from the plaintiff's mother and next friend regarding the compromise. The matter was after all of paramount importance to the plaintiff. Counsel's failure to do so raises a serious question as to the propriety of the judgment made by consent between counsel.

If plaintiff's counsel had been instructed in the matter and this was unknown to the other counsel, it would appear that even a compromise concluded under those circumstances could be set aside if grave injustice B would result to the plaintiff by reason of such compromise. (See *Marsden v. Marsden* (1972/2 All E.R. 1162 at 1167).

In the present case if the plaintiff is entitled to a greater amount in the way of damages, then she should not be precluded from claiming it.

Moreover, I think the application should also succeed on the ground that approval of the Court to the settlement involving an infant was never obtained. In this connection I adopt the statement of law set out in C *Halsbury's Laws of England* (4th Ed.) para. 1183 where it is stated.

> " A compromise or order made by consent by counsel for a minor or other person under disability is not binding on the client, unless it is sanctioned by the court as being for the benefit of the client. "

Admittedly there has been an inordinate delay in getting this matter before the court. However, I am satisfied that it is not through any want of D diligence on the part of the plaintiff's mother and next friend that the matter has taken so long to reach this Court. "

He then ordered a statement of claim and defence to be filed and for the proceedings to continue as if begun by writ.

It is from this judgment that the present appeal is brought. So far as the actual merits of the case are concerned I propose to put aside the question of E delay and of counsel's authority. There may be some substance in Mr Jamnadas' argument before this court that the sole affidavit in evidence provided a very meagre basis for the finding that the learned judge was asked to make. Who should have remedied that deficiency, so far as the matter of counsel's authority is concerned, may be a moot point, but in the result Mrs Caldwell's affidavit was unanswered.

The second point of the learned judge's finding, however, that approval F of the court to the settlement was never obtained, provides an ample base for his finding, though whether it can be supported or not having regard to difficulties to which I will advert later, is another question.

On the question of the infancy of the respondent Mr Jamnadas drew attention to *Allen v. McAlpine & Sons Ltd.* [1968] 1 All E.R. 543. In the first case considered there, the fact that the widow plaintiff had two children G did not prevent her claim from being dismissed for lack of prosecution. That is quite a different question from the disregard of a requirement that approval of a court is an essential prerequisite to the validity of a settlement to which an infant is a party. Order 80 rule 10 of the Rules of the Supreme Court (The White Book 1967) reads (as amended by the Fiji Supreme Court Rules, 1968—

> " 10. Where in any proceedings money is claimed by or on behalf of a H person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the court. "

That rule has been in force in Fiji since the Supreme Court Rules, 1968, came into force on the 3rd March 1969, and was referred to in the court below. The rule actually relevant to a settlement which took place on the 17th May 1967, was Order 22 rule 14(1) as in force as at the 1st January 1934 : see Supreme Court Rules (Laws of Fiji, 1955, Vol. 5, p. 2937). Nothing turns on this however, as, though there are some differences in wording, the effect of the rules, so far as relevant to this case, is the same.

Mr Jamnadas has argued that these rules do not apply to proceedings in the Magistrate's Court, which has its own rules. It is true that Order 10 of the Magistrates' Courts Rules does deal with certain questions touching infants as litigants. It provides (in rule 3) for suits by infants being brought by their next friends, but does not make any provision for the compromise of such suite. I do not think that this fact renders inapplicable Order 3 rule 8, which reads—

> " 8. In the event of there being no provision in these rules to meet the circumstances arising in any particular cause, matter, case or event, the court and/or the clerk of the court and/or the parties shall be guided by any relevant provision contained in the Rules of the Supreme Court. "

It may be observed that the court, as well as the parties, is to be so guided, which I think supports my view that a compromise of an action by an infant plaintiff falls within the words " circumstances arising in any particular cause, matter, case or event ", in that the circumstances arising involves action by the court. Had the rule been worded " In the event of there being no provision in these rules upon any particular subject... " Mr Jamnadas' argument would have been of greater weight.

Our attention was also called to section 46 of the Magistrates' Courts Ordinance (Cap. 10). It reads :

> " 46 The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance and Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Ordinance and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts of summary jurisdiction. "

Mr Jamnadas submitted that there was a conflict between the reference in this section to county courts practice and Order 3 rule 8 of the Magistrates' Courts rules (set out above). All that need be said on this is that a compromise by an infant is equally invalid in the county Court unless it is approved by a judge or registrar (See 9 *Halsbury's Laws of England* paras, 347 and 536 and annual Supplement) and this argument does not assist the appellant.

In my view therefore the consent judgment in question was invalid by reason of the effect of Order 22 r.14(1) of the Rules of the Supreme Court in force at the relevant time) as lacking the approval of the magistrate. As a consent judgment however it stands until set aside : *Kinch v. Walcott* [1929] A.C. 483. In *Emeris v. Woodward* (1889) 43 Ch. D. 185 it was held that the proper course to take for the purpose of setting aside a consent order was the bringing of a new action. I do not say that in the Supreme Court an Originating Summons could not serve the same purpose—if it were wrong it would in any event be a defect not going to the question of jurisdiction.

This brings me to the difficulty I mentioned earlier. The present proceedings are in the Supreme Court but the judgment purportedly set aside was given in the Magistrate's Court. While a court may be able to set aside its own consent orders in proceedings brought for the purpose I do not know of any

way in which a superior court can set aside the orders of an inferior court except by such recognised methods as appeal or by what are known as the prerogative writs or orders or where by the basic legislation the superior court is given specified powers in relation to the other. Such special powers do exist under the present legislation. For example section 33 of the Magistrates' Courts Ordinance empowers the Supreme Court to transfer any civil cause or matter from the Magistrate's Court to the Supreme Court (or to another Magistrate's Court)—but that power is exercisable only " at any stage thereof before judgment. " We are now concerned with a case in which judgment had been already given in the Magistrate's Court. We were informed from the bar by Mr Jamnadas that it is not the custom to seal judgments in the Magistrate's Court, and the learned magistrate's note indicates that he gave " judgment " by consent. There is another special power, under section 6, enabling the Supreme Court to uphold the authority of magistrates' courts in matters of contempt, and, under section 10(2), to inspect the courts' records and give instructions and advice thereon.

The Supreme Court has by section 18 of the Supreme Court Ordinance all the jurisdiction, power and authorities exercisable by her Majesty's High Court of Justice in England. This includes of course the authority of the Court of King's Bench, and, in *Rex v. Northumberland Compensation Appeal Tribunal Ex. parte Shaw* [1952] 1 K.B. 338, at 346—7.

> " The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. "

The judgment of Denning L.J. however, goes on to indicate that the mode of exercise of this supervisory jurisdiction was through the writ of certiorari. The special power given by section 33 to which I have referred, is no doubt a statutory addition to such supervisory powers and the power to remove a case to the Supreme Court before judgment would do away with the need for the prerogative orders for the purpose. There is no such special statutory power giving authority generally to the Supreme Court to entertain an action to set aside a magisterial judgment. If a consent judgment could be so treated, why not any judgment ?

I came to the question of appeals. In civil cases, by section 36 of the Magistrates' Courts Ordinance (recently reprinted) an appeal lies to the Supreme Court from all final judgments and decisions, and from all interlocutory orders and decisions. There is no requirement that the leave of the court appealed from must be obtained in the case of an appeal from a consent order, as there would be on a proposed appeal from the Supreme Court to the Court of Appeal. There are naturally time limits for giving notice and filing grounds but there is power to enlarge time (0.3 r. 9). The powers of the Supreme Court on appeal are virtually unlimited. Under Order 6 rule 16 new evidence may be allowed and by leave a party may allege facts which have come to his knowledge after the decision of the court below. Rule 18 provides (inter alia) that the Supreme Court shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the appellate court as a court of first instance. It seems that such a provision would enable the Supreme Court to deal with an appeal even in the case of a judgment obtained by fraud—see the reasoning of the Court of Appeal in *Flower v. Lloyd* (1877) 6 Ch. D. 297.

The scheme of the legislation is quite clear. Up to the stage of judgment the Supreme Court has complete control through the power to bring up the proceedings under section 33. After judgment the powers on appeal are such as to maintain that control. The Supreme Court could, on appeal have made all of the orders which the learned judge in fact made in these proceedings. Whether the respondent, had he proceeded in this way, could have obtained the necessary enlargement of time from " a court or a judge " under order 3 r.6, would depend upon whether such court or judge considered that it was required in the interests of justice. The procedure actually adopted was wrong.

The final difficult question is whether the orders made by the learned judge in these proceedings can be permitted to stand, on the basis that all essential parties were before him and that he would have had jurisdiction to make the orders if sitting in an appellate capacity. The question of delay which he had to consider would be the same if he had had to consider it on an application for enlargement of time for appeal. On the one hand it is undesirable, in the interests of uniformity, to condone breaches of proper procedure. On the other hand, the wide supervisory powers given to the Supreme Court indicate a desire on the part of the legislature to subordinate procedural matters to substantive interests, which is in accord with modern tendencies. That the interests of an infant are concerned should not be permitted to encourage deviation from proper principle. Having given this matter my best consideration I think in the circumstances that it is proper to regard the defect as procedural rather than basically jurisdictional and that it is in the better interests of justice that the orders made by the learned judge be permitted to stand.

I would therefore dismiss the appeal but make no order for the costs of either party. All members of the court being of the same opinion it is so ordered.

McMULLIN J.A.

This appeal, in my view, raises two points. The first is as to whether respondent was bound by the judgment entered, by consent, in her favour in the Magistrate's Court on the 17th May 1957 and expressed to be in full settlement of her claim. The second is as to whether, if she was not bound by that judgment, the Supreme Court had power to set it aside on the originating summons brought on respondent's behalf for that purpose.

The law on the first point is clear. A settlement or compromise in an action in which money or damages is or are claimed by or on behalf of an infant is invalid without the sanction of the court—*Halsbury's Laws of England,* 3rd Edition, Volume 9, Page 234, Para. 536. Nor does it matter that the settlement or compromise has been made the subject of a judgment by consent. Such a judgment would appear to be no better than the source from which it springs, viz ; the settlement or compromise made between the parties. A judgment given or an order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate a compromise not contained in a judgment or order—*Halsbury's Laws of England,* 3rd Edition, Volume 22, Page 792, Para. 1672. In *Wilding v. Sanderson* [1897] 2 Ch. 534 at 544 Bryan J. Said :—

> " And just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there is no agreement, and consequently, no true consent to the order made ".

Vaughan Williams J. made the point more forcibly in *Huddersfield Banking Company Ltd. v. Henry Lister & Son* [1895] 2 Ch. 273 at 276 when he said :—

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> " The real truth of the matter is that the Order is a mere creature of the agreement, and to say that the Court can set aside the agreement but that it cannot set aside an order which was the creature of that agreement seems to me to be giving the branch an existence which is independent of the tree ".

B Whatever the inadequancies of the affidavit filed in support of the application to set aside the consent judgment, there can be no dispute that respondent is an infant and, as such, a person under disability. Order 80, Rule 10 of the Rules of the Supreme Court (The White Book 1967), as amended by the Fiji Supreme Court Rules 1968, provides :

> " 10. Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court ".

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The rule corresponding to Rule 10 and in force at the time the settlement was effected and judgment entered, viz ; Order 22 Rule 14(1) was to the same effect. Clearly, subject to the setting aside of the judgment by consent, D respondent is not bound by the settlement, the approval of the court not having been obtained.

The second question is more difficult of resolution. It has been held that an application to set aside an agreement for the compromise of an action must be made by a fresh action brought for the purpose—*Emeris v. Woodward* (1890) 43 Ch. D. 185. An order, although obtained by consent, is binding unless and until it has been set aside in proceedings constituted for that purpose. In E the present case, the proceedings brought in the Supreme Court were by way of originating summons. I do not think that any point can be validly taken as to the fact that they were brought by originating summons rather than by action. An ordinary action would have been the appropriate action rather than an originating summons which is more suited to matters in which there are no disputed, questions of fact. It cannot be said that in the present case there were disputed questions of fact. The only factual issues were respondent's F age, the happening of the accident, the making of the settlement, the entry of judgment and the failure to obtain the approval of the Court. There was no dispute about these matters. It was open to establish them by affidavit. If necessary, respondent's mother, who made an affidavit in support of the originating summons, could have been required to be produced for cross-examination. Appellant did not require this nor file an affidavit contesting any of these matters. The part played by the solicitors, then or subsequently G acting for respondent was not relevant because they could not bind respondent, if the settlement was not approved. If, therefore, proceedings by way of originating summons were not appropriate, appellant has suffered no prejudice by their adoption and the defect is procedural rather than substantive.

The difficult point on this appeal is as to whether the application to set aside the judgment ought rather to have been made to the Magistrate's Court in H which the judgment by consent was entered in the first place rather than to the Supreme Court. I have been unable to find any authority on the point. In his judgment the learned Vice-President has reviewed the power of the Supreme Court to review decisions of the Magistrate's Court on appeal and by way of extraordinary remedy. He has pointed out that the powers of the

Supreme Court on appeal are virtually unlimited. The jurisdiction of the Supreme Court, as set out in the Supreme Court Ordinance, provides that the Supreme Court shall, within Fiji, possess and exercise all the jurisdiction, powers and authorities which are for the time being vested in or can be exercised by Her Majesty's High Court of Justice in England. While I can find nothing which expressly confers on the English Court power to set aside a judgment obtained in a lower court in circumstances such as the present, I cannot find any prohibition against the exercise of a power of that kind. It seems to me that the Magistrate's Court should have power to set aside its own judgments for cause shown and, if that be accepted, then it appears to me to be entirely consonant with the hierarchy of the courts in Fiji that the Supreme Court should have power to set aside judgments of the Magistrate's Court unless that power is expressively excluded by some legislative provision or rule of court. Consequently for these reasons and for the further reasons which the learned Vice-President has more adequately expressed I am of the view that the Supreme Court had power to make the order setting aside the judgment obtained in the Magistrate's Court. I would agree that this appeal should be dismissed.

MARSACK J.A.

I have had the advantage of reading the careful judgment of the learned Vice-President and agree generally with his findings and conclusions.

Briefly, it appears to me that there are two main issues involved :

(1) Was the consent judgment entered in the Magistrate's Court valid and binding although the approval of the Court to the settlement was not obtained ;

(2) Was the procedure by way of originating summons appropriate, and if not what consequences should follow.

As to (1): it is common ground that no approval was given by the Court to the settlement in question, although the plaintiff was under the legal disability of being a minor. For the reasons given by the learned Vice-President I am of opinion that in the absence of the Court's approval the judgment under review was not a valid judgment and the respondent is not bound by it.

As to (2) ; I agree with the learned Vice-President that the proceeding to set aside the judgment, if brought in the Supreme Court, should have been by certiorari or by appeal ; but I also agree that the question of the method adopted by the respondent, by way of originating summons, is a procedural matter and should not lead on that ground to judgment for the appellants. In my view the appellants have been in no way prejudiced. Counsel's submission that Mrs Caldwell, whose affidavit was before the Supreme Court, should have been called to give evidence at the hearing and to be cross-examined, overlooks the fact that under Order 38 Rule 2 the Court could on application by the other party have ordered the attendance for cross-examination of the person making the affidavit. No such application was made on behalf of appellants.

Under the procedure adopted there was no question of the determination of disputed facts, which would make proceedings by originating summons incorrect ; *In re Powers* (1885) 30 Ch. D. 291. The main questions in issue between the parties, relating to the liability of the appellants for damages, will fall to be determined in the course of the further proceedings specified in judgment appealed from. The present proceedings therefore do not offend against the principle laid down in *re Giles* (1873) 43 Ch. D. 391. Moreover,

it is expressly provided in Order 2 Rule (1)(3) that the Court shall not wholly set aside any proceedings or the writ or any other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

There is the further question as to whether the correct procedure to follow should not have been the institution of a fresh action in the Magistrate's Court to set aside the consent judgment. This procedure in my view would have been open to the respondent. But I am satisfied, for the reasons given by the learned Vice-President, that this would not oust the jurisdiction of the Supreme Court to make the order appealed from. That Court could undoubtedly have been approached by way of certiorari or appeal ; and on the grounds already set out, I am of opinion that the proceedings by way of originating summons could not be open to serious objection.

For these reasons I agree with the judgment proposed by the learned Vice-President including that as to costs.

*Appeal dismissed.*