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LAKSHMAN BHÁU KHOPKAR v. RÁDHÁBÁI, GOVINDRÁV, AND BAHIRU.

Bahiru, on the footing that the principal of the mortgage-debt be taken to have been Rs. 3,629 only, instead of Rs. 5,999, and that a fresh decree be passed.

Each party to pay his and her own costs in the Court below. The appellant to have his costs of this appeal.

PRIVY COUNCIL.*

1887. *March* 3, 4 *and* 30.

ABDUL HOSSEIN ZENAIL ABA'DI AND ANOTHER, DEFENDANTS, AND CHARLES AGNEW TURNER, OFFICIAL ASSIGNEE, PLAINTIFF.

On appeal from the High Court at Bombay.

Compromise by official trustee—Insolvent Act 11 *and* 12 *Vic., C.* 21, *Secs.* 28 *and* 29—*Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Fraud—The fraud charged in the pleading must be proved, and not fraud of a different kind—Restriction of power to amend.*

The account of an estate, formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the official assignee, representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment.

In regard to the facts that he was neither a party to, nor had any control over the compromised suit; that he owed no duty to the Court in respect of it, nor to the creditors of the estate; and that he had taken no unfair advantage of the assignee;

Held, that there were no grounds upon which this repayment could be claimed.

The plaint, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court.

Held, that the amendment at the stage when it was made was not permissible.

It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.

**Present*:—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and SIR B. PEACOCK.

The High Court having decreed the claim on a finding of fraud different from either of the above, *held,* that on this ground alone the judgment might have been reversed.

On the latter point, *Montesquieu* v. *Sandys*(1) referred to and followed.

APPEAL from a decree (9th May, 1885,) of the High Court, reversing a decree (21st September, 1883,) of the High Court in original jurisdiction.

The suit, out of which this appeal arose, was commenced on the 25th January, 1881, by the official assignee, representing the estate of Agá Mahomed Rahim Sherázi, who died in 1856, to recover from the present appellants, as heirs and representatives of Háji Zenail Abádi, who died in 1878, Rs. 1,50,000, with interest, on the ground that, having been unlawfully received by the Háji, it was repayable by his representatives.

By the Appellate Court below this claim was held good; and by the decree, against which this appeal was preferred, the appellants were ordered to repay to the official assignee the amount, with interest, amounting to Rs. 2,80,089.

The long litigation, to which the transaction at present in dispute was a sequel, was as follows:—In 1820 Mahomed Ali Khán died, leaving, as executor of his will, Agá Mahomed Shustri, who also died, having appointed as his executor the above-named Agá Mahomed Rahim Sherázi: see *Agá Mahomed Rahim's* case(2). A suit brought by the heirs of Mahomed Ali Khán in the late Supreme Court was revived in 1834, and a decree for an account was made. In 1846 under a decretal order a large amount of property in Bombay, including the Mazagon Dockyard, was attached, as belonging to Agá Mahomed Rahim Sherázi, who became insolvent, and died in 1856. On the 16th July, 1857, an order of Her Majesty in Council directed that the accounts, which purported to have been taken, should be taken again, and thereupon much assistance was given in this matter by Háji Zenail Abádi, a friend of the deceased executor, who had promoted the appeal, and acted after his death as guardian of his children.

The official assignee, Mr. O. W. Ketterer, filed in 1858 a

(1) 18 Ves. Jun., 302. (2) Sir E. Perry's Or. Ca., p. 1, (Bom., 1853).

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supplemental suit, on which were made further orders relating to the accounts, the taking of which proceeded so slowly that in the year 1866 less than a twenty-fifth part of accounts, or only 4 items out of 103, had been investigated. The position of matters in 1870 was that the heirs of Mahomed Ali Khán had not received their inheritance, *viz.*, the Mazagon property and the accumulations of rent, then in the hands of the official assignee as receiver; and neither the creditors of Mahomed Rahim Sherázi, nor his family, entitled next after them, were receiving anything. In 1870, when Mr. H. Gamble was assignee, a settlement supported by the influence of Sir Sálar Jung of Hyderabad, a relation of the Sherázi family, was proposed; whereby the assignee was to receive Rs. 65,000 in discharge of the claims of creditors, and Rs. 10,000 for his commission; also Rs. 1,50,000 was to be paid to Háji Zenail Abádi, and any surplus was to be for the benefit of the family of Mahomed Rahim Sherázi.

This agreement, however, in consequence of other claims coming up, was prevented from being carried into effect. In 1871, Ali Akbár, a creditor of the estate of the insolvent, sued for an injunction restraining the official assignee from carrying it out. A similar suit was brought by a member of the Shustri family, Abdul Latif. Ali Akbár was admitted as a creditor; the effect being that the estate, with the addition of the above-mentioned sum, would no longer have met the creditors' demands.

In 1875, negotiations were renewed, and a compromise was arranged on the basis of the terms of 1870, the claimants under Mahomed Ali Khán Shustri agreeing to pay to one Mahomed Takki Khán, who claimed to intervene in the suit of 1858, Rs. 60,000. With this addition to the Rs. 2,25,000, before agreed to be paid, terms again were settled. The result was that a consent decree was made on the 12th July, 1875, in the suit of 1858, whereby it was, in effect, ordered that out of the sum in Court to the credit of the suit of 1858, then consisting of Rs. 3,84,126, or thereabouts, there should be paid to the official assignee, the plaintiff in the suit, or his solicitor, the sum of Rs. 75,000 (of which Mr. Gamble, the official assignee, should be

allowed to retain for his own use the sum of Rs. 10,000) and all his costs. The balance of the fund after these payments to be made over, as also the Mazagon property to be transferred, to the defendant Abdul Latif Khán Shustri; and the plaintiff's claim to be dismissed.

This fund was accordingly made over to the solicitors, Messrs. Keir, Prescot, and Winter, for the plaintiff, and they paid, on the 28th August, 1875, Rs. 1,50,000 to Háji Zenail Abádin.

The sanction of the Insolvent Court was not applied for, and no mention of any payment to Zenail Abádin or of any payment other than the Rs. 65,000 and Rs. 10,000 paid to the official assignee, was made to the Court when the consent decree was obtained.

Out of the sum of Rs. 65,000 received by the official assignee on behalf of the creditors he paid a dividend at the rate of 50 *per cent.* to those of the creditors then claiming in the insolvency who succeeded in making good their claims.

In 1877 Mr. Gamble died, and in August of that year the respondent was appointed official assignee, in which capacity he received and distributed Rs. 27,000, the balance of the Rs. 65,000 remaining.

In July, 1880, the respondent became aware of the payment of Rs. 1,50,000 to Zenail Abádi, and thereupon requested his representatives to repay the sum to him. This not being done, he instituted the present suit against the appellants, and other formal defendants, on the 23rd January, 1881, claiming Rs. 1,50,000 and interest at 9 *per cent.* The defence mainly was that the payment to Zenail had been made under a legal compromise known to the official assignee in 1875. The case for the plaintiff at first alleged was that the payment of the money to Zenail Abádi was fraudulently concealed from the official assignee. Afterwards by an amendment made on the 31st July, 1883, after the evidence had been heard, the claim was based on the payment having been one to which the official assignee had not effectively consented, even if he was aware of its being made, "and that he had no power to consent to the same, and such consent

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could not be binding on his successor;" the ground ultimately taken up being, in brief, that Zenail Abádi had acted in relation to the suit of 1858 as agent for the assignee, holding in consequence a fiduciary position towards him and the creditors; so that he could not equitably derive any personal benefit from the estate without payment in full of the creditors.

The Judge of the original Court, Scott, J., stated his opinion that the Insolvent Court, had it been informed of the proposed payment of Rs. 1,50,000 to Zenail Abádi, would have ordered distribution of the whole fund; giving the residue only to the Shirázi family after payment of the creditors in full. But the question in reference to the compromise could not be determined upon that consideration alone. Compromises required that persons in a fiduciary relation to their principals should make full disclosure of every material fact that might affect the interests of the latter; and that they should not derive, by making them when they were in a fiduciary relation, any personal profit—*Brooke* v. *Lord Mostyn*(1) and, in India, *Bibee Solomon* v. *Abdool Azeez*(2); but to set aside a compromise on the ground that such disclosure had not been made, or that such profit had been made, required that the fiduciary relation should be shown to exist; and here it had not been established by the evidence. And unless grounds, good in equity, were found, the parties could not be released from an agreement made to avoid the expense and delay of a long inquiry in the Courts of law. Zenail was in no fiduciary relation towards the creditors, or the assignee; he was no party to the suit; and no duty was imposed upon him to inform the Court of the agreement by which he was to benefit, nor was he precluded from deriving benefit. The duty of informing the Court was upon the official assignee, but there was nothing to show that Zenail acted in collusion with him, or took any undue advantage of him. From the time when the suit was revived down to the date of the final settlement in 1875, Zenail was acting as much in the interests of the Shirázi family as in the interests of the creditors; and neither before nor after 1870 was invested with any fiduciary character as regards the creditors.

(1) 2 De Gex, J., and S., 373; 33 Beav., 453; 34 L. J., Ch. 65.

(2) I. L. R., 6 Calc., 687 at p. 700.

In and after 1870 the parties were separately represented, their diverse interests appearing in a clear light.

The conclusion of the judgment was as follows:—

"To sum up, I do not think it is proved (1) that Zenail held any confidential position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I (2) think that he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court.

"He may have got, and I think he did get, more than his share. He may also have appropriated to himself what was intended for those he represented.

"In the first case a suit might have been brought within three years of the knowledge of the official assignee, but that knowledge began in 1875, and the suit is now barred, there being no fraud on the part of Zenail by the Statute of Limitation.

"In the second case it was for the Shirázi family to take steps. The parties to the present suit are not in any way interested.

"Before concluding, I should like to say one word in favour of Mr. Gamble. His answer was, when he was told of the 1½ lákh, that it did not matter, as the claims of the creditors were covered by his payment. They were tolerably covered.

"Mr. Gamble admitted a claim of Rs. 55,000 in 1875, but of the other claims in the schedule the only good ones were, one for Rs. 800, and another which was finally settled for Rs. 5,000.

"Thus the sum he agreed to receive covered the principal of the claims he had to meet.

"He held erroneously, I think, that in no case could claim be entitled to interest.

"The claim which is behind the present suit had not then been brought forward. I think Mr. Gamble was justified, in the case of an insolvency twenty-five years old, in judging of the liabilities as they were to be found in the schedule. Then, further, he knew how impossible it was to hope for any conclusion of the suit in the ordinary course of law. That being the case, although

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he was blameworthy in not stating all the material facts to the Court, still he may have honestly thought the course adopted a fair and just one to all parties concerned.

"In conclusion, I would state my satisfaction that the facts have obliged me to decide on the *beati possidentes* principle. It would have been impossible to put the parties back in their original position. Zenail is dead. His money is dispersed. For eight years this sum has been dealt with as rightfully received. Moreover, the creditor who has put the present official assignee in motion has been most dilatory. His claim accrued in 1867. He proved it in 1878. He was aware, in 1875, of the payment he alleges to be fraudulent. He only informed the official assignee of it in 1880. No claim has been advanced by any other creditor.

"Suit dismissed, but I think the question was one of such doubt as to justify the official assignee in bringing the suit."

This was reversed by the High Court in its appellate jurisdiction (Sir C. Sargent, C.J., and Pinhey, J.). After a statement of the facts, (as they were afterwards set forth in their Lordships' judgment on this appeal,) the High Court proceeded thus:—

"The learned Judge in the Division Court held that Zenail Abádi's conduct at no time invested him with a fiduciary character (more especially not so after 1870) either towards Mr. Gamble or the creditors, being, as he held, an outsider, and not a party to the suit, and that he was entitled to make any terms he could with Abdul Latif without the consent of the Court, and accordingly dismissed the plaint.

"Now it is not in dispute that the suit, which was originally instituted in 1858 in the name of Mr. Ketterer, the then official assignee of the Insolvent Court, originated with Zenail; that he set Mr. Ketterer in motion by giving him an indemnity for his costs; and, according to the evidence of Pándurang, chief clerk to Messrs. Acland, Prentis, and Bishop, brought the suit to that firm. It further appears, from Zenail's own affidavit of 20th March, 1861, that his connection with the suit was as the agent of the Shirázi family, whilst admitting that he had a personal interest in it as a means of recouping himself the advances alleged by him to have been made to Messrs. Acland,

Prentis, and Bishop to prosecute the appeal to the Privy Council. Lastly, the bill of costs of Messrs. Acland, Prentis, and Bishop, who throughout the suit acted as solicitors for the several official assignees who succeeded one another as plaintiffs on the record, as well as the evidence of Mr. Prentis, who managed the suit, shows that the prosecution of the suit was left almost entirely by the official assignees to Zenail, and that he was regarded by the solicitors as the agent of the official assignees, upon whose instructions they were entitled to act, and in fact did so up to 1870, after which period nothing further was done in the suit beyond carrying out the compromise. The fact that the accounts were in Persian, and required special knowledge, necessarily threw the active conduct of the suit into Zenail's hands, so much so that we find Mr. Prentis saying that Zenail was regarded as the real plaintiff by the defendants.

"Under these circumstances it can scarcely, we think, be doubted that Zenail occupied a fiduciary position towards Mr. Gamble, even if he cannot be regarded strictly as his agent, as he would appear to have been by Mr. Gamble's solicitors, a position which demanded from him perfect good faith in the conduct of the suit, including the compromise of it, and entirely prohibited his deriving any advantage from it for the Shirázi family, as distinct from the creditors behind the back of Mr. Gamble. As, however, it was not disputed that, after Mr. Prescot gave his evidence, it must be taken as a fact in the case that whatever may have been the extent of Mr. Gamble's knowledge in 1870, in 1875 Mr. Gamble was acquainted with the intention that Zenail should receive Rs. 1,50,000 from the Shustri family, and that he assented to it, the transactions, so far as the question turns upon the fiduciary relationship between Mr. Gamble himself and Zenail, can only be impeached on the ground that Mr. Gamble's consent was obtained under circumstances amounting to fraud.

"The question for decision, however, does not, in our opinion, rest exclusively on the fiduciary relationship between Mr. Gamble and Zenail, but also on the larger principle that an insolvent, (and such was virtually the case here, Zenail having, on

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his own admission, acted as agent for the insolvent family, although, possibly, with the view to his own interests), who has set the official assignee in motion with a view to enforcing a claim against a debtor to the insolvent estate, and has taken an active part in the prosecution and compromise of the suit instituted for the above purpose in the name of the official assignee, cannot derive any benefit from such suit, except on the condition of acting in perfect good faith to the creditors. His deriving any benefit from the suit, except on that condition, would, in our opinion, be a fraud on the creditors and on the Act itself, and a Court of Equity would properly regard him as holding any such benefit as a trustee for the insolvent estate."

After going through the evidence the judgment concluded thus:—

"Upon the whole, we are forced to the conclusion that the transaction by which Zenail obtained Rs. 1,50,000 was not only the result of pressure fraudulently brought to bear on Mr. Gamble, but that it was a fraud on the creditors, of which the Shirázi family, whom Zenail represented in the transaction, cannot take advantage; and, lastly, that the case attempted to be made for the defendants, that Mr. Gamble was obliged to accept the Rs. 65,000 for the creditors or nothing, as the Shustri family would not give him any more, is not established by the evidence; such being the case, it follows that the Rs. 1,50,000 so paid to Zenail in his character of the representative of the Shirázi family, out of the Rs. 2,25,000 at which the claim of that family in the suit had been, in our opinion, unconditionally compromised, ought to be restored to the official assignee for distribution under the Insolvent Act. Mr. Turner, who, as official assignee, now represents the body of creditors, says he never heard of the payment of the Rs. 1,50,000 to Zenail until 1880; and even Nabi Khán himself, although he may have had a suspicion that Zenail had been paid something on the occasion of the compromise, acquired no knowledge which he could act upon until he obtained a copy of the receipt given by Zenail to Prescot and Winter for the Rs. 1,50,000 from a clerk in their office in 1878, before he left Bombay for Europe.

"The suit was filed in January, 1881, and the claim is, therefore, clearly not barred. We must, therefore, order that the Rs. 1,50,000, with interest at 9 *per cent.* (the money having been obtained by fraud), be paid to the plaintiff by the defendants in their character of representatives of the deceased Zenail.

"Defendants to pay plaintiff his costs of the suit."

On this appeal,

Sir *Horace Davey, Q. C.*, and Mr. *J. Rigby, J. C.*, (with them Mr. *J. D. Davenport* and Mr. *Jardine,)* appeared for the appellants.

Mr. *J. Graham, Q.C.*, and Mr. *Phipson Beale* appeared for the respondent.

For the appellant it was argued that the finding of the first Court, that no fiduciary relation existed on the part of Zenail Abádi towards the assignee, or the creditors, was correct. In this respect there was error in the judgment of the Appellate Court. Both the Courts below had rightly found that the assignee had assented to the payment being made to Zenail; and, on examination of the position of the former, it would appear that, so far as the transaction was the result of a compromise to which he was a party, as plaintiff in the suit, and to which he was a party obtaining payment in part of the creditors' claims, he could not have objected to it without upsetting the compromise altogether. This view of the case, if correct, rendered the position of the present plaintiff untenable. He was approving and reprobating parts of the same transaction, *viz.*, the compromise, under which the consent decree had been made.

It was further argued that the receipt of the money by Zenail was now sought to be impugned without its having been shown that any rule of equity had been infringed. Zenail had made, and it was not denied that he had made, the best bargain that he could for himself, and this was what the first Court referred to as his having, perhaps, got more than his share; meaning that this sum was perhaps large relatively to the amount divided among the creditors. But even as to this the value of Zenail's services might well be considered. And, whatever the opinion as to this

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part of the case might be, it could not be affirmed that his acts of omissions amounted to fraud, either actual or constructive. It was impossible to make out that Zenail had participated in the assignee's breach of duty, if any breach of duty had occurred. Nor could it be held, as the High Court appeared to have held, that because Zenail had set the assignee in motion with a view to enforcing the claims of the Shirázi family, and had taken part in the proceedings, therefore he, Zenail, could not derive any benefit for himself, nor otherwise than as a trustee for the estate. There was no evidence of "pressure fraudulently brought to bear upon Mr. Gamble," nor of any colluding with him, nor of any other such conduct as would afford ground for inferring undue influence or fraud on his part. The reasons on which the Appellate Court founded its judgment, therefore, failed.

The amendment was also made under circumstances which supported the appellant's view of the case. The plaintiff succeeding in office the assignee who had assented to the payment, at first alleged that his predecessor was not cognizant of the transaction.

This would have been a different and a stronger case had it been maintainable. The charge, however, of fraud, even when amended, could not, upon the facts, be maintained.

Reference was made to *Leeming* v. *Lady Murray*(1), as illustrating the present case by showing the general power to compromise under the English Bankruptcy Act of 1869. Also to 11 and 12 Vic., C. 21, secs. 28 and 29.

The argument principally urged by Mr. *J. Graham, Q.C.*, and Mr. *W. Phipson Beale*, for the respondent, was that the sum made over to Zenail, without due authority, still belonged to the estate of the insolvents; the assignee's not having obtained the sanction of the Court being a most material circumstance from their point of view. They insisted, moreover, on a review of the evidence, that Zenail was in a fiduciary relation to the assignee, who, again, represented the creditors. To Zenail was left the whole conduct of the suit by the assignee, and Zenail's position was such that he was incapable of taking for himself

(1) L. R., 13 Ch. Div., 123.

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any part of the funds that were put to the credit of the suit of 1858, without accounting for it, so long as any of the creditors remained unpaid. It was incompetent to the assignee to give up claims without the sanction of the Court whilst creditors who were not paid in full remained; and the unpaid creditors were not bound by his agreement so to do. It was his duty to protect them. Accordingly, it was incompetent to the assignee to assent to a transaction like the present; and, besides, the fact that the real terms of the compromise, including the payment to Zenail, were not made known to the Court when the consent decree was passed, was an indication of fraud.

Reference was made to *Luddy's trustee* v. *Peard*(1), where a solicitor for the trustee of a bankrupt was not allowed to hold, as against the trustee, an advantage obtained in a purchase effected by him upon knowledge gained while acting as solicitor for the bankrupt.

As to the position with reference to the Indian Insolvent Act, see section 89 of the Act 11 and 12 Vic., C. 21, and *Turner* v. *Trelawny*(2).

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

Sir B. Peacock:—The suit in which the judgment under appeal was pronounced, was instituted in the year 1881 in the High Court of Bombay, Original Civil Jurisdiction, by the present respondent, as assignee of the estate and effects of Mahomed Rahim Shirázi, an insolvent, against the heirs and legal representatives of Háji Zenail, to recover, with interest, a lákh and a half of rupees, received by him under a compromise made in 1875.

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

The suit arose out of litigation, dating as far back as 1834, between two Persian families, who, for convenience sake, may be described as the Shustri and Shirázi families. A merchant of

(1) L. R., 33 Ch. Div., 500. (2) 12 Sim., 49.

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

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

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

It may be mentioned that in the schedule filed by Shirázi, the insolvent, Mirzá Mahomed Shustri and Bibi Mariam Begum were inserted as creditors or claimants for Rs. 11,74,459 (the amount decreed against him in the suit of 1834), with the following remark:—"Disputed. Amount due under a decree of the Supreme Court in a cause in the Equity side, wherein the detaining creditors were complainants, and the insolvent was defendant, as executor of the last will and testament of Agá Mahomed

Ally Khán, deceased, whereby it is ordered that the said insolvent do pay into the hands of the Accountant General the sum of Rs. 11,74,459-0-65 reas, being the balance reported by the Master, in manner and at the periods following, that is to say, the sum of Rs. 1,00,000, part of such balance, on the 1st day of January now next ensuing the date hereof, and the like sum of Rs. 1,00,000 on the first day of each and every succeeding month until the sum of Rs. 6,00,000 shall have been so paid by the said insolvent to the said Accountant General, and that the said insolvent do pay the further sum of Rs. 1,00,000 to the said Accountant General on the 1st day of October next ensuing the date hereof, and the like sum on the 1st day of each and every then succeeding month, until the sum of eleven lákhs of rupees should have been so paid into Court, and the said sum of Rs. 74,459-0-65 reas, being the residue of the said balance, on the 1st day of March, which would be in the year 1848. On the 16th day of October, 1847, a writ of attachment was issued for non-payment of one instalment, and executed upon the insolvent, and since that the other writs have issued, under which the whole of his property has been sequestered and sold, but the insolvent does not know what amount has been realized, and has, therefore, inserted the whole amount decreed to be paid."

There is no difference of opinion between the two Courts either as to the terms of the negotiations of 1870, or of the actual compromise which was finally arranged in 1875.

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

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It appears from the 9th paragraph of the plaint that, at the time of the compromise, there were in the hands of the Accountant General of the Court, standing to the credit of the suit of 1834, Government promissory notes and cash of the value of about 4 lákhs of rupees, and in the hands of Mr. Gamble, the then assignee, who was also receiver in the suit, a valuable property in Bombay, known as the Mazagon Dockyard, also valued at about 4 lákhs.

To this property there were in 1870, and also at the time of the compromise in 1875, three distinct claims depending on the result of the suit. First, there was Abdul Latif, who represented the original plaintiff in the suit of 1834, and who had originally obtained a decree for upwards of 11 lákhs of rupees. Secondly, there was Mr. Gamble, the assignee of Shirázi, who had inserted in his schedule as a disputed item (11 lákhs odd) decreed against him; and, third, there was Zenail, who represented the family of Shirázi under the power of attorney which he held from them, and against whom he probably had a claim for money advanced by him to carry on the litigation, but which was a matter entirely between him and the family of Shirázi, in which the assignee or the creditors had no concern.

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

In the judgment under appeal the High Court say :—

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

"1st, that Zenail compromised the suit as the agent and confidential adviser of the official assignee; and, 2nd, that the payment to Zenail was fraudulently concealed by Zenail and his sons from this Court, and also from Mr. Gamble before and after the passing of the consent decree; but that, even if Mr. Gamble was aware of the Rs. 1,50,000 being paid to Zenail, the said payment was a fraud upon this Court and the creditors, which Mr. Gamble had no power to consent to, and such consent could not be binding on his successor."

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

Tenth. In the year 1875 an arrangement was made for the compromise of the said suit, *i. e.*, the suit of 1858, the said Háji Zenail Abádin and his son, the defendant Abdul Hoosein, acting in the negotiations which resulted in such compromise as the agents or confidential advisers of the plaintiff in the said suit.

Eleventh. By a consent decree made in the said suit on the 12th July, 1875, copy whereof is hereto annexed and marked C, it was ordered that the said Accountant General should, out of the said Government promissory notes and moneys in his hands, pay to the plaintiff in the said suit the sum of rupees seventy-five thousand and the costs of the said suit, and should make over and pay to the solicitors of the defendant in the said suit the balance of the said Government promissory notes and moneys, and that the plaintiff in the said suit, who was also the receiver appointed therein, should assign the said immoveable property to the defendant therein.

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

Thirteenth. The plaintiff has lately been informed and believes that before the passing of the said consent decree it had been agreed between the defendant in the said suit and the

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said Háji Zenail that the amount for which this suit should be compromised was the sum of rupees two lákhs and twenty-five thousand, and not rupees seventy-five thousand only, and that out of the said Government promissory notes and moneys the said sum of rupees two lákhs and twenty-five thousand should be paid in full settlement of the claims of the estate of the said Shirázi in the said suit, but that rupees seventy-five thousand only out of the said sum of rupees two lákhs and twenty-five thousand should be paid to the plaintiff in the said suit, and the rupees one lákh and fifty thousand, the balance thereof, should be paid to the said Háji Zenail.

Fourteenth. After the passing of the said consent decree, namely on or about the 28th August, 1875, Messrs. Prescot and Winter, the solicitors for the defendant in the said suit, paid to the said Háji Zenail the sum of rupees one lákh and fifty thousand, being the balance of the said sum of rupees two lákhs and twenty-five thousand after deducting the said sum of rupees seventy-five thousand paid to the plaintiff in the said suit, and the said Háji Zenail and his son, the said Abdul Hossein, retained the said sum of rupees one lákh and fifty thousand, and applied the same for their own purposes. A receipt for the said sum of rupees one lákh and fifty thousand was given by the said Háji Zenail, or by the first defendant on his behalf, to the said solicitors, but the defendants allege that the said receipt was subsequently returned to the said Háji Zenail, and that he destroyed the same. Hereto annexed, and marked D, is a document which, as the plaintiff is informed and believes, is a correct copy of the said receipt.

Fifteenth. The plaintiff says that the fact that the said sum of rupees two lákhs and twenty-five thousand was agreed to be paid for the compromise of the said suit, and that rupees one lákh and fifty thousand, part thereof, was to be paid to the said Háji Zenail, was fraudulently concealed by the said Háji Zenail and his sons, the first and second defendants, from this Honourable Court, and also from the said Henry Gamble, before the time of and after the passing of the said consent decree.

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

The learned Judge had, however, after the case had been closed, allowed the 15th article of the plaint to be amended by adding the words, "And the plaintiff further saith that, even if the said Henry Gamble was aware of the sum of one lákh and a half being paid to the said Háji Zenail, the said payment was a fraud upon the Court, which the said Henry Gamble had no power to consent to, and such consent could not be binding on his successor." The learned Judge, therefore, went on to consider whether Zenail fraudulently concealed from the Court the fact of the payment of the 1 lákh and 50,000 rupees. He said: "To sum up, I do not think it proved that Zenail held any official position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I think he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court."

Their Lordships concur entirely in that opinion. Zenail did not act as the agent of, or in a fiduciary relation to, the official assignee either at the commencement of the suit of 1858 or in the conduct of it. He, no doubt, gave very valuable assistance, but he was acting, as was well known to the assignee throughout, on behalf of the heirs and representatives of Shirázi, and possibly of himself as having made advances for conducting the suit, and not on behalf of the creditors. Certainly there was no fiduciary relation between him and the assignee at the time of the negotiations for the compromise of 1875 or at the time of the application for the consent decree. He was not *Dominus litis,* nor in any way connected with the Court; he owed no duty to the Court, and he was under no obligation to the creditors. Nor is it likely that the Court, even if all the facts had been brought to their notice, would have inquired whether the decree was likely to

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be beneficial to the creditors when all the parties to the suit consented to have it dismissed. Indeed, the Court would have had no means of forming a judicial opinion upon the subject until the accounts had been retaken, which it was the object of all parties to avoid. The brief to counsel, who appeared in Court on behalf of the assignee to consent to the compromise, was prepared by the solicitor for the assignee, who was fully acquainted with all the facts of the case.

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

Their Lordships do not understand what is meant by Zenail's share. It was a matter of controversy between the parties how much each should receive, and there is no ground for saying that Zenail took any unfair advantage of Mr. Gamble. Their Lordships, however, are clearly of opinion that, under the plaint in this suit, the question cannot be entered into whether Zenail by the terms of the compromise got more than his share or not.

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

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

The Full Court, on appeal, said it was not disputed that after Mr. Prescot's evidence it must be taken as a fact that, whatever might have been the extent of Mr. Gamble's knowledge in 1870,

he was in 1875 acquainted with the intention that Zenail was to receive Rs. 1,50,000 from the Shustri family, and that he assented to it. This ought to have been an end of the suit. The Court, however, held that Zenail acted in a fiduciary relationship towards Mr. Gamble; but that even in that case the transaction could be impeached only upon the ground that Mr. Gamble's consent was obtained under circumstances amounting to fraud. They held that, under the circumstances of the case, Zenail could not derive any benefit from the suit, except on condition of acting in perfect good faith to the creditors. They said his deriving any benefit to himself from the suit, except upon that condition, would, in their opinion, be a fraud on the creditors and on the Court itself, and that a Court of equity would properly regard him as holding any such benefit as a trustee for the insolvent's estate. It is not easy to follow the reasoning of the Court of Appeal, by which they arrived at the conclusion that Mr. Gamble's consent to accept the 65,000 rupees in satisfaction of the claim of the creditors was obtained under circumstances amounting to fraud on the part of Zenail. They treated the Rs. 10,000 paid to Mr. Prescot as a payment made to him to bring pressure on Gamble to accept Rs. 65,000 in satisfaction of the claim of the creditors.

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

At page 290, Mr. Prescot said: "Zenail gave me Rs. 10,000, I suppose out of gratitude for having got the matter through." Looking to all the circumstances, and to the fact that Mr. Prescot's clerk, who could not have had much weight or influence with Abdul Latif Shustri, or in effecting the arrangement with Mr. Gamble, also received the sum of Rs. 1,000 at the same time, it is difficult to understand how the Appellate Court could possibly have arrived at the conclusion that the Rs. 10,000 were promised or paid by Zenail to Mr. Prescot with the fraudulent intent to

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induce him to bring pressure upon Gamble, which but for that payment he would not have done. There is no suggestion that a similar payment was promised to Mr. Keir in 1870 before he made the arrangement with Gamble to the very same effect as that made by Prescot, his successor, in 1875.

All the parties beneficially interested in the funds in Court must have been anxious to compromise their claims and to terminate the litigation as speedily as possible. In the words of the learned Judge of the first Court,—"In sixteen years one twenty-fifth part of the accounts had been investigated. At that rate, every person concerned, and the generation to follow, would have passed away with the suit still hung up in the Master's office. Meanwhile, the Shustris were kept out of their inheritance, the creditors of Shirázi were deprived of all chance of a dividend; and the family of Shirázi were debarred from such share as might be theirs if any sums were found due to their father more than enough to satisfy his creditors." Zenail, after the negotiations of 1870, doubtless stood out for the Rs. 1,50,000, which, according to the terms of the arrangment then made, were to be paid in satisfaction of the claims represented by him. The Rs. 2,25,000 were not paid to him, nor was it agreed between Abdul Latif and Zenail that only seventy-five thousand rupees should be paid to Gamble, as alleged in the 13th paragraph of the plaint. The Rs. 2,25,000 were to be paid in settlement of all claims whatsoever, as well of the family as of the creditors of Shirázi. The amount to be paid to Gamble, as assignee on behalf of the creditors, was settled by Prescot with Gamble himself. It was admitted by the Appellate Court that Gamble consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, but they considered that undue pressure was brought to bear upon him, in addition to the Rs. 10,000 received by him on his own account. Prescot in arranging with Gamble acted as solicitor for the Shustri family, as Keir had done in 1870, and not for Zenail. If Gamble had insisted upon receiving a larger sum than Rs. 75,000, the amount fixed in 1870, there was no more reason that it should come out of Zenail's Rs. 1,50,000 than out of the surplus which was to go to the Shustri family. There was, therefore, no reason why Zenail should bribe Prescot to bring pressure on Gamble,

even if Prescot was open to be bribed. It is impossible to understand how it could be held that, in the negotiation with Gamble, under which he consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, Zenail was acting in a fiduciary relation to the creditors.

The Court of Appeal having dealt with the Rs. 10,000 paid to Prescot, proceeded to consider whether Mr. Gamble acted in perfect good faith towards the creditors, and upon that point they came to the conclusion that, having regard, amongst other things, to his receipt of the Rs. 10,000 in lieu of commission, and that that amount exceeded 5 *per cent.* on the assets recovered, the gravest suspicion was raised that his conduct was not actuated by perfect good faith. In short, the Court of Appeal seem to have considered that Mr. Prescot received Rs. 10,000 to bring pressure on Gamble to consent, and that Gamble received Rs. 10,000 as an inducement to betray the creditors. The Court of Appeal took no notice of the fact that the intended receipt by Mr. Gamble of the Rs. 10,000 in lieu of commission was fully explained by Mr. Gamble's solicitor, with the reasons for the payment in the brief to counsel to consent to the decree, and that in the decree itself it was expressly declared that it should be lawful for Mr. Gamble to retain in his own hands, and for his own use and benefit, the said sum of Rs. 10,000, the same being in respect of future commission as official assignee and receiver in the suit. Further, the decree of the Appellate Court for the payment, by Zenail's representatives to the plaintiff in the suit, of the Rs. 1,50,000 with interest, was founded upon the fact that that amount ought to have been paid to Gamble in addition to the Rs. 75,000, in order that the whole Rs. 2,25,000 might be administered by him. In that case the Rs. 10,000 would have been less than 5 *per cent.* on the Rs. 2,25,000 recovered. The result of the findings of the High Court as to the payments made to Prescot and Gamble was that, notwithstanding their finding that the fraud alleged in the plaint was not substantiated, they reversed the decree of the first Court, and, upon the principle that, in equity, Zenail could derive no benefit from the transaction, ordered that the present appellants, the respondents in the

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Appellate Court, as the heirs and legal representatives of Zenail, should pay to the present respondent and then appellant, not merely such a sum as would be sufficient to pay the creditors the full amount of their debts with interest, but the whole sum of Rs. 1,50,000, with interest at 9 *per cent.*, amounting to a sum exceeding two lákhs and eighty thousand eight hundred and ninety-four rupees for debt, and simple interest thereon at the rate of 6 *per cent. per annum* from the date of the decree until payment. Their Lordships do not concur in the finding of the High Court as to the object and effect of the payments made to Mr. Prescot and to Mr. Gamble, the assignee, respectively. They think it right, however, to point out that the Court of Appeal, whatever might have been their opinion as regards those payments, ought to have confined themselves to the charge of fraud made in the plaint, and that they committed a serious error in deciding the case upon a charge which was not made by the plaintiff in his original plaint, nor in the plaint as erroneously amended at the close of the case, and which does not appear to have been made at the trial. The charge in the plaint was a fraud in concealing from the assignee the fact that by a compromise of the suit made by Abdul Latif and Zenail Rs. 2,25,000 were to be paid, and that out of that sum Zenail was to receive Rs. 1,50,000, and the assignee only Rs. 75,000. The fraud charged in the amended plaint was, that the payment of the Rs. 1,50,000 to Zenail was a fraud upon the Court, which Gamble had no power to consent to. The ground upon which the Appellate Court decided the case, though not expressed in very clear terms, was that the payment by Zenail to Prescot of Rs. 10,000 was made as an inducement to him to put pressure upon Gamble to induce him to consent to receive Rs. 65,000 on account of the claim of the creditors, and that Prescot used pressure in order to secure the acceptance of that amount by him. They also substantially treated the payment to, and receipt by, Gamble of the sum of Rs. 10,000 in lieu of commission, as an inducement to him to consent to receive the sum of Rs. 65,000 in satisfaction of the claims of the creditors, the Court of Appeal expressing their opinion that Gamble was not actuated by perfect good faith towards the creditors, and

this, notwithstanding the evidence of Gamble's solicitor as to what actually took place, was objected to and disallowed as privileged. In short, though the fraud charged in the plaint was a fraudulent concealment from Gamble by an agent and fiduciary, the ground upon which the judgment of the Court of Appeal was founded was substantially a fraud brought about by Zenail, Prescot, and Gamble by bribery, corruption, and being corrupted respectively, and conspiracy to defraud the creditors of Shirázi. Neither of those charges appears to have been ever made in the Court of first instance so as to have the judgment of that Court called to or expressed upon them; nor do they appear to have been particularized in the grounds of appeal to the High Court. In short, they seem to have occurred for the first time to the High Court, and not to the plaintiff in the suit, or to his advisers. It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. See the case of *Montesquieu* v. *Sandys*[1], in which it was held that relief cannot be given upon circumstances which are not made a ground of relief upon the record.

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

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

(1) 18 Ves. Jun., 302, at p. 314.

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

Appeal allowed.

Solicitors for the appellants :—Messrs. *Hacon and Turner.*

Solicitors for the respondents :—Messrs. *Watkins and Lattey.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

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EBRA'HIM PIR MAHOMED, (PLAINTIFF), *v.* CURSETJI SORA'BJI DE VITRE, (DEFENDANT).*

Landlord and tenant—Ejectment—Co-owners—Notice to quit by one co-owner—Notice to quit before expiry of term of lease—Suit in ejectment by one co-owner—Parties—Oral agreement inconsistent with written contract—Evidence Act I of 1872, *Sec.* 92.

K. and P. were co-owners of certain property in Bombay, and by a writing dated January, 1883, they granted a lease of the whole of the said property to the defendant for a term of three years from the 1st March, 1883, to the 28th February, 1886, at a monthly rent of Rs. 705. Subsequently to the granting of the said lease, *viz.*, on the 1st September, 1883, P. conveyed her equal and undivided moiety of the said property to the plaintiff. On the 30th January, 1886,—*i. e.*, a month before the expiration of the lease,—the plaintiff gave the defendant notice to determine the tenancy, and required him to quit on the 1st March then next. The defendant refused, and the plaintiff brought this suit for possession and for occupation rent from the 1st March, 1886. The defendant pleaded that the notice to quit being given by one of the co-owners only, was invalid, and, further, that the plaintiff was not entitled to sue alone.

Held, that the notice was a valid notice, and that the suit was maintainable by the plaintiff alone.

The defendant pleaded that it had been verbally agreed between himself and his lessors that he should be entitled to a renewal of the lease for a further period of three years, if he so desired.

Held, that evidence of this oral agreement was inadmissible under section 92 of the Indian Evidence Act I of 1872, being inconsistent with the terms of the second clause of the lease, which was as follows :—"If you mean me to vacate at the completion of the term, you must give one month's notice. In accordance therewith I will vacate and give up possession to you."

Held, also, that the notice to quit was not invalid under the above clause of the lease, although given before, instead of after, the expiry of the term.

* Suit No. 95 of 1887.