1948 *Present :* **Soertsz S. P. J. and Nagalingam J.**

KANDIAHPILLAI *et al.*, Appellants, *and* VYTHIALINGAM *et al.*, Respondents.

S. C. 94—D. C. Jaffna 14,151.

Trust —Declaration that Kovil is charitable trust—Claim to be hereditary managers—Compromise—Validity of compromise—Public rights involved—Civil Procedure Code, section 408—Trusts Ordinance, sections 102, 106.

Under section 102 of the Trusts Ordinance plaintiffs brought this action for a declaration that the Nagapushani Ammal Kovil was a public charitable trust. Defendants contended that it constituted a private trust. A compromise was reached whereby the Kovil was to be declared a public trust and a board of nine trustees were to be appointed of whom four of the defendants were to be regarded as hereditary trustees. Plaintiffs sought to have this compromise set aside on the ground that the action did not relate to private rights but had reference to the rights of the public represented by the plaintiffs and that the plaintiffs could not become parties to a settlement without the prior assent of those whom they represented.

Held, that a compromise entered into *bona fide* in such an action was binding on the parties.

There is nothing in section 408 of the Civil Procedure Code or in any other provision of the law which carries such an action beyond the field of compromise.

APPEAL from a judgment of the District Judge of Jaffna.

H. V. Perera, K.C., with *H. W. Tambiah* and *S. Sharvananda*, for the plaintiffs, appellants.

F. A. Hayley, K.C., with *P. Navaratnarajah*, for the defendants, respondents.

Cur. adv. vult.

January 27, 1948. NAGALINGAM J.—

The plaintiffs appeal from an order of the District Judge of Jaffna refusing to set aside the terms of a compromise entered into between them and the defendants to the action.

The action was one instituted under section 102 of the Trusts Ordinance for a declaration that the Nagapushani Ammal Kovil of Nainativu is a charitable trust within the meaning of the said Ordinance and for certain ancillary reliefs. The defendants contended that the temple constituted a private trust. On November 7, 1942, the case was compromised, and on that date it was agreed between the parties that the temple should be declared a charitable trust within the meaning of section 99 of the Trusts Ordinance and, *inter alia*, that a vesting order in respect of the temple and its temporalities should be made in favour of trustees to be appointed by Court. The Court thereupon directed that a scheme of management consented to by the parties should be submitted for its consideration. On March 18, 1943, the proctor for the plaintiffs filed a scheme to which the proctors for the defendant would not assent, and when the matter was taken up for consideration

the defendants objected to the scheme in so far as it did not recognize the rights of the defendants as hereditary managers of the temple—rights which had been put in issue between the parties by issue 9 framed at the commencement of the trial. The Court thereupon made order setting down for trial that issue. The trial of that issue was taken up on August 4, 1944, when a compromise was again reached whereby it was agreed that there should be a board of nine trustees of whom four of the defendants were to be regarded as hereditary trustees, and the other five were to be elected by the congregation according to a scheme to be settled thereafter. It is this second compromise that the plaintiffs seek to have set aside.

Two grounds have been urged in support. The first is that by the terms of settlement reached on November 7, 1942, whereunder it was agreed that trustees were to be appointed by Court, any claim on the part of the defendants to be declared hereditary trustees was, to say the least, not accepted by them, and that in fact it was rejected by Court. The second ground is that in any event a compromise whereby the hereditary rights of certain parties were given recognition to was one which it was not competent or lawful for the plaintiffs to have entered into and much less for the Court to have given legal sanction to without the Court itself having independently arrived at an adjudication upon the hereditary rights claimed.

In regard to the first ground, it is not without interest to observe that it was the Judge before whom the compromise was entered into on November 7, 1942, who made order thereafter directing that the issue of hereditary right should be tried before the final scheme could be settled. What is more, when the defendants asked that that issue should be decided by Court, Counsel for plaintiffs, who was the Counsel who had appeared for them at the date of the settlement, did not object or contend that that was an issue that did not arise at that stage, as he might very well have urged if the parties had contemplated that the terms of the settlement had the effect of concluding the issue as to hereditary rights. One would have expected at least that an appeal would have been preferred from the order setting down for trial that issue if the plaintiffs thought that that issue did not arise for determination by the Court after the terms of settlement that had been reached on November 7, 1942. On the contrary, the plaintiffs in fact appeared at the trial of the issue without demur. Besides, on the date the terms of the first settlement were recorded, Counsel appearing for the fifth defendant made it abundantly clear that while his client consented to a declaration that the temple was a charitable trust and that a scheme of management should be formulated in respect of it, his client claimed to be appointed a trustee in any scheme framed by Court on the ground that his right to be appointed trustee was recognized in a previous case, namely, Case No. 24,476 of the District Court of Jaffna. No order was made by the Judge in regard to this claim put forward on behalf of the fifth defendant, nor, in fact, did the plaintiffs deny or controvert in any manner this claim. It is therefore manifest that the right at least of the fourth defendant to be appointed trustee was one regarded as yet outstanding between the parties when the terms of settlement were recorded. In fact the

language of the terms of settlement too does not constrain one to hold that the right of the defendants to be appointed trustees had been disposed of by that order, for the settlement only provided for the appointment of trustees by Court. Under section 106 of the Trusts Ordinance, express provision is made for the Court, in determining any question relating to the devolution of the trusteeship, to have regard to the instrument of trust, if any, and to the practice with reference to the particular trust concerned. In this case the defendants had relied upon the proceedings had in the previous action referred to above and to the decree entered therein. Apart from that they also claimed to be hereditary managers. Both these factors the Court was bound to take into consideration before appointing trustees. In these circumstances it cannot be said that the terms of settlement of November 7, 1942, precluded the defendants from raising the question of hereditary right to which they rightly or wrongly laid claim. That the plaintiffs themselves did not even at the date they filed the petition of appeal regard the question in any other light is borne out by the fact that in their petition of appeal they only claim to have the second compromise set aside and pray for an order directing the retrial of issue 9 ; the question whether the terms of settlement of November 7, 1942,, barred the defendants from raising the question, was not even made the subject of a ground of appeal. This first contention, therefore fails.

The next point for consideration is whether the compromise entered into on August 4, 1944, could form the basis for a legitimate settlement of the disputes arising on the trial of the question whether the defendants were hereditary managers of the temple. It was urged that as the action did not relate to private rights but had reference to the rights of the public or of a section of the public whom the plaintiffs represented, the plaintiffs could not become parties to any settlement of the disputes involved without the prior assent of those whom they represented.

The cases of *Abdul Karim Abu Ahamed Khan v. Abdus Sobhan Choudhury*[1] and *I. E. Seedat v. Mariam Bi Bi*[2] were relied upon by the appellants. In the former case it is true that Coxe J. who delivered the judgment of the Court said :—

> " It appears to me quite clear that if this be a public endowment the suit cannot be compromised by this petition. The case of *Gyananda Asram v. Kristo Chandra*[3] is, in my opinion, an authority for this view and it appears to me to be in accordance with common sense."

The facts of the case, however, show that the terms of the compromise were that the suit should be withdrawn for " ample consideration" to be paid to the plaintiffs. Quite clearly, therefore, the attack on the compromise was on the ground of lack of *bona fides* and that the plaintiffs were acting collusively in compromising the suit with a view to their own personal gain. Having regard to this aspect of the matter, the proposition laid down by the learned Judge would be unexceptional. In fact Counsel for the appellants himself was not prepared to go to the full length implied by the language used by Coxe J., for if he did, even the compromise entered into on November 7, 1942, declaring,

[1] *A. I. R. (1915) Cal. 193.* [2] *A. I. R. (1939) Rangoon 108*

[3] *(1904) 8 C. W. N. 404.*

the temple a charitable trust, would have to be regarded as of no effect. Counsel therefore argued that the terms of a compromise relating to a charitable trust must be severed into two parts, those which are to the benefit or to the advantage of the trust and those which are not, the former being regarded as valid and binding upon the parties, the latter as invalid and inoperative. But I think it will be more true to say that the principle to be deduced from this case and the second of the cases cited, where the finding was that the compromise was a collusive one, is that where in an action under section 92 of the Indian Civil Procedure Code, which corresponds to section 102 of our Trusts Ordinance, a compromise bearing a taint of collusion or lack of *bona fides* is presented to court, it would not be given effect to.

That this view is the correct view is borne out by the case of *Syed Abu Mohamed Barakat Ali v. Abdur Rahim*[1] where in reference to the two cases above cited the Judges expressed themselves thus :—

> 'These cases only show that in a suit brought under section 92, Civil Procedure Code, when a petition of compromise is filed, it is open to the Judge to say that the compromise is not lawful and he could then refuse to pass an order on the basis of the compromise. But it is another thing to say that a Judge has no jurisdiction to pass a decree on the basis of compromise in a suit brought under section 92, Civil Procedure Code. Order 23 of the Code of Civil Procedure dealing with adjustment of suits makes no such distinction."

Order 23 referred to corresponds to Chapter 26 of our Civil Procedure Code. Section 408 of the Code expressly permits of an action being adjusted wholly or in part by any lawful agreement or compromise, and there is no exception in that section excluding actions relating to charitable trusts from its scope, nor, in fact, is there any other provision of the law which carries such an action beyond the field of compromise. A contrast is provided by actions relating to minors, for section 500 of the Civil Procedure Code expressly enacts that no compromise on behalf of a minor should be entered into without the express leave of Court. No such provision exists in relation to charitable trusts.

An argument based on section 106 of the Trusts Ordinance was also advanced. It was said that as that section provides that in settling any scheme for the mangement of any trust under section 102 or in determining any question relating to the devolution of the trusteeship the Court shall have regard to the practice with reference to the particular trust concerned and therefore it was incumbent upon the Court to investigate and ascertain whether there was in fact any practice with regard to the particular trust ; and therefore, where a claim to hereditary trusteeship is made, the Court would not recognize such a claim unless proof to the satisfaction of the Court was adduced. In other words the Court could not act upon the bare consent of parties. I do not think this contention is entitled to prevail. For one thing, the section only emphasises the fact that the Court should not ignore the existence of any particular practice in regard to, for instance, the devolution of the trusteeship of the temple, that is to say, that where the parties are agreed

[1] *A. I. R. (1925) Cal. 187.*

that there has been a particular method of devolution appertaining to the office of trustee of a temple, the Court cannot refuse to consider the existence of the accepted method of filling the office of trustee in making an appointment. By acting upon the consent of parties and giving recognition to the existence of the particular mode of filling the office the Court would not be ignoring the practice in regard to devolution of the trusteeship but would be having in the fullest sense regard to the accepted practice. The language of the section cannot be interpreted to mean that there is a duty cast upon the Court to pursue the matter of the existence of any particular practice on its own, though the parties themselves are agreed upon the existence of such a practice. In this case, therefore, it would be quite proper to say that the Court, in giving effect to the compromise suggested by the parties whereby four of the defendants were appointed hereditary trustees, had in terms of the section regard to the practice that had been prevalent in filling the office of trustee.

In this case, there is not the slightest suggestion that the parties were motivated by other than *bona fide* considerations of the strength and weakness of the case of either party before they reached the settlement. In fact, where the parties themselves in these circumstances compromise a suit, such a compromise must be regarded as doing justice between the parties in even a more ample measure than an adjudication by Court. Besides, section 102 of the Trusts Ordinance itself expressly recognizes that a dispute or a threatened action in relation to charitable trusts could properly form the subject of a settlement. Upon the plaintiffs in an intended action under the section presenting a petition as provided therein to the Government Agent, the Government Agent or a commissioner appointed by him has to proceed to inquire into the subject-matter of the plaint and has to report to Court, *inter alia*, that it has not proved possible to bring about an amicable settlement of the question involved or that the assistance of the Court is required for the purpose of giving effect to any amicable settlement that has been arrived at. The Legislature, therefore, has expressly provided for the Government Agent or the Commissioner making efforts to settle the dispute, and where in any case the dispute is settled and the assistance of Court is deemed necessary, to apply to the Court for such assistance, and the Court would, in such a case, grant its assistance and give effect to the settlement. Is there any reason why, if the Court could give judicial sanction to a settlement reached outside Court, it should be precluded or debarred from giving effect to terms of settlement reached by the parties after the dispute has been carried into Court after unsuccessful attempts had been made to settle it outside Court ? I can see no principle upon which any distinction could be made between the two classes of cases.

Leaving out of consideration the question of collusive or fraudulent compromises or those tainted with *mala fides*, to which other principles would apply, no good reason exists for holding that where parties to an action relating to a charitable trust enter *bona fide* into a compromise, that compromise is to be deemed to be invalid or inoperative. I am therefore of opinion that the terms of settlement reached on August 4, 1944 are valid and binding on the parties.

The propriety of the appeal was also a question that was raised at the argument. The order of August 4, 1944, which is sought to be set aside, is one, it will be remembered, which was made by consent of parties. It is obvious that no right of appeal lay from such an order. A faint attempt was made to show that only one of the five plaintiffs was present in Court on that date and that the other four were absent owing to certain causes over which they had no control; but it is to be noted that all the plaintiffs were collectively represented by Counsel, who expressly agreed to the terms of settlement on behalf of the absent plaintiffs themselves, while the plaintiff who was present in Court himself signed the terms of settlement accepting them. The proposition is well established that Counsel is entitled to compromise a suit acting in his discretion in the interests of his client and that even where the terms of settlement entered into by Counsel are contrary to the instructions given to him by the client they nevertheless bind the client, unless it can be shown that the opposite side had knowledge that Counsel was acting contrary to authority. The terms of settlement, therefore, entered into in this case by Counsel bind all the plaintiffs, and the order being one made by consent of parties is not one that was appealable. With a view to surmount this difficulty, what the plaintiffs have done is to make an application to Court to have the consent order vacated and to appeal from the order refusing to set it aside. This does not give the plaintiffs the right to canvass the validity of the compromise on this appeal. The plaintiffs themselves, anticipating such an objection, filed papers in revision, and all questions have been permitted to be argued. In view of the conclusions reached on the questions raised in appeal, which are identically the same as those put forward in the revision papers, the application for revision also fails.

I would therefore dismiss the appeal and refuse the application for revision with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.