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SUKHDEV SINGH

v.

MAHARAJA BAHADUR OF GIDHAUR

[SAIYID FAZL ALI, MUKHEERJEA and CHANDRASEKHARA AIYAR JJ.]

Ghatwali tenures—Nature and incidents—Government ghatwalis and Zemindary ghatwalis—Difference—Zemindar's right to sub-soil minerals—District Gazetteers—Evidentiary value.

Though there are several instances in which Government ghatwalis were included in the zemindary of other persons, yet where no clear evidence is forthcoming as to the true character of a ghatwali, the fact that the tenure is included within a zamindary and is covered by the jama assessed upon it should turn the scale in favour of the party who alleges that it is a tenure which is dependent upon the zemindary.

The mere fact that the ghatwali was shown to be under the Collector cannot alter the character of the ghatwali, *i.e.*, if it was a zemindary ghatwali, it could not become a Government ghatwali merely because it was stated to be under the Collector.

A zemindar is presumed to be the owner of underground rights in the tenancies created by him in the absence of evidence that he ever parted with them.

A statement in the District Gazetteer is not necessarily conclusive, but the Gazetteer is an official document of some value, as it is compiled by experienced officials with great care after obtaining the facts from official records.

(History and incidents of ghatwali tenures discussed).

CIVIL APPELLATE JURISDICTION. CIVIL Appeal No. 29 of 1950.

Appeal against the Judgment and Decree dated the 10th October, 1945, of the High Court of Judicature at Patna (Manohar Lal and Das JJ.) in Appeal No. 64 of 1942 arising out of decree dated the 28th February, 1942, of the Subordinate Judge at Monghyr in Suit No. 10 of 1941.

Amarendra Nath Sinha (*Samarendra Nath Mukherjee,* with him) for the appellants.

Lal Narain Sinha (*R. C. Prasad,* with him) for the respondent.

1951. May 2. The judgment of the Court was delivered by

FAZL ALI J.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, affirming a judgment and decree of the Subordinate Judge of Monghyr in a title suit brought by the plaintiff-respondent.

The plaintiff, the Maharaja of Gidhaur, who has succeeded in both the courts below, is the proprietor of an impartible estate known as Gidhaur raj in the district of Monghyr. The ancestors of the defendants 1st party originally held a 4 annas share in a ghatwali tenure known as Mahal Dumri Nisf Katauna T. No. 325, and subsequently by private partition they were allotted mouza Dumri with its 47 tolas which are detailed in schedule I of the plaint. In execution of a mortgage decree obtained by one Chethru Rai against the ancestors of defendants 1st party, their interest, to which reference has been made, was purchased by the Maharaja of Gidhaur in the name of one of his employees, and the latter took delivery of possession of the property on the 19th April, 1904. On the 13th August, 1903, the ancestors of the defendants 1st party filed an application for setting aside the sale which was dismissed by the executing court and the appeal from the order of the executing court was dismissed by the High Court as well as by the Privy Council. After certain disputes in the criminal courts, the defendants second party alleging themselves to be the lessees of the defendants first party, obtained a mining license in 1937 from the sub-divisional officer of Jamui, and the District Magistrate apprehending a breach of the peace, started proceedings under section 144 of the Criminal Procedure Code, which ended in favour of the defendants first and second parties and against the plaintiff.

The plaintiff's case is that, emboldened by the order in the proceedings under section 144, the defendants started working mines in the tolas mentioned in schedule II of the plaint and extracted a considerable

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quantity of mica and hence he was compelled to institute the present suit. In this suit, after reciting the facts to which reference has been made he prayed for a declaration of the sub-soil rights with regard to the entire Mahal Dumri and for recovery of possession of the mortgage lands situated in the tolas specified in schedule II of the plaint. He also prayed for mesne profits and a permanent injunction restraining the defendants first and second parties from extracting mica or other underground minerals from the lands mentioned in schedule II of the plaint. The grounds on which these reliefs were claimed are summarized in paragraph 12 of the plaint in these words :—

"That the plaintiff submits that he being the 16 annas proprietor of Dumri Nisf Katauna has got an indefeasible right and title to all the underground minerals including mica situate within the said talukas. The plaintiff further submits that all the titles and interest in the said 4 annas mokrari shares of the ancestors of the defendant 1st party having been acquired by plaintiff's ancestor by auction purchase in 1903, the defendant 1st party have no sort of right and interests in the mica and other underground minerals nor the defendant 2nd party have derived any lawful right under leases alleged to have been granted in their favour by defendant 1st party, the plaintiff in law is entitled to get a declaration of his title and possession with respect to all the underground right including mica....."

The suit was contested by defendants Nos. 1 to 11 (defendants 1st party), but, as the trial judge has pointed out, the real defendant was defendant No. 1, father of the appellant. The case of this defendant was that the four annas interest in village Dumri was a ghatwali tenure granted to the ancestors of the defendants first party by Muhammadan rulers to guard the hill passes in the taluka, and the grant under which they held was affirmed subsequently by Captain Browne, a representative of the East India Company. The defendant No. 1 further contended that the mineral

and subsoil rights were vested in him as the holder of the ghatwali tenure, and that the plaintiff had acquired no right by his auction-purchase in 1903 inasmuch as the property in suit being Government ghatwali tenure was inalienable and consequently the auction-purchased was invalid. Lastly, it was contended that this defendant and his ancestors had been exercising rights of possession over the mines and minerals for more than 12 years prior to the suit in assertion of their ghatwali right and to the knowledge of the plaintiff and his ancestors and had thus acquired an indefeasible right by adverse possession to the mines and minerals in suit, especially those in the lands specified in schedule II of the plaint.

The Subordinate Judge decreed the suit, holding among other things that the disputed tenure was a zamindary ghatwali tenure, that it was not inalienable, that the plaintiff had been in possession of the property since he purchased it in 1903 until the order of the District Magistrate made in 1938, that the plaintiff as the proprietor of the Mahal was entitled to the mineral and subsoil rights and that under the mortgage-sale only the surface right had passed to the plaintiff. The findings of the Subordinate Judge were substantially upheld on appeal by the High Court, with this modification that, while agreeing with the Subordinate Judge that the subsoil rights remained with the proprietor, the High Court also held that even if the defendant No. 1 was assumed to have had the subsoil rights, those rights passed at the mortgage-sale of 1903 and therefore in any event the plaintiff was the real owner of the subsoil. On the plea of adverse possession raised in defence, the finding of the High Court was that there was no clear evidence that any mine was worked on behalf of the lessees of defendant No. 1 and that at the utmost the evidence adduced in the case showed that there had been some isolated acts of possession during recent years, probably since 1935 onwards, and therefore the plea could not be upheld.

The two main points urged on behalf of the appellant in this appeal are :—

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(1) that the finding of the courts below that the ghatwali tenure held by the defendants first party was a zamindary ghatwali and not a Government ghatwali, could not be sustained and that in fact it was a Government ghatwali and therefore the property was inalienable and no title passed to the plaintiff; and

(2) that in any event, the plaintiff's suit was barred by limitation under articles 142 and 144 of the Limitation Act.

The first point does not appear to us to be free from difficulty, and since its determination depends upon the proper construction of several old documents, we heard the parties at considerable length, notwithstanding the fact that the courts below have concurrently found that the tenure in question is not a government ghatwali. Before dealing with the merits of the controversy between the parties, it is necessary to understand what is meant by a "ghatwal" and what is a ghatwali tenure, and for the purpose of correctly apprehending what these expressions stand for, it is sufficient in our opinion to quote the following passage from the decision of the Patna High Court in *Rani Sonabati Kumari* v. *Raja Kirtyanand Singh*(1), in which the subject of ghatwali tenures has been very elaborately discussed :—

"Literally a ghatwal means a guard of the passes and the term 'ghatwali tenure' was applied by the Moghuls to lands assigned at a low rent or free of rent for guarding the mountain passes and protecting the villages near the hills from the depredations of lawless hill tribes. These ghatwali tenures are to be found for the most part on the western frontier of Bengal and particularly in the areas known as Kharagdiha, Gidhaur, Birbhum, Kharagpur, Bhagalpur, and the Santal Parganas. The ghatwals varied in rank and the incidents of their tenure varied in different places. In some cases they were owners of large estates, some of these estates being more or less of the nature of semi-military colonies.....In some cases the

(1) I.L.R. 14 Patna 70

ghatwalis were created directly by the ruling power, while in other cases they were created by the landlords or zamindars for the purpose of protecting their zamindary and tenantry and to enable them to have a small force at their command and to discharge the obligations they owed to the ruling power. Sometimes the owners of large ghatwali estates subdivided and re-granted the lands to other tenants who besides paying small rents held their lands on condition of rendering certain quasi police and military services and providing a specified number of armed men to fulfil the requirements of the Government or of the zamindar as the case might be."

A Government ghatwali is thus a tenure created by the ruling power in favour of a person who is required to render ghatwali services to it, whereas a zamindary ghatwali is a tenure created by a zamindar for ghatwali services to be rendered to him. It is quite plain that the reason why the appellant is anxious to establish that the tenancy is a Government ghatwali is that a Government ghatwali has been uniformly held to be inalienable. On the other hand, a zamindary ghatwali may be alienated with the consent of the zamindar, and, where local custom permits, even without his consent. From the reports of cases relating to zamindary ghatwalis, it appears that by the passage of time the consent of the zamindar has ceased to be a matter of much significance, and is generally presumed when it is found that the alienation has been made without any objection from the zamindar. As to the extent of the power of alienation, the following observations of the Privy Council in *Kali Prasad* v. *Ananda Rai*(1) are pertinent :—

"When once it is established that the ghatwal had the power of alienation, as before stated, that power forms an integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer."

(1) 15 I.A. 18

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In order to determine the true character of a ghatwali tenure, it is usually necessary to refer to the grant by which the tenure was created. In the present case, the appellant relies upon exhibit C (1), which is a ghatwali sanad granted in 1776 to the ancestors of the appellant and which runs as follows :—

"Know ye the Chaudhuris, kanungoes, zamindars and mutasaddis of mauza Dumri Ghat (illegible) pargana Gidhaur, Sarkar Monghyr comprised in the province of Bihar.

The perquisites of ghatwari in all the rahdaris in mauza aforesaid, have now been granted to Kunji Singh, Jangal Singh, Ragho Singh and Manorath Singh, ghatwars of the said mauza, in accordance with what has been in vogue from old time, with effect from the commencement of 1184 fasli. It is desired that they should allow the said ghatwars to enjoy the perquisites of the ghatwari in all the rahdaris according to old customs. It will be the duty of the said ghatwars to be ever ready in discharging the duties of the post and guarding the ghats and chaukis of their elaqa by making rounds day and night. If murder, mischief, theft, highway robbery and sudden night attack be committed in their elaqa, they will be held liable therefor and will be dismissed from their post. Treat this as peremptory and act according to what is written.

Dated the 5 Ziqada of the 18th year of the August reign corresponding to 1184 Fasli.'

This sanad was granted by Captain Browne, who was deputed by the East India Company to restore order in a tract known as Jungle Terai, a vast waste and hilly country as its name signifies, lying to the south of Bhagalpur and west of Rajamahal Hills. This document was construed by a Bench of the Patna High Court in *Fulbati Kumari* v. *Maheshwari Prasad*(1), and as has been pointed out by Dawson Miller C.J. in that case,—

"It is not a grant of land but an authority to the persons named to collect as formerly ghatwari or

(1) A.I.R. 1923 Patna 453

ghatwali fees or tolls from those using the roads and passes which the ghatwals undertook to protect."

When we compare this sanad with other ghatwali sanads granted by Captain Browne, some of which are found discussed in reported cases, the contrast becomes very marked. In some of the other documents—for example in the document which was the subject of the decision of the Privy Council in Narayan Singh v. *Niranjan Chakravarti*(1), and of the Patna High Court in *Rani Sonabati Kumari* v. *Raja Kirtyanand Singh*(2) the grant was in respect of a very extensive area of land and there were also words used to indicate that the services were to be rendered directly to the ruling power. The mere fact, therefore, that the sanad in this case was granted by Captain Browne cannot be held to be decisive of the nature of the tenure, because it seems to have been part of the duties assigned to him to confirm and recognise old titles. As was pointed out by Dawson Miller C.J., the sanad should be read along with the record of certain proceedings before the Dewani Adalat of Ramgarh, which show that a tenancy comprising 8 annas in mauza Dumri was granted by the zamindar of Gidhaur to 2 persons, one of whom was the ghatwal mentioned in Captain Browne's sanad, with the sanction of Captain Browne. In the present case, a document of 1798, which was the proceeding of the original court and which was before the learned judges who decided *Fulbati's* case(3) has not been produced, but we have before us a judgment dated the 18th March, 1799, of the appellate court in the same proceeding. This judgment recites that the case of the ghatwals was that they had been for 3 generations in possession of half of village Dumri, but in the year 1187 fasli (1780 A.D.) the zaminar of Gidhaur wanted to raise "revenue" or rent but they refused to accept a new patta or kabuliyat at an enhanced rent. Subsequently, the court ordered the zamindar to grant a patta, but the zamindar did not do so and forcibly dispossessed the ghatwals. They thereupon prayed that

(1) 51 I.A. 37

(2) I.L.R. 14 Patna 70

(3) A.I.R. 1923 Patna 453

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the zamindar may be ordered to grant them a patta and receive the kabuliyat at the old rent. The appellate court, to which the zamindar had appealed, upheld the decree of the first court ordering the patta to be granted. This document shows firstly that the ghatwali tenure in respect of half of Dumri had been in existence for 3 generations prior to 1789, *i.e.,* it must have come into existence long before Captain Browne's sanad, and secondly that it was held under the zamindar; otherwise, it was not necessary that the zamindar should grant a patta and the ghatwal should execute a kabuliyat in his favour.

We have also before us a document (exhibit 1) which is a report of one Khadim Muhammad Ataullah, an employee of the East India Company, incorporating certain statements made by the then zamindars of Gidhaur showing that they had been in possession of the zamindary for nearly 700 years and that "the milkiat zamindary, Chaudhri and Kanungoi of the pargana .....had all along been in their possession." This document shows that Gidhaur was an ancient zamindary and the zamindar also performed the functions of chaudhri and kanungoi. The last mentioned point is of some significance, because the sanad of Captain Browne was addressed to chaudhris, kanungos, etc.

In the case of *Fulbati Kumari*(1), to which reference has been made, there was an extract quoted from the Bengal District Gazetteer, volume XVII, at page 168, which runs as follows :—

"About 1774 the lawless state of this tract led the British to place it in charge of Captain James Browne, who settled the estates with the ghatwals with two exceptions. These two exceptions were Dumri and Mahesri which were settled directly with the proprietors, the story being that the ghatwal tenure holders fled at the approach of Captain Browne their reputation as dacoits and brigands being too strong for them to face a Government officer without fear of the consequences. In the case of Dumri however, the

(1) A.I.R. 1923 Patna 453

ghatwals finding that in their absence a settlement had been made of their tenure, returned and obtained a sanad settling it with them under the Raja of Gidhaur. Of the estates settled with ghatwals only two or now held by their descendants, *viz.,* Tilwa and Kewal. The others have passed into the hands of the Maharaja of Gidhaur, Chetru Rai, Akleswar Prasad and others of Rohini."

The statement in the District Gazetteer is not necessarily conclusive, but the Gazetteer is an official document of some value, as it is compiled by experienced officials with great care after obtaining the facts from official records. As Dawson Miller C.J. has pointed out in *Fulbati's case*(1), there are a few inaccuracies in the latter part of the statement quoted above, but so far as the earlier part of it is concerned, it seems to derive considerable support from the documents to which reference has been made.

The counsel for the appellant greatly relied on the fact that Dumri ghatwali is mentioned in Captain Browne's "India Tracts" as one of the ghatwalis placed under the Collector of Jungle Terrai districts. It appears that this point was not raised before any of the courts below, nor was Captain Browne's treatise placed before them. There is thus considerable force in the objection raised on behalf of the respondent that he has not had sufficient opportunity to study the matter and place relevant materials before this court to enable it to determine what meaning and value should be attached to Captain Browne's statement. But apart from this objection, it seems to us on the evidence as it stands, that the inference sought to be drawn from Captain Browne's statement is not fully justified for the following reasons :—

1. The mere fact that the ghatwali was shown to be under the Collector cannot alter the character of the ghatwali, *i.e.,* if it was a zamindary ghatwali, it could not become a Government ghatwali merely because it was stated to be under the Collector.

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2. As Collector of Jungle Terrai districts, Captain Browne appears to have had control not only over the ghatwals but also over the zamindars within the area administered by him.

3. The observations made by Captain Browne with regard to the Jungle Terrai ghatwals and their relation to the zamindar hardly support the view urged on behalf of the appellant.

Referring to the Jungle Terrai ghatwalis, Captain Browne states in his book as follows :—

"All the Jungle Terry gautwalls were formerly subject to the several Rajahs, to whose territories their Gautwallies belonged; they paid a slight tribute in token of feodal obedience, and were bound to oppose all invasions (principally from the south) to attend their Rajahs when summoned, with all their followers in arms, and to be responsible for every violence and irregularity committed in their respective boundaries :— their followers are still bound by the same feodal ties to them, and have lands for feodal services ; nothing can be conceived more absolute than the authority of these chiefs over their vassals ; the fear of death even, when seized on in war, is not sufficient to force from them the discovery of any secret respecting their chief, his family, or property."

Again, Captain Browne's description of the zamindar of Gidhaur is to the following effect :—

"The Raja of Guidore was formerly of great extent, but the conquests made from it by the Rajah of Bierboom and Comgar Cawn, and the independency which these wars gave the Gautwalls an opportunity of assuming, have reduced the present Rajahs Gopal Singh, and Durrup Singh, to follow an ebb, that they can scarcely recover sufficient consequence to be of any political weight whatever."

On the whole, it appears that the ghatwals of Dumri were hardly men of such consequence as to break off from the zamindar and set themselves up as independent chiefs.

There are two other items of evidence which seem to have an important bearing on the question. In the first place, the appellant's tenure was included within the Gidhaur zamindary in the Permanent Settlement, and secondly, it is shown in the Record of Rights as istemrari mokrari tenure under the zemindar of Gidhaur. In the case of *Raja Lelanund Singh Bahadoor* v. *The Bengal Government*(1) where the Government set up a claim to resume the ghatwali in the zamindary of Khuruckpore for the purpose of revenue assessment, the claim was negatived by the Privy Council, and one of the grounds upon which the decision was based was that the ghatwali lands were part of the zamindary and were included in the Permanent Settlement of the zamindar and were covered by the jama assessed on that zamindary. There can be no doubt that *prima facie* the fact that the tenure was included in the Permanent Settlement of the zamindar and under that Settlement the ghatwal had to pay rent to the zamindar raises a presumption that the ghatwali was in some way connected with the zamindar, but it must be recognized that the permanent settlement of the land "would not affect the nature of the tenancy upon which the lands were held, nor can it convert the services which were public into private services under the zamindar": [vide *Raja Nilmoni Singh* v. *Bakranath Singh*(2)]. There are several reported cases which furnish instances in which the properties of persons who were Government ghatwals were included in the zamindary of other persons, but where no clear evidence is forthcoming as to the true character of the ghatwali, the fact that the tenure is included within a zamindary and is covered by the jama assessed upon it should turn the scale in favour of the party who alleges that it is a tenure which is dependent upon the zamindary. In this case, the presumption arising under the Permanent Settlement is reinforced by the entry in the record of Rights which shows that the tenure in question is istemrari mokrari held under the Zamindar.

(1) 6 Moore's I.A. 101 (2) 9 I. A. 104

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The learned counsel for the appellant relied upon exhibits N and N-1 and certain rent receipts granted by the zamindar to show the appellant's independent title, but, in our opinion, these documents do not help him much. Exhibit N is a notice issued to an ancestor of the appellant in 1859 by an official whose signature on the document is not legible. It refers to a report of the sub-inspector of thana Chakai stating that "the sautars (bad characters) are in their places of residence and no riots or disturbances are taking place", and directs the ghatwali to prepare a list of the sautars of his ilaqa and file it before the officer-in-charge of the thana. Exhibit N-1 is a similar notice, but it is incomplete and bears no indication as to who issued it. It recites a report of a police sub-inspector stating that owing to failure of crops there were burglaries and thefts and recommends that the zamindars of the ilaqa should be directed to "look after the occurrences and keep eyes over the bad characters and mischief makers so that occurrences may be stopped". These documents do not necessarily show that the appellant is a Government gatwal. It was not unusual in old days to issue notices like those referred to, to the zamindars of the ilaqa, as exhibit N-1 itself shows, and the mere fact that the person to whom the notice was issued was described as a ghatwal does not show that he was addressed in the capacity of a Government ghatwal and not as a zamindari ghatwal.

The next item of evidence upon which the appellant tried to rely consists of certain rent receipts and road cess receipts, but these also do not help him, seeing that they contain, among other things, a statement that the tenure with regard to which the receipts were granted, appertained to the proprietary zamindary of Gidhaur.

This brief review of the evidence is sufficient to show that the appellant has not been able by clear and conclusive evidence to rebut the presumption arising from the Record of Rights and the record of the Permanent Settlement, and he has failed to establish his claim that the tenure in question is Government ghatwali. It

may be incidentally mentioned that in the mortgage suit which preceded this litigation, there was no allegation by way of defence that the ghatwali was not alienable, and though the point was raised in the execution proceedings it was decided against the appellant by the court of first instance and was abandoned on appeal. In these circumstances, we see no reason to disturb the concurrent finding of the courts below which have dealt with the matter with great care.

Passing now to the second point raised in this appeal, we find that there are concurrent findings of both the courts below against the defendants on the plea of adverse possession. In arriving at this findings, the courts below have fully discussed the evidence and given cogent reasons in support of their conclusions. This court is usually reluctant to reinvestigate matters which have been fully investigated by the courts below and on which there are concurrent findings. In the present case, the appellant has failed to show to us any exceptional circumstances to induce us to depart from the sound and well established practice, and in this view the findings of the court below must be accepted.

It was however contended that in any event the plaintiff's suit is barred under article 142 of the Limitation Act inasmuch as it was incumbent on the plaintiff to prove that he had been in possession of the disputed lands, especially those mentioned in schedule II of the plaint, within 12 years of the suit, but he had failed to do so. In our opinion, this plea must be negatived. The trial judge in his judgment came to a very clear finding in these words :—

"The story of possession and dispossession as put forth in the plaint must be believed, because, as I have already said there is overwhelming evidence in this case to prove the possession of the plaintiff over the surface as well as the subsoil."

The finding of the Subordinate Judge does not appear to have been challenged before the High Court, and though no less than 16 reasons have been given in

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the statement of case filed in this court on behalf of the appellant, it has not been stated that there is no evidence to show that the plaintiff was in possession of the disputed land or the land mentioned in schedule II within 12 years of the suit.

Thus both the points urged in this appeal fail. There can be no doubt that the entire tenure has passed to the plaintiff by the sale, but, apart from this fact, it is well-settled that a zamindar is presumed to be the owner of the underground rights in the tenancies created by him in the absence of evidence that he ever parted with them: [See *Hari Narayan Singh* v. *Sriram Chakravarthi*(1) and *Durga Prasad Singh* v. *Braja Nath Bose*(2)].

The result is that this appeal fails, and it is dismissed with costs.

Appeal dismissed.

Agent for the appellant: *R. R. Biswas.*

Agent for the respondent: *R. C. Prasad.*

BISHUNDEO NARAIN AND ANOTHER

v.

SEOGENI RAI AND JAGERNATH

[SHRI HARILAL KANIA C. J., PATANJALI SASTRI, MEHAR CHAND MAHAJAN, S. R. DAS and VIVIAN BOSE JJ.]

Civil Procedure Code (Act V of 1908), O. 32, r. 7—Suit for partition to which minor is party—Compromise by guardian—Sanction of Court not obtained before entering into agreement—Validity of decree—Suit by minor to set aside decree—Mere unfairness of division, effect of.

Where a Court has sanctioned an agreement or compromise in a suit to which a minor is a party after satisfying itself that it is for the minor's benefit, the decree based on the agreement or compromise cannot be held to be invalid or not binding on the minor merely because the sanction of the Court was not obtained by the next friend or guardian before he began to negotiate for the agreement or compromise.

(1) 37 I.A. 136 (2) 39 I.A. 133