1976
Febr. 13
—
KIKI GEORGHIOU I. IKOSI AND OTHERS
v.
IRENOULLA A. CONSTANTINIDES,

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

KIKI GEORGHIOU I. IKOSI AND OTHERS,
Appellants-Plaintiffs,

v.

IRENOULLA A. CONSTANTINIDES,
Respondent-Defendant.

(*Civil Appeal No.* 5330).

Infant—Compromise—Not sanctioned by Court—Benefit of infant—No express finding that compromise was to the benefit of the infant—Compromise not binding on the infant.

Compromise—Infant.

The appellants-plaintiffs in these proceedings sought to set aside a compromise, reached between the same parties in an action which had been brought against them by the present respondent-defendant, on the ground that the said compromise was to the detriment of one of them who was an infant.

The compromise in question (quoted in full in the judgment at pp. 66–68 *post*) was reached in an action for trespass and was recorded by the Court in the presence of counsel for the parties and in the presence of the mother of the infant who was also a party to those proceedings.

The Court below dismissed plaintiffs' action having come to the conclusion that all the defendants in the former action were duly represented by their parents; and that the compromise was reached in the presence of their parents, their architect and their counsel; and that what was required in law was that it was sufficient that the compromise was not to the detriment of the infant.

Counsel for the appellants contended:

(a) That the trial Judge was wrong in dismissing their action in that he failed to apply the law relating to contracts by infants and ought to have set aside the compromise because in effect it disposed of property belonging to the infant;

(b) that a guardian had no power to consent without an order of the Court to that effect;

(c) that the compromise was not to the benefit of the infant and that the Court did not sanction it.

Held, (1) the compromise of an action to which an infant is a party, and which affects his interest, cannot be effected without the sanction of the Court, in which the action is pending. (See pp. 71–74 *post*).

(2) The finding of the Court below to the effect that what was required in law was that it was sufficient that the compromise was not to the detriment of the infant, is wrong, because that was not sufficient in law, and unless a finding was expressly made that the compromise reached was to the benefit of the infant, that compromise is not binding on the infant.

(3) We would reverse the judgment of the trial Judge, set aside the compromise, once it was not sanctioned by the trial Judge in the previous action, allow the appeal so far as the infant is concerned, and dismiss it with regard to the remaining appellants-plaintiffs.

Appeal partly allowed.

Cases referred to:

Papadopoullou v. *Polycarpou* (1968) 1 C.L.R. 352;

Duncan v. *Dixon* [1890] 44 Ch. D. 211 at p. 213;

Nash v. *Inman* [1908] 2 K.B. 1 at pp. 11 and 12;

Geilinger v. *Gibbs* [1897] 1 Ch. 479 at p. 482;

Murray v. *Sitwell* [1902] W.N. 119;

Re Berry v. *Berry* [1903] W.N. 125;

Arabian v. *Tuffnall and Taylor, Ltd.* [1944] 2 All E.R. 317;

Re Birchall, Wilson v. *Birchall*, 16 Ch. D. 41;

Re Taylor's Application [1972] 2 All E.R. 873;

Re Whittall [1973] 3 All E.R. 35;

Rhodes v. *Swithenbank* [1889] 22 Q.B.D. 577;

Chapman and Others v. *Chapman and Others* [1954] 1 All E.R. 798 at p. 802;

Re Wells Boyer v. *MacLean* [1903] 1 Ch. D. 848.

Appeal.

Appeal by plaintiffs against the judgment of the District

Court of Nicosia (Papadopoulos, S.D.J.) dated the 29th May, 1974, (Action No. 5189/73) whereby the Court refused to set aside a compromise reached between the same parties in another action (Action No. 2762/73).

Chr. Chrysanthou, for the appellants.

E. Tavernaris, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:-

HADJIANASTASSIOU, J.: This is an appeal by the plaintiffs from the judgment of a Judge of the District Court of Nicosia dated 29th May, 1974, in Action No. 5189/73, whereby the Court refused to set aside the compromise reached between the same parties in Action No. 2762/73, on the ground that the said compromise was not to the detriment of either the infant Gloria G. Ikosi, or, indeed, anyone else who was not present during the settlement.

The case in hand was brought in the District Court of Nicosia by Kiki and Maria G. I. Ikosi through their lawful agent and mother, Margarita G. Ikosi, and Gloria, a girl under 17 years of age, suing by her next friend, her father, Georghios Iacovou Ikosi, seeking an order to set aside the aforesaid compromise on the grounds of improper representation, absence of consent, and that once plaintiff No. 3 was an infant, the compromise reached was not to her interest; and because the Court has failed to examine the matter and to make a finding that the said compromise was to the benefit of the infant. There was a further allegation of fraudulent conduct on behalf of the defendant, but this ground was not pursued during the trial for setting aside the compromise.

It appears that plaintiffs 1, 2 and 3 are sisters and the owners of a house in undivided shares, situated at Phaneromeni locality of Nicosia. The defendant Irenoulla D. Constantinides is the owner of a house which is near the house of the plaintiffs, and because of a dispute between them she brought an action against the present plaintiffs in 1973 on the ground that they were trespassing on her property. This action for trespass, No. 2762/73, was originally against Kiki Georghiou Iacovou Ikosi, Georghios Iacovou Ikosi and Ioannis Tsiopani, seeking an interim order to prevent the defendants from trespassing, that is to say, from demolishing part of her own wall which abuts with their house with the purpose of placing a column for the

support of their building. The application for an interim order was sworn by the plaintiff and on the same date the learned Judge, granted an interim order as per application and made it returnable on May 7, 1973.

On May 29, 1973, the plaintiff filed an application seeking an order to amend both the statement of claim and the title of the action. The application reads as follows:-

"Irenoulla A. Constantinides, of Nicosia,

Plaintiff,

and

1. Kiki Georghiou I. Ikosi, now of Athens through her lawful attorney and her mother Margarita G. Ikosi of Nicosia,

2. Maria Georghiou I. Ikosi now of America through her lawful attorney and mother Margarita Georghiou Ikosi now of Nicosia,

3. Gloria G. I. Ikosi of Nicosia minor through her father and natural guardian Georghios Iacovou Ikosi now of Rhodes,

4. Georghios Iacovou Ikosi of Nicosia now of Rhodes,

5. Ioannis Tsiopani of Nicosia,

Defendants."

In the meantime, on May 5, 1973, Mr. Efstathiou, counsel on behalf of the defendants filed the opposition which was supported by an affidavit of the same date sworn by Georghios Ikosi, and alleged that "the owners of the house did not interfere with the wall of the plaintiff and in truth what they did was done only on their wall for the purpose of completing the work started" (see para. 6 of the affidavit).

On June 27, 1973, the record of the Court reads:-

"For plaintiff: Mr. Tavernaris
For defendant: Mr. Efstathiou

Court: The Court, together with the advocates and the parties inspected the place and saw the wall which is in dispute. The application is adjourned for mention for 30.6.73."

On July 3, 1973, the Court, in order to understand further the dispute of the parties, visited again together with the counsel of the parties, the premises of the litigants and saw the wall which is in dispute in the presence of the father of the plaintiff (Andreas Constantinides), the defendant No. 4, Georghios Iacovou Ikosi, and his wife Margarita Georghiou Ikosi, the agent of defendants 1 and 2.

The record of the Court further shows that the parties present and their advocates started negotiations for an amicable settlement, and that they asked for a short adjournment for the continuation of the negotiations. Mr. M. Michaelides, the architect of the defendants, undertook in the meantime to prepare a plan showing the wall in dispute which is between the premises of the parties.

The case was adjourned, and on July 6, 1973, in the presence of the father of the plaintiff and defendant No. 4, his wife Margarita Ikosi—other defendants being absent—and Mr. Michaelides the architect, Mr. Efstathiou informed them that the architect of the defendants had prepared the plan. The record of the Court further reads that "the parties present and counsel of the litigants continued negotiations for a settlement and finally they reached a settlement, but the plaintiff being absent, they asked for an adjournment till the following day to enable the plaintiff to approve of the settlement personally".

On the following day, apparently because the plaintiff approved the compromise, his Honour Judge Pierides recorded the terms and conditions which the parties and their lawyers had agreed, and the record, reads as follows:-

"7.7.1973

Mr. Tavernaris, for the plaintiff.

Mr. Efstathiou and *Mr. HadjiDemetri*, for the defendants.

The plaintiff is present.

Margarita G. Ikosi is present.

The other defendants are absent.

Counsel for the parties agree that the architectural plan of the wall which has been prepared by Mr. Michaelides, the plaintiff's architect, be produced to the Court by consent, and that they, as well as the parties accept this as correct except for that part on which as it is marked, the ends of 12 wooden beams lean on the disputed wall, declaring and

accepting that other beams as well as other supports, such as rafters, ceiling etc. of the adjacent building of the plaintiff lean on the disputed wall and especially on Part 'B' of that wall (produced plan marked *exhibit No.* 1). After negotiations counsel for the parties and those of the parties present state that the present action has been finally settled as follows:–

1. The plaintiff agrees that the disputed wall be demolished by the defendants from letter 'A' on the public road, until its end which is marked by letter 'E' on the plan *exhibit* 1, and that they, on their own expense, reconstruct a new wall in the place of the demolished wall, which would be owned by them absolutely.

2. The reconstruction of the new wall by the defendants will be made as follows:–

(a) From letter 'A' until the last point of the disputed wall, on which there lies any kind of support of the adjacent building of the plaintiff, such as beams, rafters, ceiling or anything else. The new wall will be constructed in such a manner that a space of 8 inches width of the place where the old wall which is to be demolished is now standing, will be left free from any building and will be united with the adjacent space of the plaintiff's building, who is recognised as the sole owner thereof. Provided that the length of this part of 8 inches will start from letter 'A' and will proceed as mentioned hereinabove, except that it will not in any case proceed beside part 'B' of the disputed wall. That is this new wall will be confined within parts 'A' and 'B' of the old wall as those are marked on the plan *exh.* 1.

(b) The defendants undertake to construct, on their own expense, a concrete beam over the empty 8 inch space mentioned above, on which beam will lean any of the supports of the plaintiff's building now leaning on the disputed wall, which are mentioned in para (a) above.

(c) The plaintiff declares that she agrees and undertakes to permit the defendants, or any contractors, builders and other technicians of the defendants, to enter and be entering her building which is adjacent to the wall

for the purposes mentioned in the previous paragraphs and place in its precincts temporary supports for the roof of the plaintiff's said building and take all necessary measures, whether being of construction or any other technical nature, for the protection of the plaintiff's building, being liable for any damage or injury which they may cause to the plaintiff's building during the execution of the works mentioned in the preceding paragraphs of the present settlement.

(d) The defendants undertake that after the completion of the new wall they will restore the plaintiff's adjacent building to its previous good condition, including its floor and the view of the new wall on the side of the plaintiff's building.

(e) The completion of the works mentioned in the preceding paragraphs will be made by the defendants not later than the 31st July, 1973.

2. The whole of the remaining space of the disputed wall up to letter 'E' after its demolition will be owned by the defendants absolutely who are entitled to build on it a wall of their own choice of any height permitted by the appropriate authority which wall will be the absolute property of the defendants as a part of their building adjacent to it, the plaintiff not being entitled to build and/or support on it or over it any building or anything else.

3. The defendants in return for the above undertake to pay the plaintiff the sum of £150.

4. The defendants undertake to pay £25 for the plaintiff's costs.

The terms of the present settlement have been explained to the parties present who have understood and accepted them.

Court:

1. Judgment for the plaintiff for £150.– with legal interest as from today and £25 costs.

2. The remaining terms of the settlement are made a Rule of Court.

(*Sgd*) *Ch. Pierides*
Ag. D.J."

Having read the contents of the said compromise, we would observe that the learned trial Judge did not, in any way, place on record that he had considered the compromise reached as beneficial to the infant; and that he had sanctioned it before making the terms and conditions a Rule of Court. Be that as it may, it is clear that the next friend of the infant Gloria, her father, who had the sole conduct of the action, gave his consent to the compromise reached on July 6, 1973.

This judgment and order of the learned trial Judge was challenged before another Judge of the District Court, on the ground that the said compromise was not to the interest of the infant concerned. The plaintiffs, in support of their claim in action 5189/73, called Margarita Georghiou, who said that both her daughters Kiki and Maria were not represented before the trial in Action No. 2762/73 when the compromise was reached because they were abroad; and that when the settlement was made on July 7, 1973, she thought that it represented the views of the learned trial Judge only and that it was not a real compromise. She further said that because she had to obtain the consent of her daughters, she did not agree to the said compromise. Regarding the wall, the subject matter of the earlier action, she said that it belonged to them, although in the action it was not disputed. Furthermore, although she admitted that she was present when the said compromise took place, she denied that she ever appeared for her two daughters. Then, much to the surprise of the learned Judge, this witness said that after the demolition of certain part of the wall referred to in the compromise, she realized that the other side was trespassing on their land, a fact which she did not know or was aware of on the date of the alleged compromise. She further said that had she known about it, she would not have consented to the compromise or have accepted the suggestion put forward.

Finally, apparently in view of her own discovery, she said that the said compromise was to the detriment of her daughter because they ceded part of their property to the present defendant. In cross-examination, she admitted that an interim order was issued against them, prohibiting them from trespassing on the wall of the defendant. In our view, this evidence was rightly rejected by the learned trial Judge, as no Court of law could have given any credence to all those contradictions once there was evidence that she consented to the said compromise and that this was an afterthought.

Then, the infant Gloria, 17 years of age, was called to give evidence and said that although she was informed of the compromise, she asked the Court to set it aside because she did not give her consent once she thought that it was not to her interest as she believed that the disputed wall was her own property. Finally, she said that the said compromise was not to her interest and, in any event, she added, that she did not want the compromise.

We think it is necessary to state, before dealing with the contentions of counsel, that under the law an infant does not possess full legal competence. Since the infant is regarded as of immature intellect and imperfect discretion, the law, while treating all the acts of an infant which are for his benefit on the same footing as those of an adult, will carefully protect his interests and not permit him to be prejudiced by anything to his disadvantage. This statement of the law has been accepted since a long time ago, because an infant, owing to his want of judgment and capacity, is disabled from binding himself, except where, we repeat, it is for his own benefit. (See *Anthoulla Papadopoulou* v. *Xenophon Polycarpou*, (1968) 1 C.L.R. 352).

In Halsbury's Laws of England 3rd Edn. Vol. 21 page 138 para. 310, it is stated that the position of an infant under the common law is that "in accordance with the principle that an infant is of immature intelligence and discretion, an infant's contracts are at common law generally voidable". (*Duncan* v. *Dixon*, [1890] 44 Ch. D. 211, at p. 213; *Nash* v. *Inman*, [1908] 2 K.B. 1, at p. 11 and 12). The above it is apprehended, is a correct statement of the common law. It has, however, been frequently stated that the contracts of infants were at common law void. (See Halsbury's Laws of England 3rd edn. Vol. 21 page 138 para. 310). See also *Papadopoullou* v. *Polycarpou* (*supra*) at p. 382, where the Court said that a contract of an infant was void under the law as it existed before the amendment was made to s. 11 in 1956. We would reiterate that the contracts of an infant are generally voidable at the instance of the infant, though binding upon the other party. There are, of course, exceptions to this rule, but we need not refer to them in this judgment.

Reverting now to the case in hand, it appears that the learned trial Judge, having considered the effect of the compromise reached before another Judge, the evidence adduced before him, and the contentions of counsel, came to the conclusion (1) that

all the defendants were duly represented by Margarita Ikosi and Georghios Iacovou Ikosi (the next friend and father of the infant); (2) that in the presence of the parents of the defendants 1, 2 and 3, their architect Mr. Michaelides and their two counsel, they reached a compromise on July 6, 1973, but because the plaintiff was not present (her father only was attending) the case was adjourned to July 7, 1973, to enable her to approve of that compromise; and (3) that on the following day, July 7, 1973, the plaintiff was present and all defendants were represented by their mother and the two counsel, and the compromise was also approved by the plaintiff.

The learned Judge then added that having regard to his observations, he came to the conclusion, and he had no doubt, that the said compromise could not be set aside, once he was not convinced by any point raised that the said compromise could be set aside. He finally said that in his view it was obvious that both the advocates of the defendants as well as the Court, were convinced with the help of the expert that the compromise was a just one and was not to the detriment of the infant or of any other one who was absent. In conclusion the learned trial Judge dismissed the action of the plaintiffs, because as he put it, he had in mind the law and generally the legal principles relating to the infant litigants and the setting aside of compromises reached.

The main complaint of counsel in this appeal was that the trial Judge was wrong in dismissing the action of the appellants-plaintiffs because he failed to apply the law relating to contracts of infants, and ought to have set aside the compromise reached on July 7, 1973, because, in effect, the settlement was to dispose of property belonging to the infant; and that a guardian had no power to consent without an order of the Court to that effect. Furthermore, counsel argued that the compromise reached was not to the benefit of the infant and that the Court did not sanction it.

Subject to special rules of procedure, an infant can sue and be sued; but he cannot in person assert his rights in a Court of law as plaintiff or applicant, nor can an infant sue in his own name or give an authority to anyone to sue in his name or ratify the acts of anyone who does so sue. (If authority is needed, the case of *Geillinger* v. *Gibbs*, [1897] 1 Ch. 479, at p. 482 provides the answer). Consequently, if an infant is to institute and carry on proceedings, he must do so by his guardian

or some other person, his next friend, and in my view, the advocate appearing in the proceedings is the advocate of the next friend and not of the infant.

The next friend does not require any authority from the infant, and the infant has no voice in his selection. Of course, the action remains the action of the infant by his next friend, not of the next friend individually. As I said, although the next friend has the conduct of the proceedings in his hands, he is not entitled to appear in the proceedings in person (*Murray* v. *Sitwell*, (1902) W.N. 119; and Re *Berry* v. *Berry*, (1903) W.N. 125).

We find it convenient to make it quite clear that an infant, in a proper case, is as much bound as an adult by a judgment or Order of the Court in a case, but as it was said in *Arabian* v. *Tuffnall and Taylor, Ltd.*, [1944] 2 All E.R. 317 by Wrottesley, J. at p. 319:-

> "It is the interposition of the Court, charged with the duty to watch over the infant's interests, that lends sanctity to a judgment for or against an infant, and binds him. In proceedings, in the High Court the matter is taken care of by a rule and order. In Workmen's Compensation cases the same matter is taken care of by the provisions of sect. 25 of the 1925 Act; but nowhere is there anything to enable the county Court, still less to compel it, to investigate the question whether it is in the infant's interest that his rights at common law should be put an end to by a recorded agreement. Until some such provision is made, I must give the infant the benefit of the general law, if I can without manifest injustice."

Furthermore, in *Re Birchall, Wilson* v. *Birchall*, 16 Ch. D. 41, it was said that the Court will only sanction a compromise if it appears to be beneficial to the infant. Jessel, M.R. delivering his judgment with which both James and Cotton, L.JJ. concurred, said (at p. 43):-

> "In my opinion the course which has been taken in this case is quite unprecedented. The Court can approve of a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers. The practice followed by myself, and by Lord Romilly before me, at the Rolls, has been to require not only that the

compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so. If the opinion given is only that of the junior counsel and there is a leader, I ask the leader in Court whether he agrees with the junior's opinion, and this was also Lord Romilly's practice. This is the first time that I have known a compromise enforced upon infants against the opinion of their guardian or next friend and of their legal advisers, and I am of opinion that the orders cannot be sustained. The respondent can hardly be considered to be in fault, as she only took what was offered by the Court, and we, therefore, do not order her to pay costs".

This case was applied in *Re Taylor's Application*, [1972] 2 All E.R. 873, but it was distinguished in *Re Whittall*, [1973] 3 All E.R. 35.

In *Rhodes* v. *Swithenbank*, [1889] 22 Q.B.D. 577, the plaintiff, an infant, brought an action by her next friend in the county Court to recover damage for personal injuries sustained by her through the alleged negligence of the defendant. At the trial a judgment of nonsuit was pronounced, and it was suggested that if there was no appeal the defendant would not ask for costs. The plaintiff's counsel agreed to this, and the judgment was entered without costs. The plaintiff was without means. On an application on her behalf for a new trial, the case came on for hearing in the Divisional Court before Denman and Hawkins, JJ., who were of opinion that the undertaking was binding on the plaintiff. They accordingly dismissed the appeal, but gave leave to appeal to the Court of Appeal. Lord Esher, M.R., had this to say at p. 578:-

"This is an action by an infant by means of her next friend, who undoubtedly has the conduct of the action in his hands. If, however, the next friend does anything in the action beyond the mere conduct of it, whatever is so done must be for the benefit of the infant, and if, in the opinion of the Court it is not so, the infant is not bound. In the present case the waiver of the right to appeal was a matter beyond the ordinary conduct of the action, and the question therefore arises whether it was for the benefit of the infant. It seems to me that it could not possibly be so. The

position of the infant is such that no costs can be recovered from her either directly or indirectly, for she has no estate, and is apparently disabled for life. The next friend, therefore, alone is liable for costs, and he alone can gain by the compromise, while the right of appeal which was given up might possibly be of the greatest value to the infant. The compromise was no doubt entered into in all fairness, but it was not in my opinion for the benefit of the infant and cannot be binding on her, and did not prevent the prosecution of the appeal in the Divisional Court".

In *Chapman and Others* v. *Chapman and Others*, [1954] 1 All E.R. 798, at p. 802, it was said that the Court had full power to sanction such compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem.

In *Re Wells Boyer* v. *MacLean*, [1903] 1 Ch. D. 848, Farwell, J., after stating that the Court had jurisdiction to approve a scheme on behalf of the infants because it was to their benefit, said at p. 856:–

> "The result is I will sanction the arrangement, which seems to me to be a thoroughly beneficial one, subject to the qualifications I have mentioned".

Having reviewed the authorities and the principles formulated in England, we think that the authorities in question clearly show that the compromise of an action, to which an infant is a party, and which affects his interest, cannot be effected without the sanction of the Court, in which an action is pending.

The next question, therefore, is whether in exercising this power the Court has considered whether or not the compromise is beneficial to the infant. In order to answer this question, it is necessary to state that all the adults having the same interest in the result of the action, and their advocates, have consented to the compromise and, therefore, the trial Court, in our view, had full power to sanction such a compromise, once there was a real dispute as to the rights, and to bind the infant to the bargain by order of the Court.

Although no finding was made by the learned trial Judge that the compromise reached in Action No. 2762/73 was in fact and in law sanctioned or ratified, nevertheless, he misdirected himself because he thought that what was required in law was

that it was sufficient that the compromise was not to the detriment of the infant, and refused to set it aside.

As we said earlier, reading carefully the authorities, we have no doubt at all that the finding of the trial Court in the case in hand is wrong, because that was not sufficient in law, and unless a finding was expressly made that the compromise reached was to the benefit of the infant, that compromise is not binding on the infant and, therefore, we would accept the submission of counsel that the learned trial Judge misdirected himself once he failed to make a finding that the compromise was to the benefit of the infant.

We would, therefore, reverse the judgment of the trial Judge in the case in hand, set aside the compromise, once it was not sanctioned by the trial Judge in Action No. 2762/73, and allow the appeal so far as the infant is concerned, dismiss the appeal with regard to the remaining appellants-plaintiffs, but with no order as to costs in the Court below and in this Court.

Appeal partly allowed.
No order as to costs.