1928 *Present :* Garvin and Drieberg JJ.

SEGU MADAR *v.* HOWUMMA *et al.*

*40—D. C. (Inty.) Kurunegala, 2,707.*

*Muslim widow—Minor—Compromise by guardian* ad litem—*Testamentary case—No leave of Court—Civil Procedure Code, s. 502.*

Where the guardian *ad litem* of a Muslim widow, who was under age entered into a compromise on her behalf without the special leave of Court,—

*Held,* that the compromise was not binding on her, although she had given her assent to it.

APPEAL from an order of the District Judge of Kurunegala. The facts appear from the judgment.

May 23, 1928. DRIEBERG J.—

This is an appeal by the appellant from an order made on an application for the judicial settlement of the estate of Thanga Udayar, deceased. The parties are wrongly described in the petition for judicial settlement which was by the respondent to this appeal. I shall therefore refer to the parties by the position they hold in the application for administration by the present appellant. In that the appellant was the petitioner, the present respondent was the first respondent, and her father was the second respondent.

The appellant, who is the father of the deceased, applied for administrati on on September 22, 1924, alleging that the first respondent, the widow of the deceased, was a minor under twenty-one years of age and that her father, the second respondent, was a proper person to be appointed guardian *ad litem* over her. The second respondent is not an heir of the deceased.

The appellant stated that the fourth respondent was a minor and that the third respondent was a proper person to be appointed guardian *ad litem* over her. The third respondent is a sister and the fourth respondent is a brother of the intestate.

On the same day the Court issued to the respondents a citation requiring them to produce to Court all title deeds and securities of the deceased on October 28. On the same day it issued a decree *nisi* declaring the appellant entitled to letters unless cause was shown to the contrary on or before October 28, and in this notice it appointed the second respondent guardian *ad litem* over the first respondent and the third respondent guardian *ad litem* over the fourth respondent. There is nothing to show that the first and second respondents or the third and fourth respondents were before the Court when this order was made, and the procedure is irregular. Section 493 of the Code requires an application for such an appointment to be by summary procedure. On October 28, 1924, Messrs. Gomis & Jayasundere filed proxy of the first respondent who claimed to be entitled to grant of administration and the inquiry was fixed for November 11 following. On October 28 all the respondents were present, but the attention of the Court was not drawn to the fact that the second respondent had previously been appointed guardian *ad litem* and no proxy was filed by the second respondent.

On November 11, 1924, a written consent to a settlement was submitted. It provided for the appellant being appointed administrator, the first respondent was to take for her share a certain house and a field and was to renounce her claim to a share in the other lands, and the description of one land in the schedule was to be amended. It was also agreed that certain persons not named in the petition for administration should be added as respondents and heirs of the intestate. These were four children of Assanath Umma, deceased, a sister of the intestate, but this does not seem to have been done, and I can find no further reference to them in the proceedings. The settlement was submitted, signed by the appellant and his proctor, by the second respondent as guardian *ad litem* of the first respondent, and by Messrs. Gomis & Jayasundere as proctors for the ffirst and second respondents. There is a note that on December 22 the first respondent signed the consent motion and that it was explained to her by the Interpreter Mudaliyar. On February 26, 1925, it was signed by the third and fourth respondents.

On July 8, 1927, the first respondent applied for a judicial settlement. She alleged that she was a minor at the time of the administration case and that her guardian *ad litem*, the second respondent, had since died. She also said that she had received no portion of the income of the estate and gave a list of seven lands which she said the appellant had not included in the inventory. In a supplementary affidavit she stated that she had signed the settlement and that she was not bound by it as it had been entered into without the special authority of the Court.

1928.

DRIEBERG J.

*Segu Madar v. Howumma*

Now, the first respondent being a Muslim did not acquire majority by marriage, but by section 502 of the Civil Procedure Code she is a major for the purposes of Chapter XXXV., and therefore she could sue or be sued without representation by a next friend or a guardian *ad litem*. It was contended for the appellant that, she being a person of full age and capacity for the purposes of the proceedings in Court, the consent which she gave in person to the settlement was binding on her and that it was not open to her to question the regularity of the compromise made on her behalf by her guardian *ad litem*. The learned District Judge held that the settlement was not binding on her and allowed the application for a judicial settlement. The appellant appeals from this order.

The compromise regarded as one made by a guardian *ad litem* on behalf of a minor is clearly irregular.

Our Code does not provide, as the Indian Code now does, Order 32, rule 7 (1), that the leave of the Court should be expressly recorded in the proceedings. This addition to the Indian Code, however, merely gave effect to the practice previously existing, and here special leave to enter into a settlement or compromise on behalf of the minor, distinct from the general sanction applied for by all the parties, has always been insisted on (*Silindu v. Akura*,[1] *Bandara v. Elapata*[2]). There is nothing in the record to indicate that the Court exercised any discretion as to the propriety of the compromise or that any material was put before it on which it could have formed an opinion whether it was for the benefit of the first respondent. The Court is not by the appointment of a guardian *ad litem* relieved completely from the duty of watching the interests of minor parties to actions. The appellant in his application for administration stated that the value of the estate was Rs. 7000. The amended inventory after the revision by the revenue authorities, which was filed eight months after the settlement, showed the value of the estate on which duty was payable as Rs. 20,011·25. This shows the danger of allowing such a compromise as this before the real value of the estate is known.

It is significant that no effect was given to the compromise by executing a conveyance to the first respondent until June 27, 1927, ten days before the first respondent applied for a judicial settlement.

If the respondent was a minor for all purposes the settlement cannot bind her for the reasons I have stated. Is she then to be bound by it because by the provisions of section 502 of the Civil Procedure Code she was competent to appear in the action without a guardian *ad litem* and because she signed the settlement ? It is clear to my mind that she is not bound by it. She was not acting as a person of full capacity, nor could the responsibility for the

[1] *(1907) 10 N. L. R. 193'.* [2] *(1922) 1 Times of Ceylon Reports 32.*

settlement attach to her when she was under the tutelage of the guardian *ad litem* with whom the Court dealt as her representative who could bind her by his action.

In my opinion the order of the learned District Judge is right. I wish to draw his attention to the application for judicial settlement. It does not state the parties to it but names as respondents " Sinna Udayarlage Howumma and others." This is indefinite and uncertain. The Court will also direct attention to the children of Assanath Umma, the deceased sister of the intestate, who, it is agreed, are heirs of the intestate but who, so far as I can see, were not brought into the proceedings though on November 11, 1926, the journal entry has a note " estate closed."

The appeal is dismissed, with costs.

GARVIN J.—I agree.

*Appeal dismissed.*