

1923.

[IN REVISION.]

Present : Jayewardene A.J.

SAYALEE v. SETUWA.

P. C.—Kandy, 9,841.

*Decisory oath—Application for maintenance for illegitimate child—Mother challenging defendant to take the oath that he did not visit her—Oath taken—Case to be tried on evidence.*

Where a mother applied for maintenance on behalf of an illegitimate child and challenged the defendant to take an oath at a temple that he did not visit her and that the child was not his, and the defendant accepted the challenge and took the oath, the Supreme Court sent the case back to be tried on evidence.

THE facts appear from the judgment.

No appearance.

August 2, 1923. JAYEWARDENE A.J.—

This is an application for maintenance by a woman on behalf of her illegitimate child. On the day of trial, the applicant challenged the respondent to take an oath at Alutnuwara dewala that he did not visit the applicant and that the child is not his. The respondent accepted the challenge and took the oath. The application was thereupon dismissed. The applicant then petitioned this Court, saying that she consented to accept the respondent's oath at the instigation of the arachchi of the village and praying that the case be re-opened. As I felt doubtful whether a maintenance case, in which an illegitimate child's interests are concerned, could be decided by a decisory oath I ordered the case to be listed for argument after notice to both parties. Neither party appeared before me.

In *Kiri Menika v. Punchirala*<sup>1</sup> I find that this Court set aside a decree based on a decisory oath taken by the defendant on the challenge of a next friend who was suing on behalf of two minors. In that case the action was about some lands. The defendants offered to take an oath in terms of the Oaths Ordinance of 1895. The next friend consented to be bound by such oath, but later moved to withdraw that consent. The Judge disallowed the motion, and the defendants took the oath. The next friend again petitioned making the same application. The Court held the minors bound by the oath and dismissed the action. The next friend appealed, and Grenier J. said :—

“The plaintiffs in this case are minors, and their interests should be jealously guarded by the Court. The case should not have been disposed of in the way it was. The action of plaintiffs' next friends was not sanctioned by the Court, and the next friends themselves appear to have petitioned the Court, soon after the reference to the decisory oath, asking the Court to order a trial of the case. It was clearly the duty of the Court to protect the interests of the minors, even if the next friends were inclined to prejudice them. The order appealed from must be set aside, and the case sent back for trial in due course.”

This Court appears to have treated the acceptance of the offer to take the oath as a compromise under section 500 of the Civil Procedure Code, which forbids a next friend from entering into any agreement or compromise with reference to the action without the leave of the Court. Implied assent of the Court to such an agreement or compromise is insufficient, but the attention of the Court must be strictly called to the fact that a minor was a party to the compromise, and the Court must expressly approve of the proposed compromise. See *Silindu v. Akura*.<sup>2</sup> Proceedings for maintenance under Ordinance No. 19 of 1889 are civil. See *Justina v. Arman*.<sup>3</sup> A mother suing for maintenance on behalf of an illegitimate child is in the position of a next friend. It has also been held that an illegitimate child is not bound by any compromise entered into between the parents, See *Janehamy v. Darlis Zoysa*.<sup>4</sup> In view of these decisions, acting in revision, I set aside the order of dismissal entered by the Magistrate and send the case back to be decided on evidence.

*Set aside.*

1923.

JAYEWAR-  
DENE A.J.

*Sayalee v.*  
*Setuwa*

<sup>1</sup> (1909) 1 *Curr. L. R.* 13.

<sup>2</sup> (1907) 10 *N. L. R.* 193.

<sup>3</sup> (1909) 1 *Curr. L. R.* 120 ; 12 *N. L. R.* 263.

<sup>4</sup> (1909) 12 *N. L. R.* 70.