

party, that is to say, the complainant of the criminal proceedings. I may point out that the order passed on the 23rd September, 1939, by the Sessions Judge has the disadvantage of leaving it open to a dispute between the parties as to whether the order actually affects the disposal of the buffalo or not, for the buffalo was to be made over to Kukur Ahir if she is in the custody or control of the lower Court or the police. It would be better for the Sessions Judge to ascertain whether the buffalo was at the date of the application in the custody or control of the lower Court or the police before passing an order so that the order eventually passed might be definite in its terms and certain in its application.

I would, therefore, make the rule absolute, set aside the order passed and direct the Sessions Judge to dispose of the matter in accordance with law.

Chatterji, J.—I entirely agree.

S. A. K.

Rule made absolute.

APPELLATE CIVIL.

Before Harries, C.J. and Dhavle, J.

AWADHESH PRASAD MISSIR

v.

WIDOW OF TRIBENI PRASAD MISSIR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 7—leave of Court, whether necessary before compromise is entered into—subsequent approval by Court, whether sufficient compliance with rule 7—guardian ad litem appointed for minor—father or karta, whether competent to compromise on behalf of minor.

* Appeal from Appellate Decree no. 558 of 1937, from a decision of Babu Kamini Kumar Banerji, Subordinate Judge, Darbhanga, dated the 30th January, 1937, affirming a decision of Babu Bijay Krishna Sarkar, Munsif of Darbhanga, dated the 18th April, 1935.

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A guardian ad litem cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court.

The terms of Order XXXII, rule 7, Code of Civil Procedure, 1908, are not complied with by merely asking the Court to approve of a compromise which has actually been entered into. The language of the rule makes it clear that the Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian ad litem to enter into the compromise.

Mariam Bibi v. Amna Bibi(1) and *Kedar Nath Sahu v. Basant Lal Sahu*(2), followed.

If a guardian ad litem has been appointed for a minor, then the karta of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian ad litem be a party to it.

The rules contained in Order XXXII make it clear that when a next friend or guardian ad litem has been appointed, he and he alone can represent the minor.

Davuluru Vijaya Ramayya v. Davuluru Venkatasuba Rao(3) and *Gurmallappa Mallappa Katti v. Mallappa Martandappa Teli*(4), followed.

Jhakhri Gope v. Phagu Mahto(5), distinguished.

Ganesha Row v. Tuljaram Row(6), referred to.

Appeal by the plaintiffs.

The case was in the first instance heard by Agarwala, J. who referred it to a Division Bench.

The facts of the case material to this report are set out in the judgment of Harries, C. J.

Dr. D. N. Mitter and *B. N. Rai*, for the appellants.

(1) I. L. R. [1937] All. 317, F. B.

(2) (1939) 20 Pat. L. T. 170.

(3) (1915) I. L. R. 39 Mad. 853.

(4) (1919) I. L. R. 44 Bom. 574.

(5) (1927) 8 Pat. L. T. 708.

(6) (1913) I. L. R. 36 Mad. 295, P. C.

Harnarayan Prasad (with him *P. Jha* and *B. K. Prasad Sinha*), for the respondents.

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HARRIES, C. J.—This is a second appeal from concurrent decrees of the Courts below dismissing the plaintiffs' claim for a declaration that a certain compromise decree was not binding upon them and for certain consequential relief.

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The facts of the case can be shortly stated as follows. One Rajendra Prasad Missir and three others instituted two suits against Ramadhikari Missir and his three sons, Ramchandra Prasad Missir, Jagdish Prasad Missir and Rameshwar Prasad Missir, and his two grandsons, Awadhesh Prasad Missir, minor son of Rameshwar Prasad Missir, and Sant Prasad Singh, minor son of Jagdish Prasad Singh. In these suits the plaintiffs sought recovery of khas possession of some lands on the allegation that they were the bakasht lands of all the maliks and that they had fallen into the plaintiffs' patti in a Civil Court partition. The defendants, on the other hand, contended that the lands were their khiraj tenures held at a fixed rent.

The trial Court and the first appellate Court accepted the contention of the defendants and held that the plaintiffs were not entitled to possession. Second appeals were preferred to this Court, and during the hearing of those appeals a compromise was arrived at between the parties. It was agreed that the lands were to be regarded as the khiraj tenures of the defendants, but the rents of the lands were to be enhanced, and the defendants submitted to decrees for arrears of rent at the enhanced rate for six years. By the compromise the parties were to bear their own costs throughout the litigation. The Bench which heard the second appeal approved of the compromise in these terms :

" We are satisfied that the terms settled between the parties are for the benefit of the minor defendants-respondents concerned."

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and a decree was passed in terms of the compromise.

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At the date of the compromise decree in this Court Awadhesh Prasad Missir and Sant Prasad Missir were minors and were represented in that litigation by one Ramasrey Prasad who was appointed guardian ad litem of the minors by an order of the Court dated the 20th of February, 1926. Ramasrey Prasad Missir was no party to this compromise, and it would appear that the learned Judges hearing the second appeal were under the impression that the two minors concerned were under the guardianship of their respective fathers. In the order-sheet of the High Court the following appears:—

"The plaintiffs in both the suits are major. The defendant no. 6, Awadhesh Prasad Missir, is minor under the guardianship of his father Rameshwar Prasad Missir, the defendant no. 4, and defendant no. 7 Sant Prasad Missir is minor under the guardianship of his father Jagdish Prasad Missir, the defendant no. 3. One of the defendants Ramchandra Prasad Missir, defendant no. 2, is present in Court and has taken part in settling the terms of the compromise."

From the above it is clear that this Court was not aware of the fact that the minor defendants were represented through a guardian ad litem who had no connection with the family.

On attaining majority the two minors, Awadhesh Prasad Missir and Sant Prasad Missir, brought a suit out of which this present appeal arises for a declaration that the compromise decree of the High Court in the earlier litigation was not binding upon them. They further prayed for a declaration that the defendants were not entitled to recover rent at the enhanced rate and prayed for a decree for Rs. 172-14-0. being the amount of enhanced rent which had been paid under the compromise decree. They also claimed a further sum of Rs. 644-11-0 as costs incurred by them. The plaintiffs alleged that as they were minors at the time of the compromise, the compromise decree was not binding upon them, because leave of the Court had not been obtained by their guardian ad litem to enter into the compromise. As a matter

of fact the guardian ad litem of the minors did not appear before the court and was no party to the compromise. It is common ground that the compromise was entered into between the advocates concerned in the case with the assistance of Ramchandra Prasad Missir, defendant no. 2. The advocates appearing for the adult members of the present plaintiffs' family held vakalatnamas from their respective clients; but these vakalatnamas did not in terms entitle the advocates to act on behalf of the minor.

The main defence to the present suit was that the compromise had been entered into by the adult members of the family including the karta, and it was contended that in such circumstances the compromise was binding upon the minors as it had been held by the Court to be for their benefit. The defendants contended that even where minors are represented in a suit by a guardian ad litem the karta of the family may nevertheless compromise the suit provided he is a party to it and the compromise is for the benefit of the minors.

Both the lower Courts held that the guardian ad litem of the minors was not a party to the compromise, but as the compromise was for the benefit of the minors it could be entered into by the karta and the adult members without consulting the guardian ad litem. Accordingly both the Courts held that the compromise decree was binding upon the present plaintiffs and dismissed the present suit in its entirety.

It has been argued on behalf of the appellants by Dr. Dwarka Nath Mitter that the compromise decree in the High Court could not be binding upon the plaintiffs by reason of the provisions of Order XXXII, rule 7, of the Code of Civil Procedure. That Order provides:

“(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

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(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

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It is urged that in this case no application for leave to compromise was made by the guardian ad litem and that no leave was granted by the Court to enter into the compromise. It is clear from the order of the Court that the parties first compromised and then placed the compromise before the Court and asked the latter to hold that it was for the benefit of the minors and to approve of it. The actual words used by the learned Judges were :

" We are satisfied that the terms settled between the parties are for the benefit of the minor defendants-respondents concerned."

In my judgment a guardian ad litem cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court. The terms of Order XXXII, rule 7, Code of Civil Procedure, are not complied with by merely asking the Court to approve of a compromise which has actually been entered into. The language of the rule makes it clear that the Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian ad litem to enter into the compromise. It has been strongly urged on behalf of the respondents that approving of the terms of a compromise after it has been entered into is sufficient compliance with Order XXXII, rule 7, Code of Civil Procedure; but in my judgment approving of something already done is very different from considering the terms of a proposed compromise and granting leave to a guardian ad litem to enter into such a compromise.

This matter was considered by a Full Bench of the Allahabad High Court in the case of *Mariam Bibi v. Amna Bibi*(¹). In that case it was expressly laid down that leave to enter into an agreement in a suit must be obtained before the agreement is entered into

(1) I. L. R. [1937] All. 317, F. B.

and leave cannot be given after the agreement has been concluded. A similar view was taken by a Bench of this Court in a recent case, *Kedar Nath Sahu v. Basant Lal Sahu*⁽¹⁾, and in my judgment these cases must be followed.

It has been contended, however, on behalf of the respondents that the provisions of Order XXXII, rule 7, have no application to this case. According to the respondents, the guardian ad litem was no party to the compromise and in the proceedings which terminated in the compromise the minors were represented by their fathers and their grandfather, who was the karta of the family. It is urged that the karta of a family, if he is a party to the litigation, can always represent the minors and may compromise a suit so as to bind them even when there is a guardian ad litem appointed for the minors.

In my judgment if a guardian ad litem has been appointed for a minor, then the karta of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian ad litem be a party to it. Order XXXII, rule 3, Code of Civil Procedure, requires the Court to appoint a guardian for a minor who has been made a defendant, and rule 5 of the same Order provides that

"Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit."

From this rule it is clear that if a guardian ad litem has been appointed, then no application in the suit on behalf of the minor can be made by the karta or his natural guardian. Such application must in all cases be made by the guardian ad litem. From this it follows that a natural guardian cannot compromise a suit so as to bind a minor defendant without the guardian ad litem of the latter being a party to the compromise. If a compromise is entered into, an application on behalf of all the parties must be made

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to the Court for an order in terms of the compromise, and no such application can be made on behalf of a minor defendant except by his guardian ad litem. The rules contained in Order XXXII make it clear, in my view, that where a next friend or guardian ad litem has been appointed he and he alone can represent the minors.

This matter was considered by their Lordships of the Privy Council in the case of *Ganesh Row v. Tuljaram Row*(¹). In that case a partition suit was brought by a member of the joint family and the father was made third defendant and his minor son made sixth defendant. The Court appointed the father guardian ad litem of the minor. The father compromised on behalf of himself and the minor without obtaining the leave of the Court under section 462, Code of Civil Procedure (now Order XXXII, rule 7). Their Lordships of the Privy Council reversing the decisions of the Courts in India held that the powers of the father were controlled by the provisions of section 462 of the Code, and he could not, without leave of the Court, do any act in his capacity of father, or managing member of the joint family which he was debarred from doing as guardian ad litem. To hold otherwise would be to defeat the object of the enactment. In short, it was held that if a father is appointed to act as guardian ad litem of his minor son he must observe the provisions of Order XXXII, rule 7, Code of Civil Procedure, and cannot enter into a compromise by reason of his position as father and natural guardian of the minor son. Their Lordships, however, in this case did not decide whether a father, who was a party to the suit, could compromise on behalf of his minor son, who was represented in the suit by a guardian ad litem. At page 303 Mr. Ameer Ali, who delivered the judgment of the Board, observed:—

“ The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was

(1) (1913) I. L. R. 36 Mad. 295, P. C.

also guardian ad litem for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a bona fide settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem, is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court".

The precise point came before a Bench of the Madras High Court in the case of *Davuluru Vijaya Ramayya v. Davuluru Vankatasubbarao*⁽¹⁾. In that case a father entered into a compromise on behalf of himself and his minor son, though the latter was represented by his brother as guardian ad litem. It was urged that the provisions of section 462, Code of Civil Procedure (now Order XXXII, rule 7), did not apply to the case and that the father had full powers to compromise. The Bench, however, held that the father could not enter into a compromise binding on his son where the latter was represented by a different person as guardian ad litem. At page 855 the learned Judges observed:—

"The first point argued for appellant is that as the compromise was entered into by plaintiffs' father and not by their guardian ad litem (who was their brother, the present second defendant) no

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sanction of the Court was necessary under section 462 of the old Code of Civil Procedure. Reliance is placed on *Ganesh Row v. Tuljaram Row*(¹), which, however, affords no support for such a contention. It is not denied that if plaintiffs' father had been representing the interests of his sons in Appeal no. 504 of 1907 he could not have entered into a valid compromise on their behalf without the leave of the Court so as to bind them. We cannot accept the suggestion that when he had no responsibility for them, and when their interests were entrusted to another person he should have larger powers to bind them. We have no hesitation in rejecting this contention".

The same view was taken by Heaton, J. in *Gurmallappa Mallappa Katti v. Mallappa Martandappa Teli*(²). Dealing with section 462 of the old Code, the learned Judge at page 581 observed :

" That section, I think, necessarily implies that during the continuance of proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian ad litem of the minor, and by him only with the leave of the Court".

It is to be observed that Macleod, C. J., did not go as far. At page 580 he observed :—

" My brother Heaton, however, thinks that on general principles when a minor is represented in a suit by a guardian ad litem other than the natural guardian, the powers of his natural guardian to deal with the minor's interests which are involved in those proceedings are suspended. I am not prepared to go so far as that.....". The learned Chief Justice, however, did not hold affirmatively that in such a case the father could compromise.

(1) (1918) I. L. R. 36 Mad. 295, P. C.

(2) (1919) I. L. R. 44 Bom. 574.

Counsel for the respondents has strongly relied upon a Bench decision of this Court, *Jhakhri Gope v. Phagu Mahto*(¹), where it was held that the karta of a Hindu joint family has free authority to act for the family, and it is not necessary to obtain the leave of the court before a payment of the amount due under a decree to the joint family is made to him merely because a minor member of the family is concerned.

Order XXXII, rule 6, Code of Civil Procedure, provides that no next friend or guardian for the suit shall, without the leave of the Court, receive any money or other moveable property on behalf of a minor either by way of compromise before a decree or order is made, or under a decree or order in favour of the minor. Nevertheless this Court has held that where money is due to a joint family of which a minor is a member under a decree, such decree can be discharged by payment to the karta. In my judgment this case differs very materially from the case now before the Court. A karta of the family is entitled to receive everything due to the family, and he can give a good discharge on behalf of the family. The karta may well be regarded as entitled to receive what is due to the family under a decree even where a minor member of the family is represented by a guardian ad litem. Payment to the karta is payment to the family, and no member of the family can allege that the family has not been paid when the karta has in fact been paid.

For the reasons which I have given, I am satisfied that the compromise in the High Court was not binding upon the minors, and accordingly I am of opinion that the plaintiffs are entitled to a declaration that the compromise is not binding upon them. In my judgment, however, the minors cannot in the present proceedings obtain any relief in respect of enhanced rents actually paid and costs incurred. Such relief may be obtainable in appropriate proceedings, but I express no opinion on the matter. I

(1) (1927) 8 Pat. L. T. 708.

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would, therefore, allow this appeal, set aside the decrees of the lower Courts and grant the plaintiffs a declaration that the compromise decree of the High Court in the second appeal to which I have referred, is not binding upon the present plaintiffs. The plaintiffs will have the costs of this appeal and of the proceedings in the Courts below.

Dhavlé, J.—I agree.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Wort and Meredith, JJ.

BISHUNDEO NARAIN MISSIR

v.

RAGHUNATH PRASAD MISSIR.*

Limitation Act, 1908 (Act IX of 1908), section 14 (2) and Article 182 (5)—application for transfer of decree, whether is step-in-aid of execution—"made in accordance with law", meaning of—decree transferred to another Court—certificate of non-satisfaction not received—application for execution made to original Court, whether is step-in-aid of execution—section 14 (2), whether applies to execution proceedings—Article 182, whether bars its application.

An application for transfer of a decree is a step-in-aid of execution, but such an application must also be an application in accordance with law.

Amrit Lal v. Murlidhar(1), followed.

An application which is made to a proper Court for transfer to a Court which for temporary reasons, not known to the decree-holder, was at that particular time incompetent to execute the decree, is a step-in-aid of execution.

The phrase "made in accordance with law" does not include an application to the Court to do something which either from the decree-holder's direct knowledge in fact or

* Appeal from Appellate Order no. 241 of 1939, from an order of R. B. Beevor, Esq., i.c.s., District Judge, Muzaffarpur, dated the 18th May, 1939, affirming that of Mr. Ram Anugrah Narayan, Subordinate Judge, First Court, Muzaffarpur, dated the 14th February, 1939.

(1) (1922) 3 Pat. L. T. 422.