

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

1919.

November
21.

GURMALLAPPA MALLAPPA KATTI, MINOR, BY HIS GUARDIAN, APPELLANT No. 3 SATAPPA, AND OTHERS, (ORIGINAL DEFENDANTS NOS. 3, 4, 6 AND 7), APPELLANTS v. MALLAPPA MARTANDAPPA TELI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 1, 2 AND 5), RESPONDENTS^o.

Civil Procedure Code (Act V of 1908), Order XXXII, Rule 7—Minor—Decree against minor's father—Minor represented in execution proceedings by his brother as guardian ad litem—Compromise application by minor's mother—Leave of the Court not obtained—Compromise ineffectual without Court's consent—Sale by mother as natural guardian.

An award decree was passed against the father of the minor plaintiffs. On father's death, execution-proceedings were commenced against the plaintiffs represented by their elder brother as their guardian *ad litem* and in the course of these proceedings an application was made to the Court by both parties intimating that they had entered into a compromise. The plaintiffs' application was, however, signed not by their brother guardian *ad litem* but by their mother. The Court recorded it, without granting or rejecting it, and continued the execution proceedings. The mother then executed a sale-deed of the property on the same terms as had been agreed upon by the compromise. The minor plaintiffs having sued to set aside the sale-deed,

Held, that the sale-deed was voidable as the mother had applied to the Court to sanction the compromise and thereby she put it out of her power to settle the creditor's claim as the minor's natural guardian without the Court's consent under Order XXXII, Rule 7, Civil Procedure Code, 1908.

Per MACLEOD, C. J. :—“Though Order XXXII, Rule 7, Civil Procedure Code, 1908, applies to execution proceedings, there seems to be a distinction between a case where minor's liability has been determined by a decree in his father's life time and a case where the minor's liability in the first instance is in dispute. For in the former case there is a debt which the guardian is clearly entitled to pay off in full, and the fact that the judgment-creditor has issued execution against the minor making an outsider his guardian *ad litem* does not alter the situation.”

Per HEATON, J. :—“Order XXXII, Rule 7, Civil Procedure Code, 1908, implies that during the continuance of the 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." •

SECOND appeal against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by C. G. Kharkar, Subordinate Judge at Chikodi.

Suit to set aside a sale-deed.

The lands in suit belonged to the plaintiff's father Martandapa. In 1893 Martandapa passed a mortgage bond in favour of the defendants. Disputes having arisen between Martandapa and the defendants over their dealings the matter was referred to arbitrators who made their award on the 11th June 1904. It was filed on the same date as a decree in suit No. 478 of 1904 of the Chikodi Court. Under this decree Martandapa agreed to give the lands mortgaged to the defendants as sale out and out in satisfaction of Rs. 1,600 found due from him with a condition that defendants were to reconvey the lands to Martandapa on his paying Rs. 1,600 within twenty years. In execution of this award decree, the defendants claimed possession of the lands in 1906 from the minor plaintiffs and their step-brother Baslingapa as in the interval Martandapa had died. Plaintiffs were represented by their brother Baslingapa as guardian *ad litem* in these execution-proceedings.

On the 25th June 1906, both parties presented a joint application to the Court, intimating that they had entered into a compromise; that the defendants had agreed to give up their claim for mesne profits; that the conditional sale effected under the award decree was agreed to be made a complete sale; that the plaintiffs should receive Rs. 175, in addition to the sum of Rs. 1,600, covered by the award decree; that the defendants should be put in instant possession and enjoy the

1919

GUR-
MALLAPPA
v.
MALLAPPA
MARTAND-
APPA.

1919.

GUR-
MALLAPPA
v.
MALLAPPA
MARTAND-
APPA.

property as owner. On behalf of the minor plaintiffs the application was signed by their mother Neelava and not by Baslingapa who was their guardian *ad litem*. The Court merely recorded this application without granting or rejecting it. It continued the execution proceedings and directed a warrant for delivery of possession to issue by order, dated the 23rd July 1906.

In the interval, that is, on the 17th July 1906, the sale-deed in suit was passed by the minor plaintiffs represented by their mother Neelava for Rs. 1,775, composed of Rs. 1,600, which related to the award decree and Rs. 175, shown as having been paid in cash. On the same date Baslingapa who represented the minors as the guardian in the execution-proceedings executed a separate deed consenting to the sale-deed passed by Neelava. Neither of these documents was produced in the execution-proceedings and the sanction of the Court was not endorsed upon it. In 1915, this action was instituted by the plaintiffs to recover possession of the lands after setting aside the sale-deed which was passed by their mother and also the award decree which was included in the consideration for the deed.

The defendants contended that the sale-deed was passed by the plaintiffs' mother with the consent of her step-son Baslingapa; that it was passed for adequate consideration and for the benefit of the plaintiffs and therefore binding on them; that the award decree was not illegal; and that the plaintiffs could not go behind the decree.

The Subordinate Judge held that the sale-deed was passed for legal and necessary purposes and for the benefit of the minor plaintiffs, but that it was void for want of sanction under section 462 of the old Civil Procedure Code of 1882. He rejected the claim for possession and mesne profits and gave a declaration that the sale-deed was void and not binding on plaintiffs.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree observing that the sale-deed was passed under a compromise which was entered into on behalf of the minor plaintiffs with reference to the subject matter of the execution-proceedings; that the guardian had no power to enter into the compromise or to execute the sale-deed in pursuance thereof without the leave of the Court expressly recorded in the proceedings; that the sale-deed was, therefore, voidable under Order XXXII, Rule 7, Civil Procedure Code, 1908 : *Virupakshappa v. Shidappa and Basappa*⁽¹⁾.

The defendants appealed to the High Court.

M. R. Jayakar with *A. G. Desai*, for the appellants :—The lower Court is wrong in its view that the sanction of the Court was necessary to validate the compromise and that the sale-deed is, therefore, voidable under Order XXXII, Rule 6, of the Civil Procedure Code, corresponding to section 462 of the old Code. Moreover, the authority relied upon by that Court, viz., *Virupakshappa v. Shidappa and Basappa*⁽¹⁾, does not apply to the facts and the circumstances of the present case.

The sale-deed was, no doubt, passed in pursuance of the compromise. But it was not passed by the guardian *ad litem* of the minors. That guardian was Baslingapa and not Neelava, who was the natural guardian of the minors. She had independent powers to sell the property of the minors for necessity. Here necessity has been found proved by both the lower Courts. Her inherent right to sell the property of the minors in case of necessity is not subject to the control of the Court. Therefore section 462 has no application, as it applies to a guardian *ad litem*, which Neelava was not. In *Virupakshappa v. Shidappa and Basappa*⁽¹⁾,

⁽¹⁾ (1901) 26 Bom. 109.

1919.

GUN-
MALLAPPA
v.
MALLAPPA
MARTAND-
APPA.

the transaction was by a guardian, *ad litem*: *Hunoomanpersaul Panday v. Mussumat Babooee Munraj Koonweree*⁽¹⁾; and *Ganesh Row v. Tuljaram Row*⁽²⁾.

Nilkant Almaram, for the respondents Nos. 1 and 2:—The view as taken by the lower Court is correct. I do not question the powers of a natural guardian of minors to deal with their property under the circumstances mentioned in *Hunoomanpersaul's case*⁽¹⁾. But when they came before any Court they are under the protection of that Court and nothing can be done on their behalf with reference to the suit in which they are concerned without the leave of that Court. That the compromise and the sale-deed were with reference to the suit is not denied. When the joint application was made to the Court setting forth the compromise, it was made by Neelava as guardian of the minors. That compromise and the application could have been made by Basalingappa who was the guardian *ad litem*. If that had been the case, according to the appellants themselves the Court would have been entitled to consider the propriety of its terms and safeguard the interests of the minors. Is that jurisdiction of the Court taken away by the mother of the minors taking the place of their brother? I submit not, as the compromise is with reference to the suit.

MACLEOD, C. J.:—The facts of this case are very clearly set out at page 6 of the Print.

The plaintiffs are minors and in effect their mother as next friend has sued to set aside the sale-deed of the 17th July 1906 passed by her as their natural guardian. It has been found by both the lower Courts that the deed was passed for legal purposes, but the sale-deed has been declared to be void on the ground that the sanction of the Court was necessary. This, on the facts

⁽¹⁾ (1856) 6 Moo. I. A. 393.

⁽²⁾ (1913) 36 Mad. 295.

stated, involves a confusion of ideas. It is true on an award decree against the plaintiffs' father execution proceedings were commenced against the minors represented by one Baslingapa as their guardian *ad litem*, after which terms of compromise were arranged. An application to the Court was presented by both parties intimating they had entered into a compromise. The plaintiffs' application was signed however not by Baslingapa but by their mother. The Court recorded it, without granting or rejecting it. Clearly the application signed by plaintiffs' mother was not in order. Thereafter the Court passed an order in execution.

In spite of that the mother executed the sale-deed now in question, and as it has been found that it was for legal purposes and for the minor plaintiffs' benefit it cannot be avoided unless it can be held that the powers of their mother as their natural guardian to satisfy the decree passed against their father were entirely suspended from the time the execution proceedings commenced, or must be taken as suspended in consequence of her own action. The fact that Neelava agreed to sell the lands on the same terms as had been agreed upon by the compromise apparently made with the guardian *ad litem* which was never sanctioned by the Court is a mere coincidence, and is irrelevant to the general question which we have to deal with, and which so far as can be discovered has not yet been decided by the Courts in India. The question was referred to in *Ganesh Row v. Tuljaram Row*⁽¹⁾, but their Lordships of the Privy Council said then that that question was not in issue on the facts of that case; as the father of the minor had been appointed guardian *ad litem* in the suit, and his powers of management so far as they related to the minor's interest in the suit were held to be controlled by the provisions of section 462 of the

1919.

GUR-
MALLAPPA
v.
MALLAPPA
MARTAND-
APPA.

⁽¹⁾ (1913) 36 Mad. 295.

1919.

GUR-
MALLAPPA
v.
MALLAPPA
MARTAND-
APPA.

Code of 1882. Now in this case a decree was passed against the minor's father based on an award, and after his death the creditors sought to execute it, against his heirs. Neelava could have settled that claim by transferring these lands to the creditors and receiving Rs. 175 and on the facts found such a transaction could not now be disputed.

I fail to see why she could not have so settled the creditor's claim, disregarding altogether the execution proceedings, as she was not representing the minors in them. The transferee could then take the usual risk of the transaction thereafter being set aside, if it were proved that the minors' guardian had exceeded her powers as such guardian. My brother Heaton, however, thinks that on general principles when a minor is represented in a suit by a guardian *ad litem* other than his 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, but on the facts in this case I am not disposed to differ as Neelava had applied to the Court to sanction the compromise and thereby, I think she put it out of her power to settle the creditor's claim as the minors' natural guardian without the Court's consent.

I should also like to point out that though section 462 of the Code of 1882 applied and Order XXXII, Rule 7, of the present Code applies to execution proceedings, there seems to me to be a distinction between a case where the minor's liability has already been determined by a decree in his father's life time, and a case where the minor's liability in the first instance is in dispute. For, in the former case there is a debt which the guardian is clearly entitled to pay off in full, and the fact that the judgment-creditor has issued execution

against the minor making an outsider his guardian *ad litem*, does not in my opinion alter the situation.

The appeal will be dismissed with costs.

HEATON, J. :—I need not restate the facts.

The matter seems to me to be one of importance as a matter of principle. If you take the bare words of section 462 of the old Code (now Order XXXII, Rule 7) they do not cover this case, as there was not a compromise by the guardian *ad litem*. Therefore, it may be said, there was not anything for which the leave of the Court was required. But there was a compromise during the continuance of the proceedings and it was a compromise which settled the very matter which was before the Court. The intention so to compromise the matter was brought to the notice of the Court. The Court declined to give effect to that intention for it continued the proceedings before it and made an order contrary to that intention. Yet the compromise was effected ; not it is true by the guardian *ad litem* but by the natural guardian of the minor. That compromise in my opinion was contrary to law because in effect it defeated the purpose of section 462.

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.

That, I think, is the principle and purpose underlying section 462, and I think that a relaxation of that principle might lead to very serious abuse.

Therefore I think the appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

1919.

GUR-
MALLAPPA
V.
MALLAPPA
MARTAND-
APPA.