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*Present :* Fisher C.J. and Drieberg J.

MEIS SINGHO *v.* JOSIE PERERA *et al.*

*116—D. C. (Inty.) Kurunegala, 3,247.*

*Compromise—Agreement filed in Court but not notified in presence of parties—Binding character—Civil Procedure Code, s. 408.*

Where an agreement, entered into between parties to testamentary proceedings, was filed of record but was not notified to Court in the presence of the parties as required by section 408 of the Civil Procedure Code,—

*Held*, that the Court was not bound to enter decree in accordance with the terms of the agreement.

Such an agreement would not be bad because it was not notarially executed.

APPEAL from an order of the District Judge of Kurunegala.

*H. V. Perera*, for petitioner, appellant.

*N. E. Weerasooria*, for respondents.

September 16, 1929. DRIEBERG J.—

Simon Appuhamy died intestate on August 6, 1926, leaving as his heirs his widow, Egi Nona, his brother, the appellant, and three sisters. The appellant applied for letters of administration on May 26, 1927, and on June 29 the widow and sisters agreed to the appointment of the appellant as administrator. In his inventory filed with his application for administration the appellant showed that the debts of the estate exceeded the assets by Rs. 44.94.

In the record there is a document " A " dated August 24, 1927; it is an agreement by the widow and sisters of the intestate that the appellant should pay all the debts due by the intestate and become entitled to all the property, movable and immovable, of the estate, and that when all those debts were discharged they should transfer their shares of all the property to the appellant; the estate consisted mainly of lands and interests in leased lands.

At this time the official assessment of the estate was being made, and the valuation dated August 31, 1927, was submitted, which showed that the assets exceeded the debts by Rs. 975, and on December 2, 1927, the appellant filed an amended inventory on this valuation.

Egi Nona died in November, 1927, and the respondents to this appeal, who are her sisters, were substituted in her place. In November, 1928, they applied for a judicial settlement of the estate; they took objection to matters in the accounts filed and they attacked the agreement " A " on the following grounds:

that it was not binding on the widow or her heirs, that it was not valid in law, that it was obtained by fraud, that the appellant had taken advantage of his position as administrator, that Egi Nona did not have independent advice, and that the administrator by it undertook to do no more than he was bound to do. No counter affidavit was filed by the appellant.

When the matter came up for inquiry no evidence was led by either side. For the appellant objection was taken that the respondents had no status to apply for a judicial settlement, that the appellant had made payments in pursuance of the agreement, and that it was not possible for the parties to the agreement to withdraw from it. In support of the last point the appellant relied on the case of *Silva v. Hadjiar*,[1] to which I shall refer later. The respondents contended in addition to what was stated in their affidavit that the agreement was void as it was not executed in the manner required by Ordinance No. 7 of 1840.

The learned District Judge held that the respondents were entitled to apply for a judicial settlement and that the agreement was not binding as it was not notarially executed and no decree had been entered on it. He also referred to the fact that Egi Nona entered into the agreement under the mistaken belief that the estate was insolvent. The appellant appeals from this judgment.

The case for the appellant was that the agreement was one which was governed by the provisions of section 408 of the Civil Procedure Code. Section 408 provides that—

> " If an action be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the Court by motion made in presence of, or on notice to, all the parties concerned, and the Court shall pass a decree in accordance therewith, so far as it relates to the action, and such decree shall be final so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction."

Beyond the bare fact that the agreement is in the record there is nothing to show that it was notified to the Court at the time, and no reference appears to it until the respondents came in after the death of Egi Nona.

The agreement does not bear on it any endorsement by the Secretary of the Court or the Judge. There is no entry relating to it on August 28, 1927, in the journal, nor on the next date, September 2, 1927, when an entry appears relating to the Crown valuation.

[1] *(1914) 3 Bal. Notes 7.*

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The next journal entry, on September 26, 1929, is as follows:— "Messrs. Daniel for petitioner; to be called; inventory; minutes of consent filed; inventory 10.10." It does not appear what this minute of consent is, and there is nothing to indicate that it is this agreement.

Mr. Perera argued that even if the agreement was not formally presented to Court by the parties it could be given effect to later even if one of them withdrew from it. He relied on the Indian case of *Brojodurlabh Singha v. Ramanath Ghose*,[1] where a majority of the Full Court held that where a compromise or adjustment of an action was made out of Court it could be recorded and decree entered on it though one party to it resiled from the agreement before it was presented to Court and objected to decree being entered on it. This was a decision on section 375 of the Code of 1882, the wording of which on this point is somewhat different to section 408 of our Code. Section 375 provides that "such agreement, compromise, or satisfaction shall be recorded and the Court shall pass decree in accordance therewith"; while our Code provides that "the agreement, compromise, or satisfaction shall be notified to Court by motion made in presence of, or on notice to, all parties concerned."

This ruling was approved of by Jayewardene J. in *Suppiah v. Abdulla*,[2] but the question there arose in a different form. The plaintiff in that case sued the defendant for arrears of rent and for money advanced to the defendant; while this action was pending, but before answer was filed, the defendant prosecuted the plaintiff for criminal trespass and other offences. The criminal case was settled, the terms being that the defendant was to be allowed occupation of the house for some time, that he was to pay the rent due, and that the plaintiff was to withdraw the action without costs. The defendant paid into Court the arrears of rent due. The plaintiff insisted on proceeding with the action. It appears that the agreement in the Police Court case did not state at what rate the rent was to be computed and there was disagreement as to what the rental was. The trial Judge held that the agreement was not binding as it had not been placed before the Court in which the action was brought, and the defendant being in default in filing answer, he entered judgment for plaintiff as claimed. Jayewardene J. held that the agreement was binding and sent the case back for the Judge to inquire into the settlement and, I take it, the terms of the settlement, for the agreement in the Police Court did not state the aggregate amount due or the amount of monthly rent.

The Indian case I have referred to was approved by de Sampayo J. in *Silva v. Hadjiar* (*supra*), but it was not necessary for the purpose of that case. In that case a writing embodying the settlement

[1] *24 Calcutta 908.* [2] *(1924) 26 N. L. R. 79.*

was submitted as a motion in Court by Counsel on both sides and order was made that decree be entered in accordance with its terms. It was directed that the case was to be mentioned on a later date for a fair copy of the draft to be submitted. When the case was called for this purpose Counsel for the defendant said that his client refused to sign it and be bound by it. The Court entered judgment in terms of the agreement, and this order was affirmed in appeal. Sir Alfred Lascelles C.J. held that the matter was concluded when Counsel stated the agreement to Court and that all that was left to be done was the purely ministerial act of furnishing the Court with a fair copy of the agreement. The case was not one of a repudiation of an agreement before it was presented to the Court as such, and I cannot regard the reference by de Sampayo J. to the Indian case as an assent to the ruling in it and as conflicting with his judgment in *Ramyah Pulle v. Mohideen.*[1] There a case was put off for settlement and when the parties appeared in Court the defendant said that the matter had been settled, but this was denied by the plaintiff. The Court then held an inquiry as to whether there had been a settlement. De Sampayo J. said: "The duty of the Court in those circumstances was obvious. It was either to enter judgment for the plaintiff as agreed on November 3 or sweep aside all that related to an attempt at a settlement of the case and to hear the case and give judgment. The Court, instead of doing so, entered upon a lengthy inquiry as to whether there was a settlement or not. This is an impossible procedure. The plaintiff, even if he was present at the discussion of the terms of a settlement, might well have withdrawn from the compromise. As I said, the Court can only act upon settlement which has not only been mutually arrived at but is stated to the Court by both parties. If one party denies, though falsely, that there was any settlement, there is an end of the matter and the case must take its ordinary course."

In my opinion this is the right view of section 408, and it cannot be said that the agreement embodied in "A" is one which was stated to Court by both parties as an agreement on which the Court was to act, and the Court is not obliged to enter decree in accordance with it.

If, however, the agreement was so presented it would not be bad because it was not notarially attested.

Both parties must be regarded as having put before the Court at the inquiry their whole case, and this being so the appellant has failed in matters in which the burden of proof was on him. The widow was not represented by a Proctor, she was given to

[1] *(1924) 5 C. L. Rec. 204.*

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understand that she was surrendering nothing as the estate was insolvent, the appellant was in a fiduciary capacity in relation to her, and it was incumbent on him to prove the circumstances in which she agreed and that she was fully aware of what she was agreeing to.

The appeal is dismissed with costs.

FISHER C.J.—I agree.

*Appeal dismissed.*