1920.

Present : De Sampayo J. and Schneider A.J.

PITCHE *v.* ANNAMALAI CHETTY.

80—D. C. Kurunegala, 7,265.

Decisory oath—Challenge by next friend of minor plaintiff—Special sanction of Court not obtained—Agreement to take oath at a dewale—Oath taken at the first step.

The next friend of the minor plaintiff challenged a witness for the defendant to take an oath at the Rambathe dewale that C paid the amount of the mortgage due to her husband. It was agreed that, if the oath was taken, the plaintiff's action should be dismissed.

Held, that the taking of the oath at the first of a series of steps of the temple was not a compliance with the direction that the oath should be taken at the dewale.

Held further, that the agreement that the plaintiff's action be dismissed if the oath be taken was in the nature of a compromise of the plaintiff's claim, and should have had the special sanction of the Court.

THE facts appear from the judgment.

Weerasuriya (with him *Nagalingam*), for appellant.

Arulanandan, for respondent.

October 6, 1920. DE SAMPAYO J.—

I think this case has not been rightly disposed of in the District Court. The plaintiff, who is a minor, brought this action through a next friend for declaration of title to a certain land which had been seized by the defendant in execution of a writ against a third party and unsuccessfully claimed by the plaintiff. The defendant denied the plaintiff's title, and set up certain other defences. The issues stated are not very illuminating, but they were " whether the plaintiff was the absolute owner of the share of the land he claimed, and was the said share liable to be seized under the writ ? " Evidence was called on behalf of the plaintiff, and at a certain stage of the proceedings the plaintiff, meaning by that the next friend of the plaintiff, challenged a witness for the defendant, a woman, named Ukku Menika, to take an oath at the Rambathe dewale that Copra Tamby and Kuttamassa Tamby paid the amount of the mortgage due to her husband. It is not very clear how this question was relevant to the dispute as to title. But it is not necessary to go into that matter. The witness accepted the challenge, and it was agreed that, if the oath was taken, the plaintiff's action should be dismissed with half the costs, and the land declared to be liable to be sold under the defendant's writ. The Court then ordered that the

oath be taken in the presence of the Court peon Siyadoris on January 31 at 2 P.M. To me it is very astonishing that a Court peon should be entrusted with such a responsible duty. But the ground on which the plaintiff afterwards attempted to get over the proceedings connected with the oath was that the oath was not taken by the witness as directed in respect of place and time. In the original order the Court noted that the case should be called on February 2, meaning, I suppose, that the oath would in the meantime have been taken and a report to that effect would be before the Court. When the case was called on February 2, the Court had before it a report of the peon that the oath was duly taken. At the same time the plaintiff submitted a petition to the Court, and also a report of the police officer to whom he had complained as to the irregularity. The Court peon was examined by the Court, but an application on the part of the plaintiff to call two persons, who were admittedly present at the taking of the oath, was disallowed. The particular reason for refusing to hear the plaintiff's witnesses was that, according to the Judge, the plaintiff was not consistent with himself as regards the objections. The police officer's report only stated that the plaintiff had complained that the oath was taken on the first step of the dewale, and nothing is stated there as to the time. But the Court failed to notice that, in the petition which was presented at the same time, both the objections were stated, and, therefore, there was no attempt on the part of the plaintiff to put forward a different case from what he had previously relied on. However all these things may be, the point is whether in the circumstances the oath was rightly taken as directed, and whether it is not within the power of the plaintiff to object to the proceedings adopted by the next friend. It seems to be agreed that the oath was taken on the first step of the dewale. It appears that the dewale is an ancient temple, some eight miles from Kurunegala, and probably it is one of those temples which have a series of a steps in front of it for people to enter. I cannot myself regard the taking of the oath on the first step of such a temple as a serious compliance with the direction that the oath should be taken at the dewale. The gist of the proceedings is that a party puts the opposite party or a witness on the obligation to take a solemn oath in a sacred place. Taking the oath in any place outside the dewale itself does not appear to me to be a compliance with the requirement. Moreover, this arrangement is in the nature of a compromise of the plaintiff's claim. It seems to me that for that purpose the next friend should have had the special sanction of the Court as required by section 500 of the Civil Procedure Code. There was no such sanction, and the Court, I think, ought now to discountenance the proceedings by which this compromise was effected, as was remarked in similar circumstances in the case of *Kiri Menika v. Punchirala*.[1] It was the duty

[1] *1 Cur. L. R. 13.*

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of the Court to protect the interest of the minors, even if the next friend was inclined to prejudice them. That same case is likewise an authority for the principle that, even if a proceeding of this kind be taken by the next friend, he himself would be able to withdraw from it. In this case it is the minor who wishes to withdraw from it, assisted as he may be by the same next friend, and I think the Court ought to see that justice is done by having a proper trial of the case instead of making it depend upon doubtful proceedings, like the one before a Court peon. I would set aside the judgment entered, and send the case back, in order that the Court might itself hear the case and determine it on evidence. In the circumstances, there is no need to make any order as to costs.

SCHNEIDER A.J.—I agree.

Set aside.