NIHAL SHANTHA (MINOR) BY NEXT FRIEND GUNASEKERA
v.
NORANGODA

SUPREME COURT
G. P. S. DE SILVA, C.J.
KULATUNGA, J.,
RAMANATHAN, J.
S.C. 94/94.
C.A. REV. 1159/86.
D.C. COLOMBO 6200/RE
JUNE 21, AND JULY 10, 1995.

Minor – instituting action by next friend – Settlement reached on trial date – Application to set aside – Non compliance of S. 500 Civil Procedure Code – Granting of Leave of Court – Judicial Act – Mandatory – Order 32 Rule 7 of Indian Civil Procedure Code – S. 462 Indian Civil Procedure Code (Old)

The plaintiff by his next friend, his father instituted proceedings seeking the ejectment of the defendant and for damages. On the trial date (21.2.86) the parties arrived at a settlement. On 19.5.86 an application was made to set aside the aforesaid settlement, on the ground of non compliance with S. 500 of the Civil Procedure Code. The application was dismissed; the Court in its order stated that "In fact the settlement was arrived at after the terms of settlement were presented to court and its leave obtained." The Court of Appeal refused the application in revision. It was submitted that the settlement was invalid in terms of S. 500 of the Civil Procedure Code for failure on the part of the District Court to record that the settlement was with leave of court.

Held:

(i) The court was fully conscious of the crucial fact that a minor was a party to the case; the settlement was reached before the Court itself, the counsel and the Registered Attorney for the Plaintiff and the minor himself were present in court.

(ii) It is not imperative for the court to expressly record the fact that leave of court was obtained; this fact could be shown in some way not open to doubt.

Cases referred to:

1 *Manohar Lal v. Jadunath Singh* (1906) 1 LR 28, Allahabad 585.
2. *Silindu v. Akura* – 10 NLR 193.
3. *Bandara v. Elapatha* – 23 NLR 411.

APPEAL from the judgment of the Court of Appeal

A. K. Premadasa P.C. with *C. E. de Silva* for Plaintiff-Appellant.

P. A. D. Samarasekera, P.C. with *H. Withanachchi* for substituted defendant-respondent.

Cur. adv. vult.

August 03, 1995.

G. P. S. DE SILVA, C.J.

The plaintiff by his next friend, his father, instituted these proceedings in the District Court, seeking the ejectment of the defendant from the land and premises bearing assessment Nos. 66 and 67, Mulleriyawa North, Angoda, and for the recovery of damages. The plaintiff was a minor of about 14 years of age.

The action was on the basis that the defendant was in occupation with the leave and licence of the plaintiff. The defendant in his answer claimed prescriptive rights to the land and premises in suit. The defendant further pleaded that the plaintiff could not have and maintain this action inasmuch as there has been a failure to comply with the provisions of section 547 of the Civil Procedure Code.

On the trial date, namely 21.2.86, the parties arrived at a settlement, whereby the defendant was to be declared entitled to one half share of the land and premises inclusive of the buildings bearing assessment Nos. 66 and 67 and the plaintiff was to be declared entitled to the balance half share including the building bearing assessment No. 65.

On 19.5.86 an application was made to the District Court to have the aforesaid settlement entered into on 21.2.86 set aside on the ground of non-compliance with the provisions of section 500 of the Civil Procedure Code. This application came up for hearing before the **same additional District Judge** who heard the case and recorded the terms of settlement on 21.2.86. After inquiry, the Additional District Judge dismissed the application and in his order dated 16.9.86 made the following relevant and significant observation.

> "...The terms of settlement are given in detail in the proceedings of 21.2.86. In fact the settlement was arrived at after the terms of settlement were presented to Court and its leave obtained."

Thereafter the plaintiff filed an application in revision and *restitutio in integrum* in the Court of Appeal to set aside the orders of the Additional District Judge dated 21.2.86 and 16.9.86 (referred to above) and to have the case re-fixed for trial. The Court of Appeal dismissed this application. Hence the present appeal to this court.

Leave to appeal to this court was granted on the following question:–

> "Was the settlement arrived at on 21.2.86 invalid in terms of section 500 of the Civil Procedure Code for failure on the part of the learned judge to record that the settlement was with the leave of court."

Section 500 of the Civil Procedure Code reads thus;–

> "500, (1) No next friend or guardian for the action shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the action in which he acts as next friend or guardian."
>
> (2) Any such agreement or compromise entered into without the leave of the court shall be voidable against all parties other than the minor."

Mr. Premadasa for the plaintiff-appellant strenuously contended (a) that section 500 of the Civil Procedure Code must be strictly construed since it affects the rights of a minor; (b) that the court must **expressly record** the fact that the leave of the court was obtained in order to enter into the agreement or compromise on behalf of the minor; it cannot be implied (c) the granting of "the leave of court" is a judicial act and is a mandatory requirement.

It is true that the record does not expressly state that "the leave of Court" was granted in respect of the settlement arrived at on 21.2.86. However, in the proceedings of 21.2.86 it is clearly recorded that (1) the **plaintiff minor** is present; (2) the father of the minor is present; (3) counsel for the plaintiff and the registered Attorney-at-Law for the plaintiff are present. In many cases the court merely records the fact that "the parties are present." But in the instant case there is a significant difference; there is an express record of the presence in court of the plaintiff who is a minor. It seems to me that this is a very clear indication that the Court was fully conscious of the crucial fact that a minor was a party to the case. Moreover, this is not a case where the settlement was reached outside court and the court was notified of the settlement. The settlement was reached before the court itself, counsel and the registered Attorney-at-Law for the plaintiff being also present in court.

Mr. Premadasa placed strong reliance on the decision of the Privy Council in *Manohar Lal v. Jadunath Singh* [1]. Lord Macnaghten, dealing with section 462 of the then Civil Procedure Code of India (which is in terms similar to section 500 of the Civil Procedure Code) stated thus:–

> "It was argued on behalf of the appellant that the exigencies of that provision had been complied with in this case, inasmuch as it appeared that the minor (the first respondent), who was a party to the compromises in question, was described in the title of the suit as a minor suing "under the guardianship of his mother," and the terms of the compromises were, of course, before the court. In the opinion of Their Lordships that is not sufficient. There ought to be evidence that the attention of the court was directly called to the fact that a minor was a party to the compromises, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the court was obtained."

It will be observed that the Privy Council does not hold that it is imperative for the court to expressly record the fact that leave of court

was obtained. That fact could be shown "in some way not open to doubt."

The next case cited by Mr. Premadasa was *Silindu v. Akura*[2]. In my view that case can be easily distinguished from the case before us. In the course of his judgment Grenier A.J. expressed himself thus: "The record in the case before us contains the following entry ... parties present. It is agreed between the parties that judgment be entered up as follows for the plaintiff and then follow the terms of the judgment which were subsequently embodied in the decree. **There is nothing to show that the court was made aware of the fact that the plaintiff was a minor ..."** (The emphasis is mine). In the same case Wood Renton J, in a short judgment states" ... I think that the record should show (a) that the attention of the court has been directed to the fact of minority, and (b) that the court has approved of the proposed compromises." In my view, Silindu's case (*supra*) is not an authority for the proposition that the court must expressly record in the proceedings the fact that the leave of the court was obtained.

The other case which was strongly relied on by Mr. Premadasa was *Bandara v. Elapatha* [3]. That was an application for *restitutio in integrum* in respect of an order entered by the District Court in a testamentary action where several parties were interested in the estate. In these proceedings, the 1st respondent was a minor. Sampayo, J. referring to section 500 of the Civil Procedure Code stated, "It appears to me that the leave of the court referred to in the section is a special leave to be applied for by the guardian, and different from the general sanction applied for by all the parties for the approval of the court to the terms of settlement." The above dicta must be considered in the context of the facts of the case. I think this case too can be distinguished from the appeal before us where the court was fully aware of the fact that the plaintiff was a minor. In any event, the question whether the record should expressly state the fact that the court granted leave did not arise for consideration.

At this point it would not be irrelevant to refer to the wording in Order 32 Rule 7 of the Indian Civil Procedure Code – Rule 7(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."

It is a matter of significance that the words "expressly recorded in the proceedings" are not found in section 500 of our Civil Procedure Code; the omission tends to show that it is not an essential requirement postulated in section 500 of our code.

On a consideration of the matters set out above, I hold that the settlement arrived at between the parties on 21.2.86 is not invalid in terms of section 500 of the Civil Procedure Code by reason of the failure of the Court to record in the proceedings that the settlement was with the leave of court. The judgment of the Court of Appeal is accordingly affirmed and the appeal is dismissed but without costs.

KULATUNGA, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal dismissed.