

1961 *Present: H. N. G. Fernando, J., and L. B. de Silva, J.*

M. A. C. MALEEHA NONA, Petitioner, and M. C. M. MAHUMOOD
and 21 others, Respondents

*S. C. 108/1960—Application for Restitutio in Integrum and/or Revision
in D. C. Colombo, 1934/L*

*Action against minors—Appointment of guardian ad litem—Admission, by guardian,
of plaintiff's claim—Difference between such admission and an adjustment of
the action—Voidability of decree—Civil Procedure Code, ss. 72, 408, 500.*

Section 500 of the Civil Procedure Code which debars a guardian of a minor from compounding an action without the leave of the Court refers to such an adjustment of an action as is mentioned in section 408 and is not applicable to an admission made by the guardian in terms of section 72.

In a *rei vindicatio* action instituted in 1940 some of the defendants, who were minors, were represented by a guardian *ad litem*, who, when called upon to answer the plaint, filed a minute of consent consenting to judgment as prayed for without costs. Decree was accordingly entered in 1941 against the defendants.

Held, that the guardian's minute of consent was an admission of the plaintiff's claim within the meaning of section 72 of the Civil Procedure Code and not an adjustment within the meaning of section 408. Accordingly, the decree entered in the action could not be set aside in an application for *restitutio in integrum* subsequently made by one of the minors on the ground that there was a compromise of the action and that in terms of section 500 of the Civil Procedure Code it was unlawful as being one made by the guardian without the leave of the Court.

APPPLICATION for *restitutio in integrum* and/or revision in respect of a decree entered by the District Court, Colombo.

E. B. Vannitamby, with *H. S. Ismail*, for petitioner.

H. W. Jayewardene, Q.C., with *M. T. Sivardeen* and *D. S. Wijewardene*, for 1st to 22nd respondents.

Cur. adv. vult.

November 10, 1961. H. N. G. FERNANDO, J.—

This is an application for *restitutio in integrum* to set aside a decree entered in 1941 declaring the plaintiff and the 10th defendant in that action to be entitled to an undivided two-thirds share of the land to which that action related. The present petitioner who seeks this relief was admittedly a minor aged only three years at the time when the decree was entered.

It would appear that the petitioner's father one Abdul Cader purchased the property in question in February 1925 in his own name. Abdul Cader died in May 1938 and his brother Abdul Razak was duly appointed to be the administrator of his estate. In the petition for administration (D. C. Colombo Testy. 8542) the widow Kadija Umma and five minor children as well as the mother of the intestate were made respondents, the minors being represented by their guardian *ad litem* one U. L. M. Mohamed, their mother's sister. In the schedule of assets of the intestate, the estate was credited only with a one-third share, and not the entirety of this property, it being mentioned in the schedule that the other two-thirds belonged to the deceased's brother although the title deeds are in the name of the deceased. The same was the case in the inventory filed by the administrator in 1940, and in the final account filed in April 1941 the income only of a one-third share of the rents of the property was brought into account. The guardian *ad litem* specifically declared to the Court that this final account was correct.

As already stated the deed of 1925 by which the deceased Abdul Cader purchased the property was in his own name, but the present respondents have produced a document marked *R2* purporting to have been signed in November 1937 by Abdul Cader in which he declares that the property had been purchased at an auction sale with money provided in equal shares by himself and his two brothers and that he holds two-thirds of the property in trust for the brothers. The respondents further state that the money for the purchase came from the profits of a business which was being carried on in partnership by the three brothers. It is averred that on the faith of this document the guardian-*ad-litem* of the minor children of the deceased signed a declaration that two-thirds share of the property belonged to the deceased's two brothers and consented to the administrator executing the necessary deed for the purpose of conveying to the brothers title to the two-thirds

shares. This declaration which was authenticated by a Proctor was filed in the Testamentary case in June 1940, but the parties were apparently advised subsequently that such a transfer may not be effective, and presumably for this reason the action No. 1934 was instituted in September 1940, in which the plaintiff who was one of the brothers of the deceased sought a declaration of title to a two-thirds share of the property in favour of himself and his other brother, the 10th defendant. In that action also the minors were represented by their maternal uncle the 6th defendant. He by a minute of consent dated 26.2.41 consented to judgment as prayed for without costs. The main ground of the present application for *restitutio* is that this was a compromise of the action and that in terms of section 500 of the Civil Procedure Code it was unlawful as being one made by the guardian without the leave of the court. I am unable to agree with this contention.

Section 500 in my opinion refers to such an adjustment of an action as is mentioned in section 408 of the Code, which provides *inter alia* that "if an action be adjusted fully or in part by any lawful agreement or compromise . . . such agreement or compromise shall be notified to the court . . . and the court shall pass a decree in accordance therewith", but section 408 does not itself contemplate an admission by a defendant of the plaintiff's claim against him. Such an admission is provided for not in section 408 but in section 72 of the Code whereby if a defendant when called upon to answer the plaint admits the claim of the plaintiff, the court must give judgment against the defendant according to the admission so made. The Journal Entries in action No. 1934 show only that there was first an appointment of a guardian *ad litem* of the minors and thereafter service of summons. Date was fixed for Answer but Answer was not filed, instead there was filed a minute of consent to which I have already referred and the Proctor for the plaintiff moved for decree to be entered as prayed for without costs. Clearly there was here a simple admission of the plaintiff's claim of the nature contemplated in section 72 and subject to any special restriction as to the applicability of section 72 for the reason that the defendants were minors, the District Judge was bound to enter the decree.

Counsel for the petitioner has not drawn our attention to any decision indicating that a guardian *ad litem* of minor defendants requires the leave of the court before he may admit a claim in terms of section 72. The only argument against the applicability of that section is the highly technical one that because the plaintiff and the guardian had agreed that costs be waived there was no pure admission of the plaintiff's claim and instead an adjustment within the meaning of section 408. The consent of the plaintiff to waive costs is not in my opinion an adjustment of that nature.

In any event I am satisfied in view of the facts as briefly stated above that no prejudice was caused to the minors by their guardian's admission of the claim. The fact that their mother, their grandmother and their guardian the maternal uncle acquiesced in the administrator's declaration

that the deceased Abdul Cader owned only a one-third share in his own right and the further fact that the document *R2* in which the deceased had acknowledged himself to be the trustee on behalf of his brothers for the two-thirds shares has not been challenged in these proceedings show that the plaintiff's claim in action No. 1934 could not have been successfully resisted.

The application is refused with costs fixed at Rs. 250.

L. B. DE SILVA, J.—I agree.

Application refused.

