

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 8TH DAY OF MARCH 2022 / 17TH PHALGUNA, 1943

OP(C) NO. 1550 OF 2021

AGAINST THE COMMON ORDER DATED 29.07.2021 IN I.A.NOS.1 & 2 OF
2020 IN OS 172/2016 OF MUNSIF COURT, PUNALUR

PETITIONER/DEFENDANT:

KRISHNA MOORTHY RAO
AGED 55 YEARS
JAGANNATHA RAO, S/O.KRISHNAMOORTHI RAO,
SREEVILASOM HOUSE, PIDAVOOR P.O., PIDAVOOR VILLAGE,
PATHANAPURAM TALUK, KOLLAM DISTRICT.
BY ADV B.KRISHNA MANI

RESPONDENTS/PLAINTIFFS:

- 1 S.BHANUMATHI @ LAKSHMI
AGED 42 YEARS
W/O.LATE REGHUNATHA RAO, RESIDING AT BALAJI NIVAS,
PIDAVOOR P.O., PATHANAPURAM TALUK,
KOLLAM DISTRICT - 691 625.
- 2 RAHUL K.R., MINOR
AGED 10 YEARS
ADOPTED SON OF 1ST PLAINTIFF AND HER DECEASED
HUSBAND REGHUNATHA RAO, REPRESENTED BY THE 1ST
PLAINTIFF, S.BHANUMATHI RESIDING AT BALAJI NIVAS,
PIDAVOOR P.O, PATHANAPURAM TALUK,
KOLLAM DISTRICT - 691 625.
BY ADVS.
JOBY CYRIAC
KURIAN K JOSE

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 25.02.2022,
THE COURT ON 08.03.2022 DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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O.P(C). No.1550 of 2021

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Dated this the 8th day of March, 2022

J U D G M E N T

The defendant in O.S.No.172/2016 pending before the Munsiff Court, Punalur, has filed this Original Petition under Article 227 of the Constitution of India challenging a common order in I.A.Nos.1 and 2 of 2020 dated 29.07.2021 in the above Suit.

2. A pertinent question arose for consideration herein is: **whether a Suit filed by a minor without a next friend shall be taken off the file or the same is a curable irregularity and thereby the minor can go on with the Suit after amending the Suit and appointing a next friend, on detecting the defect?**

3. Heard Advocate B.Krishna Mani, the learned counsel for the petitioner as well as Advocate Joby Cyriac, the learned

counsel appearing for the respondents in detail.

4. Coming to the facts of this case : O.S.No.172 of 2016 was filed by one Bhanumathi @ Lakshmi as 1st plaintiff and Rahul.K.R, a minor, aged 6 years (the adopted son of the 1st plaintiff) as 2nd plaintiff against the defendant seeking the relief of permanent prohibitory injunction from destroying the boundaries of plaint schedule property, annexing the same to his plot, from ousting the plaintiff from the plaint schedule properties, from cutting and removing trees therefrom and from committing any waste therein. It is relevant to note that though Rahul.K.R, the 2nd plaintiff, is a minor (aged 6 years during 2016), no next friend was appointed to proceed with the case. Thereafter, I.A.No.1/2020 was filed to amend the plaint by appointing a next friend and I.A.No.2/2020 was filed to receive third party affidavit to appoint next friend to the 2nd plaintiff.

5. The learned Munsiff considered the above petitions on merits. The learned Munsiff observed that as per Rule 212 of Civil Rules of Practice, omission to file an affidavit is a curable defect

and therefore a third party affidavit is liable to be accepted. Similarly, relying on a decision reported in [1955 KLT 75], ***Ouseph Joseph v. Thoma Eathamma***, the learned Munsiff found that a Suit without a guardian for a minor is only an irregularity which could be cured at any stage prior to the decree. Accordingly, both the applications were allowed.

6. While disputing the correctness of the above finding, Advocate B.Krishna Mani, the learned counsel for the petitioner, submitted that on a plain reading of Order 32 Rule 2 of the Code of Civil Procedure, it is emphatically clear that where a Suit is instituted without a next friend, plaint to be taken off the file. According to Advocate B.Krishna Mani, the filing of a Suit without a next friend is not a curable irregularity and the court has no other option other than to taken off the Suit from the file. Therefore, this Suit should be taken off from the file and cannot be proceeded. Advocate B.Krishna Mani placed a decision reported in [AIR 1976 Madras 235], ***Kamalammal v. A.M.Shanmugham & Ors.***, to contend that there is difference between a Suit being dismissed and

a plaint being taken off the file. According to the learned counsel, going by the ratio of the above ruling, the suit filed by the 2nd plaintiff without appointing a next friend shall be taken off the file of the court. In the said decision, the Madras High Court observed as under:

“..... Admittedly, in this case, no application under Order XXXII, Rule 2 has been filed by the appellant for taking the plaint off the file. The above rule itself does not contemplate a suit instituted by such a minor plaintiff being dismissed on that ground. There is a difference between a suit being dismissed and a plaint being taken off the file, and all that Order XXXII, Rule 2(1) contemplates is a plaint being taken off the file on an application for the said purpose being made by the defendant. It is true the courts have made a distinction between two classes of suits instituted by a minor, one knowing that he was a minor and he was incompetent to institute a suit without the next friend and yet filing a suit with a view to deceive the court or with some ulterior purposes, and the other, a minor filing the suit without knowing or realising his minority and in the former case the suit being dismissed and in the latter case the plaint being taken off the file.”

7. Another decision of the Apex Court reported in [1968 KHC 637], ***Ram Chandra Arya v. Man Singh & anr.***, has been relied on to contend that a decree against a lunatic person without appointment of a guardian is a nullity. This legal position is not in dispute.

8. Another decision reported in [2021 (5) KHC 619], ***Raghavan M.K. v. Moodan Kuthirummal Karthiyani (Deaf and Dump)***, also is highlighted to contend that filing an application for appointing a next friend in a suit instituted by a minor is a pre-requisite to be complied with to effectuate valid institution of the Suit.

9. Coming to ***Ouseph Joseph v. Thoma Eathamma***'s case (*supra*), a learned Single Judge of this Court, while dealing with a case of a minor defendant, who was not represented by a guardian, it was held that to commence a Suit without such a guardian would only be an irregularity, which could be cured at any stage prior to the decree.

10. It is relevant, rather interesting to note that Advocate B.Krishna Mani argued that there is no direct decision of this Court on this point (dealing with Order 32 Rule 2 of CPC) and therefore this Court shall abide by the mandate of Order 32 Rule 2 of C.P.C. Advocate Joby Cyriac, appearing for the respondents also failed to point out any decision of this Court on this point. While

appreciating the argument advanced by Advocate B.Krishna Mani, I have no hesitation to hold that the learned Advocate B.Krishna Mani did not notice a decision reported in [1985 KLT 845 :1985 KHC 185 : 1985 KLJ 703], *Ahammed Pillai v. Subaida Beevi*.

11. In *Ahammed Pillai v. Subaida Beevi's* case (*supra*), a learned Single Judge of this Court considered a case wherein plaintiff, who claimed to be aged, 19 years, though he was minor, filed a Suit, where the defendant filed a petition under Order 32 Rule 2 of the Code of Civil Procedure with prayer to take off the suit from the file. Thereafter, plaintiff filed another petition seeking appointment of a next friend for her. The learned Munsiff allowed the plaintiff's application and dismissed the defendant's application. The said order was challenged before this Court. In *Ahammed Pillai v. Subaida Beevi's* case (*supra*), this Court referred, various decisions of the Lahore High Court, Rajasthan High Court and also a decision of this Court reported in [1963 KLJ 39 : 1963 KHC 319], *Akku Amma & Ors. v. Kunhi Raman Nair & Ors.* In *Akku Amma & Ors. v. Kunhi Raman Nair & Ors's* case

(*supra*), this Court after referring the decision of the Bombay High Court reported in [AIR 1959 Bombay 232], ***Gulabchand Nanulal & Ors. v. Fulchand Hirachand & anr.*** held that *where the minor or insane is one of the plaintiffs, a final order of appointment of another as his next friend is unnecessary and all that is required is for another to have intimated the court that he is safeguarding the interest of the incapable plaintiff in the action. It then follows that, if in a particular case another person failed to intimate so but did really act as the next friend in the Suit, the omission would only be an irregularity and not a fatal defect in the proceedings. The decree in such a case would be valid and cannot be set aside when prejudice is proved to have been caused to the incapable by the omission.*

12. After discussing the ratio of the above decision, the learned Single Judge in ***Ahammed Pillai v. Subaida Beevi***'s case (*supra*) dismissed the revision holding that it could not be said that a Suit instituted by a minor without intervention of a next friend is a nullity and the defect cannot be rectified. It is a curable

irregularity, curability depending upon the facts and circumstances of the case. Where on account of an error or a bona fide mistake such an irregular Suit is instituted, there is no reason why the irregularity cannot be cured by providing suitable person as next friend.

13. Therefore, the argument advanced by Advocate B.Krishna Mani, the learned counsel for the petitioner, that there is no direct decision of this Court on this point, appears to be not correct in view of the judgments in *Ahammed Pilla's* case (*supra*), following *Akku Amma & Ors. v. Kunhi Raman Nair & Ors.* (*supra*).

14. **Therefore, the legal question mooted by the learned counsel for the petitioner to the effect that if a Suit has been filed by a minor without a next friend, it is not a curable irregularity and the same shall be taken off the file, is not the law. Therefore, it is held that a Suit filed by a minor without a next friend need not be taken off from the file since the same is a curable irregularity and by filing a subsequent application,**

the defect can be cured. To put it differently, a minor who filed Suit without appointing a next friend as stipulated under Order 32 Rule 2 of C.P.C, can cure the defect by appointing a next friend seeking such prayer by filing a separate petition for the same and the Suit can be proceeded.

15. Here, evidently the 1st plaintiff filed a Suit along with the 2nd plaintiff, a minor. If the contention raised by the learned counsel for the petitioner, if found in the affirmative (though found not sustainable) then also, the 1st plaintiff has no rider to go with the Suit which she had instituted properly. On the facts of this case, the appointment of next friend subsequent to the filing of the Suit is not bad in law. Overall discussion would go to show that the common order impugned herein does not suffer from any perversity, irregularity or arbitrariness and therefore the order is only to be confirmed.

16. In the above circumstances, this Original Petition is devoid of any merits and is accordingly dismissed. The interim stay shall stand vacated.

17. It is submitted by the learned counsel for the respondents that the petitioner herein has been obstructing trial of the Suit, thereby the widow and the adopted child are in pecuniary and are in thirst to establish their legal right by disposing the Suit on merits. Hence he prayed for a direction to the trial court to expedite disposal of the Suit in a time bound manner. This grievance appears to be convincing. Hence there shall be a direction to the learned Munsiff, Punalur to dispose of O.S.No.172/2016 at the earliest, at any rate, within a period of 6 months from the date of receipt of a copy of this judgment or its production by the concerned parties.

Registry is directed to forward a copy of this judgment to the court below concerned for information and compliance, within 7 days.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF OP(C) 1550/2021

PETITIONER'S EXHIBITS

- Exhibit P1 TRUE COPY OF THE PLAINT IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR DATED 31/3/2016.
- Exhibit P2 TRUE COPY OF THE WRITTEN STATEMENT DATED 13/7/2017 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P3 TRUE COPY OF THE COUNTER CLAIM DATED 20/10/2017 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P4 TRUE COPY OF THE I.A.NO.1/2020 DATED 14/9/2020 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P5 TRUE COPY OF THE OBJECTION DATED NIL I.A.NO.1/2020 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P6 TRUE COPY OF THE ADDITIONAL OBJECTION DATED 6/7/2021 IN I.A.NO.1/2020 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P7 TRUE COPY OF THE I.A.2/2020 DATED 14/9/2020 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P8 TRUE COPY OF THE THIRD PARTY AFFIDAVIT DATED 14/9/2020.
- Exhibit P9 TRUE COPY OF THE OBJECTION DATED NIL.
- Exhibit P10 TRUE COPY OF THE COMMON ORDER DATED 29/7/2021 IN I.A.1/2020 AND I.A.2/2020 IN O.S.172/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR.
- Exhibit P11 TRUE COPY OF THE PLAINT, O.S.217/2016 BEFORE THE MUNSIFF'S COURT, PUNALUR DATED 10/4/2016.
- Exhibit P12 TRUE COPY OF THE RELEVANT PORTION OF O.P.(C) 1335/2020 DATED 26/8/2020 BEFORE THE HON'BLE HIGH COURT OF KERALA, ERNAKULAM.
- Exhibit P13 TRUE COPY OF THE PROCEEDING DATED 24/4/2015 ISSUED BY THE TAHSILDAR, PATHANAPURAM.

Exhibit P14

TRUE COPY OF THE JUDGMENT DATED
30/10/2018 IN WP(C) NO.14508/2015 BEFORE
THE HON'BLE HIGH COURT OF KERALA,
ERNAKULAM.

Exhibit P15

TRUE COPY OF THE RELEVANT PORTION OF
W.P.(C) NO.5332/2020 DATED 18/2/2020
BEFORE THE HON'BLE HIGH COURT OF KERALA,
ERNAKULAM.