



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 1089 OF 2019
IN
SECOND APPEAL NO. 20 OF 2019

SHAIKH MAQDUM SHAIKH
VERSUS
SHAIKH JAMANA BEGUM

...
Advocate for Appellant : Mr. Arvind Deshmukh
Advocate for Respondent : Mr. A. N. Patale
....

CORAM : S. G. MEHARE, J.
DATE : 12.12.2023

PER COURT :

1. This is an application filed by the owner of the suit land. When the suit was filed, he was minor. Hence, his father had filed a suit for removal of encroachment against the respondent. However, the suit was instituted without next friend. The suit was decreed. The learned first appellate Court dismissed the suit holding that the father of the present applicant was not the owner of the suit land which the encroachment was made. The present applicant who was the land owner attained the majority during the pendency of the first appeal, but inadvertently he did not apply for substituting him as the plaintiff/

appellant to the first appeal. Hence, he prayed to substitute him in this Second Appeal filed by his father in his interest.

2. The learned counsel for the respondent/original defendant has vehemently opposed the application contending that the objection was raised at the earlier stage, but the plaint was not taken off the file. The matter was proceeded and decreed. The First Appellate Court took the cognizance of the objection that the suit was defective as not filed by the next friend of the minor. Now, the applicant cannot cure the defect. There is judicial pronouncement of the Court based upon the facts available before the Court, therefore, the application is not tenable.

3. A small question is, whether non filing of the suit by the next friend is a defect that dis-entitles the party to claim the protection of the right or is it a curable ?

4. The learned counsel for the respondent is correct that where the suit is instituted without next friend, the plaint is to be taken off the file. Sub Rule (2) of Rule 4 of Order XXXII of the Code of Civil Procedure provides that a notice of such application shall be given to such person and the Court, after hearing his objection (if any), may make such order in the matter as it thinks fit.

5. In the case of *Bachh Raj Vs. Sundar, A AIR 1963 Rajashtan High Court 119*, the Rajasthan High Court held that subsequent steps may be taken to rectify the mistake and secure the proper representation. The expression “ may make such order” in Rule 2 (2) should be fairly construed. In the case of *Doorga Mohun Dass Vs. Tahir Ally and Another, (1895) ILR 22 Cal 270* it has been held that a suit by minor without prayer is made is mere irregularity which can be waived by the defendant.

6. The effect of instituting the suit without next friend as per Rule 2 of Order XXXII of the CPC was clear that it was a curable defect and the suit could be thrown at the threshold.

7. It appears that for the first time, in the appeal the objection was seriously raised that the suit was defective being instituted without next friend. Before the trial Court, no serious objection was raised. Order XXXII Rule 12 of the CPC provides course to be followed by minor plaintiff or applicant on attaining majority. It has been provided therein that on attaining the majority the minor may elect whether he will proceed with the suit or application. If he elects to proceed with

the suit or application, he shall apply for an order discharging his next friend, and for leave to proceed in his own name.

8. By way of this application, he is claiming that the appellant wanted to proceed with the appeal on his own name. Ultimately, he wanted to discharge his father to the extent of his share. The defect which has been considered by the learned First Appellate Court is not incurable defect. The decree was in his favour holding that the respondent had encroached upon his land. Considering this provision of law the Court is of the view that the application deserves to be allowed. Hence, the order :-

ORDER

- (i) The application is allowed.
- (ii) The applicant is allowed to proceed with the suit/appeal and his father who was the plaintiff has been discharged to the extent of his share in the suit land.
- (iii) Necessary amendment be carried out on or before the next date.
- (iv) List the Second Appeal on 25th January, 2024.

(S. G. MEHARE)
JUDGE