

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.13086 OF 2022**

SHANKAR MAHESH CHAVAN UNDER GUARDIAN SHARAD
DHONDIRAM CHAVAN
VERSUS
VENKAT RAMA INGALE AND ANOTHER

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Mr. M. M. Joshi h/f Mr. Suhas B. Ghute, Advocate for the
Petitioner.

Mr. Manoj Shelke, Advocate for Respondent Nos.1 and 2.

...

**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 13th FEBRUARY, 2023.**

PER COURT:-

1. Heard.

2. In the present matter caveat is filed on behalf of respondent nos.1 and 2 and appearance was caused. By order dated 22.12.2022 this Court noted that the counsel for the respondents sought accommodation for filing affidavit-in-reply and as such, the matter came to be adjourned on 05.01.2023. On 05.01.2023 the matter was adjourned to today. Office noting shows that the affidavit-in-reply is not filed by the respondents till today. Considering the limited issue which is canvassed before this Court, petition has been taken up for hearing.

3. The challenge in this petition is to the order dated 05.12.2022 passed in Miscellaneous Civil Appeal No.14/2021, whereby the appeal filed by the respondents came to be allowed and the order of the Trial Court below Exhibit-5 dated 12.02.2021 came to be quashed and set aside. RCS No.786/2020 was filed by the petitioner, who is a minor through his uncle as next friend. By this suit, the petitioner sought an order of perpetual injunction

restraining the respondents from interfering with the possession and enjoyment of the suit property. In the said proceedings an application for temporary injunction came to be filed by the petitioner. The Trial Court considering the material which has been produced on record demonstrating the *prima facie* possession of the petitioner over the suit property and in particular taking into consideration the application filed by the respondents under Section 98 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 for summary eviction came to the conclusion that the petitioner is in possession of the suit property and an order of temporary injunction restraining the respondents from causing obstruction to the possession of the petitioner came to be passed. Aggrieved by the order dated 12.02.2021 of temporary injunction, Miscellaneous Civil Appeal No.14/2021 came to be filed before the Appellate Court. The Appellate Court allowed the appeal setting aside the order of the temporary injunction on the ground that the suit has to be filed by the next friend, but in the present case the proceedings have been filed by the uncle. The Appellate Court assessed the tenability of the suit under the provisions of Order XXXII Rule 1 of the Code of Civil Procedure and held that unless the point of guardianship is decided, the suit cannot proceed and whether the parents of the minor are interested in the appeal of the minor is also not made clear. Without going into the merits of the proceedings, the Appellate Court on the basis of these findings allowed the appeal.

4. Learned counsel for the petitioner has pressed into service the decision of the High Court of Madras in the case of ***Chinnappayan Vs. Annamalai (Minor) and Others***, reported in ***LAWS (MAD)-1995-2-141***, which takes into consideration the

provision of Order XXXII Rule 1 of the Code of Civil Procedure and it is held that the competence of the next friend of the minor instituting a suit cannot be a subject matter of the investigation at any stage of the suit and the next friend does not need to ask for sanction of the Court to recognise him as the next friend of the minor.

5. Under Order XXXII Rule 1 of the Code of Civil Procedure every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The provisions of Order XXXII Rule 4 provides that any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. Provided that the interest of such person is not adverse to that of the minor. In the present case, the sale deed in respect of the suit property has been executed through the uncle of the minor i.e. Sharad Dhondiram Chavan and the RCS No.786/2020 has also been instituted by the minor through his uncle. The suit has been instituted for an order of perpetual injunction restraining the respondents from the interfering with the possession and peaceful occupation of the suit property by the petitioner. In such an event even *prima facie* it can be seen that the proceedings which have been instituted is in the interest of the minor in as much as what has been sought is the protection of the property of the minor. There is no case for alienation of the property in which case the Court would be on its guard and will investigate as regards the interest of the minor. Considering the provision of Oder XXXII Rule 1 of the Code of Civil Procedure the observation of the Appellate Court cannot be legally sustained.

6. The Appellate Court without deciding the appeal on merits has allowed the appeal only on the ground of guardianship of the minor. Considering the above, the impugned order dated 05.12.2022 is quashed and set aside and the matter is remanded to the Appellate Court to decide the appeal in accordance with the law and on the merits of the matter, without recourse to the provisions of Order XXXII Rule 1 of the Code of Civil Procedure.

7. Writ Petition stands allowed in the above terms.

(SHARMILA U. DESHMUKH)
JUDGE