CASES

DECIDED BY

THE SUPREME COURT OF CEYLON,

THE COURT OF VICE-ADMIRALTY

IN THE ISLAND,

AND

HER MAJESTY THE QUEEN IN

HER PRIVY COUNCIL

ON APPEAL FROM THE

SUPREME COURT OF THE ISLAND.

UDUMA LEBBE *et al* *v.* SEYADU ALI *et al.*

D. C., Kurunégala, 857.

Civil Procedure Code, ss. 481 and 582—Appointment of next friend under s. 481—Certificate of curatorship under s. 582—Necessity for inquiry as to value of minor's property upon application for appointment of next friend.

A person who has been regularly appointed as next friend under section 481 of the Civil Procedure Code has a right to sue without a certificate of curatorship under section 582.

Per BROWNE, J.—A certificate of curatorship is necessary only for actions instituted (or defended) by a curator in his own name *qua* curator, and is not necessary for actions instituted (or defended) by a minor by his next friend or guardian *ad litem*.

In regard to the proviso of section 582, when application is made for the appointment of next friend or guardian, it is not necessary to inquire into the value of the minor's property. Such inquiry is necessary only when it is sought to appoint a curator generally, or for the limited purpose contemplated by that section.

Per WITHERS, J.—If a next friend claims charge of a minor's property of the value of Rs. 1,000 or over for any of the reasons stated in section 582, he cannot institute an action with reference to that property, unless he first takes out a certificate of curatorship.

D. C., Kégalla, 160 (*2 S. C. R. 81*, *3 C. L. R. 26*), commented upon.

THIS was an action in ejectment brought by the plaintiffs to recover certain lands which they averred they inherited from one Maimo Natchia, and from which they were ousted by the defendants. The fifth and sixth plaintiffs, Ossen and Mahommadu, being minors, the first plaintiff, their father, was, on his application, appointed their next friend for the purpose of this action. On the day of trial, the court *ex mero motu* called upon the plaintiffs' Proctor to show cause why the action should not be dismissed, on the ground that the first plaintiff's appointment as the next friend of the minors was invalid, because no certificate was obtained in accordance with section 582 of the Civil Procedure Code, and no inquiry was made to ascertain the value of the property.

After argument, the District Judge ordered that the case be taken off the trial roll to enable the first plaintiff to obtain the requisite authority to sue under section 582 of the Civil Procedure Code.

The plaintiffs appealed.

The case was argued before LAWRIE, A.C.J., and BROWNE, J., and judgment being reserved, it was, at the request of their Lordships, argued again before the Full Court (consisting of LAWRIE, A.C.J., and WITHERS and BROWNE, JJ.) on the 8th March, 1895.

Wendt, for the appellants.

Sampayo and *Blazé*, for the respondents.

Cur. adv. vult.

12th March, 1895. BROWNE, J.—

In this action fifth and sixth plaintiffs are minors, and before the action was instituted the first plaintiff, their father, was (by Mr. Dunuwille, Acting District Judge) appointed their next friend in order to institute this action of ejectment and for damages against the defendants. It is to be noted, however, that the application was not accompanied by a copy of the plaint proposed to be filed, as this Court (*2 C. L. R. 82* and *163*, and *1 S. C. R. 302*) has directed should be always done.

The appointment was, however, made, and has not been objected to on that ground.

At the trial, however, the Court of its own instance (Mr. Mason, District Judge, presiding) ordered the action to be taken off the file, on the ground that the plaintiff's appointment as next friend was invalid, because (1) no certificate was obtained in accordance with section 582 of the Civil Procedure Code, and (2) no inquiry was made to ascertain the value of the property; leave was reserved to the plaintiff to rectify his procedure in these respects.

Plaintiff, however, in appeal contends that these requirements were unnecessary. The learned District Judge's order shows he held these necessary, because the defendants had questioned plaintiffs' assertion that the lands of the estate, whereof plaintiffs are heirs, were worth under Rs. 1,000, asserting they were of Rs. 3,500 value, and because in case No. 160 of the District Court of Kégalla (*2 S. C. R. 81, 3 C. L. R. 26*) this Court had suggested that, even if a next friend had been appointed under section 481, it would seem as if section 582 would prevent him from suing until he had also obtained a certificate of curatorship.

It is necessary, therefore, now to rule upon what was then only a suggestion; and in my humble opinion this necessity, that an appointment of a next friend should be supplemented by a certificate of curatorship, does not exist.

In the first place, chapter XXXV. of the Code nowhere so requires it; and it is to be remembered that the two procedures of a minor suing by his next friend, and of a curator obtaining his certificate for all purposes whatever, and, if need be, thereafter bringing an action, are entirely distinct in their nature. The minor may often, as here, be only a necessary party to an action brought by others, the result whereof may or may not give or ensure him a right to some property. It may be that that property and all else belonging to him may be so inconsiderable in value, and so safely guarded for him by his relatives, that not only would certificate of curatorship be unnecessary, but it would be a positive hardship to require it to be taken to his loss in the cost thereof. When, however, his interests require he should have a permanent curator who shall have right to litigate when necessary, but who very possibly may never have to litigate at all, but only to receive and apply the income of the estate, such curator must of course be clothed with the authority of a certificate.

These are the three possibilities: (1) a minor may himself sue by his next friend; (2) his duly appointed curator may sue for him; and (3) a relative of a minor whose estate is under Rs. 1,000, desiring to see the child's rights protected in some action which

he may deem necessary to be instituted, may get a special *quasi* curatorship authority from the court limited to that one action only. This last is the object of the proviso to section 582. Certificate of curatorship is necessary only for actions instituted or defended by a curator in his own name *qua* curator, and is not necessary for actions instituted (or defended) "by a minor by his next "friend" (or guardian *ad litem*).

As regards the ground that no inquiry has been made as to the value of property, there seems to be some confusion. It would not have been necessary at all to inquire as to the value of a minor's property when application was made that a next friend or guardian should be appointed to aid him in litigation. Such inquiry need be made only when it is sought to appoint a curator generally or for the limited purpose contemplated by section 582 (proviso). But in this action the objection taken by defendant concerning value of property is that plaintiffs, as a body, could not sue without having administered their mother's estate, and this no doubt the Judge will yet have to determine according as he shall find what is the value of her estate.

The appointment of the next friend being otherwise unquestioned, this order must be set aside, but without costs, and the action remitted for trial.

WITHERS, J.—

The order complained of is one directing that the case be taken off the trial roll to enable the first plaintiff to obtain the requisite authority to sue under the 582nd section of the Civil Procedure Code.

The action is to recover lands alleged to be in the unlawful possession of the defendants. It is brought by the husband of one Pitcha Uma, deceased, to whose estate in the premises he and their children have (it is alleged) succeeded on intestacy.

The father sues for his own interest, and he claims to sue as the next friend of two of his children, the fifth and sixth plaintiffs. He himself is the first plaintiff, and his order of appointment as next friend is to be found at page 44.

The defendants appeared to the summons issued on the acceptance of the plaint and answered.

The trial was fixed for the 4th September. On that day the District Judge, of his own motion, called on the plaintiffs' Proctor to show cause why the plaintiffs' action should not be dismissed, on the ground that first plaintiff's appointment as next friend is invalid by reason of no certificate having been obtained under the

provisions of section 582 of the Civil Procedure Code, and because no inquiry was made to ascertain the value of the property.

The value of the minors' property sought to be recovered must not be confounded with the whole inheritance.

The value of the inheritance is a question put in issue on the pleadings.

The property sought to be recovered in this action is assessed in the plaint at Rs. 400 only. That is not traversed in the answer. Two of the five children only are minors.

Their share of the premises, assessing it to be two-fifths of three-fourths of Rs. 400, is considerably under Rs. 1,000.

The appointment of the next friend was made with consent of the defendants, who raised no objection on the ground of the value of the minors' interest in the premises exceeding Rs. 1,000.

Hence, under section 582, the father was not disqualified to act as next friend even if he claimed to have charge of the fifth and sixth plaintiffs' share of the premises. But he has made no such claims, and because he comes forward to recover shares in land withheld from them, their adult brethren and himself, I fail to see why he should be considered to claim charge of their shares. *Non constat*, that he will not place the children in charge of their shares when recovered, or give them up to any one they nominate.

They consented to their father being appointed their next friend. Anyhow it seems to me that the utmost the Judge could do was to have the names of the fifth and sixth plaintiffs struck out as improperly joined, and to let the trial continue. But in my opinion the plaintiff should be allowed to carry on the action as constituted, and I would set aside the order and remit the case for trial.

Reading sections 481 and 493 together, I understand the Code to say that any person being of sound mind and full age, so long as his interest is not adverse to that of the minor, and he is not a defendant in the action, may, if he is otherwise a fit person, be appointed next friend of a minor.

If he *claims charge* of a minor's property of the value of Rs. 1,000 under a deed or will, or by reason of nearness of kin and otherwise, he cannot institute an action with reference to that property unless he first takes out a certificate of curatorship.

LAWRIE, A.C.J.—

In the Kégalla case reported in the 3rd volume of the *Ceylon Law Reports*, p. 26, I expressed the opinion that a next friend regularly appointed under section 481 must get a certificate of curatorship before he could bring an action in the name of the minors.

I feel it difficult to reconcile some of the provisions of the 35th chapter with those of the 40th chapter of the Code. It is hard to ignore or to explain away the plain words of section 582, "no "person shall be entitled to institute or defend any action connected "with the estate of a minor of which he claims charge until he "shall have obtained such certificate."

Is the solution to be found in the words "of which he claims "charge"?

A next friend may have no pretension to have charge of the minor's property; perhaps if he does not a certificate is not necessary.

It is clear that in some circumstances a next friend may sue in the minor's name without getting a certificate; for instance, under section 590 the next friend may sue the curator.

I therefore concede that it is a reasonable construction of the 35th chapter, that a man regularly appointed under section 481 is clothed with authority to sue without getting a certificate, and also a man appointed under section 479 may defend without the same certificate.

I agree with my brother WITHERS, and in the result arrived at by my brother BROWNE, but not with all his comments on the Ordinance.