

1931

*Present : Lyall Grant J. and Maartensz A.J.*MEURLING *v.* BUULTJENS.335—*D. C. Matara*, 5,155.*Lunatic—Action by manager of estate—  
No appointment as next friend—Civil  
Procedure Code, ss. 478 and 501.*

The manager of the estate of a lunatic is not entitled to institute an action on behalf of the estate without first obtaining leave of Court to sue as next friend of the lunatic.

**A**PPEAL from an order of the District Judge of Matara.

*N. E. Weerasooria*, for plaintiff, appellant.

*Hayley, K.C.* (with him *Navaratnam*), for defendant, respondent.

May 7, 1931. LYALL GRANT J.—

In this case a Miss Meurling describing herself as the manageress of the estate of Mr. R. O. Meurling in case No. 3,406, D. C., Matara, sued Mr. B. G. Buultjens. The plaintiff averred in the plaint that the defendant took on lease from the plaintiff a cinnamon plantation and that he had failed to pay a balance of Rs. 750

due as rent for the same, and the plaintiff prayed that the defendant be condemned to pay to the plaintiff Rs. 750 with legal interest thereon from date hereof till payment in full. The plaint is dated September 27, 1929, and the date of the answer is February 20, 1930.

The defendant in his answer pleaded that the plaintiff in her plaint did not disclose any right on her part to maintain this action. On March 14 the plaintiff in her replication stated that she was suing the defendant in her capacity as manageress of the estate of her brother R. O. Neurling.

The case followed the usual course ; lists of witnesses were filed, subpoenas ordered, and the case came up for trial on August 21, 1930. The issue settled on that day covered all the merits of the case, but among them was an issue suggested by the defendant (3) " Can the plaintiff maintain this action without first obtaining the appointment of a next friend ". The case was tried on the merits, all the witnesses on both sides being examined and cross-examined in full, and on August 28 the learned District Judge made an order in which he dealt with the whole case submitted to him.—He found on most of the points in favour of the plaintiff ; but he found that the objection raised in the third issue was fatal to the plaintiff's right to bring the action, and accordingly he dismissed the action with costs payable by the plaintiff only, but with leave to her or to anyone else representing the estate of R. O. Meurling to institute a fresh action for the recovery of the money. Against this judgment the appeal is brought.

On appeal it was admitted that the plaintiff had not complied with the terms of section 478 of the Civil Procedure Code as applied to lunatics by section 501. It was urged, however, by appellant's counsel that it would be unfair in the circumstances to compel the plaintiff to institute a fresh action. He referred to the

case of *Sinnapillai and another v. Sinnatangam*<sup>1</sup> where de Sampayo J. in a somewhat similar case set aside a judgment dismissing the action and sent the case back for the purpose of plaintiff being permitted to obtain the authority of the Court to sue as a next friend. In that case, however, the merits of the case had not been tried and it appears that the Commissioner of Requests upheld the objection when made, and dismissed the plaintiff's case without affording her any opportunity of obtaining the leave of the Court to sue.

In the case of *Gunasekera v. Abubakker*<sup>2</sup>, which is a Full Bench case, it was decided that an action by a minor was not well brought if brought in the name of the curator. There also the case does not seem to have proceeded to trial in the lower Court. It was held by the District Judge that the first plaintiff who was curator of the estate of the minor, but had not obtained leave to sue, could not proceed with the action. Wendt J. said that while he thought the dismissal of the action should stand the Court ought to direct that the order should have no other effect than if the plaintiff had been taken off the file. Middleton J. went further. While saying that the decision of the District Court must be upheld, he added "I would treat this order as one under section 478, and allow the plaintiff to be restored to the file upon the curator's applying to, and obtaining the leave of the Court to sue as next friend of the minor." Moncreiff A.C.J. agreed.

I do not think that in the present case there is anything to be gained by varying the order made by the learned District Judge. The plaintiff itself states that the defendant took on lease from the plaintiff a cinnamon plantation and prays that the defendant be condemned to pay to her the sum sued for. That statement is not correct and the prayer also appears to require amendment.

The proper time for obtaining the authority of the Court is before the plaintiff is filed, and it is only after this is done that the case can proceed. I do not think there is any advantage in altering the order made by the District Judge and the appeal is therefore dismissed with costs.

MAARTENSZ A.J.—I agree.

*Appeal dismissed.*

<sup>1</sup> 2 *C. W. R.* 73.

<sup>2</sup> 6 *N. L. R.* 148.