

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919. • MAINA KOM HABI TARDE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. SHANKAR MORU TARDE, MINOR, BY HIS GUARDIAN SADU VITHU KADAM (ORIGINAL PLAINTIFF), RESPONDENT^o.
December 2.

Guardians and Wards Act (VIII of 1890), section 36—Suit against a guardian—Leave of the Court not obtained before filing the suit—Leave can be granted subsequently.

Under section 36 of the Guardians and Wards Act, 1890, proceedings are not entirely nullified because leave of the Court is not obtained before a suit is filed. It would be open to the Court on a proper application by the plaintiff to remedy the mistake and to empower the plaintiff to continue the proceedings against a guardian.

SECOND appeal against the decision of J. H. Betigiri, First Class Subordinate Judge, A. P., at Satara, confirming the decree passed by V. R. Kulkarni, Second Class Subordinate Judge at Wai.

Suit for account.

Plaintiff was a minor. His next friend filed a suit for an account under section 36 of the Guardians and Wards Act (VIII of 1890), alleging that he was appointed guardian of the person and defendant No. 1, guardian of the property of the minor plaintiff by the District Court at Satara in Miscellaneous application No. 5 of 1906; that since then defendant No. 1 had been managing the estate of the minor plaintiff; that her management had not been honest; that in April 1915, the next friend demanded an account from defendant No. 1, but she refused to render the same. Hence the suit.

Defendant No. 1 (plaintiff's aunt) contended that proper accounts of her management were tendered from time to time.

^o Second Appeal No. 392 of 1918.

Defendants Nos. 2 and 3 who were sons of defendant No. 1 replied that they had not been appointed guardians of the minor plaintiff and therefore the suit against them could not lie.

Before the Subordinate Judge an issue was raised "Is the suit defective having regard to the fact that the permission from the District Court to institute the same was obtained not before the suit was instituted but subsequently?" The Subordinate Judge held that the suit was not defective because all that the provisions of section 36 of the Guardians and Wards Act required was that a suit under the provisions was to be instituted by the permission of the Court. Such leave had been obtained in the present case; whether the same was obtained before or after the institution of the suit was immaterial. Accounts were, therefore, taken and a decree was passed by the Subordinate Judge directing that the defendants do pay to the minor plaintiff Rs. 540 and costs of the suit.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

The defendants appealed to the High Court.

Jayakar with *S. R. Parulekar* for *Y. V. Bhandarkar*, for the appellants.

K. N. Koyajee, for the respondent.

MACLEOD, C. J.:—The plaintiff, a minor, filed this suit by his next friend for an account under section 36 of the Guardians and Wards Act, VIII of 1890. The 1st defendant is the guardian of the property appointed by the District Court of Satara. The defendants Nos. 2 and 3 are the sons of the 1st defendant and are alleged to be managing the minor's property under the 1st defendant. The trial Court took an account and directed that the defendants should pay the minor plaintiff's next

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friend the sum of Rs. 540 only and the costs of this suit. In appeal that decree was confirmed.

The only point which has been taken in second appeal is that the whole of this proceeding should be avoided because the plaintiff's next friend did not obtain the leave of the Court under section 36 of the Guardians and Wards Act before he filed this suit. Leave as a matter of fact was obtained on the 26th January 1916 before the suit came on for hearing. There are cases in which the failure to obtain the leave of the Court required by a particular Act is fatal to those proceedings. For instance it has been held that if leave when it is necessary is not obtained under clause 12 of the Letters Patent, the mistake cannot be remedied after the suit has been filed, because it is only by obtaining leave that the plaintiff in such a suit can bring it within the jurisdiction of the Court. But in this case it appears to us from the provisions of section 36 of the Guardians and Wards Act that leave of the Court must be obtained by a person who wishes to institute a suit against a guardian merely for the protection of the guardian and such a provision does not go to the jurisdiction of the Court. If the suit is filed without leave, then as soon as the attention of the Court is drawn to that fact, the proceedings will be stayed but I do not think that the proceedings are entirely nullified for want of leave. It would be open to a Court on a proper application by the plaintiff to remedy such a mistake, and if it thinks fit to empower the plaintiff to continue the proceedings against a guardian. In this case the plaintiff's next friend is as a matter of fact the guardian of his person. No doubt he considered himself as such guardian empowered to look after the interests of the minor when he saw that those interests were not being properly looked after by the guardian of the property. That no doubt was the cause of the mistake.

We think that the Court was perfectly right in coming to the conclusion that that mistake was remedied by the order made giving leave to the plaintiff's guardian to continue the suit. Therefore I think the order of the Court below was correct and the appeal must be dismissed with costs.

HEATON, J. :—I agree, but I should like to add this. The directions contained in an Act of the Legislature are intended to be followed, and it seems to me that it cannot be said that a suit of this kind is rightly filed when it is filed without leave previously obtained of the Court. But it does not follow that if this is not done the plaint must be handed back to the plaintiff to be redated and again handed back to the Court after leave is obtained. I think that everything that the section requires is obtained if you regard the suit as effectively filed on the day on which leave is given by the Court. This might be a very material matter if a question of limitation arose. In this case, however, there is no such question and I think the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Heaton.*

SOMESHWAR JETHALAL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. CHUNILAL NAGESHWAR (ORIGINAL DEFENDANT), RESPONDENT.*

Easement—Tree growing on the boundary between two fields—Right of one proprietor to cut off projecting branches and roots—Injunction.

* Second Appeal No. 489 of 1918.

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