

Council that in execution of a decree against a Hindu father or other managing member of a Hindu family the power of disposition (*vide* section 266, Civil Procedure Code) which he may exercise over joint family property for purposes sanctioned by law would be operative to pass to the purchaser not only his personal interest in the property sold, but also the interest of the sons or other members of the joint family in the property although they were not parties to the decree (*Nunna Setti v. Chidaraboyina*(1)). We can see no reason why the principle of these decisions is not equally applicable to Hindu families governed by the Marumakkatayam Alyasantana or Makkatayam Law in force on the West Coast, simply because the property of the joint family is impartible in the sense that there can be no compulsory partition among the members of the family.

We, therefore, affirm the decree of the lower Appellate Court and dismiss this appeal.

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VELAMMA
v.
IBRAHIM
LEBBI.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

DORASWAMI PILLAI (PLAINTIFF), PETITIONER,

v.

THUNGASAMI PILLAI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1903.
November 6.

*Civil Procedure Code—Act XIV of 1882, ss. 416, 462—Neat friend—
Interest adverse to minor.*

A suit relating to the estate or person of an infant, and for his benefit, has the effect of making him a ward of Court, and no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself.

Where a suit, which was being conducted on behalf of a minor, was withdrawn without leave being asked for or given to bring another suit, the order passed on the petition for withdrawal was set aside by the High Court, on

(1) I.L.R., 26 Mad., 214 at pp. 222, 223.

* Civil Revision Petition No. 62 of 1903, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the orders of W. Gopalarao, Subordinate Judge of Madura (East), on Civil Miscellaneous Petition Nos. 361 and 435 of 1902, respectively (Original Suit No. 60 of 1901).

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revision, and the suit restored to the file of the lower Court for disposal according to law.

Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.

WITHDRAWAL of suit filed on behalf of a minor. The circumstances under which this petition was filed are fully set out in the judgment.

C. Ramachendra Rao Saheb and M. B. Sankara Ayyar for petitioner.

P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—This has been treated as a revision petition not only against the order of the Subordinate Judge, dated the 13th October 1902, but also against his order, dated the 28th July 1902. In passing both these orders it is clear that the Subordinate Judge failed to exercise the jurisdiction which the Court by reason of the petitioner (plaintiff in the suit) being an infant had over the conduct and disposal of the suit and to realize his responsibility in the matter. As observed by Scott, J., in *Karmali Rahimbhoy v. Rahimbhoy Habhibbhoy*(1) “a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court.” That being so, no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself. (Story’s ‘Equity Jurisprudence,’ section 1353.)

Section 446 of the Code of Civil Procedure enacts that, if the interest of the next friend is adverse to that of the minor, or if the next friend does not do his duty, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court may order the next friend to be removed. It is, therefore, the duty of the Court, if it finds that the next friend does not do his duty in relation to the suit, not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the

suit or withdraw from it. In the present case, on the 28th July 1902, when the case came on for final hearing after several adjournments, the junior vakil who was specially engaged on that very day, apparently in virtual supervision of the senior who was present in Court presented a petition stating that the plaintiff or rather his next friend was unable to conduct the further proceedings in the suit by meeting the necessary expenses and to prove that the whole of the plaint properties belonged to the plaintiff and praying that the Court might be pleased to strike the case off the file without further proceedings. This application was granted on that very day and the plaintiff ordered to pay the defendants' costs. It is established beyond all doubt by the evidence of the junior vakil who was examined as a witness on behalf of the respondents in connection with the review petition that he was engaged by the next friend's father, that the Judge asked him whether he was going to withdraw unconditionally or whether he wanted to withdraw with permission to bring a fresh suit, and that he, in reply, stated he did not want such permission.

Assuming that the next friend, the mother of the plaintiff, was aware of the contents of the vakalatnamah authorizing the vakil to withdraw the suit executed that very day outside the precincts of the Court and that she did authorize the vakil to withdraw the suit, it must have been obvious to the Subordinate Judge that, in withdrawing the suit without permission to bring a fresh suit, the minor's vakil, at the instance of the next friend, was acting most prejudicially to the interests of the minor; and that is apparently the reason why he pointedly asked the vakil if he wanted permission to bring a fresh suit. It is therefore clear that the Subordinate Judge was under the impression that he was bound to allow the withdrawal and dismiss the suit with costs for default of prosecution, and that he had no jurisdiction to adjourn the suit in the interests of its ward. The plaintiff's next friend in her deposition taken in connection with the review application states that she was not aware of the contents of the vakalatnamah, or of the withdrawal petition, both of which bear her mark, and that she became aware of the withdrawal only a day or two after it was withdrawn; and the evidence of the father of the next friend and one of the attesting witnesses to the vakalatnamah is to the effect that the withdrawal was brought about by the first defendant himself and that the suit was withdrawn by reason of the first

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defendant having promised to give to the plaintiff his share after the suit was withdrawn. The Subordinate Judge does not discuss the evidence bearing on this question. Under section 462, Civil Procedure Code, a withdrawal of the suit by the next friend in pursuance of an agreement or compromise entered into with the defendant, without the leave of the Court, will be voidable at the instance of the minor (*Karmali Rahimbhoy v. Rahimbhoy Habbibbhoy*(1)). In rejecting the application for review the Subordinate Judge has evidently overlooked the provisions of section 462. It is, however, unnecessary to call for a finding on this point. For the reasons already stated in connection with the unconditional withdrawal of the suit on the 28th July 1902, I set aside his order under section 622, Civil Procedure Code, following the decision of the Calcutta High Court in *Ram Surup Lal v. Shah Lataf Hossein*(2) and direct that the suit be restored to file and proceeded with and disposed of according to law.

The respondents must pay the costs of the petitioner both here and in the application for review in the Court below.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

PARANGODAN NAIR (PLAINTIFF), PETITIONER,

v.

PERUMTODUKA ILLOT CHATA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 43—Suit for money paid on a contract—Breach of contract and failure of consideration—Previous suit for specific performance dismissed—Maintainability of present suit.

Plaintiff had paid the defendants a sum of money on a contract under which defendants undertook to renew a kanon, and had previously sued the defendants unsuccessfully for specific performance of that contract. Plaintiff now sued to recover the money. On its being contended that the suit was barred by section 43 of the Code of Civil Procedure:

(1) I.L.R., 13 Bom., 137.

(2) I.L.R., 20 Calc., 735.

* Civil Revision Petition No. 328 of 1903, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of J. C. Fernandez, Subordinate Judge of South Malabar, in Small Cause Suit No. 56 of 1903.