

those given by him. The appellant is entitled to his costs throughout in each case.

BASUDEVA
DOSS
v.
RAJA
HARISCHAND
JAGADDEVA
GARU.

PANDRANG ROW J.—I agree that the fee in question is not rent and that the appeals should be allowed.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

RAMAHARI PATRO, MINOR BY GUARDIAN SRIMATHI PATRANI
(SECOND COUNTER-PETITIONER), PETITIONER,

1935,
July 26.

v.

GOVINDA RONA (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 95—Applicability—Minor plaintiff—Case of—Improper arrest before judgment obtained by next friend—Damages against minor's estate in respect of—Award of—Power of Court.

Section 95 of the Code of Civil Procedure is not inapplicable to cases in which the plaintiff is a minor. The Court has therefore power under that section to award damages against the minor's estate in respect of an improper arrest before judgment obtained by his or her next friend.

In considering the provisions of the Code relating to costs (section 35) or to damages for improper arrest or attachment before judgment (section 95), it is not right to deal with the general law relating to the circumstances in which a minor's estate can be made liable in respect of the acts of a guardian.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Berhampur,

* Civil Revision Petition No. 1643 of 1933.

RAMAHARI
PATRO
v.
GOVINDA
RONA.

dated 29th April 1933 and made in Original
Petition No. 13 of 1932.

B. Jagannadha Das for petitioner.
Respondent *ex parte*.

JUDGMENT.

This revision petition raises a question of some importance. In a money suit instituted on behalf of a minor plaintiff by his mother as next friend, an arrest before judgment was obtained on allegations which have been subsequently found by the Court not to have been justified. The defendant accordingly applied for an award of damages under section 95 (a) of the Civil Procedure Code and the lower Court has awarded a sum of Rs. 30 and directed it to be recovered from the family property of the minor.

In revision, Mr. Jagannadha Das contends that, taking the arrest to be improper, it was a tortious act of the next friend and the Court ought not to have awarded damages against the minor's estate in respect of such tortious act. The objection is plausible, and I am sorry to be obliged to decide it without the help of an argument on behalf of the respondent, as the respondent is *ex parte*.

I have however come to the conclusion that the view taken by the Court below is right. In considering the provisions of the Code relating to costs (section 35) or to damages for improper arrest or attachment before judgment (section 95), it does not seem to me right to deal with the general law relating to the circumstances in which a minor's estate can be made liable in respect of the acts of a guardian. Take the instance of a

suit instituted by a next friend on behalf of a minor. When such a suit fails, Courts have frequently given a decree for costs against the minor's estate. I do not think it is possible to bring such a case under any principle of the law of contract or the law of torts or the law relating to alienation by a guardian. I presume that the justification for such a course is that the language of section 35 is wide enough to authorize it and it is only in the special circumstances contemplated by Order XXXII, rule 14, Civil Procedure Code, namely, when the Court is satisfied that the institution of the suit was unreasonable or improper, that the next friend can be made personally liable for costs. In the same way, when section 95 of the Code is invoked, I do not think it is legitimate to canvass whether, if a suit for damages is brought by a defendant aggrieved by a wrongful arrest or attachment, he could obtain relief against the minor plaintiff or not. It may in a sense be true that section 95 provides a summary remedy for relief which can also be obtained by a suit. But I am not satisfied that the two remedies are co-extensive for all purposes and must be decided on the same considerations. For instance, sub-clause (b) of section 95 provides for compensation being payable to a defendant against whom an arrest or attachment before judgment was obtained, if the suit of the plaintiff ultimately fails and it appears to the Court that there was no reasonable or probable ground for instituting the same. I very much doubt if a claim like this could be made the subject of a separate suit.

I have, therefore, to consider whether there is any necessity or justification for excluding the

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application of section 95 to cases in which the plaintiff happens to be a minor represented by a next friend. I am not satisfied that there is sufficient reason for doing so. It may ordinarily be presumed that, in such a suit, the next friend is taking steps to obtain an arrest or attachment before judgment only in the supposed interests of the minor. If ultimately damages should be awarded in respect of such action, it may well be made a matter of accountability by the guardian to the minor's estate, instead of denying all redress to the aggrieved defendant on the ground that the application was made not by the minor plaintiff but by his next friend. The section only says that the award of compensation is to be against the plaintiff and the plaintiff in the action is undoubtedly the minor and not the guardian. The award of compensation would therefore, just like the award of costs, be only against the minor, recoverable no doubt from his estate.

I do not feel that such a view will seriously jeopardise a minor's interests. After all, it is for the Court to consider whether or not compensation ought to be awarded and, if the Court is satisfied that in making the application the next friend was acting for his own ends and not in the belief that it was for the interests of the minor's estate, the Court may either refuse to exercise its discretion and refer the defendant to a suit for damages or, if the analogy of Order XXXII, rule 14, could be invoked (even during the plaintiff's minority), the Court may pass an order against the next friend himself. I am accordingly of opinion that the balance of convenience is in favour of the view that section 95 ought not to be held to

be inapplicable to cases in which the plaintiff happens to be a minor. The revision petition is therefore dismissed.

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BUNA.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Stodart.

NETTALIA SEQUERIA (PLAINTIFF), APPELLANT,

1935,
July 29.

v.

CHOVVAKARAN ORKATTERI ABDUL KHADER,
MINOR, AND TWO OTHERS ALSO MINORS, BY GUARDIAN
KHAN SAHIB THAYILAKANDI MUKKATIL MOIDU
(RESPONDENTS), RESPONDENTS.*

Malabar Tenancy Act (XIV of 1930), secs. 3 (o) and (p), 18, 20 (6), 22 and 40 (2)—Melchartdar—Ejectment suit by, against kuzhikanamdar from jenmi or original landlord—Application under sec. 22 by kuzhikanamdar in—Objection under S. 20 (6) by melchartdar to—Maintainability—Party to application—Jenmi or original landlord, if a necessary party.

The first plaintiff, the ultimate landlord or jenmi and the karnavan of a tarwad, granted to the mother of the plaintiffs 2 to 4 a melcharth. The melcharth document contained no provision for any payment of rent to the melchartdar during the continuance of the original tenant in possession, nor did it provide for any collection of rent by the melchartdar from the original tenant. It empowered the melchartdar to give notice to quit to the original tenant but it went on to add that any suit in ejectment should be instituted jointly with the karnavan but conducted at the expense of the melchartdar. After the grant of the melcharth, plaintiffs 1 to 4, the mother of the plaintiffs 2 to 4 having died in the meanwhile, filed a suit in ejectment against the defendant who was in possession

* Appeal Against Order No. 291 of 1933.