FULL BENCH.

Before Sir Shāh Muhammad Sulaiman, Acting Chief Justice, Mr. Justice Young and Mr. Justice Sen.

ALI MUHAMMAD KHAN (PLAINTIFF) *v.* ISHAQ ALI KHAN AND OTHERS (DEFENDANTS).*

1931 June, 19.

Civil Procedure Code, section 26; order III, rules 1 and 2; order IV, rule 1; order VI, rule 14—Presentation of plaint —Plaint presented by next friend of alleged minor who was really a major—Irregularity curable—Jurisdiction.

A suit was filed in the name of the plaintiff by his mother acting as next friend and describing him as a minor, while in fact he was of age. It was found that the suit had been authorised by him and that it was prosecuted by him in person; it was also found that the mistake was a *bona fide* one. The first court considered that in the circumstances there was no serious defect in the suit and decided the suit on the merits. The lower appellate court considered that the defect was so serious that it could not be remedied, and dismissed the suit. On second appeal—

Held that the misdescription of the plaintiff as a minor suing through his next friend and any consequent defects in the signature, verification and presentation of the plaint were technical defects or irregularities of procedure which did not affect the jurisdiction of the court to entertain the suit; and the suit should not be dismissed, but the plaintiff could and should be allowed to amend the misdescription, and then the appeal in the lower appellate court should be proceeded with.

Neither section 26 nor any other provision of the Civil Procedure Code in express terms requires that the plaintiff should file the plaint personally or by a person duly authorised by him. If the legislature had intended that the absence of the presentation of the plaint by the plaintiff or by some person duly authorised by him would altogether oust the jurisdiction of the court, the language used would have been definite and specific. There being no such specific rule, it is doubtful whether order III, rule 1, would apply; if it does not apply, the presentation by a person orally authorised to do so would be valid. But even if it does apply, the omission to

* Second Appeal No. 1009 of 1928, from a decree of Brij Behari Lal, Subordinate Judge of Mainpuri, dated the 5th of March, 1928, reversing a decree of Siraj-uddin, Munsif of Shikohabad, dated the 24th of April, 1926.

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comply with this provision would be a mere irregularity and would not cause an absence of jurisdiction. The court would have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence, and it is fair and just to allow the defect to be cured, the court would undoubtedly do so.

Messrs. *S. C. Goyel* and *S. B. L. Gaur*, for the appellant.

Messrs. *Iqbal Ahmad* and *M. A. Aziz*, for the respondents.

SULAIMAN, A.C.J., YOUNG, and SEN, JJ. :— This case has been referred to a larger Bench because of some apparent conflict in the observations made by this Court in a number of cases.

The suit was for pre-emption and was filed in the name of Ali Muhammad Khan, stated to be seventeen years and eleven months old, under the guardianship of his mother. It was instituted on the 28th of August, 1925. The plaint was signed by the mother and by a pleader appointed under a vakalatnama bearing her signature. It was *not disputed* in the courts below that the plaintiff was aware of the institution of the suit and that in fact he was prosecuting it. Before the hearing of the case when the plaintiff was questioned he stated that his father had died when he was still a child and he did not know his correct age but had learnt from his colleagues that he was about eighteen years of age. The vendees did not challenge the fact of the minority of the plaintiff, but a rival pre-emptor did so. The learned Munsif while discussing the course adopted by the plaintiff considered that he chose the method of filing the suit through a next friend because it was a doubtful case, and for him it was the proper course. He thought that, because the plaintiff himself had been prosecuting the suit, there was no serious defect in the frame of the suit. If he was a major he fully understood his interest, and if he was a minor he was represented by his next friend. The lower appellate court

took a contrary view of the legal position of the plaintiff and remitted an issue for a finding on the question of minority. The finding was against the plaintiff, it being held that he had just attained majority before the institution of the suit.

The position according to law was that a suit was filed in the name of the plaintiff by his mother acting as his guardian and next friend and describing him as a minor, while in fact he was of age; but the suit had been authorised by him and it was prosecuted by him in person.

The lower appellate court came to the conclusion that the defect was so serious that it could not in any way be remedied. It has, accordingly, dismissed the suit.

There is some authority for the support of the view taken by the lower appellate court. It was observed in the case of *Sheorania* v. *Bharat Singh* (1) that a suit instituted on behalf of a person alleged to be a minor through his next friend, when the plaint was neither signed nor verified by the real plaintiff but only by the next friend, was defective inasmuch as there was no plaint by the real plaintiff before the court which could be amended. So far as the learned Judges laid emphasis on the absence of any verification of the plaint by the real plaintiff, their observation was contrary to what had been previously held by a Full Bench of this Court in *Rajit Ram* v. *Katesar Nath* (2), *viz.*, that the defect in the verification of the plaint, even if discovered subsequently, was in no way fatal to the suit and could be remedied. The view expressed in *Sheorania's* case (1) has been followed recently by a Division Bench of this Court in *Ruhul Amin* v. *Shankar Lal* (3). But in that case emphasis was not laid on the want of signature and verification, as had

(1) (1897) I.L.R., 20 All., 90. (2) (1896) I.L.R., 18 All., 396.

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been done in *Sheorania's* case, but rather on the absence of proper presentation of the plaint. The learned Judges came to the conclusion that a plaint presented by a next friend of a person who was stated to be a minor, while in fact he was not a minor, was not validly presented to the court, and that, in view of the provisions of order IV, rule 1, and order III, rules 1 and 2 of the Code of Civil Procedure, a defect of that sort could scarcely be regarded as a defect or irregularity in any proceeding in a suit within the meaning of section 99 of the Code but was a plea which affected the jurisdiction of the court. It was, accordingly, held that the trial court had no jurisdiction to entertain the suit at all, except upon a plaint properly presented. It may be remarked that the absence of proper presentation had not been put forward as a ground in *Sheorania's* case.

On the other hand, there are observations in numerous other cases of this Court which point to the contrary conclusion. We have already referred to the Full Bench case in *Rajit Ram* v. *Katesar Nath* (1). In *Basdeo* v. *John Smidt* (2) it was held that the plaint in a suit which had not been signed by the plaintiff named therein or by any person duly authorised by him in that behalf was not necessarily absolutely void, and that a defect in the signature of the plaint, or the absence of signature, where it appeared that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, might be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit. The learned Judges considered that the striking off of the name of the guardian and the description of the plaintiff as being of age, was an amendment of the plaint which the court had authority to permit. That was certainly a case where the plaint had been filed by an advocate:

(1) (1896) I.L.R., 18 All., 396. (2) (1899) I.L.R., 22 All., 55.

but the learned Judges referred with approval to several unreported cases where the plaint had been filed by a person who was not an advocate.

In the case of *In the matter of the petition of Bisheshar Nath* (1) a single Judge of this Court observed that rule 14 of order VI of the Code of Civil Procedure, which required a pleading to be signed by a party, was merely a matter of procedure, it being the business of the court to see that that provision was carried out. He further held that where a suit was duly authorised, the proper signing of the plaint was a matter of practice only, and if a mistake or omission had been made, it might be amended at any time. In that case the plaint had been signed by another person on behalf of the plaintiff who was actually in jail at the time, and there was obviously no proper presentation of it in court by him or by any person duly authorised in his behalf. The learned Judge held that there was no fatal defect in the suit. A similar view was expressed by another Bench of this Court in the case of *Bombay, Baroda and Central India Railway* v. *Siyaji Mills Company* (2), where it was held that any irregularity in the signature or verification of the plaint was a mere defect of procedure and could not be fatal when the merits of the case had not been affected. In that case a suit had been instituted by a person not duly authorised, but with the knowledge and by the authority of the plaintiff named therein. It was accordingly considered that it was unimportant how the plaint was actually filed or signed.

The other High Courts in India appear to have taken the view contrary to that expressed in *Sheorania's* case. We may refer to the case of *Taqui Jan* v. *Obaidulla* (3) in which TREVELYAN and AMEER ALI, JJ., held that a suit instituted by a person alleging himself to be a minor, the suit being brought through

(1) (1917) I.L.R., 40 All., 147. (2) A.I.R., 1927 All., 514.
(3) (1894) I.L.R., 21 Cal., 866.

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a next friend, while in fact the plaintiff was not a minor at the time, need not be dismissed and the plaint could be amended. This was followed by the Calcutta High Court in the case of *Narayan Chandra Das* v. *Dulal Chandra Dutta* (1) and by the Lahore High Court in the case of *Amritsaria* v. *Gamun* (2). The Bombay High Court in the case of *Ganapati Nana Powar* v. *Jivanabai Subanna* (3) where the plaintiff's mukhtar who held a special power of attorney and not a general power of attorney as required by the rules of that High Court had filed the plaint, held that that was a mere irregularity which could be cured. In *Shanmuga Chetty* v. *Narayana Ayyar* (4) ABDUL RAHIM and BURN, JJ., held that where a plaintiff had been described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend under a *bona fide* belief that he was still a minor, the suit should not be dismissed but the plaint should be returned for presentation after making the necessary amendments by striking off the description of the plaintiff as a minor suing through a next friend and making other consequential alterations in the plaint. It is thus clear that there is plenty of authority in support of this other view.

It seems to us that in *Ruhul Amin's* case (5) it was assumed that the Code of Civil Procedure expressly required that the plaint should be presented either by the plaintiff personally or by some person duly authorised by him. No doubt that is necessarily implied when the presentation of the plaint is necessary for the institution of a suit. But there is no rule which in express terms requires that the plaintiff should file the plaint personally. Nor is there any rule which expressly says that it should be filed by a person holding a general power of attorney on behalf of the plaintiff, or otherwise duly authorised by the latter. The most

(1) A.I.R., 1927 Cal., 477.
(2) (1924) 89 Indian Cases, 363.
(3) (1922) 24 Bom. L.R., 1302.
(4) (1916) I.L.R., 40 Mad., 748.
(5) (1923) I.L.R., 45 All., 701.

that can be said is that this is implied by the scheme of the rules in schedule I of the Code. If the legislature had intended that the absence of the presentation of the plaint by the plaintiff or by some person duly authorised by him would altogether oust the jurisdiction of the court, the language used would have been definite and specific. Instead of that, section 26 merely provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed, without saying in express terms that the presentation should be by the plaintiff or his duly authorised agent. As there is no specific rule either requiring or expressly authorising the plaintiff to present the plaint, it is doubtful whether order III, rule 1, of the Code would apply to such a case. If it does not apply, the presentation by a person orally authorised to do so would be valid. But even if it does, we are clearly of opinion that the omission to comply with this provision would be a mere irregularity and not an absence of jurisdiction. The court receiving a plaint which has not been properly presented would have jurisdiction to dismiss it and pass orders on it. It would not be acting without jurisdiction if it did so. We do not mean to imply that a plaintiff has the right to get his plaint presented by a man in the street. If the person presenting it was not properly authorised, the presentation would be irregular. The court would then have the discretion to allow the irregularity to be cured or not. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured, the court would undoubtedly do so. It is not absolutely helpless in the matter.

We may also refer to the case of *Mohini Mohun Das* v. *Bungsi Buddan Saha* (1) decided by their Lordships of the Privy Council. There three suits had been

(1) (1889) I.L.R., 17 Cal., 580.

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filed by one of three joint creditors, the others being named as co-plaintiffs with him in the plaints, which he alone had signed and verified. The record did not show that the other plaintiffs, who had omitted to sign the plaints or to verify them, had repudiated the suits. It does not appear from the judgment that they had given any express approval of the suits to the court before the period of limitation had expired. The question was whether the other two plaintiffs must be considered to have been plaintiffs to the suits from the very beginning or from the date when certain orders intended to cure the defect were passed. Their Lordships of the Privy Council clearly held that the other plaintiffs became parties to the suits from the time when the plaints were filed and that the suits were not barred by lapse of time. This, in our opinion, is a clear authority for the proposition that the absence of signatures or verification or, for the matter of that, the absence of presentation on the part of some of the plaintiffs out of several, does not affect the jurisdiction of the court, and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority.

In this view of the case the plaintiff's suit could not necessarily be thrown out on the technical ground that the plaint as originally filed described him as a minor under the guardianship of his mother. The defect in its form should be cured, as it was due to a *bona fide* mistake. As the defect does not affect the merits of the case, it is not necessary to have a trial *de novo*.

We, accordingly, allow this appeal, and setting aside the decree of the lower appellate court send the case back to that court with direction to allow the plaintiff to amend the description of himself in the plaint and then to dispose of the appeal according to law. The costs of this appeal will abide the result