

APPELLATE CIVIL

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

ALI AHMAD (PLAINTIFF) Appellant,

versus

SAID MIAN AND ANOTHER (DEFENDANTS)
Respondents.

Civil Appeal No. 890 of 1920.

Civil Procedure Code, Act V of 1908, Order XXXII, rule 2 (1)
—suit instituted by a minor without a next friend—no application
by defendant to have plaint taken off the file — proper procedure.

A. A., a minor, instituted the present suit on 29th August 1919, and on 9th October 1919 the defendant appeared and pleaded that the plaintiff could not sue as he had agreed to the transaction out of which the suit arose. He made no application under Order XXXII, rule 2 (1), Civil Procedure Code, that the plaint should be taken off the file. The Court itself noted that the plaintiff appeared to be under age and this was admitted by the plaintiff. Upon this the Court rejected the plaint.

Held, that the order rejecting the plaint was erroneous. The Court ought to have suspended all proceedings and allowed the minor sufficient time to have himself properly represented in the suit by a next friend.

Beni Ram v. Ram Lal (1), referred to.

Second appeal from the decree of Khan Bahadur Sheikh Amir Ali, District Judge, Gujranwala, dated the 23rd December 1919, affirming that of Diwan Sita Ram, Junior Subordinate Judge, Gujrat, dated the 9th October 1919, rejecting the plaint.

MUKAND LAL PURI, for Appellant.

GOBIND RAM, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—This is a second appeal from the decree of the Subordinate Judge rejecting a plaint on the ground that it was instituted by the minor plaintiff without a next friend. The suit was instituted on the 29th August 1919 and on the 9th October 1919, the date fixed for hearing, the defendant appeared and pleaded that

the plaintiff could not sue as he had agreed to the transaction out of which the suit arose. He made no application under Order XXXII, rule 2 (1), Civil Procedure Code, that the plaint should be taken off the file. The Court itself noted that the plaintiff appeared to be under age and took his statement in which he admitted that he was 15 years of age. Upon this the Court rejected the plaint; and also pointed out that the plaintiff had not deposited $\frac{1}{4}$ th of the purchase money as required by section 22 of the Punjab Pre-emption Act, I of 1913. This order was upheld on appeal by the District Judge and the plaintiff has filed a second appeal to this Court.

In our opinion the order rejecting the plaint is clearly erroneous. It is not an order contemplated by Order XXXII, rule 2, Civil Procedure Code, and moreover there was no application by the defendant to have the plaint taken off the file. It was pointed out in the case of *Beni Ram v. Ram Lal* (1), that a case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice must be considered to be in force. This practice was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. In the present case there is no ground at all for supposing that the plaintiff knowingly instituted the suit without a next friend with intention to deceive. Mr. Gobind Ram urges that on the 9th October 1919, the date on which the plaint was rejected, the suit, if then instituted, would have been barred by time. We have nothing to do with the question of limitation at present which can be decided by the trial Court to which this case will be sent back.

We accept the appeal, and, setting aside the order of the lower appellate Court, remand the case to the Court of first instance for redecision. The plaintiff should be given a reasonable time for remedying the defect in the plaint. Stamp in this Court and the lower appellate Court will be refunded and other costs will be costs in the case.

A. R.

Appeal accepted—case remanded.

(1) (188 I. L. R. 13 Cal. 189, 191.