

SCHRIEBER
v
DAYARATNA AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
C.A.L.A 181/2003
D.C. MT. LAVINIA NO. 80/02/NF
NOVEMBER 28, 2003

Civil Procedure Code – Appointment of a next friend – Minor resident at Mawanella – Assaulted in Dehiwela – Action filed in Mt. Lavinia – Does the District Court of Mt. Lavinia have Jurisdiction to appoint a next friend? – Judicature Act – Amendment 16 of 1989 – Section 19(1) – Appointment of a Guardian – Compared – Civil Procedure Code section 479, section 481(2) – Failure to give Notice of the application to appoint a next friend – A defect or an irregularity in the appointment of a next friend – Is it fatal?

The plaintiff minor claimed damages from the defendant, in the District Court of Mt. Lavinia, though the minor resided at Mawanella, but was assaulted in Dehiwela. The application of the father of the minor to the District Court of Mt. Lavinia to appoint him as the next friend, was allowed. The petitioner contends that (1) the District Court of Mt. Lavinia had no jurisdiction to appoint a next friend to represent a minor who resided in Mawanella and (2) there was a failure to serve notice on the petitioner of the application for the appointment of a next friend.

Held:

- i) Jurisdiction over the person and estates of minor and over their guardians is vested in the District Court which has jurisdiction over the place where the minor resides. The power to appoint a guardian for the action is vested in the Court where the action against the minor is instituted, irrespective of the residence of the minor. The same principle applies for the appointment of a next friend.
- ii) The appointment of a next friend is made not upon jurisdiction the Court has over the minor but upon Courts jurisdiction over the cause of action in respect of which the minor proposes to file action.
- iii) There is no legal necessity to make the petitioner a respondent to the application to appoint a new friend. Therefore there is no requirement to give notice to him even though he had been named a respondent.

- iv) Irregularity in the appointment of a next friend is no ground for the dismissal of the action. Even if the failure to serve notice on the petitioner is treated as an irregularity it cannot vitiate the order appointing the next friend.

APPLICATION for Leave to Appeal against the Order of the District Court of Mt. Lavinia.

Cases referred to:

1. *Keppitipola Kumarihamy v Rambukpotha* – (1929) 30 NLR 273
2. *Fernando v Fernando* – 2 Ceyl. LR 282
3. *Mohamed Umma v Mohideen* – 2 Cey. Law R. 163
4. *Wanigasekera v Louisz* – (1943) 44 NLR 37
5. *Walian v Banke Behari Pershad Singh* 1 LR 30 Cal. 1021 I.L.R.

N.D.R Casie Chetty for petitioner.

Ranjan Suwandaratne for 1st and 2nd respondents

Cur. adv. vult.

July 16, 2004

GAMINI AMARATUNGA, J.

This an application for leave to appeal against an order made by the learned District Judge of Mt. Lavinia dated 21.5.2003 rejecting the objection of the petitioner to the order made by that Court on 21.01.2002, appointing the 2nd respondent minor's father, the 1st respondent, as the next friend in the action the minor filed against the petitioner to recover damages for personal injuries caused to her as a result of an assault by the petitioner.

It appears that the 2nd respondent minor has filed case No.3573/02/M in the District Court of Mt. Lavinia on 23.01.2002, against the defendant claiming damages in a sum of Rs.750,000/- for personal injuries caused to her by assaulting her on 25.01.2000 at Dehiwala. In the plaint it is alleged that on 25.01.2000, when the minor, along with her father crossed the road at a pedestrian crossing at the Dehiwala junction, the defendant stopped his

vehicle and without any cause, assaulted the minor plaintiff causing dislocation of two teeth of her upper jaw. It was for this injury that the plaintiff minor claimed damages from the defendant.

It also averred in the plaint that at the time of the aforesaid incident the defendant assaulted her father and for that incident, the defendant was charged in the Magistrates Court, Mt Lavinia, and that he pleaded guilty and was fined Rs. 2000/- and was given a suspended sentence.

Before the plaint was filed in the aforesaid damages case on 21.01.2002, the plaintiff's father had filed petition and affidavit in the District Court of Mt. Lavinia praying that he be appointed next friend of the plaintiff minor for the purpose of filing the aforesaid damages case against the defendant. The petitioner had been named the 3rd respondent to that application. The Court had assigned No.80/2002/N.F. for that application. The petition for the appointment of a next friend was accompanied by a draft plaint of the damages action.

On 21.01.2002, the learned District Judge, after recording the evidence of the minor plaintiff's father had made order appointing him as the next friend of the minor for the purpose of institution action on the draft plaint annexed to the petition. The plaint in the damages action was filed on the same day and it was assigned No. 3573/02.M.

After receiving summons in the damages action, the petitioner had made an application to the District Court to get the order appointing the minor plaintiff's next friend vacated. The grounds urged in support to the application were, (i) that the District Court of Mt. Lavinia had no jurisdiction to appoint a next friend to represent a minor who resided in Mawanella and (ii) that there was failure to serve notice on the petitioner of the application for the appointment of a next friend. After considering the application, the learned District Judge had made order refusing the petitioner's application. Now he seeks leave to appeal against that order mainly on the same grounds.

In support of the submission that the District Court of Mt. Lavinia had no jurisdiction to appoint a next friend to represent a minor resident in Mawanella, section 19(1) of the Judicature Act, as

amended by Judicature (Amendment) Act No. 16 of 1989 has been cited in the written submissions of the petitioner. The relevant part of the said section 19(1) of the Judicature Act is as follows.

“Every District Court shall be a court of record and shall within its district have unlimited original jurisdiction over the persons and estates of persons of unsound mind, minors and wardsand over guardians and trustees”

In view of this provision it appears that the submission (impliedly made) is that jurisdiction to appoint a next friend for the minor plaintiff is vested in the District Court which has jurisdiction over the area where the minor is resident, namely Mawanella.

It is not disputed that jurisdiction over the *person* and *estates* of minors and over their guardians is vested in the District Court which has jurisdiction over the place where the minor resides. The case of *Keppitipola Kumarihamy v Rambukpotha* ⁽¹⁾ cited on behalf of the petitioner confirms this. That case relates to the appointment of a guardian for a minor. But the appointment of a guardian of a minor is different from appointing a next friend. The appointment of a next friend is made not upon jurisdiction the Court has over the minor, but upon the *Court's jurisdiction over the cause of action* in respect of which the minor proposes to file action.

A case has to be filed or defended by a person who has the legal capacity to be a party to an action. A minor has no such capacity. Unless he is represented by a person having legal capacity the Court cannot enforce its decrees against a minor or award costs against him. This is the reason for the necessity to have a next friend for minor plaintiff. The power of the Court, where the minor's action or an action against the minor is instituted to appoint a next friend or a guardian for the purpose of the action manifest from an examination of section 479 of the Civil Procedure Code. That section states that “where the defendant to an action is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the action for such minor....”. This shows that the *power to appoint a guardian for the action is vested in the Court where the action against the minor is instituted, irrespective of the residence of the minor*. The same principle applies for the appointment of a next friend. The

requirement that the plaint intended to be filed shall be submitted with the application to appoint a next friend is to enable the Court to exercise its judgment whether the plaint, on the face of it shows a good cause of action and whether it is to the interest of the minor that the action should be brought. *Fernando v Fernando* (2).

The absurdity of the petitioner's argument that the next friend or the guardian for the action must be appointed by the District Court where the minor resides can be demonstrated by the following hypothetical example. If a case against a minor, residing in Mawanella, is instituted in the District Court of Mt. Lavinia, can it be said that the District Court having jurisdiction over Mawanella has to appoint the guarding for the action and the Mt. Lavinia Court has no jurisdiction to make such appointment? Such a proposition is absurd, impracticable and accordingly is untenable. For those reason I hold that the District Court of Mt. Lavinia had jurisdiction to appoint a next friend for the minor plaintiff's action instituted in that Court.

The other point urged in support of leave to appeal is the failure to give notice to the petitioner of the application to appoint a next friend. This submission has been made in view of the requirement set out in the section 481 (2) of the Civil Procedure Code that the defendant to the action shall be made a respondent to the application for the appointment of a next friend. It had been held in *Mohamed Umma v Mohideen* (3) that the intended defendant need not be made respondent to the petition and that the requirement to make the defendant a respondent only applies in cases where such application is made in the course of or as incidental to an action. In the present case the petitioner had been cited as the 3rd respondent to the application for the appointment of a next friend. If there is no legal necessity to make the petitioner a respondent, there is no requirement to give notice to him even though he had been named a respondent.

In any event, any irregularity in the appointment of a next friend is no ground for the dismissal of the action. *Wanigasekara v Louisz* (4). Howard, C.J. in that case quoted with approval the following passage from Chitaley, volume 3 (2nd Ed.) "A defect or irregularity in procedure in the appointment of a guardian *ad litem* is also only an irregularity and will not be a ground for setting aside

the decree unless it had the effect of causing prejudice to the minor. In *Walian v Banke Behari Pershad Singh*,⁽⁵⁾ Their Lordships of the Judicial Committee, after impressing upon the Courts in India the importance of following strictly the rules laid down in the Code, proceeded to observe at 1031 'But it is quite another thing to say that a defect in following the rules is necessarily fatal to the proceedings.'

Thus even if the failure to serve notice on the petitioner is treated as an irregularity, it cannot vitiate the order appointing the next friend.

For the reasons set out above I uphold the learned District Judge's order dismissing the petitioners application made to have the appointment of the father of the plaintiff as her next friend for the action filed against the petitioner set aside. There is no reason to grant leave to appeal. I therefore refuse leave to appeal and dismiss the application with costs in a sum of Rs.10000/-.

Application dismissed.