

Bombay High Court

Somnath vs Tipanna Ramchandra Jannu on 20 October, 1972

Equivalent citations: AIR 1973 Bom 276, (1973) 75 BOMLR 177

Author: Deshmukh

Bench: Deshmukh, Shah

JUDGMENT Deshmukh, J.

1. This is plaintiff's appeal. Plaintiff is described in the plaint as a major person aged 35 but of unsound mind, or a person incapable of taking care of his own affairs and, therefore, sued through the next friend, his wife. For the purpose of this appeal, it is not necessary to refer to the contents of the plaint. Suffice it to note that there appears to be a decree ultimately passed by the High Court in First Appeal No. 479 of 1961 decided on 25-7-69 arising out of Special Suit No. 108 of 1958 in the Court of the Civil Judge (s. D.) Poona, in favour of the defendant. Defendant is executing that decree in Special Darkhast No. 90 of 1968 and the suit by the next friend on behalf of the plaintiff, who is described as a person of unsound mind is for a declaration that the plaintiff has a right to remain in possession of the suit property and that that defendant is not entitled to execute the decree for specific performance obtained by him in the litigation mentioned above.

2. While opposing the suit on the merits, the defendant in his written statement also alleged that it was not true that the plaintiff was a person incapable of taking care of his own affairs. He, therefore, challenged the presentation of the plaint as improper. He also filed an independent application, Exh. 29, containing the same allegation, viz., that the plaint was not properly presented and it should be struck off the file.

3. The learned Civil Judge (S. D.) Poona, framed two preliminary issues and disposed of the suit on those issues. The first issue was whether the plaint has been properly presented by the plaintiff and the second was, what order.

4. The learned Civil Judge referred to the provisions of Order 32, Rule 15 of the C. P. Code and also some case law dealing with the same provisions. He relied upon some observations in the judgment of the Madras High Court in the case of Govindayya v. Ramamurthi, AIR 1941 Mad 524. According to the learned Judge's view, the next friend of the plaintiff should have first applied and obtained finding of the court under the provisions of Order 32, Rule 15 that the plaintiff was in fact a person of unsound mind and that the next friend should sue. Since that procedure is not followed, the plaint is not properly presented and the suit is liable to be dismissed. Accordingly, he dismissed the suit with costs for want of proper presentation of the plaint. Being aggrieved by this order, the plaintiff has filed this appeal.

5. It has been argued before us that the entire procedure followed by the learned trial Judge was erroneous and in spite of the application of the plaintiff's next friend to hold an inquiry about the unsoundness of mind of the plaintiff and the granting of his application in that behalf, the learned Judge suddenly turned round and heard the matter on preliminary issue with regard to the presentation of the plaint. Some cases also have been cited before us, more particularly from Madras and Andhra Pradesh High Courts. Apart from the case law, we propose to examine the question of

the procedure to be followed for admitting the plaint when a major person is described as a person of unsound mind and the next friend wants to prosecute the suit for and on his behalf.

6. Before we do that, we may briefly note what the learned Judge has done. When the plaint was presented, which contains in the body of it in para 10, a statement that the plaintiff is unable to take care of his own property it has been straightway admitted and summons has been issued to the defendant. The defendant filed his written statement in which he disputed the right of the next friend to present the suit as the unsoundness of mind of the plaintiff was disputed. He also filed a separate application to hold an inquiry in that behalf and to reject the plaint as not properly presented. In the meanwhile, plaintiff has presented on 5-1-1972 the documents along with the list, Ex. 17, which contained amongst other things a certificate of a medical practitioner certifying the plaintiff to be suffering from a particular mental disease. By an application, Ex. 22, dated January 19, 1971, the learned counsel for the plaintiff stated that he proposes to give evidence in support of the unsoundness of mind of the plaintiff on such day as the Honorable Court may fix in that behalf. The only order passed on this application is "Time granted." the plaintiff filed another application, Ex. 23, dated January 25, 1971 by which he requested the court to pass order on the application for issuing witness summons. That application was taken on board, and on the application Ex. 24, the court passed an order directing issue of summons Ex. 25 is a summons issued to Dr. Roshan Master of the Ruby Hall Nursing Home, Poona. It appears that even before filing the written statement, the defendant had applied by Ex. 13 on November 17, 1971, that the suit was not presented according to law, and that not only the interim injunction should be dissolved but the suit itself should be struck off the file. No orders, however, were passed except calling for the say of the other side. As the learned Judge passed orders granting plaintiff's application for issue of summons to the medical practitioner, one gets the impression upto that stage of the proceedings that the learned Judge intends to inquire about the unsoundness of the mind of the plaintiff which was being challenged by the defendant. However, long thereafter, on February 7, 1972, defendant gives a further application, Ex. 29, and urges that the presentation of the plaint itself is bad as the plaintiff does not appear to be a person of unsound mind. The defendant has also applied earlier by Ex. 26 to require the next friend to furnish security in the amount of Rs. 1000/- on the ground that the suit is frivolous and the next friend has no property of her own. Instead of proceeding to inquire about the unsoundness of mind, the learned Judge fixed the matter on March 20, 1972, for passing orders on Exhs. 26, 28 and 29 and adjourned the suit on 24TH March, 1972. On 24TH of March, he framed the preliminary issues as indicated earlier and disposed of the suit in view of his finding that the next friend had not given a separate application earlier for obtaining permission to present the plaint on behalf of the plaintiff who was alleged to be of unsound mind.

7. To say the least, we do not find any warrant in the procedure adopted by the learned Judge, nor does his order indicate as to how he struck upon this procedure for disposing of the suit on preliminary issue of the proper or improper presentation of the plaint. The provisions regarding the presentation and prosecutions of suits on behalf of minors and persons of unsound mind are dealt with in Order 32 of the Code of Civil Procedure. We would, therefore, in the first instance refer to the provisions of the Civil Procedure Code in that behalf of the correct procedure that ought to be followed when the plaintiff is alleged to be either a minor or a person of unsound mind.

8. Rules 1 to 14 of Order 32 deal with the procedure to be followed when the plaintiff or the defendant is a minor. In the case of plaintiffs and defendants who may be persons of unsound mind, the procedure is laid down in Rule 15 of Order 32 WHICH is as follows :

"The provisions contained in Rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."

The above rule contemplates two kinds of cases. Where a persons is already adjudged to be of unsound mind as under the Lunacy Act, that would be the first category of cases of persons of unsound mind which are covered by Rule 15. However, there may be persons of unsound mind who are not so adjudged by the court. how shall a suit be filed on their behalf; or how shall such persons defend the suit filed against them? The second part of the provision of Rule 15 quoted above shows that in case of such a person who is not already adjudged a inquiry, has to find out that by reason of unsoundness of mind or infirmity, the person concerned is incapable of protecting his interest when suing or being sued. Once this finding is arrived at, the provisions of Rules 1 to 14, so far as they may be applicable automatically get extended to the persons of this type.

9. The plaintiff in the present suit is not already adjudged to be of unsound mind. The case of the present plaintiff obviously falls under the second part of Rule 15. In the case of such a plaintiff, the court has to find on inquiry whether he is in fact so. At what stage this should be done and in what manner, is not prescribed by any part of Order 32 or by any other provisions of the Code of Civil Procedure.

10. Shri Chitale, the learned counsel for the respondent-defendant said that some of the judgments of the Madras High Court have taken the view that this finding has to be arrived at the admission of the plaint. We will presently point out that the context in which those observations are made appears to be slightly different, but we are inclined to hold that the inquiry contemplated by the provisions of Rule 15 of Order 32 appears to be, in the first instance, an ex parte inquiry in the absence of a defendant. It further appears to be an inquiry for the prima facie satisfaction of the court to give a finding that the provisions of Order 32, Rules 1 to 14 get extended, because the plaintiff appears to be a person of unsoundness of mind, or of such mental infirmity as to be incapable of protecting his own interests.

11. The learned Civil judge thinks that an independent application has to be made by the plaintiff and findings obtained from the court. Some fo the observations in the cases decided by this High Court as also by the Madras High Court seem to indicate that an application by the plaintiff was necessary. WE tried to find out whether there are any amendments to the rule contained in Order 32 by the High Courts of Madras and Andhra Pradesh, but we do to find any amendment which requires a plaintiff to make an application. Apart from the case law, therefore, we will first examine the procedure prescribed by Order 32 in the case of a minor which procedure is automatically extended to the case of a person of unsound mind, the moment he is shown to have been already adjudged or a court before whom the suit is presented finds him so on inquiry.

12. Rule 1 of Order 32 makes it mandatory for filing a suit on behalf of a minor that it shall always be presented in the name of the minor but by a person who will be described as the next friend of the minor. Not only the rule is mandatory but Rule 2 lays down the consequence where a suit on behalf of the minor is filed without there being a next friend. If a defendant finds that the suit has been instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint struck off the file with costs paid by the pleader or the other person by whom the suit is presented. Sub-rule (2) of Order 32 requires a notice to be issued of such application, and the court after hearing the objections may make such order in the matter as it thinks fit. It is, therefore, clear that the suit on behalf of the minor without the next friend is liable to be struck off the file. Rule 3 deals with a case where the defendant is a minor, and we need not point out how the position of a minor defendant is dealt with the provisions of Order 32. Suffice it to point out that there is a distinct difference between a suit on behalf of the minor plaintiff and suit a minor defendant; whereas the suit has to be directly presented by a next friend on behalf of the minor, while suing a minor defendant, an application has to be made to the court to appoint a person as guardian-ad-litem to represent the minor defendant in the case. The further provisions point out that the court may firstly satisfy itself that the defendant is a minor and then issue notice to the proposed guardian and obtain his consent before making appointment of that person as guardian-ad-litem. Rule 4 deals with the qualification of a person who can act as next friend or a guardian-ad-litem. This rule also need not detain us at the moment. Similarly,, we need not go in detail to the provisions of Rule 5 to 7 which deal with the authority of the next friend or guardian to represent the minor or the person of unsound mind in the suit and pass certain receipt if he compromises the suit etc. Rule 8 deals with the retirement of a next friend for certain acts of commission and omission. Rule 10 is an incidental provision dealing with stay of the suit on removal of the guardian until another person is appointed. Rule 11 deals with the retirement, removal or death of a guardian for the suit, and Rule 12 deals with the course to be adopted by a minor plaintiff who attains majority during the pendency of the litigation. Rule 13 deals with the position of a minor co-plaintiff and Rule 14 gives an option to the minor after attaining majority to take certain steps when he finds that the suit on his behalf was unreasonable or improper. These are the total provisions which deal with the minors and their guardians or next friends.

13. Nowhere do we find in this procedure a provision for the next friend to apply either for getting himself appointed as the next friend or to seek a permission of the Court to present the plaint or pursue the litigation on behalf of a minor. It is entirely different that the defendant, after entering appearance, may point out either by a written-statement or otherwise that the plaintiff is not a minor, and the suit presented on his behalf is not proper. The Court, undoubtedly, has the right to decide the issue when so raised by the defendants, and if satisfied that the so-called minor was in fact a major, the Court could come to the conclusion that the suit was not properly presented and the plaint may be struck off the file. In such a case, it means that the plaintiff was in fact a major, and when a person is major, primarily it is his and his right alone to file or not to file a suit or to defend or not to defend the case against him. None else has a right to act on his behalf. It is on those principles that a wrong person has come before the court, that the suit will be thrown out.

14. If this is all that is contemplated in the case of a minor, and if these provisions are extended to the case of a person of unsound mind, then we fail to understand why the procedure could be

different. There is, however, one difference, viz., that the allegations in the plaint that a person is a minor may suffice for the court to admit the plaint and issue process. That may not be enough in the case of a person of unsound mind if he is not already adjudged so by a competent court. In that case, as the second part of Rule 15 quoted above shows, the court will have to make an inquiry and find him to be so before the plaint is admitted and the defendant is called upon to answer the plaint in response to a suit presented by a next friend on behalf of a person of unsound mind. We will shortly indicate what should be done by the court so far as giving the finding contemplated by ever, short of that, we do not find any difference between the procedure to be followed in the case of a minor and that of a person of unsound mind.

15. Our attention was drawn to two other provisions of the Code of Civil Procedure where court's permission is to be obtained by making a proper application in that behalf before a suit is prosecuted in a certain manner. The first provision relates to the prosecution of a suit in a representative capacity on behalf of numerous persons having the same interest or filing a suit in a representative capacity against the defendants who may be some of the numerous persons having similar interest. When a suit of this type is to be file din a representative capacity, or where in a suit defendants are sought to be sued in that capacity. Rule 8 of Order 1 postulates that a permission of the court is to be obtained in that behalf. In other words, by an application accompanied by an affidavit or some other evidence, the court must be satisfied that the plaintiff prima facie holds interest which is being held by numerous other persons and it is desirable and necessary that the plaintiff is permitted to sue in a representative capacity. In the same manner, the court has to be satisfied that the defendants are persons of a certain category where it is desirable and necessary to permit them to be sued in a representative capacity. When a court is so satisfied, it gives permission, and then the suit proceeds as a representative suit or a suit against the defendant in a representative capacity. The other provision that was brought to out notice is contained in Order 33 of the Code of Civil Procedure. This order deals with suits by paupers. If a person wants to sue in forma pauperis, he has to apply for permission to sue as such and that application has to contain the particulars required in regard to the plaint in suit. It must also contain a schedule of movable and immovable property belonging to the applicant with the estimated value thereof annexed thereto. This application is required to be signed and verified in the manner prescribed for signing and verification of pleadings. When a person having no money wants to file a suit, he has first to apply in this manner as provided by Rule 2 of Order 33. We may skip over the intervening provision of how that application is heard, but if at the end of the hearing, the Court grants the application, that application itself has to be registered and is to be deemed as a plaint in the suit. There is, therefore, no doubt that before a suit is filed, an application must be filed by a person wanting to sue as a pauper, and it is entirely a different matter that the procedure prescribed requires the applicant to include all that the plaint requires, and ultimately the same application in registered and numbered as a plaint or suit. This Court by adding Rule 17 to Order 33 has extended the above provision to a defendant also who wants to file a cross-claim in forma pauperis while defending the suit. It is, therefore, obvious that wherever a separate or independent application for obtaining orders of the court was contemplated, it has been so provided in the other parts of the Civil Procedure Code. However, we do not see any provisions, which require the next friend of a minor to make a separate application either to prove the minority of the plaintiff or to obtain court's permission to permit him to sue as a next friend. Since the same provisions are extended to a person of unsound mind while

suing through the next friend, we are of the view that no separate application is contemplated, and none need be made by the next friend in that behalf.

16. We may now point out how precisely the court shall deal with a suit presented by a next friend alleging the plaintiff to be a person of unsound mind. We may refer to the provision to Order 7, Rule 1 WHICH lays down the particulars that a plaint shall contain. Clause (d) of Order 7, Rule 1 says that among other particulars where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect shall be made in the plaint. The only requirement, therefore is that the next friend must state in the plaint that the plaintiff is a person of unsound mind. That has been done by the next friend of the present plaintiff by including para 10 in the plaint by including para 10 in the plaint which is in the following words -

"That the plaintiff in suit being of unsound mind, the suit in question be permitted to be filed by his next friend who in fact is his de facto guardian and has no adverse interest with the plaintiff for the purposes of this suit. She is his married wife and hence she is fit to act as his next friend for the purposes of this suit."

Not only the statement of unsoundness of mind finds place in the plaint, but though not necessary, as pointed out above, the paragraph also seeks permission to file the suit as next friend on behalf of the plaintiff. According to us, this is the only requirement which a plaintiff is required to fulfill, and that has been done in this case. We may briefly refer to the other provisions which deal with the plaint in a civil suit. Under Rule 2, the plaintiff has to state precisely the claim when the suit is for recovery of money. However, in the case of recovery of mesne profit, an approximate valuation would be enough. Under Rule 3, the plaintiff is enjoined to give certain type of descriptions of the property when the subject-matter is immovable property. Under Rule 4, the plaintiff must indicate his subsisting actual interest when he seeks to file a suit in a representative capacity. When the defendant is to be so sued in the representative capacity, the nature of his interest also must be indicated as laid down in Rule 5. If the plaintiff seeks exemption from the Law of Limitation, he must state the precise ground in the plaint itself. This is the requirement of Rule 6. Under Rule 7, the reliefs which the plaintiff seeks must be specifically enumerated. If there are distinct reliefs based upon distinct grounds, each one of them must be separately stated as required by Rule 8. In other words, Rules 1 to 8 of Order 7 deal with the contents of the plaint in various types of suits. It is obvious that the court has a right to reject a plaint under Rule 11 of Order 7 on the grounds mentioned therein. It is not necessary here to point out that the provisions of Rule 11 are not exhaustive, but the court has right to reject the plaint on certain other grounds, also. We are referring to the provisions of Rule 11 only for the purpose of pointing out that one of the courses to be adopted after the plaint is presented could be the rejection of the plaint. If, however, the court does not reject the plaint, what does it do? It admits the plaint. And when it so admits, what the plaintiff is required to further do in that behalf is laid down by Rule 9 of Order 7. It is well known that after the plaint is examined, what is known as "the first orders of the Court" are obtained. The plaint is registered and these orders are obtained by which the court issues process to the other side and calls upon it to defend the suit. There is no formal order regarding admission of the plaint, but the procedure adopted in registering the plaint and issuing process is tantamount to admitting the plaint. When the plaintiff is an adult person and himself files the suit, the examination of the plaint

has to be made in the light of the provisions which we have summarised above. When the plaint is complete with all the requirements of Order 7, it is admitted and process is issued. However, in the case of a plaint which is presented on behalf of a person of unsound mind by his next friend the representation by the next friend does not become effective for the purpose of admitting the plaint and issuing process against the defendant until the stage contemplated by Order 32, Rule 15 is reached. If the plaintiff is already adjudged by a competent court and the order is attached to the plaint by the next friend, he falls in the first part of Rule 15 of Order 32 and the provisions of Rules 1 to 14 immediately become applicable. If he is not so adjudged, as in the present case, until the court finds him to be so on an inquiry contemplated by the second part of Rule 15 of Order 32, the provisions of Rules 1 to 14 do not get extended, and there is no plaint properly presented so as to call upon the defendant by issuing process. On reading the provisions, we are of the view that in a plaint which contains the statement that the plaintiff is a person of unsound mind and also further statement that he has not been yet so adjudged, the court is at once called upon to give a finding after the inquiry as required by second part of Rule 15 of Order 32. It is a part of the court's duty to do so, as it is the other part of the court's duty to examine the plaint and reject it under the provisions of Rule 11 of Order 7. If in this inquiry, which we are indicating the court comes to the conclusion that the plaintiff is not a person of unsound mind that will be a valid ground to reject the plaint. The powers of the court to reject the plaint are contemplated by Rule 11, but since the grounds mentioned in that rule are not exhaustive, a finding of the above-type would be a valid ground to reject the plaint. In view of the fact that a wrong person is suing mind, there is no need to issue process and call upon the defendant to defend.

17. The above discussion clearly leads to the logical conclusion that when the plaint is being examined for the purpose of admission, if it contains a statement as required by clause (d) of Rule 1 of Order 7 that the plaintiff is a person of unsound mind and that a next friend is suing on his behalf, the court must at once hold an inquiry. It is the duty of the court to do so and it is not necessary for the next friend to make a separate application for that purpose. This inquiry should ordinarily include the calling of the plaintiff himself and questioning him in Court. If the Court entertains doubt about the mental capacity or the soundness of his mind, it is open to the Court to take further assistance in the form of medical examination and the evidence of the doctor under whose observations the plaintiff may be kept. The quantum and extent of inquiries must be left in each case to the circumstances prevailing. There may be a plaintiff who on immediate view may appear to be a person of unsound mind, and the Court may not need much evidence beyond recording of the questions put to and the answers given by the person concerned. There can be other cases which are not so clear and more evidence may be necessary. However, apart from the total extent of the evidence that might be led, we would suggest that as a matter of strong commonsense approach, the plaintiff who is alleged to be of unsound mind should be invariably called for being questioned when the case falls under the second part of Rule 15 of Order 32. This inquiry is made "for the purpose of recording a finding by the court that the plaintiff is a person of unsound mind, or a person mentally so infirm as to be incapable of protecting his own interests. The provisions of Rule 15 of Order 32 makes it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction, or if not so adjudged, is found by the court on inquiry to be so. That is the foundation, prima facie, for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the court to give a finding

and to admit the plaint and issue the process to the other side.

18. We may at once point out that such an inquiry and finding may be good for the purpose of the next friend to present the suit and obtain first order of the court. This finding of the court does not and cannot bind the defendant who may after entering appearance point out to the court that it has been misled into giving a wrong finding and the defendant was willing to prove that the plaintiff was a person who was capable of protecting his own interests. If such a challenge is held out in a given case, the issue is still open between the parties. The defendant is entitled to prove this allegation. The court cannot shut out an inquiry simply because on the earlier inquiry by it, it gave a finding as contemplated by one part of Rule 15 of Order 32. If a defendant holds out such a challenge and succeeds in proving what he alleges, the consequences are obvious, and we have already indicated what the court will do when on its own inquiry it found that the plaintiff was a person capable of defending his own interest. The same consequence might follow if the defendant is able to satisfy the Court that the plaintiff was a person who was capable of defending his interests.

19. This according to us, is the correct procedure which must be adopted in a litigation where a next friend seeks to file a plaint on behalf of a person of unsound mind.

20. The same approach seems to have been adopted by the Andhra Pradesh High court and Madras High Court. The learned Judges seem to contemplate some kind of application by the next friend of the plaintiff apart from the suit and the independent inquiry therein by the court. For instance, a Division Bench of the Madras High Court in AIR 1941 Mad 524, disapproves of the observation of an earlier learned Single Judge of that Court, Mockett. J, in an unreported judgment had taken the view that there must be a preliminary inquiry and a finding of the court before the plaint was filed. Pointing out that this was not the correct procedure, what the learned Judges say is that the inquiry contemplated by Rule 15 of Order 32 is only a prima facie inquiry, and after the presentation of the plaint for permitting the next friend to sue on behalf of the plaintiff who is of unsound mind. They at once pointed out that this would be a sort of summary inquiry where the court has some evidence on record that the plaintiff is incapable of taking care of his own interest and, therefore, the next friend should be allowed to sue on his behalf. They also pointed out that it is open to the defendant to allege and prove that the plaintiff is a person who can take care of his own interest, and, therefore, the plaint presented by the next friend is improper or unauthorized. That issue is open between the parties after the process is issued in the suit. Forgetting this broad proposition which really is the ratio of that judgment, the learned trial Judge has quoted and relied upon the following passage from page 527 of the report which is as follows : -

"We think it desirable that the Court should insist upon an independent application and an affidavit fully disclosing the facts relating to the unsoundness of mind of the person on whose behalf the plaint is presented and the Court before admitting the plaint should if the allegations in the affidavit are not convincing, insist upon the production of witnesses in order to enable the Court to satisfy itself that the person was of unsound mind and incapable of protecting his own interests and record a finding to that effect "

21. In view of our analysis of the provisions of Order 32 as well as Order 7, we are with respect, unable to agree that there has to be an application, or that the court should insist upon an application by the next friend for requesting the court to hold an inquiry. We have already pointed out what if the proper statement about the unsoundness of mind is contained in the plaint, the court is called upon as a part of its duty to hold the inquiry contemplated by the second part of Rule 15 of Order 32. We are, however, with respectful agreement with the observations that the inquiry to be held by the court at the time of issuing process cannot and need not bind the defendant, and it is open to the defendant to prove otherwise after he enters appearance. If the learned Judge really wanted to rely upon the above passage, we fail to understand how he could adopt the procedure which he has done. Even according to the Madras High Court, it was desirable to have an independent application, and it was further necessary for the court to insist upon a separate application. WE have already quoted references from the Rojnama of the learned Judge which show that the plaintiff had given applications after applications to hold an inquiry about the unsoundness of mind and to permit him to examine the medical practitioner on her behalf. Nothing more should have been done by any plaintiff. The learned Judge failed to perform his duty and adopted a course of framing a preliminary issue about the proper presentation of the plaint and has ultimately erroneously dismissed the suit.

22. Shri Chitale for the respondent-defendant has also referred to another judgment of the Madras High Court in *re K. Narashimha Bhattachariar*, AIR 1939 Mad 657. It appears that in that case, on some inquiry about the mental deficiency of the plaintiff, the next friend was permitted to file the suit on his behalf. When that authority was challenged by the defendant in the written statement, the learned Judges observed that once the plaintiff is permitted to sue by the next friend, the authority of the next friend cannot be questioned by an issue raised in the suit. Unless by a substantive application the authority of the next friend is rejected, it is not competent to raise an issue in answer to the plaint. A very different type of issue seems to have come up for consideration of the Madras High Court. According to the case law of that Court, the permission required was obtained by the next friend, and how to revoke that permission, or how to prove that the permission ought not to be given was the only question before them. Instead of raising a point in the written statement, their view seems to be that an independent application must be made by the defendant for revoking that permission. Again, with respect, it is difficult for us to agree with those observations for reasons which already appear in the earlier part of our judgment. However, this judgment is not strictly relevant for the purpose of deciding the question that has arisen before us in this appeal.

23. We may point out that the learned single Judge of the Andhra Pradesh High Court takes a view similar to the Madras High Court about the necessity of an application being filed by the next friend and obtaining a finding of the Court on that application with regard to the unsoundness of mind of the plaintiff. In *Papi Reddi v. Rami Reddi*, , a conclusion is drawn that the provisions of Rule 1 of Order 32 contemplate an application being filed before representation is obtained by the next friend. Shri Chitale, the learned counsel for the respondent-defendant, referred to a judgment of the Madras High Court in *Mohammad Ibrahim v. Shaik Mohammad* AIR 1949 Mad 292, and emphasised Court's inherent powers to find out whether the plaintiff is a person of sound or unsound mind during the course of the suit even though an enquiry to obtain representation was

permitted to the next friend. The issue is an open issue between the plaintiff and the defendant and the Court has ample power to decide that issue if raised by the defendant in his pleadings. All the judgments which were cited before us do not doubt the Court's power to investigate the truthfulness of the representation of the next friend if a challenge is thrown out by the defendant later on in the court of the suit. The only difference appears to be that, whereas an independent application is found necessary by some of the Courts, in our view, there is no need for such an application, either by the plaintiff or by the defendant as none such is conceived of by any of the provisions of the Code of Civil Procedure.

24. In the present case, the learned Judge in the Court below has practically refused to perform his duty of satisfying himself at the initial stage before issue of process or at a later stage when the dispute was raised by the defendant as to whether the plaintiff was in fact a person of unsound mind. Instead of holding that inquiry, he assumed that the next friend ought to have obtained that finding from the Court and perhaps a permission to file the suit. This not having been done, the presentation itself is held improper. the entire approach as well as the conclusion is erroneous and must be set aside.

25. We will, therefore, allow this appeal and send back the suit for further disposal according to law. When the learned Judge will hear the parties on the following issue as a preliminary one -

"Whether the plaintiff Somnath was a person of unsound mind or of such mental infirmity as to be incapable of protecting his interests at the date of the filing of the suit."

The parties will appear before the learned trial Judge on November 20, 1972. The learned Judge will thereafter give them a date for hearing and dispose of this preliminary issue as early as possible and thereafter proceed to disposes of the suit according to law. Costs of this appeal will be costs in the suit and will abide the final results of the suit.

26. Appeal allowed.