

## KERALA HIGH COURT

Narayani Amma

Vs

Bhaskaran Pillai

Second Appeals Nos. 1569 of 1964 and 161 of 1965, Kottayam in A.S. No. 450 of 1963

(M.U. Isaac, J.)

23.05.1968

### JUDGMENT

**M.U. Isaac, J.**

1. These appeals arise out of O. S. No. 294 of 1960 on the file of the Munsif's Court, Kanjirapally. S. A. No. 1569 of 1964 is by the 12th defendant; and the other appeal is by the 10th defendant. The plaintiffs are eight minors; and the suit was instituted by one Madhavan Pillai, who is an uncle of the 1st plaintiff, as next friend of the minors. Defendants 2 to 8 and the 1st plaintiff are the children of the 1st defendant. The next friend, Madhavan Pillai, and the 10th defendant are brothers of the 1st defendant. Plaintiffs 2 to 4 are the children of the 5th defendant; and plaintiffs 5 to 8 are the children of the 3rd defendant. They belong to the Nayar community, and are governed by the Travencore Nayar Act 2 of 1100. The main relief claimed in the suit is a declaration of the title and possession of the plaintiffs' tarwad for the two items of immovable properties described in the plaint schedule. Item No. 1 is a garden land in Sy. No. 404/1, 2 and 4 in Cheruvally Village, Kanjirapally Taluk, having an area of 1.40 acres. Item No. 2 is a one-third share in a residential building situate in the adjoining land bearing Sy. No. 404/3 in the same village.

2. The allegations in the plaint, in so far as they are relevant for the decision of these appeals, are the following. The plaint properties belonged to the 1st defendant's tarwad. There was partition in the tarwad in 1102 as per Ext. P-1. In that partition, the 1st defendant's tavazhi got these properties; and accordingly, they belonged to the tarwad consisting of defendants 1 to 9 and the plaintiffs. As the 1st defendant and her children were residing far away from the properties, and as her mother, Gouri Amma, had not sufficient means for livelihood, she was allowed to take the income of the first item of the plaint properties. Gouri Amma was also residing in the building mentioned as item No. 2. She was taking the income with the help of the 10th defendant; and after her death in 1132, the 10th defendant has been continuing his possession of item No. 1 as a care-taker. The land in which the building mentioned as item No. 2 is situate along with a one-third share in the said building fell to the share of one Meenakshi Amma under the partition, Ext. P-1. The 11th defendant, who is the 10th defendant's wife, purchased the said land and the one-third share in the building from Meenakshi Amma. Accordingly, defendants 10 and 11 have been

residing in the said building. In 1950, defendants 1 and 2 along with others executed a deed of gift, Ext. D-2, giving the plaint properties and other properties to the 3rd defendant and her husband. Ext. D-2 was executed on the assumption that the plaint properties belonged to defendants 1 to 3. As per Ext. D-4 dated 5-10-1960, the 3rd defendant and her husband sold the first item to the 12th defendant. Neither the 3rd defendant and her husband nor the 12th defendant have got possession of the properties as per Ext. D-2 or Ext. D-4. These transactions were not for any tarwad necessity, nor supported by consideration. They are, therefore, invalid and not binding on the plaintiff's tarwad. On the above allegations, the plaintiff's prayed for –

- (a) declaration of title and possession of the plaintiff's tarwad to the plaint properties;
- (b) demarcating the boundary of the first item from the land lying on the eastern side;
- (c) an injunction against the 12th defendant from reducing to his possession the first item, and against the 10th defendant from permitting any other person to take possession of the said property; and
- (d) relieving the 10th defendant of his rights in the first item as care-taker thereof.

The plaint was subsequently amended, by which the plaintiffs prayed for the additional reliefs of setting aside Exts. D-2 and D-4 and recovery of possession of the first item from the 12th defendant with mesne profits at the rate of ₹ 50 per year, in case it was found that he was in possession of the said property.

3. The suit was contested by all the defendants, except the 11th. Defendants 1 to 9 filed a joint written statement and the 3rd defendant also filed a separate written statement. The contentions of defendants 1 to 9 and 12 are common. I shall briefly state their contentions. The 1st plaintiff is residing with and is being looked after by his parents; and his father, who is a Vakil practising at Shertallai, is the guardian of the 1st plaintiff. Similarly plaintiffs 2 to 4 and 5 to 8 are residing with and are being looked after by their respective parents; and their fathers are their guardians. The 3rd defendant and her husband along with their children plaintiffs 5 to 8, are residing far away from the plaint properties; and it was not possible to manage them. Hence they wanted to sell the said properties; but the 10th defendant, taking undue advantage of the above situation and the fact that he was living in the house mentioned in item. No. 2, planned to purchase the said properties for a very cheap price. The 3rd defendant and her husband sold the first item alone to the 12th defendant for a much higher price. The 10th defendant got offended and infuriated; and he attempted to trespass and forcibly take away the income from the said property. Thereupon, the 12th defendant complained to the police; and the police started proceedings against the 10th defendant and his companions under Section 107, Criminal Procedure Code, for security for keeping the peace. Madhavan Pillai, who has instituted this suit as next friend, is a brother of the 10th defendant. The friend is a pauper, and a person hired by the 10th defendant for instituting this suit to save him from the above proceedings. The next friend has no concern with the minors; and the suit is detrimental to their interest. He is not, therefore, entitled to institute this action for the minors. Regarding the tarwad partition, Ext. P-1, they contended that defendants 1 to 3 got the plaint properties to their individual shares, and that they did not form a tavazhi under the said partition. Hence the tarwad consisting of defendants 1 to 9 and the plaintiffs had no right in the said properties, and defendants 1 to 3 are the absolute owners thereof. Regarding the deed of gift, Ext. D-2, they contended that it was executed as part of a family

settlement, along with Ext. D-1, a deed of settlement, and that it was valid, even if the plaintiff properties belonged to the tarwad. It was also contended by them that under the partition deed, Ext. P-1, Meenakshi Amma had only a one-sixth right in the building mentioned in the second item of the plaintiff schedule, that the 11th defendant has got only the said right, and that the remaining five-sixth share in the building was owned by the 3rd defendant and her husband as per Ext. D-2. They further contended that the 10th defendant was not a care-taker of the first item at any time, that he had no manner of a right in the said property, and it was in the possession of the 12th defendant pursuant to the sale deed, Ext. D-4.

4. The 10th defendant supported the plaintiffs' case that the plaintiff properties belonged to the tarwad consisting of defendants 1 to 9 and the plaintiffs, and that Exts. D-2 and D-4 were invalid. But he claimed that the first item was given to him by the 1st defendant and others on oral lease in 1113, that he has been holding it thereafter as a lessee, that he had effected valuable improvements therein, and that he was not liable to be evicted therefrom.

5. Several issues were framed by the trial Court; but it is not necessary to refer to them. The main points which arose for decision were –

1. Whether Madhavan Pillai was competent to institute the suit as next friend of the minor plaintiffs.
2. Whether, under the partition deed, Ext. P-1, the plaintiff properties were given to the shares of defendants 1 to 3 individually, or to the share of the 1st defendant's tavazhi.
3. Assuming that the plaintiff properties belonged to the tavazhi of the 1st defendant, whether Ext. D-2 is valid as part of a family settlement; and
4. Whether the 10th defendant has got any right in the plaintiff properties.

In the course of the suit, the 1st plaintiff attained majority; and on 7-9-1962 he filed an affidavit supporting the contentions of defendants 1 to 9, and stating that the suit was detrimental to the interest of the minors, that it was filed at the instance of the 10th defendant, and that the suit should be dismissed. Notice was given to all parties on the affidavit; but no action was taken by the trial Court in that matter. The trial Court decided all the above points in favor of defendants 1 to 9 and 12, and dismissed the suit with costs. Madhavan Pillai, acting as next friend of plaintiffs 2 to 8, filed an appeal in the District Court, Kottayam; and the 10th defendant filed a cross-objection. The learned Additional District Judge did not consider the first point; and he reversed the findings of the trial Court on the second and third points. Regarding the 10th defendant's claim, he concurred with the trial Court in holding that the lease set up by the 10th defendant was untrue; but he held that the 12th defendant did not get possession of the first item of the plaintiff properties pursuant to Ext. D-4, and that the 10th defendant was in possession of the same as a care-taker. In the light of the above findings, he allowed the appeal with costs, granting plaintiffs 2 to 8 all the reliefs sought for in the plaintiff, except recovery of possession of the first item with mesne profits from the 12th defendant. The cross-objection of the 10th defendant was also dismissed.

6. The appeal filed by the 10th defendant can be easily disposed of. Both the Courts have concurrently disbelieved his case of lease. The trial Court held that the 12th defendant was in possession of the property, while the lower appellate Court held that the 10th defendant was in

possession of the same, as caretaker. Under law it means that he was only an agent. An agent holds the principal's property only on behalf of the principal. The agent has no possession of his own. What is called a caretaker's possession is the possession of the principal. I should therefore, clarify the position, and hold that the 10th defendant had no possession of the property at any time. Admittedly, a receiver was appointed for the first item of the plaint schedule properties by the Executive First Class Magistrate, Devikulamp and he is in possession of the said property. He should restore possession of the property to the rightful owner.

7. I shall now consider the question whether the plaint properties were allotted to the tavazhi of the 1st defendant or to defendants 1 to 3 individually under the partition of 1102. The properties partitioned as per Ext. P-1 were the properties which belonged to the tavazhi of Gouri Amma, the mother of the 1st defendant. At that time, defendants 2 and 3 were the only children of the 1st defendant; and they were minors. There were also other minor members in the tavazhi. Ext. P-1 clearly states that the plaint properties were allotted to the share of the 1st defendant and her children, the 2nd and 3rd defendants. In the scheme of the partition, the 1st defendant and these two minor children formed a tavazhi. Nothing was given to them separately or individually as it was done in the case of some of the other persons, who are parties to Ext. P-1. The learned Additional District Judge has fully considered this question. The learned counsel for the appellant also did not seriously challenge the correctness of the finding of the lower appellate Court on this point. I hold that the plaint properties vested in the tavazhi of the 1st defendant under Ext. P-1.

8. The next question for consideration is whether Ext. D-2 is valid as part of a family settlement. Ext. D-1 is a deed of settlement executed by the 1st defendant and her husband, Padmanabha Pillai, settling the properties mentioned therein in favor of defendants 2 and 4 to 9 and the 1st plaintiff. These properties consist of 29 items of immovable properties, which were given to the 1st defendant by Padmanabha Pillai as gift and were accordingly in the possession and enjoyment of the 1st defendant and her children, 7 items of immovable properties belonging to Padmanabha Pillai, and all the movables belonging to the 1st defendant and Padmanabha Pillai. Ext. D-2 was executed on the same day by defendants 1 and 2 and Padmanabha Pillai in favor of the 3rd defendant and her husband. The 3rd defendant was at that time living with her husband, at a place far away from the house, wherein defendants 1 and 2 and 4 to 9 and the 1st plaintiff were residing. The properties given to the 3rd defendant and her husband under Ext. D-2 consist of the plaint properties, a garden land having an extent of 3.15 acres and belonging to Padmanabha Pillai, and another garden land having an extent of 70 cents and belonging to the 1st defendant, and also the rights under a decree obtained by Padmanabha Pillai, Ext. D-1 refers to Ext D-2; and Ext. D-2 refers to Ext. D-1. It is clear from the terms of these documents that they evidence an arrangement agreed to by all the persons who are parties thereto, and that they were executed to give effect to that arrangement. The principle is well established that if a transaction is contained in more than one document between the same parties, they must be read and interpreted together. In *Manks v. Whitely*<sup>1</sup>, Moulton L. J. stated:

"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make

equities apply to the parties they must be equities arising out of the transaction as a whole". The above passage was quoted with approval by the Supreme Court in *Chattanatha Karayalar v. Central Bank of India Ltd*<sup>2</sup>., Exts. D-1 and D-2 have, therefore, to be read and interpreted together.

9. I shall now consider whether Exts. D-1 and D-2 constitute a valid family settlement. In *Sahu Madho Das v. Mukandram*<sup>3</sup>, the Supreme Court referred to family settlement as

"an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (Provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration, when consideration is present".

The above statement was not intended as an exhaustive definition of a family settlement. A Full Bench of the Allahabad High Court in *Dasodia v. Gaya Prasad*<sup>4</sup>, said:

'A doubtful claim based on the allegation of an antecedent title is not essential for the validity of a family arrangement; such arrangement may bind the parties to it if it is for the benefit of the family or for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the property. But there must be some kind of consideration before an agreement in respect to the division of family property can be held to be a valid family arrangement".

Exts. D-1 and D-2 related to properties which belonged to the tavazhi of the 1st defendant and properties belonging to the 1st defendant and Padmanabha Pillai. Thus properties which did not belong to the tavazhi and persons who were not members of the tavazhi have come into the transaction. It was contended that a family settlement

<sup>1</sup>1912-1 Ch 735

<sup>3</sup> AIR 1955 SC 481

<sup>2</sup> AIR 1965 SC 1856

<sup>4</sup> AIR 1943 All 101 (FB)

is a settlement of the family or tarwad properties among its own members, and that a settlement which takes in other properties and brings in other persons is not a family settlement. I have not been referred to any authority in support of the above contention. I do not also think that it can be sustained on any principle. A family settlement is only an agreement by the members of the family to divide and hold the family properties separately in accordance with the agreement; and if the agreement is supported by consideration, and is not invalidated by any vitiating circumstance, it would be a valid settlement. I do not find any reason why the inclusion of properties which do not belong to the family or junction of persons who are not members of the family should by itself invalidate the settlement. In the instant case, Padmanabha Pillai and the 1st defendant have not taken any benefits under Ext. D-1 or D-2. They have brought in large extent of valuable properties of their own, and made them available by way of gift for settlement among the members of the tavazhi. The 1st defendant also surrendered all her rights in the tavazhi properties. Hence, there is no scope for any complaint on this account. Ext. D-2 is styled

as a gift deed; and it is in favor of the 3rd defendant and her husband. Ext D-1, though it is styled as a deed of settlement, is drawn up in the form of a gift deed. I have already held that these two documents were executed to give effect to a family arrangement and that they have to be read and construed together. Thus construed, neither of them is a deed of gift. Under Ext. D-1, defendants 2 to 9 and the 1st plaintiff got absolutely to themselves 29 items of immovable properties, which belonged to the tavazhi of the 1st defendant, by getting them released of the rights of the 1st and 3rd defendants therein. They also got other 7 items of immovable properties which belonged to Padmanabha Pillai, and all movables belonging to him and the 1st defendant. It was in consideration of this conveyance that they surrendered their rights in the plaint schedule properties, which are given to the 3rd defendant and her husband as per Ext. D-2. Under Ext. D-2, the 3rd defendant and her husband got in addition to the plaint schedule properties, two other valuable items of immovable properties, and also the rights under a Court decree. In consideration of this conveyance, the 3rd defendant surrendered her rights in the 29 items of immovable properties, which belonged to the 1st defendant's tavazhi and included in Ext. D-1. Exts. D-1 and D-2 are thus mutually supported by consideration. These documents, therefore, constitute a valid family settlement.

10. It is also evident from what I have stated above that the consideration for Ext D-1 proceeded from defendants 2 to 9 and the 1st plaintiff, while the consideration for Ext. D-2 proceeded from the 3rd defendant. It can also be said that the large extent of properties which were given as gift by the 1st defendant and Padmanabha Pillai as per Exts. D-1 and D-2 also formed part of the consideration for the settlement evidenced by these documents. The point to be noted is that no consideration has proceeded from the husband of the 3rd defendant. He is not a member of the tavazhi; and he cannot derive any rights in the tavazhi properties under the family settlement. He is not a party to this suit and hence the question whether he would derive any rights in the plaint properties under Ext. D-2 cannot be decided in this action. There is no case, and it was not contended, that Ext. D-2 is bad, because the conveyance thereunder is also in favor of the 3rd defendant's husband. The transaction was not attacked on this ground.

11. The fact that Exts. D-1 and D-2 constitute a valid settlement only means that it is binding on the parties to the settlement. The question whether it is binding on the tarwad and whether it can be set aside by the minor members of the tarwad depends on entirely different considerations. All the major members of the tarwad are parties to or have accepted the settlement. All the minor members who subsequently attained majority have also accepted the transaction. Under these circumstances, there would be a presumption that the transaction was beneficial to all the members of the tarwad; and it cannot be set aside unless it is established that it was detrimental to the interest of the minors. There is no such case for the plaintiffs 2 to 8. Apparently it was a very beneficial arrangement for all the members of the tarwad. The whole attack against Ext. D-2 was on the assumption that it was an outright gift of the whole tarwad properties by two members of the tarwad in favor of another member and her husband. This, as I have held, is not the true character of the transaction. Ext. D-2 was only part of a family settlement; and hence the objection raised by plaintiffs 2 to 8 to the validity of Ext. D-2 falls to the ground. There are also other difficulties for plaintiffs 2 to 8 to succeed in this action. In the first place, as Exts. D-1 and D-2 constitute a family settlement it is not possible to set aside Ext. D-2 without Ext. D-1 also being set aside. Both of them would stand or fall together. Secondly, the conveyance under Ext. D-2 is in favor of the 3rd defendant and her husband; and it relates to the plaint properties and other properties. The 3rd defendant's husband is not a party to the suit; and the validity of Ext. D-2 cannot be adjudicated behind his back. Thirdly, under the family settlement effected by Exts.

D-1 and D-2, defendants 3 and 5 have conflicting interests. There is no case that plaintiffs 5 to 8 do not get the plaint properties as children of the 3rd defendant. So the interest of the 3rd defendant and plaintiffs 5 to 8 is to uphold Ext. D-2, under which they got the whole of the plaint properties. It is only plaintiffs 2 to 4. the children of the 5th defendant who can be interested in questioning the validity of Ext. D-2. Thus the plaintiffs 2 to 8, who have joined in this action, have conflicting interests in the relief asked for in respect of Ext. D-2.

12. Ext. D-4, the sale deed in favor of the 12th defendant relating to the first item of the plaint properties, has been sought to be set aside on the ground that Ext. D-2 was void, and that the 3rd defendant and her husband had no right therein. Therefore, if plaintiffs 2 to 8 do not succeed in setting aside Ext. D-2, they must fail in setting aside Ext. D-4 also. It may be open for plaintiffs 5 to 8 to assail Ext. D-4 on the ground that Ext. D-4 is not supported by tarwad necessity. They have no such case in the plaint. On the other hand, the 3rd defendant has pleaded that Ext. D-4 was executed for proper consideration and tarwad necessity. She has also let in evidence in support of that plea. This question was not considered by the Courts below, as Ext. D-4 was not attacked on such a ground. The plaintiffs cannot therefore, succeed in getting Ext. D-4 set aside.

13. There is an important question raised in this case; and it relates to the competency of the next friend to maintain this action on behalf of plaintiffs 2 to 8. It was submitted on his behalf that in the absence of a guardian appointed or declared by a competent authority, any person who is of sound mind and has attained majority is entitled to act as next friend of a minor, provided that his interest is not adverse to that of the minor. Reliance was made on sub-rules (1) and (2) of Rule 4 in Order 32 of the Civil Procedure Code They read as follows :-

"4. Who may act as next friend or be appointed guardian for the suit- (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. ...."

The learned counsel also relied on the following observation of Rajamannar C. J. in *Parameswaran Pillai Velayudhan Pillai v. Parameswaran Pillai Narayana Pillai*<sup>5</sup>,

"Undoubtedly any person who is of sound mind and has attained majority may act as next friend of a minor or lunatic for the suit, provided that the interest of that person is not adverse to that of the minor or the lunatic".

I respectfully agree with the above observation, which is only a statement of the provision contained in Order 32, Rule 4 (1) of the Civil Procedure Code. But the question for decision in

the instant case is whether a person, who has no interest at all in the benefit of the minors and who has been put forward by another person for achieving his own objects, is entitled to act as a next friend of the minors, and maintain a suit in the name of the minors. It appears to me that no person has a right to act as a next friend of a minor, and institute a suit for the minor, by reason of the mere fact that he is not of unsound mind, he is a major, and he has no adverse interest to the minor. Rule 4 (1) contains only an enabling provision. Unsound mind, non-attaining of majority and adverse interest are disqualifications, which prevent a person from acting as next friend of a minor. Absence of these disqualifications does not give him the right to act; but it only qualifies him to act. Whether a person can be permitted to act as next friend of a minor is a matter to be decided by the Court; and the decision must depend upon the sole question whether it is a *bona fide* action instituted for the benefit of the minor.

14. Order 32 of the Civil Procedure Code has been enacted for the protection of the interest of minors. (Vide the decision of the High Court of Patna in *Ramchandrar Singh v. Gopi Krishna*<sup>6</sup>, and of the High Court of Madhya Pradesh in *Tulsiram v. Shyamlal*<sup>7</sup>.) It would be an abuse of the statutory protection, if a person who has no interest in the minor and who is not concerned with his benefit, is permitted to institute suits in the name of the minor for achieving that person's own object, or serving the interest of others. The law allows two occasions for a minor to institute an action. One is during the period of his minority; and the other after he has attained

<sup>5</sup> AIR 1961 Mad 345

<sup>7</sup> AIR 1960 Mad Pra 73

<sup>6</sup> AIR 1957 Pat 260

majority. In the first case, the action has to be instituted by a next friend. The obvious advantage in allowing a minor to institute a suit during his minority is that much of the evidence, which would be available if the action were instituted soon after the cause of action arose, would be lost if he were to wait to institute it, after attaining majority. Failure to institute the action during the minority does not bar the remedy. He can institute the action after attaining majority within the period allowed by the law of limitation. At the same time, the institution of a suit by a next friend involves the minor in serious consequences. After he attains majority, he has to elect whether the suit is to be continued or not. If he elects to abandon the suit, he has to pay all the costs incurred by the next friend, as well as the costs of the opposite party, unless he satisfies the Court that the institution of the suit by the next friend was unreasonable or improper. (Vide the decisions of the High Court of Madras in *Chikkanna Chetty v. Dhanakoti Narayana Chettiar*<sup>8</sup>, and of the High Court of Bombay in *Ratanchand v. Jasraj*<sup>9</sup>.) If the suit happens to be decided against him during his minority, the decree is binding on him, irrespective of the question of negligence or inaction on the part of the next friend in prosecuting it. The minor can have the decree set aside only by another suit, in which he has to prove gross negligence of the next friend in the conduct of the earlier suit.

15. A minor has no volition of his own. He can act only through the next friend. A minor who is a party to a suit is considered to be under the protection of the Court; and it is consequently the duty of the Court to watch his interests vigilantly, and to see that he is represented by a fit and proper person. If a person, not subject to any of the disqualifications mentioned in O. 32 of the Civil Procedure Code, has got the unfettered right to institute an action in the name of any minor as his next friend, an unscrupulous person may institute a suit as next friend of a minor against the minors own parents, though the minor may be living with the parents and the parents may be acting in all possible respects for the benefit of the minor. Similarly joint families and tarwads may also be dragged into litigations in the name of minors by strangers, who have no interest in

the minors and whose sole interest may be the ruination of the family or the tarwad, or the wreaking of vengeance against anyone of its members. This would be a calamitous situation. It would not only defeat the statutory protection given to a minor under Order 32 of the Civil Procedure Code, but it would also enable an unscrupulous person to drag many happy families into frivolous and vexatious litigations in the name of innocent minors and create discord and disruption. I have no doubt that this is not the correct legal position. In my view, if the competency of a next friend is questioned, it is the duty of the Court to enquire whether the action has been instituted by him *bona fide* and for the benefit of the minor. If the Court finds that it is not so, the action must be dismissed on that sole ground. If the suit instituted by a next friend is against the minor's own parents, very strong grounds should be made out for permitting him to maintain the suit. Normally, nobody can have better interests in the children than their own parents. The following observations contained in the judgment of Bhagwati J. in *Santosh Kumari v. Chimanlal*<sup>10</sup> support my view. The learned Judge said:

"If it was the case of the respondent that the minor's name was being bandied

<sup>8</sup> AIR 1934 Mad 73

<sup>10</sup> AIR 1950 Bom 307

<sup>9</sup> AIR 1940 Bom 58

about or used with some ulterior motives or objects of the next friend himself and the proceedings taken by the next friend ostensibly in the name of the minor but really for some purposes of his own, it would have been open to the respondent to take out proceedings to have the next friend removed and on demonstrating before the Court in that behalf to have the proceedings brought to a standstill".

16. I shall now examine the position of the next friend in this litigation, and the nature of the suit. As I have already held Exts. D-1 and D-2 constitute a family settlement. Apparently it was beneficial to all the members of the tarwad. Nothing has been made out to show the contrary. All the major members of the tarwad were parties to the settlement. It was a transaction of 1950. Defendants 6, 7, 8 and 9 were minors at that time. Defendants 6, 7 and 8 became majors long before the institution of this suit. They did not question the settlement. On the other hand, they have supported it in the suit. The 1st plaintiff, who was a minor, repudiated the suit as soon as he became a major, stating that it was a mala fide action, and prayed that it may be dismissed. It is said that some of the other minor plaintiffs have also attained majority by this time. But none of them has elected to proceed with the action instituted by the next friend. The minor plaintiffs are the children of defendants 1, 3 and 5 and their fathers are alive. The suit is vehemently contested by these defendants. The evidence shows that all the plaintiffs are residing with their parents; and that their interests are looked after as best as possible by their parents. It is also in evidence that the 10th defendant, taking advantage of the position, that he is residing adjacent to the first item of the plaint properties and the fact that the 3rd defendant and her husband are residing far away, attempted to purchase the said property for a cheap price, but it was sold by them to the 12th defendant for a proper price, and that, thereafter, he began to commit trespass on the property, which necessitated taking security proceedings against him by the police. It is only at this juncture that the present suit has been filed; and in this suit the 10th defendant has set up a false case that he is a lessee of the said property. The next friend is the 10th defendant's own brother. He is a person who is not possessed of any means and a dependant of the 10th defendant. His evidence shows that he is not concerned with the interest of the minors, and that he knows very little about them. It is abundantly clear that this is a litigation, which has been instituted by the

next friend at the instance of the 10th defendant and really prosecuted by him, in total disregard of the interest of the minors and with the sole object of wreaking his vengeance against the members of the plaintiffs' tarwad and the 12th defendant, who purchased the property, and if possible to establish his false claim of lease to the said property. It would be an abuse of the process of Court, if the next friend and the 10th defendant are allowed to maintain this action in the name of the minor plaintiffs. I hold that the suit has been instituted mala fide, that it is not for the benefit of the minors, and that it is liable to be dismissed on that sole ground.

17. In the result, I allow S. A. No. 1569 of 1964, set aside the decree of the lower appellate Court, and restore the decree of the trial Court. Madhavan Pillai, the next friend of the minor plaintiffs, and the 10th defendant will pay the costs of the 12th defendant and of defendants 1 to 9 and the 1st plaintiff in this Court and in the lower appellate Court. Defendants 1 to 9 and the 1st plaintiff will be entitled to only one set of costs. S. A. No. 161 of 1965 is dismissed. The 10th defendant will pay the costs of this appeal to the 12th defendant. The Executive First Class Magistrate, Devikulam, will restore possession of the first item of the plaint properties to the 12th defendant with all the income collected through the receiver.  
Order accordingly.