

**Thimmappa Vs. Hanusavva and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/374018](http://sooperkanoon.com/374018)

**Court :** Karnataka

**Decided On :** Apr-08-1958

**Reported in :** AIR1959Kant157; AIR1959Mys157; ILR1958KAR267;  
(1958)36MysLJ474

**Judge :** K.S. Hegde, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 32, Rules 2, 3, 3(5), 9 and 151

**Appeal No. :** Second Appeal No. 350 of 1954

**Appellant :** Thimmappa

**Respondent :** Hanusavva and ors.

**Advocate for Def. :** N. Bheemacharya, Adv.

**Advocate for Pet/Ap. :** R.S. Mehendra, Adv.

**Judgement :**

1. This is a plaintiff's appeal. It is directed against the order of the learned Subordinate Judge, Chitaldrug, in R.A. No. 10/53. The said appeal was dismissed by the learned Subordinate Judge on the ground that the same is not maintainable. The facts of the case are as follows:

The mother of the plaintiff as his next friend instituted the present suit on behalf of the minor plaintiff for declaration that the plaintiff was the adopted son of one Obalappa. In the said suit the defendants raised objections to the effect that the next friend was not competent to institute the suit on behalf of the minor as the minor's father was alive. When the case was part heard an application was filed on behalf of the plaintiff to bring on record the father of the plaintiff as co-next friend with his mother.

By agreement of parties the Court ordered substitution of the father for the mother as the next friend of the minor plaintiff. But the plaint was not ordered to be amended nor did the parties get it amended. The suit was ultimately dismissed by the trial court. The certified copies of the decree and the judgment granted to the plaintiff for purpose of filing the appeal continued to show the mother as the next friend. This was rather an ambiguous position.

The persons interested in the plaintiff ultimately decided to file the appeal showing the mother as the next friend of the minor appellant. Respondents objected to the maintainability of the appeal. At that stage the appellants filed I. A. No. 2 to remove the father and appoint the mother as the next friend. It is not the case of the parties that there is any conflict between the father and the mother or between any of them and the minor. The first appellate Court rejected both the appeal as well as the application as not maintainable. Hence this second appeal,

2. It is regretted that the learned appellate Judge took a highly technical view of the case. In his opinion once the mother had been removed rightly or wrongly by the trial court, she had no further right to file an appeal. He was also of the opinion that he had no jurisdiction to appoint the mother over again as the next friend. In his view the appeal was not properly instituted. The view of the first appellate Court is erroneous.

There is a fundamental distinction between the acceptance of a next friend and the appointment of a guardian. In the case of a next friend, he takes the initiative and institutes the proceeding. No initial appointment is necessary. It is true in a case falling under Order XXXII Rule 9(i) the next friend may be removed by the Court; otherwise he continues as the next friend. But in the case of a guardian there must

be an appointment by a court as required by Rule 3 (i) of Order XXXII.

It may be urged that in the instant case there was an order under Order XXXII Rule 9 (a) C. P. C, That order is of doubtful validity. See Bai Dahi V. Shankarbhai Deojibbai : AIR1954 Bom214 . But an appeal instituted by a minor without a next friend is not a nullity. See Lachman Singh v. Chattar Kaur, AIR 1927 Lah 663, All Ahmed v. Said Mian, AIR 1924 Lah 188(1); In re Lalbihari Shah, AIR 192 L Cal 776; Kamalakshi v. Ramasami Chetti, ILR 19 Mad 127.

It will be seen From Order XXXII Rule 3 (5) C.P.C. that a person appointed under Sub-rule (1) to be a guardian for the minor shall, unless his appointment is terminated by retirement, 'removal or death, continues as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and in any proceedings in the execution of the decree. There is no such corresponding rule in the case of a next friend.

Some courts have held that once a next friend comes on record, he continues at the subsequent stages unless he is removed and no new next friend can bypass him and continue the proceeding. See Daulat Bai v. Shunkat Hai, AIR 1931 Lah 635; Arakhito Rauto v. Patito Rauto, AIR 1933 Orissa 843; Sadhu Singh v. Asa Singh, AIR 195) Pepsu 3; and Sawan Ram v. Nachittar Singh, AIR 1952 Pepsu 63. This is a rule of necessity and not of law. It is clear from Order XXXII Rule 2 that a suit instituted by a minor is not a nullity. Otherwise Rule 2 becomes meaningless.

This is eminently a fit case where the court below should have removed the father and appointed the mother as the next friend of the minor appellant or in the alternative, kept the appeal pending and allowed the father to come on record as the next friend of the appellant and continue the appeal. The Court had ample powers to do so, even under its inherent powers. It must also be noted that the confusion in this case is partly due to the perfunctory manner in which the trial court dealt with the matter.

3. In the result, this appeal is allowed. The order of the first appellate court in R. A. No. 10/53 is set aside and the appeal remanded to the learned Civil Judge,

Chitaldrug, for disposal according to law in the light of the above observations. There will be no order as to costs in this appeal. Institution fee in this appeal is ordered to be refunded.

4. Appeal remanded.

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