

plaintiff was wrong and denied. In face of this averment, it is not understood as to how later on he took up the plea that he had executed a rent note in the Bahi of the plaintiff in October, 1965.

(7) In view of what I have said above, this petition fails and is dismissed, but with no order as to costs.

N.K.S.

APPELLATE CIVIL

Before H. R. Sodhi, J.

JAGAT SINGH AND OTHERS,—Appellants

versus

JOGINDER PAUL AND OTHERS,—Respondents.

**Second Appeal From Order No. 48 of 1970**

November 17, 1970.

*Code of Civil Procedure (V of 1908)—Section 2 and Order 32 Rule 2—Suit filed by minor without a next friend—Trial Court ordering plaint to be taken off the file—Such order—Whether amounts to rejection of plaint so as to make it appealable.*

*Held*, that the word 'reject' implies a refusal to receive or accept. Same is the implication when a plaint is ordered to be taken off the file under order 32 rule 2 of Code of Civil Procedure. All that is intended is that the Court declines to accept the plaint presented to it in the name of the minor when he is not suing through a next friend. An order though professed to have been passed under order 32 rule 2 of the Code, must be considered to be one rejecting the plaint or dismissing the suit and it is appealable as a decree within the meaning of section 2 of the Code. (Para 4)

*Second Appeal from the order of the Court of Shri R. L. Garg, Additional District Judge, Jullundur, dated 25th May, 1970, reversing that of Shri Darshan Singh Chhina, Sub-Judge, II Class, Jullundur, dated 7th February, 1968, setting aside judgment and decree of the trial court and remanding the case with the direction that it would proceed with in accordance with law.*

A. L. BAHRI, ADVOCATE, for the appellants.

R. L. AGGARWAL AND G. C. GARG, ADVOCATES, for respondent No. 1 only.

## JUDGMENT.

SODHI, J.—(1) The sole question that has been agitated in this appeal is that the appeal before the Additional District Judge, Jullundur, was not competent and the order of remand passed by him is, therefore, illegal and without jurisdiction.

(2) Des Raj and Joti Ram sons of Kanshi Ram respondents sold agricultural land measuring 22 Kanals situate in village Sura, Tehsil and District Jullundur, for an ostensible consideration of Rs. 2,000 to Jagat Singh appellant by a registered sale-deed dated 24th November, 1964. Joginder Paul plaintiff-respondent claiming to be the son of Des Raj, one of the vendors and nephew of the other, instituted a suit for possession by pre-emption which was decreed *ex parte* on 31st January, 1967. The *ex parte* decree was later set aside on the application of the vendee defendant who resisted the suit. One of the objections taken by the vendee was that the plaintiff was a minor at the time of presentation of the plaint and the suit having been filed without a next friend, the plaint be ordered to be taken off the file under Order 32, rule 2 of the Code of Civil Procedure. The plaintiff after obtaining an adjournment filed an application for amendment of the plaint under Order 6 Rule 17 read with section 151 of the Code, though it was denied by him that he was a minor when the suit was filed. The trial Court struck the following issues to dispose of this controversy :—

1. Whether the plaintiff was not a minor at the time of the filing of the suit ?
2. If issue No. 1 is not proved, whether the plaint requires amendment ?
3. Whether the application is premature ?
4. Relief.

(3) After recording evidence, issue No. 1 was decided against the plaintiff it being held that he was a minor at the relevant time. The prayer for amendment was refused on the ground that the plaintiff was either negligent or he appeared to have made an attempt to dupe the Court. In the result, the plaint was directed to be taken off the file under the aforesaid provision of law. Rult 2 of Order 32, Code of Civil Procedure, reads as under :—

- “2. (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have

the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

- (2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any) may make such order in the matter as it thinks fit."

The plaintiff preferred an appeal which was heard by the Additional District Judge, Jullundur, who by his order passed on 25th May, 1970, accepted the same and remanded the case back to the trial Court for decision in accordance with law. The Court of first appeal came to the conclusion that there was no negligence on the part of the plaintiff nor did he deliberately represent himself to be a major when in fact he was a minor. In the opinion of the Additional District Judge, the plaintiff had definitely become major on 7th February, 1968, when the trial Court ordered the plaint to be taken off the file and it was, therefore, no longer necessary for him to be represented in the suit through a next friend. It was urged before the lower appellate Court that no appeal lay against an order made under Order 32, Rule 2, of the Code but this contention was repelled. It is not disputed that a formal decree was drawn up by the trial Court dismissing the suit of the plaintiff.

(4) Mr. A. L. Bahri, learned counsel for the appellant, has reiterated the objection raised before the Court of first appeal and strenuously urged that an order under Order 32, rule 2, of the Code is not a decree and that the mere fact that the trial Court erroneously prepared a decree could not give a right of appeal to the plaintiff. There can be no dispute with the proposition that a non-appealable order does not become appealable as a decree merely because a decree has been drawn up by the Court. It is the substance and not the form of the order that determines a right of appeal which is the creation of a statute and cannot be implied. Sometime a practice is adopted by the Courts to embody orders in the form of decrees but they are nonetheless orders. The expression "decree" as defined in section 2(2) of the Code means not only the formal expression of adjudication of the rights with regard to all or any of the matters in controversy in the suit but also includes the rejection of a plaint. Order 7, rule 11, enjoins upon a Court to reject a plaint in cases specified therein and taking a plaint off the file under Order 32, rule 2, is not included therein. The grounds of rejection as given in the aforesaid rule 11 are, however, not exhaustive and plaint can be

rejected in other appropriate cases as well. The rejection of a plaint which may amount to a decree does not envisage that the rejection must only be on the grounds stated in the said rule. The question that survives for consideration, therefore, is whether an order directing the plaint to be taken off the file because the suit had been instituted in the name of a minor, can in law, be treated as one rejecting the plaint so as to give a right of appeal against the said order. The word "reject" according to its ordinary dictionary meaning implies a refusal to receive or accept and same is the implication when a plaint is ordered to be taken off the file. All that is intended is that the Court declines to accept the plaint presented to it in the name of the minor when he is not suing through a next friend. A Division Bench of the Calcutta High Court in *Beni Ram Bhutt and others v Ram Lal Dhukri and others* (1), took a similar view and held that an order though professed to have been passed under section 442 of the Code of Civil Procedure, which corresponded to present Order 32, rule 2, must be considered to be one rejecting the plaint or dismissing the suit and that it was appealable as a decree within the meaning of section 2 of the Code. It will, in my opinion, make no difference whether such an order has been passed when on the face of the plaint it appears that the same was filed by a person who was a minor or that after an inquiry into the question of minority, it is found as a fact that the plaintiff was a minor at the time of filing of the suit. Sub-rule (2), of rule 2 of Order 32, does provide for an inquiry when application is made by a defendant to have the plaint taken off the file on the ground that the plaintiff is a minor. One of the objects of issuing notice of application of the defendant asking for the plaint to be taken off the file and hearing objections to such an application is to determine whether the plaintiff is really a minor and then to consider what order is necessary in the circumstances of the case if the plaintiff is found to be such and has sued without a next friend. It is not necessary that in every case the plaint must be taken off the file and it is open to Court to suspend the proceedings to allow sufficient time to the plaintiff to have himself represented in the suit by a next friend. When a plaint is ordered to be taken off the file and no opportunity is given to the plaintiff to amend the plaint, it must be deemed to have been rejected, and an appeal against that order becomes competent. The contention of Mr. A. L. Bahri, learned counsel for the appellant, that such an order should not be read as amounting to an order

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(1) I.L.R. 13 Cal. 189.

rejecting a plaint but is just an order against which no appeal is provided under Order 43, Rule 1, of the Code, has, therefore, to be repelled. The argument indeed is that the right of appeal must be specifically given and cannot be held to be implied. In my view, it is not a case of implying a right of appeal but only of appreciating the true import of the order directing a plaint to be taken off the file. If, on the other hand, the Court dismisses the suit instead of passing an order as envisaged in Order 32, rule 2, and a final decree is drawn up, howsoever erroneous may be the dismissal of the suit, the fact remains that the same has been dismissed and a decree passed. In such a situation as well, the right of appeal as conferred by section 96 of the Code of Civil Procedure, cannot be denied to the plaintiff.

(5) For the foregoing reasons, the appeal has no merit and stands dismissed with no order as to costs.

N.K.S.

MISCELLANEOUS CIVIL

Before D. S. Tewatia, J.

DURGA DASS,—Appellant

versus

TARA RANI AND ANOTHER,—Respondents.

Civil Misc. No. 2762-C of 1970

in

E. F. A. No. 119 of 1970.

November 17, 1970.

*Hindu Marriage Act (XXV of 1955)—Sections 24 and 25—Execution proceedings to realize the amounts made payable by the Court—Whether proceedings under the Act—Litigation expenses for such proceedings—Whether can be ordered to be paid.*

Held, that "proceedings under the Act" as mentioned in section 24 of Hindu Marriage Act, cover also the execution proceedings to realize the amounts made payable by the Court and litigation expenses for such proceedings can be ordered to be paid. The difficulties of a litigant start after the decree is secured and he sets about the task of executing the decree. If