

(1983) 04 GUJ CK 0011
In the Gujarat High Court

Case No : Civil Application No. 683 of 1983 (in F.A. No. 650 of 1978)

Dharamshi Polabhai

APPELLANT

Vs

Champaklal Vashram and Others

RESPONDENT

Date of Decision : 05-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 32 Rule 1, Order 32 Rule 12, Order 32 Rule 12(4), Order 32 Rule 14

Citation : AIR 1983 Guj 217 : (1983) 2 GLR 1280

Hon'ble Judges : S.B. Majmudar, J; D.C. Gheewala, J

Bench : Division Bench

Advocate : J.M. Thakore, General and D.L. Kothari, for the Appellant; J.R. Nanavati, for the Respondent

Final Decision : Dismissed

Judgement

Majmudar, J.—The petitioner who is original respondent 1 in the main first appeal and who was original defendant 1 in Special Civil Suit No.

37 of 1971 in the court of the learned Civil Judge (Senior Division), Rajkot, has requested this court by way of the present application to decide as

a preliminary point the question regarding the maintainability of the first appeal. Earlier, a Division Bench of this court had directed on 23-2-1982

that this application be heard along with the main appeal. But subsequently, a later Division Bench of this court directed that this application be

taken up for consideration earlier and the learned advocates of both the sides are agreed to this position and that is how this application reached

final hearing before us yesterday.

2. In order to appreciate the grievance of the petitioner, centering round the maintainability of the first appeal, it will be necessary to quickly glance

through a few relevant facts leading to the present litigation between the parties. Opponent I is the original plaintiff on whose behalf Special Civil

Suit No. 37 of 1971 was filed in the court of the learned Civil Judge (Senior Division) at Rajkot by his guardian and next friend his adoptive

mother Bai Santok, as admittedly opponent 1 was a minor at the time when the suit was filed. The said suit was filed against the present petitioner

who was defendant 1 as well as against opponent 2 who is since deceased, against opponent 3 who is since deceased and who is represented by

her heirs opponents 3/1 to 3/4, opponent 4 as well as opponent 5 who were defendants 3 to 5 respectively, Opponent 1 had filed the suit through

his guardian and adoptive mother for getting partition of property of joint Hindu family allegedly consisting of himself and defendant 1 and others

and to get his one-half share separated and to get accounts of the property and his share of the income and mesne profits on the various allegations

contained in the plaint. At this stage, we are not concerned with the merits of the controversy. Hence, we do not dilate on the same any further.

The aforesaid suit was filed on 25-6-1970 in forma pauperis. An application for permission to sue in forma pauperis was moved being civil

miscellaneous application No. 269 of 1970, before the trial court which ultimately came to be allowed on 26-4-1971 and opponent 1's mother

Bai Santok as guardian and next friend of minor plaintiff was permitted to file the suit in forma pauperis and the suit was registered as special civil

suit No. 37 of 1971 on 26-4-1971. It appears that during the pendency of the suit, opponent I married on 21-5-1975. That prompted the present

petitioner, defendant 1, as well as original defendants 2 and 3 to file application Ex. 154 on 23-7-1975 requesting the trial court to issue notice

under Order 32, Rule 12, C. P. Code, to opponent 1 who according to the petitioner and other contesting defendants, had become major as he

had married during the pendency of the suit. The said application was replied to by Ex. 155 on 14-8-1975 by opponent 1's guardian and next

friend Bai Santok. She stated that the plaintiff was still minor and hence, the application filed by the petitioner and other defendants was not

maintainable. In view of the aforesaid stand taken by opponent 1's guardian and next friend, the petitioner's learned Advocate in the trial court,

Mr. D. L. Kothari made an endorsement below Ex. 154 that the said application was not pressed. The said endorsement was made on 3-9-1975.

It appears that thereafter, the learned trial Judge decided the suit on merits on 26-4-1976 and dismissed the suit of opponent 1 with cost and also

directed opponent 1's guardian and next friend Bai Santok to pay court-fees which would have been paid if the plaintiff was not permitted to sue

as a pauper according to Order 33, Rule 11, C. P. Code.

3. Being aggrieved by the aforesaid decree of dismissal of the suit, an appeal was filed before this court u/s 96 of the C. P. Code on 9-9-1976.

The said appeal was sought to be filed as a pauper under Order 44, Rule I, C. P. Code praying therein that opponent 1's guardian and next friend

might be permitted to file this appeal in pauperism. The said miscellaneous civil application came to be registered as miscellaneous civil application

No. 64 of 1976 in this court. As the said application was filed beyond 30 days of the date of the decree of the trial court, opponent 1's guardian

and next friend filed civil application No. 2191 of 1976 before this court praying for condonation of delay of 9 days in filing the appeal in

pauperism. Notice was issued in the said application for condonation of delay to the other side and that is how the present petitioner appeared

before this court through his learned Advocate and contested the said application. He filed his objections on 10-2-1977. In the meantime,

respondent 3, Bai Mani, who was original defendant 3 in the trial court expired and her heirs were permitted to be brought on record by Civil

Application No. 1896 of 1978 filed by opponent 1's guardian and next friend in delay condonation Application No. 2191 of 1976. The said

Application No. 1896 of 1978 was granted by this court on 7-9-1978. The heirs of original defendant 3 Bai Mani who were brought on the

record of the proceedings in this court, also filed their objections to the delay condonation application after they were joined as parties to the

present proceedings in this court. Thereafter, this court, after hearing the concerned parties, condoned the delay in filing the first appeal on behalf of

opponent No. 1 who was still at that time prosecuting the proceedings in this court as a minor through his guardian and next friend Bai Santok. The

delay condonation application No. 2191 of 1976 came to be granted on 1-2-1978. It is thereafter that opponent 1 filed another civil application

No. 356 of 1978 in the first appeal which was at that time bearing stamp No. 12233 of 1976. The said application was filed under the provisions

of Order 32, Rule 12 by opponent 1 on 27-1-1978. At that time, opponent 1 submitted to this court that he had already become major on 27-12-

1975 and hence, the title in the appeal may be allowed to be amended and that opponent 1 may be permitted to prosecute the appeal as a major-

appellant. A Division Bench of this court granted the said application on 22-2-1978. It appears that at the stage when the said application for

correcting the record was made and at the time when it came to be granted, the opponents were not ordered to be served with the notice of the

said civil application and the order passed by the Division Bench of this court on 22-2-1976 in civil application No. 356 of 1978 appears to be an

ex parte order. However, the said circumstance does not have any pernicious effect on the present respondents in the appeal including the present

petitioner for the simple reason that it is the petitioner's own case, accepting the stand taken by opponent 1 in the civil application No. 356 of

1978, that opponent 1 has become major on 27-12-1975 and it is on this basis that the present application is moved by the petitioner for Retting

reliefs as prayed for therein. Therefore, it has to be taken as an accepted fact between the parties that opponent 1 became major on 27-12-1975

and that he requested this court to permit him to prosecute this appeal as a major by his application No. 356 of 1978 and that the court granted

him permission to prosecute the appeal as a major appellant, on 22-1-1978 and the record of the appeal stood corrected accordingly.

4. We may now note a few relevant events which occurred after February 1978. On 26-7-1978, this court granted opponent 1 leave to appeal in

forma pauperis and admitted his appeal to final hearing. That order was passed on 26-7-1978 by a Division Bench of this court in miscellaneous

civil application No. 64 of 1978 which originally was filed as civil miscellaneous application in 1976 precisely on 9-9-1976 as noted earlier and

which had remained pending in this court for about two years on account of the intervening events which we have mentioned earlier viz. the

proceedings becoming unready on account of the death of Maniben, respondent 3, as well as due to the fact that the proceedings had to be kept

pending awaiting decision of this court on the delay condonation application. We may note at this stage that in miscellaneous civil application No.

64 of 1978 which was an application for granting leave to opponent 1 to prefer appeal as an indigent person, earlier this court had issued Rule on

22-2-1978 and notice was ordered to be issued to the Government Pleader and it is thereafter that on 26-7-1978, the application was granted.

Opponent 1 was permitted to prefer the appeal in pauperism and his appeal was admitted to final hearing. Thus, the appeal bearing stamp No.

12233 of 1976 as originally filed in this court was registered as first appeal No. 650 of 1978 pursuant to the aforesaid order of this court in civil

miscellaneous application No. 64 of 1978. As rule was issued in the said application to all the opponents, it is easy to presume that all the

necessary parties had notice of the said proceedings and it is after giving them an opportunity of hearing that the said application came to be

granted by the court. Two more facts need be stated in the chronology of events before we conclude the narration of the events leading to the

present application. On 18-1-1982, the present petitioner filed miscellaneous civil application No. 19 of 1982 requesting this court to dispauper

opponent 1 on the ground that he had sufficient means to pay the court-fees. Before that application could proceed on merits, opponent 1 filed a

statement in this court on 8-2-1982 expressing his willingness to pay up the requisite court-fees and accordingly he paid the requisite court-fees on

the memo of appeal. As a result thereof the petitioner's application for dispaupering opponent 1 did not survive. It is in these circumstances that

the present petitioner has moved this application requesting this court to decide as a preliminary point the contention of the petitioner that the main

first appeal is not maintainable and that it deserves to be dismissed. It is requested by the petitioner that the earlier order of this court condoning

delay in filing the main first appeals, as passed in civil application No. 2191 of 1976, be recalled and set aside. That the order passed by this court

permitting opponent 1's mother, guardian and next friend to join heirs of respondent 3, Bai Mani by way of civil application No. 1896 of 1977

also be recalled and set aside. That the amendment granted by this court in the cause title of memo of appeal, in civil application No. 356 of 1978

also may be recalled and set aside and the order admitting the appeal may also be revoked.

5. The main thrust of the arguments in support of the present application as canvassed by the learned Advocate General on behalf of the petitioner

centres round the provisions of Order 32, Rule 12, C. P. Code. It would be necessary to note the argument canvassed by the learned Advocate

General in support of the present application at this stage. It was contended that as stated by opponent 1 himself in his application No. 356 of

1978 moved earlier by him in those proceedings, opponent 1 had become major on 27-12-1975. That event happened prior to the decree of the

trial court. Placing reliance on Order 32, Rule 12, it was contended by the learned Advocate General that on the date on which opponent 1 who

was minor plaintiff attained majority, the proceedings in the suit were not over in the trial court and consequently, he was required to strictly comply

with the provisions of Order 32, Rule 12 by exercising his option to continue the suit in his personal capacity or to opt out of it. As the said

procedure was not followed, the decree which ultimately resulted in his suit on 26-4-1976 was a nullity.

6. It was next contended that moment opponent 1 minor-plaintiff became major on 27-12-1975, his guardian and next friend became functus

officio and, thereafter, she could not act as guardian of the minor who was no longer minor and consequently, she could not have filed the present

appeal as guardian of minor on 9-9-1976 in this court. That all steps which she took subsequently in this court from 9-9-1976 onwards by way of

filing applications for bringing on record heirs of original opponent 3 Mani and by filing application for condonation of delay in preferring appeal in

forma pauperis, were all null and void and hence, the present appeal deserves to be dismissed as not maintainable. It was alternatively contended

that in any case, clock must be put back and the decree of the trial court should be set aside on this preliminary ground and the case may be

remanded to the trial court for proceeding further in accordance with law after complying with the provisions of Order 32, Rule 12.

7. It is on the basis of the aforesaid contentions that various reliefs as prayed for in this application are sought to be obtained.

8. The present application is hotly contested by opponent 1 who has appeared through his learned Advocate Mr. J. R. Nanavati. It is contended

on behalf of opponent 1 that it is true that opponent 1 had become major during the pendency of the suit in the trial court on 27-12-1975. But

before that, all the relevant evidence which was required to be led by the respective parties was led in the trial court and after 27-12-1975, no

fresh evidence was led by any party and the only effective step which was taken by the trial court after 27-12-1975 was to hear arguments of the

respective advocates of the contesting parties and thereafter judgment was delivered on 26-4-1976 and that too against opponent 1 plaintiff who at that time had become major. Mr. Nanavati contended that merely because opponent 1 who had become major after 27-12-1975 did not apply to the trial court under Order 32, Rule 12 to get description of his name corrected and shown in his personal capacity and for deleting the name of his guardian-ad-litem and next friend, the contesting defendants including the petitioner were not prejudiced at all and at the highest, it was an irregularity and as the ultimate decree of the trial court was against opponent 1, it was for him to challenge the decree on this additional ground of non-compliance with the procedure of Order 32, Rule 12. But opponent 1 was not feeling aggrieved by the said irregularity in the procedure and he was not inclined to challenge the decree of the trial court on that technical ground. Consequently, it is not open to the defendants including the petitioner to make capital out of the aforesaid procedural irregularity and in any case, non-compliance with the provisions of Order 32, Rule 12 had no fatal effect on the decree of the trial court. The decree was not rendered a nullity only on that account as tried to be contended by the learned Advocate General for the petitioner. Mr. Nanavati next contended that Order 1, Rule 10, C. P. Code as well as Section 99 of the said Code are complete answer to the technical contention raised by the learned Advocate General on behalf of the petitioner regarding alleged effects of non-compliance with Order 32, Rule 12 during the pendency of the proceedings in the trial court. Mr. Nanavati next contended that during the pendency of this appeal in this court, procedure of Order 32, Rule 12 has been followed though belatedly by opponent 1 and his application No. 356 of 1978 has been granted by a Division Bench of this court. The result is that the record of the appeal is duly amended and now opponent No. 1 is prosecuting this appeal in his individual capacity. Consequently, it cannot be said that the appeal which is being prosecuted by opponent 1 in his individual capacity has become incompetent on account of any technical flaw. Mr. Nanavati next contended that before opponent 1 gave the said application No. 356 of 1978 in this court, for correcting the record in appeal by showing him as major, whatever steps his mother took as his guardian and next friend cannot be said to be totally unauthorised and void. She was duly authorised to prosecute the suit in the trial court as

guardian-ad-litem and next friend of opponent 1 and her authority to act in the interest of opponent 1 did not automatically come to an end the

moment opponent 1 became major on 27-12-1975. He, therefore, contended that the earlier orders passed by this court after hearing the present

petitioner as well as other contesting opponents, in delay condonation application in preferring the appeal, when this court granted civil application

No. 2191 of 1976 as well as the order passed by this court admitting the appeal, cannot be said to be null and void and the appeal deserves to be

decided on merits after repelling the hypertechnical contentions raised by the petitioner in the present application.

9. It is in the context of the aforesaid rival contentions canvassed by the learned Advocates of the respective parties that we proceed now to

resolve the short controversy which has been posed for our consideration at this stage. As we have noted earlier, the entire controversy centres

round the provisions of Order 32, Rule 12. C. P. Code which reads as under:--

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will

proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his

own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus:--

A. B. late a minor, by C. D. his next friend, but now having attained majority.

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or

application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte; but no order discharging a next friend and permitting a minor plaintiff to proceed in his

own name shall be made without notice to the next friend.

A mere glance at the said provisions shows that it is a procedural provision which lays down that a minor plaintiff or a minor not a party to a suit on

whose behalf an application is filed in the trial court has, on attaining majority, to elect whether he would like to proceed with the suit or application

or not. The said provision is required to be read in the light of the provision of Order 32, Rule 1 which lays down that every suit by a minor shall be

instituted in his name by a person who in such suit shall be called the next friend of the minor. A reference to Order 32, Rule 2 also becomes useful

at this stage. It provides -

(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"".

Under Sub-rule (2) of Rule 2, it has provided -

""(2) Notice of such application shall be given to such persons, and the court, after hearing his objections (if any) may make such order in the

matter as it thinks fit"".

The aforesaid procedural provision shows how the suit by or against a minor can be proceeded with in the court of the first instance. It is not in

dispute between the parties that opponent 1 was admittedly a minor on the date on which the suit was filed in the trial court firstly by way of

miscellaneous application for leave to sue in forma pauperis i.e. on 25-6-1970 as well as on the date on which the said application was granted by

the trial court and the suit was ordered to be registered as special civil suit No. 37 of 1971, i.e. on 26-4-1971. It is in these circumstances that the

scope and ambit of the play of Order 32, Rule 12 is required to be considered in the present case. The said procedural provision calls upon the

concerned minor plaintiff to opt out on attaining majority during the pendency of the suit and to decide whether he would like to proceed with the

suit or application. If he decides to proceed with the suit, he has to apply for an order discharging the next friend. On the other hand, if he elects to

abandon it, he may apply to get his suit dismissed. In the present case, it is not the contention of the petitioner that opponent 1 had ever applied to

the trial court to dismiss the suit on the ground that he wanted to abandon it. Thus, there was no possibility of applicability of Order 32, Rule 12 (4)

in the present case. The only event which happened was that opponent 1 on attaining majority did not exercise his option one way or the other and

remained silent. The question is whether by mere silence on the part of the plaintiff who had then become major, a mere inaction on his part in

putting forward his election qua the proceedings in the trial court as laid down by

Order 32, Rule 12 can have any pernicious effect on the ultimate decree which was passed by the trial court treating opponent 1 to be still a minor. Before we proceed to deal with various authorities to which our attention was invited by both the sides, in support of their respective contentions, we may note a few relevant facts which emerge from the Rojnama of the suit which indicated the progress of the suit from time to time in the trial court till opponent 1-plaintiff who was admittedly a minor initially, attained his majority on 27-12-1975. Special Civil Suit No. 37 of 1971 was registered on 26-4-1971. Thereafter, the suit got registered as special civil suit remained on the file of the trial court for couple of years, from 1971 onwards till 1975. During all this period, opponent 1 plaintiff was admittedly a minor plaintiff who was prosecuting the suit through his guardian and next friend Bai Santok. The said action on behalf of opponent 1 was perfectly justified and in consonance with the procedural provision of Order 32, Rule 1. issues were framed in the said suit on 7-8-1971. Thereafter, evidence was led by the respective parties both oral as well as documentary. In the process, years rolled by and the suit remained pending on the file of the trial court. Last witness for the contesting defendants viz. witness No. 12 K. J. Kakkad was examined at Ex. 166 on 26-9-1975 before the trial court. Even on that day, opponent 1 plaintiff was admittedly a minor and was duly and properly represented by his guardian. Thereafter, on 16-10-1975, a purshis Ex. 168 was filed by the learned Advocate for the contesting defendants closing the evidence. Thereafter arguments of the plaintiffs Advocate Mr. Oza were heard by the learned trial Judge and the case was fixed on 21-10-1975 for hearing arguments of Mr. Oza and that of Mr. Kothari and Mr. Shah who were the learned Advocates for the contesting defendants in the trial court. The Rojnama entries of these relevant dates clearly bring out this factual position. It is only on 21-10-1975 which was the next date of hearing in the trial court when further arguments of the respective learned Advocates were to be heard that an application was moved by the petitioner's Advocate Mr. Kothari being Ex. 169 requesting the trial court to grant him permission to amend his written statement. It appears that the said application came to be granted by the learned trial Judge after hearing the concerned parties and in the light of the amended written statement,

further issues were added, but on these issues, neither side chose to lead any evidence and even the plaintiff-opponent 1 on whose behalf right of rebuttal evidence was sought to be reserved did not choose to lead such rebuttal evidence. Thus, the fact remains that in spite of amendment of the written statement and in spite of additional issues which were framed pursuant thereto, no fresh evidence was led by either side and the learned Advocates of respective parties decided to address the learned trial Judge on the evidence on record as it was led prior to 16-10-1975. As noted earlier, in the meantime, opponent 1 attained majority. But no application seems to have been moved by him before the learned trial Judge exercising his option under Order 32, Rule 12. The learned trial Judge heard the arguments of the learned Advocates on the basis of the evidence on record and ultimately by his judgment and decree dated 26-4-1976 dismissed the suit of the plaintiff with cost. It is in the background of the aforesaid events that occurred during the pendency of the suit in the trial Court that the grievance voiced on behalf of the petitioner by his learned Advocate Mr. J. M. Thakore, has to be appreciated. On a mere reading of Order 32, Rule 12, it is not possible to agree with the broad submission canvassed on behalf of the petitioner by the learned Advocate General that the moment a minor plaintiff who attained majority pending the proceedings in a suit fails to elect one way or the other, whether to proceed with the suit or to abandon the suit, subsequent proceedings before the trial court become unauthorised and the decree that follows either dismissing the suit or decreeing the suit would ipso facto become void decree. No such fatal effect can be culled out from the non-compliance of the procedural provision of Order 32, Rule 12 as tried to be suggested by the learned Advocate General for the petitioner. In fact, an option is given to the minor-plaintiff to elect either to proceed with the suit in his individual capacity or to abandon the suit. But if he does not exercise his election, by mere inaction on his part, no inference can be drawn that he had decided to abandon the suit and had opted for dismissal of the suit as laid down by Order 32, Rule 12 (4). The said rule enacts procedural provision giving an option to the minor plaintiff and it nowhere lays down any penalty for the minor plaintiff imposing any fatal consequence if election is not exercised one way or the other by the minor on attaining majority pending the suit. The said provision of Order 32, Rule 12 has also

to be read in the light of Section 99 of the Code which lays down as under :--

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of

parties or cause of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of

the court.

Provided that nothing in this section shall apply to non-joinder of a necessary party"".

It is obvious that merely because the minor plaintiff having become major does not exercise his option under Order 32, Rule 12 one way or the

other, during the pendency of the suit, it cannot be said that thereby any irregularity, defect or error of the type which affects the merits of the case

or jurisdiction of the court gets projected in the proceedings. At the highest, it remains a procedural irregularity which will have no fatal effect on

the decree that follows and such a decree cannot be reversed only on that ground by the appellate court as enjoined by the legislature by enacting

Section 99. Therefore, on the express language of Order 32, Rule 12, read with Section 99, the main submission canvassed by the learned

Advocate General has got to be repelled.

10. We may now turn to various authorities on which strong reliance was placed by the learned Advocate General in support of his contentions.

11. Our attention was invited to a decision of the Bombay High Court in *Ratanchand v. Jasraj* AIR 1940 Bom 58. The question before the

Division Bench of the Bombay High court was as to whether next friend of the minor plaintiff would remain liable to pay cost to the defendants if

during the pendency of the suit, the minor plaintiff had become major and had exercised his option under O. 32, Rule 12 to get out of the suit and

to get it dismissed. In that case, the suit was instituted in 1938 on behalf of the minor plaintiff by his next friend and father-in-law one *Jasraj*

Kasturchand. On the day on which the suit was filed, the minor plaintiff was aged 17 years. The partition of the joint family properties was prayed

for in the said suit on behalf of the minor by his father-in-law acting as his next friend. During the pendency of the suit, costs were incurred by the

parties on account of certain applications filed in the suit. On 18-1-1939, the minor plaintiff attained his majority and on 26-1-1939 he took out a

summons asking for an order that the suit filed in his name by the next friend be directed to be dismissed and the next friend be ordered to pay the costs of all Parties of and incidental to the suit. The contention of the next friend was that he had been instructed in all materials by the minor plaintiff himself and that the suit was a perfectly proper suit. Thus, the short controversy before the court in the said case was as to whether the next friend and guardian of the plaintiff could be saddled with the cost of the litigation if ultimately the plaintiff attained majority and decided to opt out of the suit and to get it dismissed. The trial court dismissed the suit and ordered that the minor plaintiff should pay costs of the next friend as well as the costs of the contesting defendants. The contesting defendants carried the matter in appeal and contended that they were entitled to order for payment of costs against the next friend irrespective of any misconduct on his part. The appeal as filed by the contesting defendants came to be dismissed by the Division Bench of the Bombay High Court. While dismissing the appeal, Beaumont, C. J. speaking for the Division Bench observed as follows:--

So long as the plaintiff is a minor there must be a next friend shown on the record who is answerable for costs; but as soon as the minor attains his majority, the next friend is functus offi-cio and prima facie his liability ceases. The former minor plaintiff is bound under Order 32, Rule 12 to elect whether he will proceed with the suit or not. If he elects to proceed with the suit, the title to the record is altered by showing him as a major plaintiff, and he thereupon becomes liable for the costs as from the commencement of the suit and the defendant is therefore placed in exactly the same position as he would have been in if the plaintiff had never been a minor. If the minor elects not to proceed with the suits, he can only do so on submitting to an order to pay the costs of the defendant and also the costs of the next friend. There also, the defendant is placed exactly in the same position as he would have been in, if the plaintiff had never been a minor. It is only in a case of a misconduct by the next friend, which falls within Rule 14, that any order for payment of costs can be made against the next friend after the minor has attained his majority"".

It is difficult to appreciate as to how the aforesaid decision can advance the case of the petitioner in the present case. The short controversy with

which the Division Bench in the aforesaid case was concerned was pertaining to the liability of the next friend to pay costs of the suit after the minor

plaintiff on attaining majority decided to opt against the suit. It is true that the observations are made in the said case to the effect that once the

plaintiff becomes major, the guardian and next friend becomes functus officio. But these observations are made in the context of the question

whether the next friend can be made liable to pay costs of the proceedings to the plaintiff as well as to the contesting defendants after the plaintiff

becomes major. Nowhere has the Division Bench considered the effect of non-compliance with the provision of Order 32, Rule 12 by the minor

plaintiff who becomes major, on the ultimate decree which may come to be parsed in the suit. That question never arose for consideration and

consequently it was not required to be considered and was not considered by the Division Bench in the Ratanchand's case (supra). Hence, the

ratio of the decision in the aforesaid case being totally inapplicable to the facts of the present case cannot be of any assistance to the petitioner.

12. Our attention was then invited to a passage from Halsbury's Laws of England, 4th Edn., Vol. 24. para 895.11. The said para reads as under:-

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When an infant who is sole plaintiff or applicant in legal proceedings attains full age while they are pending, he may elect whether the proceedings

are to continue or not. If he elects to continue the proceedings, they will then be conducted in his own name and he will be liable for the costs of

them from the commencement. If he elects to discontinue them he may obtain an order to dismiss them on payment of the costs from the

commencement, or he may take no steps, in which case, the defendant may apply to dismiss the proceedings, but cannot make the infant pay the

costs of them.

When an infant is co-plaintiff or co-petitioner with others, he may, on attaining full age, apply to have his name struck out but in that case, if his co-

plaintiff or co-petitioners so desire, he may be added as a defendant or respondent to the proceedings. He may not, on attaining full age, claim to

appear as a plaintiff separately from his co-plaintiff.

The last part of the aforesaid para says that in case the minor plaintiff on attaining majority takes no steps exercising his option one way or the other

to continue or to discontinue, the defendant may apply to dismiss the proceedings, but the defendants cannot make the infant-plaintiff pay the costs of the proceedings. It may be noted at this stage that such a contingency has not arisen in the instant case. The contesting defendants did not apply to get the proceedings dismissed on the ground that the minor plaintiff had not taken any steps under Order 32, Rule 12, one way or the other. The learned Advocate General for the petitioner submitted in this connection that the defendants had in vain applied earlier before the trial court for calling upon the minor plaintiff to exercise his option under Order 32, Rule 12 on the assumption that he had become major. But it was found out that even though the plaintiff had married, he was still a minor. Consequently, the defendants had not pressed their application Ex. 155. and consequently the defendants never knew as to when the opponent 1 became major. Thus, they got no opportunity in the suit to request the learned trial Judge to dismiss the proceedings. That is neither here nor there. The fact remains that during the proceedings in the trial court, after opponent 1 became major on 27-12-1975, no such application was given by the petitioner or other contesting defendants requesting the learned trial Judge to dismiss the suit as the plaintiff had not exercised his option one way or the other under Order 32, Rule 12. Even otherwise, the aforesaid observations found in para 895.11 in Halsbury's Laws of England cannot automatically be made applicable to the proceedings governed under the CPC as Section 99 of the Code contra-indicates the legislative intention to the effect that even if such a procedure had not been followed by the minor plaintiff that would not by itself visit him with a fatal consequence and the appellate court cannot reverse the decree only on that ground. Our attention was not invited to any such parallel provision in the English procedural law and consequently, the aforesaid observations in para 895.11 in Hals-bury's Laws of England cannot advance the case of the petitioner.

13. We were then referred, to a derision of the Calcutta High Court in *Drupad Chandra v. Bindumoyi Dasi* AIR 1926 Cal 1053. A Division Bench of the Calcutta High Court in the aforesaid case was concerned with the question whether a minor defendant represented by guardian-ad-litem is under a duty to discharge his guardian-ad-litem on attaining-majority. On the facts of the aforesaid case, one Jatindra who was a minor was a party

to the suit which culminated into an appellate decree against him. By the time the said decree came to be passed, he had already become major.

Still, he continued to be represented through his guardian-ad-litem. The said Jatindra tried to avoid the appellate decree subsequently by

contending that the plaintiff of that suit knew that he had already become major and still he had not applied to the trial court to discharge the

guardian-ad-litem of minor Jatindra who had become major. Consequently, the decree passed by the appellate court against him treating him to be

minor though in fact, he was major, was null and void. This contention canvassed on behalf of Jatindra was repelled by the Division Bench of the

Calcutta High Court speaking through Greaves, J. and it was held:-

A duty lay on Jatindra, when he attained majority to discharge his guardian-ad-litem and appear himself. Despite the fact that the plaintiff was his

grandmother, who presumably knew when he attained majority, we do not think that the obligation was on her to discharge the guardian who

properly represented the infant during his minority. We think therefore that it is not possible to say that Jatindra was not bound by the decree.

To say the least, the aforesaid decision of the Calcutta High court instead of supporting the case of the petitioner really goes against him. The

Division Bench of the Calcutta High Court has in terms held that even though a minor party has become major if he still continues to be represented

for any reason by his erstwhile guardian, an order passed by the court against him in such proceedings does not become invalid. It is true that the

aforesaid Calcutta case was not concerned with the case of a minor plaintiff who becomes major pending the suit. But on principle, it would make

no difference, whether minor plaintiff on attaining majority continues to remain represented by his erstwhile guardian or whether minor defendant on

attaining majority continues to remain represented by his erstwhile guardian, so far as net effect of such a situation on the ultimate decisions of the

court goes. The decision rendered by a court in other case cannot be rendered null and void for the simple reason that these are all procedural

provisions whose non-compliance does not have any fatal effect on the efficacy of the decision of the court arrived at after hearing the concerned

parties.

14. Our attention was then invited by the learned Advocate General to decision

of Orissa High Court in Gadadhar Panda and Another Vs.

Gangadhar Panda and Others, . In the aforesaid decision, Rule N. Misra, J. had to consider the question whether a minor plaintiff who had

challenged the previous partition through his guardian and next friend on permissible grounds under Hindu law could be-permitted to convert the

suit into one by a major plaintiff and could challenge the partition on an other permissible grounds available to a major plaintiff because he had

attained majority during the pendency at the suit. In the said case, minor plaintiff had sought to challenge the partition brought about by his father

during the minority of the plaintiff. The learned trial Judge held that the suit was not maintainable as the right of the minor coparcener to dispute

partition effected by his father was personal and cannot be exercised during his minority by his guardian and it is on this ground that the trial court

held the suit not maintainable. R. N. Misra, J. in the aforesaid decision agreed with the view taken by the learned trial Judge and held that the

plaintiff was rightly nonsuited as his suit was not maintainable during his minority as per the provision of Mitakshara law. It is at that stage that an

alternative contention was canvassed on behalf of the plaintiff's advocate before the Orissa High Court viz. that the plaintiff had then become major

and he desired to challenge the partitions on the grounds indicated in the plaint in his own capacity as major and, therefore, the question of

maintainability of the suit did not remain important. The said alternative contention was rejected by the Orissa High Court by holding as under (At

p. 26):--

It is the settled practice that a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement".

It is in this context that it was observed (At p. 26):

It would be difficult to accept Mr. Ramdas's contention. The plaint does not indicate the option of the plaintiff as an adult. It would require

substantial amendment. The plaintiff will have to lead evidence in the suit and cannot rely upon the evidence of the guardian. In the circumstances it

would not be proper to accept the contention of Mr. Ramdas and give relief to the plaintiff to carry on the suit".

The aforesaid observations of the Orissa High Court are based on the peculiar facts of that case and" nowhere touch the moot question posed for

our consideration.

15. We were then taken to the case of Hazari and Another Vs. Suresh and Others, . In that ease, two brothers one of whom, was a minor

instituted a suit for an injunction restraining the defendants from, interfering with the irrigation of the plaintiffs' fields. The elder brother was the

miner's guardian. The minor attained majority during the pendency of the suit but thereon he neither elected to continue the suit nor to abandon it.

In this context, it was held by P. N. Goel J. as under:--

The interests of the two brothers being common, the older brothers could proceed with the suit even if the younger brother did not apply stating

that he elected to continue the suit. Further, the elder brother could have maintained the suit even without impleading his minor brother. The latter

had also applied in the first appellate court that the fact of his attaining majority may be brought on record. There was nothing to indicate that he

had abandoned the suit in the trial court. In these circumstances, the omission by the minor to elect to continue the suit, did not render the suit in

any way defective".

We fail to understand how these observations of the Allahabad High Court can render any assistance to the petitioner in the present proceedings.

In the case of co-plaintiffs, even if one plaintiff is minor and even if he does not exercise his option, the suit can continue at the instance of the other

major plaintiff. The facts of the present case are entirely different and consequently no assistance can be rendered to the petitioner by the aforesaid

decision of the Allahabad High Court.

16. These were the only judgments which were placed for our consideration by the learned Advocate General for the petitioner in connection with

provision of Order 32, Rule 12. He then invited our attention to two other decisions which do not touch upon Order 32, Rule 12. One such

decision is in Mt. Surji Vs. Manki Ram, . wherein Bind Basni Prasad, J. of the Allahabad High Court held:--

It would be an abuse of the process of the court to allow a decree which is a nullity to stand. The inherent powers of the court should, therefore,

be exercised to set aside such decree".

There cannot be two opinions about the aforesaid proposition of law. If a decree is a nullity, it has got to be set aside and can be set aside even by

the same court in exercise of its inherent powers. On the same lines is also the decision of this court in Bai Halima v. Mohmedbhai Rajebhai. 18

Gui LR 264, wherein A. D. Desai, J. held that the suit must end in a judgment and a decree, and if a decree passed by the court is held to be a

nullity, the court is bound to take notice of it and re-commence the suit from the stage at which the decree was passed and must be taken to its

logical conclusion. The aforesaid decision of this court is also totally besides the point If it is held that the decree passed in the present case by the

trial court against the minor plaintiff who really was major at that time, was a nullity, then consequence must follow of putting the clock back and of

directing the learned trial Judge to proceed further in accordance with law from the stage at which invalidity had percolated in its proceedings. But

if on the other hand, it is found that the decree passed by the trial court was not a nullity, no other question would survive for consideration. As we

have already held above, the decree passed in the present case by the learned trial Judge cannot be said to be a nullity from any point of view

simply because the minor plaintiff at the end of the trial and at the stage of arguments did not exercise his option one way or the other under

Order 32, Rule 12 and did not get the record corrected. That inaction on his part had no vital effect in hearing of the arguments by the learned trial

Judge on available evidence led during the time the plaintiff was admittedly a minor. The only step which was taken by the learned trial Judge after

the plaintiff became major was to hear the arguments of the respective advocates of both the sides and to decide the same on the available

evidence. No vital infirmity can be found in the said proceedings which culminated into the decree of dismissal of the suit of opponent 1 plaintiff. It

is pertinent to recall that the plaintiff against whom the decree is passed does not challenge the decree on the ground of alleged infirmity resulting

from non-compliance with the provision of Order 32, Rule 12. In view of that fact, it would be too much for the defendants to contend that non-

compliance with the said procedure which has ultimately resulted into the decree in their own favour should have any vital adverse effect on the

decree which does not hurt them in any manner even in spite of non-compliance with the said procedure. It is difficult to appreciate how the

defendants including the present petitioner can feel aggrieved by the decree of dismissal of the suit passed by the learned trial Judge which is

obviously in their favour and how they can avoid the said decree by submitting that the decree is a nullity, on the ground that unsuccessful plaintiff

did not opt out one way or the other under Order 32, Rule 12, C.P. Code on attaining majority. At this stage, we may also note one submission of

learned Advocate General for the petitioner. He submitted that if the plaintiff-opponent 1 had applied to the trial court under Order 32, Rule 12, C.

P. Code, on attaining majority, the petitioner defendant could have requested the court to call the plaintiff as a witness for enabling the defendant to

cross-examine him. It is difficult to appreciate this contention. If the plaintiff did not decide to enter the box, the defendant could not have

compelled him to do so and could have at the highest contended for drawing an adverse inference against him. Such a contention can be urged

even in the main appeal which is yet to be decided on merits. Hence, it cannot be said that non-compliance with the procedural provision of Order

32, Rule 12 by the plaintiff-opponent in the trial court has prejudiced the petitioner in any way.

17. We may now turn to a few other decisions which have a direct bearing upon the question posed for our consideration. In *Khetrabasi Parida*

Vs. Chaturbhuj Parida and Others, A. Misra, J. held that merely because a party who was major was described as minor in the proceedings in

the suit, the decree passed in the said proceedings would not be rendered a nullity. For reaching the said conclusion, the learned Judge placed

reliance on two Division Bench judgments of Patna and Madras High Courts respectively in (1940) 21 Pat LT 269 and ILR 39 Mad 1031: (AIR

1917 Mad 318). The aforesaid Division Bench judgments of the concerned " High Courts had taken the view that the decree obtained against a

person treating him as minor while in reality he was major on the date of the decree was not a nullity. The said view was rightly accepted by A.

Misra, J. in the aforesaid case and we fully concur with the same; The Division Bench of the Patna High Court in *Sarangdhar v. Parvati* ILR 32 Pat

983 : (AIR 1955 NUC 229), was concerned with a situation in which certain respondents who were minors had attained majority at the appellate

stage and yet, necessary amendment was not made in the appellate proceedings. Considering the effect of the said situation. Narayan, J. speaking

for the Division Bench held that absence of necessary amendment in the appeal proceedings had no adverse effect on the suit.

18. In *Lanka Sanyasi v. Yerran Naidu* AIR 1928 Mad 294, a Division Bench of the Madras High Court had to consider the effect of non-

correction defendant's description as minor through his guardian-ad-litem when he himself became major during the pendency of the proceedings

on the binding nature of the decree passed against such defendant in the suit. It was observed by the Madras High Court in the aforesaid case:--

Mere circumstance that a minor defendant had attained majority during the pendency of the suit and has not elected to continue the defence

himself is not sufficient to enable him to have declared as not binding on him the judgment duly pronounced by the court".

19. Following the ratio of the aforesaid judgment of the Madras High court, a Division Bench of the Kerala High Court in *Savithri Vs. Vasudevan*

Nambudiri, has held that if minor defendant who was sued through the guardian-ad-litem does not choose to defend the suit when he attained

majority and allows the case to proceed as though he was still a minor without bringing to the notice of the court the fact of his having attained

majority then he must be deemed to have elected to abide by the judgment or adjudication by the court with respect to the matter in controversy

on the basis of the suit at the time. The aforesaid decisions though rendered in the context of minor defendant attaining majority pending the suit,

clearly laid down that non-description of the correct position of the party-defendant had no adverse effect on the ultimate decree that follows in the

said proceedings. The said principle ipso facto can be applied even to the case of a minor plaintiff who having attained majority does not opt out

under Order 32, Rule 12 one way or the other. If he does not opt out against the suit nor does he expressly intimate his election for continuing the

suit, the same inference which, was drawn by the Madras and Kerala High Courts can be drawn against him, viz. he also chose by his own

conduct of inaction to continue the suit rather than to discontinue, the same, and the ultimate decree would remain binding on him. Under these

circumstances, it is not possible to agree with the contention of the learned Advocate General that on the facts of the present case, the decree

rendered by the learned trial Judge against the plaintiff-opponent 1 should be treated as a nullity. So far as the question of maintainability of the

present appeal is concerned, it raises in its turn further question whether the minor plaintiff who had become major could legally file the appeal

through his erstwhile guardian-ad-litem and whether correction of the memo of appeal as per the order of this court on 22-2-1978 in civil

application No. 356 of 1978 had any effect on the filing of the present appeal within the prescribed period of limitation. On these questions, we do

not express any opinion for the present and the said questions are kept open as they can be more effectively dealt with at the time of final hearing

of the main appeal. For the present, the short question which was posed for our consideration by the learned Advocate General in support of the

present application viz, as to whether the decree of the trial court had become a nullity on account of non-compliance with Order 32, Rule 12, C.

p. Code, during the trial proceedings, has got to be answered against the petitioner and as that was the main question on which our decision was

invited by the learned Advocate General for the petitioner in the present civil application, the net result of our decision is that the civil application

fails. Rule issued therein is, therefore, ordered to be discharged. In the facts and circumstances of the case, there will be no order as to costs. At

the oral request of Mr. Kothari, learned Advocate for the petitioner, hearing of the main appeal is deferred for two weeks.