

(1958) 10 BOM CK 0004
In the Bombay High Court
Case No : Civil Application No. 306 of 1958

Gulabchand Nanulal and Others	Vs	APPELLANT
Fulchand Hirachand and Another		RESPONDENT

Date of Decision : 25-10-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 1, Order 32 Rule 10(1), Order 32 Rule 10(2), Order 32 Rule 11(2), Order 32 Rule 3
 Limitation Act, 1963 — Article 181

Citation : AIR 1959 Bom 232 : (1959) 61 BOMLR 484 : (1959) ILR (Bom) 1076

Hon'ble Judges : Y.S. Tambe, J; V.M. Tarkunde, J

Bench : Division Bench

Advocate : A.L. Halve, for the Appellant; A.D. Mande and K.A. Potey, for the Respondent

Judgement

Y.S. Tambe, J.—This application is made by Sampatlal u/s 151 of the CPC for the rehearing of First Appeal No. 39 of 1946 decided by a Division Bench of the then High Court at Nagpur on 30-12-1954. Though it is not so stated in the application, Shri Halve who appears before us for Sampatlal contends that the decision of the Nagpur High Court and the decree made in that appeal were null and void on account of a procedural defect.

2. It is necessary to set out certain facts in detail. The suit out of which this appeal arises is between the members of two branches of the family which at one time were joint. The following family tree would disclose their relationship:

GUMANCHAND	-----	
Hirachand	(d. 1927) Nanhoolal (d. 1948)	-----
Suganchand	Jadao Bal Dulichand Pudamchand Gulabchand Mangalchand	
Udakaran (Deft. 1)	(d. 1927) (d. 1918) (Piff. 1) (Piff. 2) (Piff. 3) (Piff. 4)	
=Window Sunderbal Sampatlal		Jugraj (Deft.2) (Piff.5) Petitioner before us.)

3. It would be seen that the present applicant was Plaintiff No. 5 to the original

suit. It is not disputed before us that Dulichand, Punamchand, Gulabchand, Mangalchand and Sampatlal formed a joint Hindu family of which Dulichand was the karta during his lifetime. These members of the joint family instituted a suit against the male members of the other branch for the recovery of certain property which was alleged to have been left behind by Jadao Bai. The plaintiff's case was that after the death of Jadao Bai Nanhoolal succeeded to that property. That property however was kept by Nanhoolal in deposit with Fulchand. After Nanhoolal's death, the plaintiffs succeeded to that property and demanded its return from Fulchand. But as Fulchand refused to hand over possession of the property they instituted this suit for obtaining possession thereof. In the suit Dulichand acted as a next friend of the present applicant Sampatlal. Sampatlal was at that time said to be about 7 years old. The suit was instituted in the year 1944. It failed in the trial court and was dismissed on 12-11-1945. An appeal was preferred to the Nagpur High Court by the Plaintiffs against the judgment and decree of the trial court. Dulichand at that time was alive and acted as a next friend of Sampatlal in the appeal. It appears that both Dulichand and Punamchand, original Plaintiffs Nos. 1 and 2, died some time prior to 1954. We should have mentioned earlier that the appeal was presented by Shir A. L. Halve on behalf of all the Plaintiffs.

4. On 4-1-1954 an application was made to the Nagpur High Court by Shri Halve on behalf of the remaining appellants Gulabchand, Mangalchand and Sampatlal stating therein that Dulichand was dead and therefore his name be struck off. Shri Halve also made another application on 17-4-1954 stating that the second Plaintiff Punamchand was also dead and therefore his name should be struck off. Both these applications were dealt with in the Registry of the Court and the Registrar by his orders dated 3-2-1954 and 21-7-1954 ordered deletion of the names of Dulichand and Punamchand respectively.

5. The appeal came up for hearing before the Court on 13-10-1954 and was heard on that date & on subsequent dates, 14th and 15th October 1954 and the judgment was delivered on 30-12-1954 and the judgment was delivered on 30-12-1954. This appeal was also argued by Shri Halve on behalf of all the appellants. It was not pointed out by him at the hearing that on account of the death of Dulichand and continuing minority of Sampatlal it was necessary to appoint a next friend of Sampatlal, nor was it stated before the Court by Shri Halve that he was not appearing for Sampatlal. The appeal proceeded on the footing that Shri Halve was arguing the appeal for all the appellants. The appeal was dismissed by the Nagpur High Court and the decree was signed by Shri Halve on 7-1-1955. On 30-3-1955, an application for leave to appeal to the Supreme Court was made in the High Court by Gulabchand, Mangalchand and Sampatlal. On this date Sampatlal had not attained majority and Gulabchand in these proceedings acted as his next friend. Sampatlal attained majority on 11-2-1956 and then, nearly after two years, Sampatlal has made this application u/s 151 of the CPC for the rehearing of the appeal.

6. The contention of Shri Halve is that the decision of the appeal by the High Court and the decree made thereunder are null and void on account of non-appointment of a next friend of Sampatlal. According to Shri Halve, it was obligatory on the Court under Order 32, Rule 19 (1) of the CPC to have kept the appeal pending till the appointment of a next friend of Sampatlal was made. The Court not having done so its decision and the decree made are nullity. Reference is also made by Shri Halve to the decisions in Venkatrav v. Madhavrav, ILR Bom 53; Chundury Krishnayya v. Koripatti Raju, AIR 1917 Mad 969 ; Pulin Chandra Sen Vs. Amin Miah Muzaffar Ahmad and Others, and Venkateswara v. Ravunni Nair, AIR 1915 Mad 461. We find it difficult to accept Shri Halve's contention.

7. It is indeed true that Rule 10 (1) of Order 32 provides that on retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place; but this rule, in the case of death of next friend, would be attracted only when the fact of the death of the next friend is brought to the notice of the Court. As stated above, it was not brought to the notice of the Court, when the appeal came up before the Court on 13-10-1954, by Shri Halve that Sampatlal was still a minor, that his next friend Dulichand was dead and that therefore it was necessary to get another person appointed as a next friend in his place. The facts stated above clearly indicate that Shri Halve well knew that the next friend of Sampatlal was dead. In fact, he had even applied after the death of Dulichand the next friend of Sampatlal, not only on behalf of Gulabchand and Mangalchand but also on behalf of Sampatlal that Dulichand's name should be removed. It was not stated in that application also that Sampatlal was then a minor and therefore it was necessary to get another person appointed as a next friend in place of Dulichand. Had Shri Halve stated this or in any other manner brought to the notice of the Court that Sampatlal was a minor on the date the appeal was heard, certainly the Court would have stayed the hearing of the appeal and awaited an application under Order 32, Rule 10 (2), for appointment of a next friend for minor Sampatlal. It would be seen from the provisions of that Sub-rule that, in the first instance, the pleader of the minor is expected to make such an application.

8. We are not now concerned with the stay of the hearing of the appeal but with altogether a different question and that question is whether the decree made in the appeal is a nullity. In our view there is a difference between a decree obtained against a minor without appointing a guardian for him and a decree made in a suit brought by a minor Plaintiff, without he being represented by a next friend. Provisions of Order 32, Rule 3 and Order 32, Rule 11 (2) of the CPC impose a duty on the Court to make an order of appointment of a guardian for the minor Defendant when the fact of his minority becomes known to the Court. This duty has to be performed by the Court irrespective of any application for appointment of a guardian of the minor Defendant. There is no such duty imposed on the Court in a case of a minor Plaintiff. On the other hand it appears that it is expected of the pleader or of the person who institutes a proceedings on behalf of the minor to see that the name of minor's next friend is shown on the

record; failure of which might render him liable in costs. The decree made in a suit against a minor, Defendant without appointing a guardian for him may, therefore, on account of failure to perform an imperative statutory duty on the part of the Court, amount as a general rule to a nullity but such would not necessarily be the case when a suit instituted by or on behalf of a minor without mention of his next friend on record is decided by a Court. In our view, the provisions of Order 32, Rule 2 make the position clear. Rule 2 of Order 32 provides that 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. In the event the Defendant fails to raise this objection and the suit proceeds and a decree is made that decree is not a nullity: see *Kamalakshi v. Ramsami Chetti*, ILR Mad 127 and AIR 1940 99 (Nagpur) .

9. Sub-rule (2) of Rule 5 of Order 32 provides that every order made in a suit or on any application before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be may be discharged, and where the pleader of the party at whose instance such order was obtained knew, or might reasonable have known, the fact of such minority, with costs to be paid by such pleader. True that this Sub-rule does not in terms apply to a decree but applies to an order made in a suit either on an application or otherwise. In our opinion, there is no reason why the principle underlying this Sub-rule should not be applicable even where a decree has been made in a suit by a minor Plaintiff, without a next friend. The principle is that every order made in a suit either on an application or otherwise in the absence of an appointment of a next friend or guardian of a minor is not necessarily a nullity. Undoubtedly, it is in the discretion of the Court to discharge such an order when a proper case is made out but it is not obligatory on the Court to do so. In our view, therefore, it is not possible for us to hold that the mere failure to get a next friend appointed for the then minor Sampatlal appellant, after the death of Dulichand, would render the judgment delivered by the Nagpur High Court and the decree made thereunder null and void.

10. It is well settled that Courts should take care of the interests of the minors, and we are well aware of the principle. We would not have hesitated to set aside this decree on a proper case being made out, but in the instant case it is not even alleged in the application that the interests of Sampatlal have in any manner suffered or that prejudice has been caused to him on account of the absence of an order by the Court appointing a next friend of Sampatlal. As already stated, Sampatlal was at the material time a member of a joint Hindu family and it is admitted before us that he is even now a member thereof. On the date of the hearing of the appeal, Gulabchand, being its eldest male member, was the "karta" of the joint family and was his guardian. Gulabchand was on record and was actually prosecuting the appeal. Another adult member of the family, Mangalchand, was also on record and was prosecuting the appeal. Shri

Halve was engaged as counsel to argue the appeal on behalf of all the appellants. Even Dulichand, when he was alive, had engaged Shri Halve to conduct the appeal not only on his own behalf but also on behalf of Sampatlal. The appeal was argued by Shri Halve on behalf of all the appellants on record. It has not been stated in the application before us nor has it been argued before us that had there been an appointment of a next friend of Sampatlal he would have engaged another counsel or that Shri Halve would have urged some other points than were urged by him in the appeal. In fact, we find that subsequent to the decision of the appeal an application was made to the Nagpur High Court for a certificate to enable the appellants to file an appeal to the Supreme Court and in that application Gulabchand was shown as the next friend of Sampatlal. In these facts and circumstances of the case we are satisfied that no prejudice at all has been caused to the minor Sampatlal on account of the absence of a formal order appointing a next friend for Sampatlal after the death of Dulichand. On the other hand, we are satisfied that his interests have been effectively represented and have been adequately safeguarded in this case by his guardian Gulabchand and the counsel Shri Halve appearing in the case. The principle underlying a minor plaintiff being represented by his next friend or appointment of a guardian of a minor defendant is that a minor being incapable of taking adequate steps to safeguard his interests some adult person should guard his interests. This object has been fully achieved in this case. Even in a case of a decree made against a minor Defendant where it is found that the interests of a minor Defendant have been adequately safeguarded by his guardian, though he was not formally appointed by the Court as his guardian, their Lordships of the Privy Council have refused to interfere with the decree made. In *Mt. Bibi Walian v. Banke Behari Pershad Singh*, 30 Ind App 182, their Lordships observed (page 189):

"Their Lordships are unable to concur in the conclusions at which the learned Judges arrived. The present Plaintiff's were substantially used in the former suit and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother, and with the sanction of the Court; and for the reasons given by the First Court their Lordships attach no importance to the certificate of Durga Dutt. There is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the new Plaintiffs to be their guardian ad litem is shown to have been drawn up; and that it is not definitely shown that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother."

In our opinion, these observations would equally apply in the instant case. Here, the interests of minor Sampatlal are adequately safeguarded and effectively represented by his de facto and de jure guardian Gulabchand who had engaged Shri Halve as counsel and who had also been engaged for the minor by his former next friend Dulichand. Shri Halve had not stated before the Court that he had ceased to appear for Sampatlal. It can be safely assumed that he continued

to represent the then minor Sampatlal because he was so instructed by Gulabchand. No case is, therefore, made out of any prejudice having been caused to the minor. On the other hand, we feel that to allow such an application would be unjust to the respondents. It cannot be said that the decree is a nullity so far as the interests of Gulabchand and Mangalchand are concerned who were majors. But what has been asked for is setting aside of the entire decree on the ground that a next friend was not appointed for Sampatlal. In our opinion, it is not open to Sampatlal to ask such a relief.

11. Further, it was open to him to make an application for review, if at all there was any substance in the contention raised by him, and pray that the decree be set aside so far as his own interest was concerned in the suit property. Limitation for a review application is only 90 days. Admittedly two years prior to this application Sampatlal had attained majority. No reason is given why a review application was not filed on the ground of an alleged apparent mistake on the record; viz., non-representation of him by a next friend. The period prescribed for a review application has long since elapsed.

12. This brings us to the decisions referred to us by Shri Halve in the course of his argument.

13. ILR Bom 53, in our opinion, has no relevance to the question raised. It relates to the validity or otherwise of the appointment of the person who had instituted the suit as an agent on behalf of the Plaintiff.

14. AIR 1917 Mad 969, is distinguishable on facts. In that case reopening of the decree was not asked for by the minor by way of an application u/s 151 of the CPC but a regular suit was filed for setting aside the previous decree passed against the minor in a former suit. The case of the minor was that in the former suit to which he was a Defendant a decree was passed against him by the trial court. He then appealed through his guardian ad litem to the Appellate Court. During the pendency of the appeal his guardian ad litem died. No appointment of a guardian ad litem for the minor was thereafter made and the appeal was decided while he was unrepresented, and on this ground it was claimed that the decree made in the former suit against him was a nullity. The contention raised by the minor failed in the trial court. The minor took an appeal against the decree of the trial court to the subordinate court and the contention of the minor succeeded. An appeal was taken against the decision of the subordinate court to the High Court by the opposite party and it was contended that the omission to get a next friend appointed for the minors in the prior proceedings at the appellate stage was a mere irregularity. The argument advanced was founded on the difference between the appointment of a next friend of a minor Plaintiff and the appointment of a guardian ad litem for the minor Defendant. It was contended that in the former proceedings in the trial court there was a guardian ad litem appointed for the minors who were Defendants. In appeal also they were properly represented by that guardian. It is only during the pendency of the appeal arising out of the former suit that the guardian ad litem had died and no

fresh appointment was made. This according to the contention raised was on the same footing as no appointment of a next friend of the Plaintiff and was therefore a mere irregularity. This contention however was negated by the High Court. In negating the contention Sadasive Aiyar J., observed (Page 971):

"It might also be conceded that minor Defendant who are appellants stand in some respects in the position of Plaintiffs and the guardian ad litem of minor Defendants-appellants is, in some respects, in the position of the next friend of minor Plaintiffs : *Shapurji Hormasji v. Monnesseh Jacob*, ILR Bom 374. But this is not so in all respects and for all purposes: see *Venkata v. Alakarajamba Maharani*, ILR Mad 187, where it was held that the guardian ad litem for the Defendant in the lower court is alone entitled to appeal and nobody else could, on the analogy of the next friend of a Plaintiff, prefer the appeal without a proper appointment of himself as guardian by the Court after the removal of the original guardian ad litem.

On the question we have now to consider, namely whether a decree passed in appeal against minor appellants (who were Defendants) is valid without their having been legally represented, the above argument based on the argument based on the difference in procedure in some respects between the cases of minor Plaintiffs and minor Defendants seems to me to be of no help."

In our opinion, the decision in this case would, therefore, be of no avail to the applicant Sampatlal before us inasmuch as he was a Plaintiff in the original court and also an appellant before the Nagpur High Court in appeal.

15. AIR 1915 Mad 461 is also distinguishable on facts in that case where that a suit was instituted in 1905 on behalf of the minor by his next friend. Sometime thereafter the next friend of the minor died. On 26th October, 1906 the Munsif declared that the suit abated in consequence of the death of the next friend. The minor on attaining majority moved the Munsif's Court in 1912 to set aside the order of abatement. This application was rejected by the Munsif. He therefore instituted a regular suit claiming therein the same reliefs which were prayed for in the first suit instituted by the next friend. This suit was dismissed on the ground that the previous order of abatement of the suit had precluded him from claiming the same reliefs on the same cause of action. Against this decision the matter came up before the High Court and it was held by Seshagiri Aiyar J. that the order of abatement passed by the Munsif was erroneous as there was no authority in law to make an order of abatement on the death of the next friend of the minor Plaintiff. The fact of the death of the next friend of the minor Plaintiff was known to the Munsif. Provisions of Order 32, Rule 10 (1) came into play. It was therefore held that the suit was tenable. It would be seen that the suit which was pending before the Munsif was not disposed of by the Munsif on merits; it in fact had not proceeded to trial at all. This decision therefore would be no authority for the proposition contended for before us that the decision given in a suit on merits is a nullity merely on the ground of absence of a formal order of appointment of a next friend.

16. Pulin Chandra Sen Vs. Amin Miah Muzaffar Ahmad and Others, is similarly distinguishable on facts. The facts were that on behalf of a minor a suit for enforcement of a mortgage was filed by his next friend. A preliminary decree was passed in the suit on 1st December, 1917 and the period of grace expired on 1st June, 1918. In the meantime the next friend of the minor Plaintiff died and no steps were taken thereafter by anybody to get a next friend appointed. The minor after attaining majority made an application for getting the preliminary decree made final. This application was within three years of his attaining majority but was beyond the period of limitation prescribed for making an application for a final decree and on this ground of limitation the application made by him was dismissed by the trial court. The matter came up before the High Court and the High Court held that in the peculiar circumstances of the case the article of the Limitation Act that governed the case was Article 181 of the Act and the right to the decree-holder to make an application for a final decree would accrue to him on his attaining majority. This decision also, in our view, is not an authority for holding that the decree made without a formal order in a case where a minor was one of the Plaintiffs or appellants would be a nullity merely on the ground of failure to appoint a next friend of the minor.

17. IN the result, therefore, in our judgment, the application fails and is dismissed with costs.

18. Application dismissed.