Raj Behari Lal And Ors. vs Dr. Mahabir Prasad And Ors. on 11 November, 1955

Equivalent citations: AIR1956ALL310, AIR 1956 ALLAHABAD 310, 1956 ALL. L. J. 45 ILR (1956) 1 ALL 332, ILR (1956) 1 ALL 332

JUDGMENT

Agarwala, J.

1. I have had the advantage of reading the judgment prepared by my learned brother V. D. Bhargava, and as I generally agree with him. I need not recite the facts again or deal with the cases referred to by him at length.

2. A minor cannot sue by himself nor can he be sued without being represented by someone else. This someone else is called a "next friend" when the minor is the plaintiff in an action, and is called a "guardian ad litem" when the minor is a defendant. The nomenclature does not matter, and the real fact is that the next friend or the guardian ad litem represents the Interest of the minor.

3. Once a person has been named either the next friend or the guardian of the minor, reason requires that he should continue to represent the minor through all the off-shoots of the proceedings, for it would be anomalous if without the removal of the representative already named someone else were to commence representing the minor.

If there are different representatives at different stages without the former representatives being removed by order of the Court, it would result in confusion as to which guardian will execute the decree or order when one is made in the proceedings, and against whom or be whom an appeal from the decision of the trial Court will be filed and who will file the restoration application or an application for setting aside a decree.

From the very nature of things it is necessary that one person at a time should represent the minor. If he is found negligent or unsuitable, the Court can remove him and appoint another. But more than one person cannot be allowed to be the representative of the minor at one and the same time-

4. An appeal is a continuation of a suit and the lis includes the various off-shoots of at proceeding. It must therefore be that whoever be the representative of the minor in the trial Court should also ordinarily be his representative in the appellate Court or in other higher Courts where the same lis continues.

5. This view finds support from a number of cases. In -- 'Jwala Dei v. Pirbhu', 14 All 35 (A), it was held that where a guardian 'ad litem' has been once appointed, his appointment enures for the whole of the lis in the course of which it has been made, unless and until it is revoked toy the Court.

The same view was taken in -- 'Sambhoo v. Kanhaya', AIR 1922 All 332 (2) (B) and --Venkata Chandrasekhara Raja v. Alakarajamba Maharani', 22 Mad 187 (C). A contrary view having been expressed in --"Salaluddin Khajeh v. Afzal Begum', AIR 1925 Cal 23 (D), that the guardian ad litem appointed in a suit does not continue as such without a fresh appointments during the execution proceeding, the Legislature Intervened and amended Order 32, Rule 3, Civil P. C., by inserting Sub-rule (5) as follows :

> "A person appointed under Sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree." Thus it is clear that the Legislature overruled the Calcutta view and confirmed the view of the other High Courts.

6. It is clear therefore that under this Rule the guardian of the minor who had been appointed in the suit while it was pending in the trial Court must continue even in appellate proceedings unless his appointment is terminated by retirement, removal or death. But it is urged that this rule applies only when the minor who was a defendant in the suit and for whom a guardian was appointed is a respondent in an appeal arising out of the same suit and does not apply when the minor is the appellant.

It appears to me that there is no warrant' for any such distinction. Sub-rule (5) of Rule 3 of Order 32 is quite clear that the guardian of the minor appointed for the suit shall continue as such throughout all proceedings arising out of the suit including proceedings in any appeal. When the minor files the appeal, it is a proceeding arising out of the suit and, therefore, the same guardian must continue.

He must appeal on behalf of the defendant appellant minor unless his appointment is terminated by retirement, removal or death. But it is urged that under Order 22, Rule 11 the word "plaintiff" shall be held to include the appellant, and the word "defendant" a respondent and the word "suit" an appeal. But the Rule applies to proceedings under Order 22, as stated expressly in Rule 11 itself. It does not apply to other proceedings.

When an appeal is filed by a defendant minor, his guardian ad litem appointed in the suit must describe himself in the memorandum of appeal as the guardian of the minor and not as a next friend. Where the appeal is by a minor plaintiff, then alone the person representing the minor appellant will be described as next friend, because he was so described in the suit.

In my opinion there is no reason to interpret Sub-rule (5) of Rule 3 of Order 32 as it has been suggested on behalf of the appellant. It follows, therefore, that ordinarily an appeal on behalf of a minor must be instituted by the guardian of the minor appointed as such in the trial Court,

7. But Order 32, Rule 3, Sub-rule (5) itself provides for an exception to this Rule. When the appointment of the guardian is terminated by retirement, removal or death, some other person may represent the minor in the appeal. Therefore when the person who was the minor's guardian in the trial Court does not wish to file the appeal and some other person interested in the welfare of the minor wishes to obtain a decision of the appellate Court in favour of the minor, what is to be done?

Commonsense dictates that the proper course in such an event is for that other person to file a memorandum of appeal on behalf of the minor along with an application for the removal of the guardian representing the minor in the lower Court and for his own appointment as guardian of the minor. If this application is allowed, the memorandum of appeal filed on behalf of the new guardian becomes validly presented.

If the application is not allowed, the appeal must be held to have not been validly presented. This procedure was suggested by a Bench of this Court in -- 'Latafat All Khan v. Muhammad Yar Khan', AIR 1930 AH 456 (E), and. I respectfully agree with the view of the Bench. It follows therefore that the mere fact that an appeal is instituted on behalf of the minor not by the person who was his guardian in the Court below but by some other person interested in the minor does not render the presentation of the appeal null and void, provided an order is made by the Court removing the previous guardian and appointing the new one in his stead.

Where no such application has been filed along with the memorandum of appeal and is presented subsequently, there is nothing to prevent the Court from ordering the removal of the guardian with effect from the date of the institution of the appeal and appointing the new guardian also with effect from that date, provided nothing has happened in the meanwhile which makes it inequitable or unlawful to do so.

8. I am, therefore, of the opinion that a minor defendant against whom a decree is passed can file an appeal through a person other than the guardian 'ad litem' appointed in the trial Court and such an appeal would be a validly instituted appeal, provided that upon an application made by the aforesaid person the Court orders the removal of the guardian 'ad litem' appointed in the trial Court with effect from the date of the institution of the appeal and appoints the person who has filed the appeal on behalf of the minor as the guardian of the minor with effect from that date and that if no such application is made or if such application is made and disallowed, the appeal cannot be considered to be a validly instituted appeal.

Desai, J.

9. The provisions in Order 32, Civil P. C. are expressed to apply in suits. Every suit by a minor must be instituted in his name by his next friend. Where a defendant is a minor the Court must appoint a guardian for the suit for him. Any person who is of sound mind and has attained majority may act as next friend or guardian. A next friend who wants to retire must procure a fit person to be put in his place.

A next friend can be removed by the Court if his interest becomes adverse to that of the minor and for other similar reasons. The Court may permit a guardian for the suit to retire or may remove him if he does not do his duty or for any other sufficient reason. Where a guardian retires, dies or is removed, the Court must appoint a new guardian in his place. These are the provisions of Rules 1, 3, 4, 8, 9 and 11.

In none of these provisions is there any reference to appeal or application for revision. In Order 41, which deals with appeals, there is no reference to the provisions of Order 32 or to the matters dealt with therein. The Code of Civil Procedure makes a distinction between a suit and an appeal; it separately prescribes the procedure to be followed in a suit and in an appeal.

Though for certain purposes a proceeding in an appellate Court may be said to be a proceeding in the suit itself and the suit may be said to be pending even though the proceeding in the trial Court has ended and a proceeding in the appellate Court is pending, the word 'suit' as used in the Code of Civil Procedure does not include an appeal.

It is obvious that when the Code deals with the procedure to be followed by an appellate Court separately the provisions relating to the procedure to be followed in a Court of original jurisdiction cannot apply to proceedings in an appellate Court. The procedure to be followed by an appellate Court is dealt with exhaustively in Order 41.

The provisions regarding pleadings in Orders 6, 7 and 8 do not apply to appeals and cross-objections; what should be the contents of a memorandum of appeal is mentioned in Rule 1 of Order 41. The provisions of Order 5 do not apply; instead Rule 14 of Order 41 contains the provision regarding service of the notice of appeal. The provisions of Order 9 do not apply; instead Rules 17, 18, 19 and 21 apply.

Similarly Rule 20 takes the place of the provisions of Order 1, Rule 22 takes the place of the provisions of Order 8, Rules30, 31, 32 etc. take the place of the provisions of Order 20. The Code deals with certain matters which may arise in a suit and also in an appeal; the provisions dealing with, these matters must naturally apply in suits and also in appeals. For example, a decree may be passed in a suit and also in an appeal and the provisions of Order 21 relating to execution of decrees govern decrees passed in suits and also decrees passed in appeals.

Similarly, an injunction can be issued by si Court of original jurisdiction and also by a Court of appellate jurisdiction; Order 39 governs injunctions issued by both the Courts. The matters dealt with in Order 32 are not matters of this kind; they are matters expressly stated to arise in suits only and therefore the provisions of Order 32 by themselves cannot govern proceedings in Courts of appeal.

10. According to Section 141 of the Code the procedure provided in the Code in regard to suits is to be followed, as far as can be made applicable, in all proceedings in any Court of civil jurisdiction. The words "all proceedings in any Court of civil jurisdiction" mean proceedings in a Court of original civil jurisdiction and do not include proceedings in a Court of appellate jurisdiction. All proceedings

in a Court of original Jurisdiction are not suits; only some of them come within the meaning of suits.

What Section 141 lays down is that the procedure provided in the Code will be followed in all proceedings in a Court of original jurisdiction whether they are in the nature of suits or not. Since the Code itself makes a distinction between the procedure to be followed in a suit and the procedure to be followed in an appeal and since the procedure to be followed in an appeal is exhaustively provided for in Order 41, the provisions of Section 141 could not have meant that the provisions dealing with suits should govern appeals also so far as practicable. It has been held in a number of authorities that the words "all proceedings, in any Court" mean all proceedings in any Court of original jurisdiction.

11. The question arises how a minor is to file an appeal and how an appeal is to be filed against a minor. The Code of Civil Procedure does not contain any express provision dealing with the question. Yet there must be some law; neither can a minor be allowed to prosecute an appeal nor can an appeal be allowed to be defended by a minor.

The only answer that can be given to the question is that the manner in which the minor plaintiff or the minor defendant was represented in the Court of original jurisdiction is the manner in which he must be represented in the appeal. The party is the minor himself; his next friend or guardian simply represents him because he cannot himself look after the litigation.

If a minor plaintiff is represented in the suit by X as his next friend, this representation, is established for the whole lis and he must be represented by X, whether he is an appellant or a respondent. Similarly if a minor defendant is represented in the suit by Y as his guardian, this representation is established for the whole lis and in the appeal Y must represent him whether he is an appellant or a respondent.

X will continue to be the next friend of the plaintiff in the appeal and will be designated as such even if the plaintiff is a respondent; similarly, Y will continue to be the guardian of the defendant and will be designated as such in the appeal even if he is an appellant. Just as whoever is a party in the suit becomes a party to the appeal, so also whoever represents a minor party in the suit continues to represent him in the appeal. In -- 'In the matter of Sukhdeo Ral', 2 All LJ 489 (P) and 'Sambhoo v. Kanhaya (B)', referred to by our brother Vishnu Dutt, it was held that the appointment of a guardian 'ad litem' in a suit continues for the whole of the lis,

12. Rule 3 (5) of Order 32 provides that a person appointed to be guardian for the suit for a minor shall, unless the appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceeding for the execution of a decree.

This provision which was added in 1937 in order to remove a conflict among various High Courts, establishes two facts; one is that a guardian of a defendant continues to be his guardian even if the defendant is an appellant and the other is that a proceeding in an appellate Court arises out of the suit and is not, for the purpose of the Rule, a part of the suit itself. Rule 3 (5) deals only with a

guardian; there is no similar Rule dealing with a next friend.

But it does not follow that a next friend of a plaintiff is not to continue as his next friend in appeal. As I said, the provision in Rule 3 (5) was added not with a view to enact a new Rule but with a view to remove a doubt. Even before the enactment of the Rule a defendant was to be represented by the same person as his guardian in appeal and in execution proceedings also but since some Courts doubted whether it was so, the Legislature enacted the Rule in order to remove the doubt.

The reason why the Legislature did not enact a similar Rule regarding next friend may bo that the appointment of next friend is a matter of choice while the appointment of a guardian depends upon an order of the Court and while it may be doubted whether an order passed by a Court inures even if the Court has become 'functus officio', such, a doubt cannot exist in respect of next friend who has been selected by the minor himself in the lis.

13. The question referred to us is in two parts, but really there is only one question. What is meant by the first question is not whether the physical act of a minor defendant's filing an appeal through a person other than the guardian 'ad litem' is possible, but whether the law permits the act. That exactly is the second question which presupposes that the physical act can be done.

What we have to answer is whether an appeal filed by a minor defendant through a person other than the guardian 'ad litem' is valid in law and it must be answered in the negative. For the reasons stated above whoever is a party and whoever represents him in the suit must be a party and must be his representative in the appeal and the appeal on behalf of a minor defendant must be filed by the, guardian appointed in the suit.

The appellate Court cannot recognise any other person as having a right to file the appeal. I disagree with the answer proposed to be given by my learned brothers. It is conceded by one of them that it is an irregularity for a minor defendant to file an appeal through a person other than the guardian appointed for him in the suit; if it is an irregularity the answer to the question must be "no". At least the first part of the question referred to us must be answered in the negative.

It is against law for a minor defendant to file an appeal through a person other than the guardian appointed in the suit; even if the contravention of the law is 'allowed to be remedied subsequently and even if the minor defendant is allowed to get an order from the appellate Court removing the guardian appointed in the suit and appointing the other person as the guardian, the fact cannot be gainsaid that the filing of the appeal through a person other than the guardian appointed in the suit is an, act prohibited by law.

It makes no difference whether the contravention of the law amounts to an irregularity or an illegality. An irregularity is as much a contravention of law as an illegality; the only difference between the two being that one does not necessarily vitiate all the subsequent proceedings. But no permission can be granted for an irregularity; the law may condone it but does not permit it.

14. There is no provision in the Code for remedying the irregularity or illegality consisting of a minor defendant's filing an appeal through a person other than the guardian appointed in the suit. There is no warrant for the procedure suggested by my learned brothers. Laying down such a procedure is a legislative act which is outside the scope of a Court. A Court can interpret or construe a provision that exists; it cannot enact a provision.

There is no provision anywhere in the Code which can be interpreted, even by straining its language, to mean that if a minor defendant files an appeal through a person other than the guardian appointed in the suit he can apply to the appellate Court for an order removing the guardian appointed in the suit and substituting in his place the person through whom the appeal is filed. Prescribing of this practice is, therefore, nothing but usurping legislative power.

A High Court has certain legislative power; it can add to, or amend, the provisions in the Orders; but that is a power to be exercised by the High Court in accordance with a certain formality and not by individual Judges. Once it is conceded that it is against law for a minor defendant to file an appeal through a person other than the guardian appointed in the suit, nothing but an express provision of law can remedy the irregularity or illegality.

An appellate Court cannot entertain an appeal filed by a minor defendant not through the guardian appointed in the suit; if it cannot entertain it, it cannot dear with any application made in the appeal. As an appellate Court it has got no power to remove any guardian; this power vests in the trial Court. Since whoever is the next friend or the guardian of a minor in the suit continues to be his next friend or guardian in the appeal, the provisions regarding retirement, removal and death of the next friends and guardians in Order 32 must govern their retirement, removal and death in appeal.

Therefore an appellate Court can remove a guardian but it can do so only in an appeal that has been validly presented before it. If the appeal as filed is incompetent and not maintainable at all, the Court in which it is filed acquires no jurisdiction to deal with it, and cannot pass an order removing the guardian. Further, an appellate Court can remove a next friend or guardian who exists as such in the proceeding before it and over whom it has acquired jurisdiction; it cannot remove a next friend or a guardian who does not exist as such before it and over whom it has acquired no jurisdiction.

If X is appointed as a guardian in the suit for a defendant minor and the minor files an appeal through Y as his guardian, the appellate Court has no jurisdiction over X, who has not appeared before it as guardian, and cannot remove him; it can remove only Y if it finds him unfit to act as guardian. The power of removing X vests in the trial Court and cannot vest in the appellate Court because he is not before it as a guardian.

From the fact that the Code has not prescribed the procedure to be followed by a defendant minor who wants to appeal through ft person other than the guardian appointed in the suit, it can be inferred that the Legislature does, not contemplate that he can be permitted to file-such an appeal. The Court would, not be interpreting and enforcing law but would be going beyond its Jurisdiction and legislating, if it were-to lay down that an appeal filed by a minor defendant through a person other than the guardian appointed in the suit is competent, if it is accompanied by an application

praying for removal of the guardian appointed in the suit and appointment of the other person as the guardian.

If it is necessary to permit a minor defendant in certain circumstances to file an appeal through a person other than the guardian appointed in the suit, let the Legislature or the High Court in exercise of its Rule-making power enact a law permitting it; but a Court should not usurp the powers of the Legislature or the High Court. A Legislature normally provides for ordinary events.

Ordinarily a guardian appointed by the Court for a minor defendant would prefer an appeal on his behalf if there is any hope of success. The Legislature itself contemplates that he would safeguard the interest of the minor; he would not have been appointed as guardian unless the Court was satisfied that he had no interest adverse to the minor and was fit for appointment as guardian. Such a person is not expected to ignore the minor's interest and refrain from preferring an appeal, for which there is some hope of success, negligently or dishonestly or unreasonably.

It would be a rare case for a guardian to refrain from filing such an appeal dishonestly, negligently or unreasonably and therefore no provision for such a contingency appears to have been made by the Legislature. In the absence of a specific provision a person other than the guardian appointed in the suit cannot file an appeal on behalf of a minor defendant; he has no locus standi and the appellate Court cannot entertain the appeal filed by him.

15. A guardian appointed, by Court can be removed only if he desires to retire or does not do his duty or other sufficient ground exists. If a guardian dishonestly or unreasonably does not with to file an appeal, that may be said to be a case for his removal (provided that the Court has power to remove him). But in every casa an which a guardian refuses to file an appeal there will not be a case for his removal.

For instance if he 'bona fide' believes that there is no substance in the appeal or if he has no funds to enable him to file an appeal, it would be no ground for removing him. Therefore, the remedy suggested in some decisions that a person other than the guardian appointed in the suit can file an appeal with an application for substituting him as the guardian in place of the guardian appointed in the suit would not be available in every case. If the appellate Court has no power to remove the guardian, as is my view, the remedy will not be available in any case.

16. In the view that I take I am supported by -- 'Venkata Chandrasekhara Raja v. Alakarajamba Maharani (C)'; -- 'Bawan Das v. Bishnath', 1899 All WN 203 (G) and 'Latafat Ali Khan v. Muhammad Yar Khan (E)', referred to by my learned brothers and -- 'Ganesh v. Govind', AIR 1944 Nag 78 (H). In 'Bawan Das v. Bishnath (G)', it was observed that a person other than the guardian appointed in the suit cannot file an appeal on behalf of the defendant minor without the removal of the guardian appointed in the suit. The learned Judges did not lay down how the guardian appointed in the suit was to be removed and by which Court, whether it was necessary for another person to be appointed as guardian in his place and if so how and by which Court.

As a mere proposition it is correct to say that a person other than the guardian appointed in the suit cannot file an appeal unless the guardian has been removed. In the case of 'Latafat Ali Khan (E)', the learned Judges did not lay down that the guardian appointed in the suit can be removed under the existing law; they were doubtful whether the trial Court or the appellate Court has jurisdiction to remove the guardian.

What they suggested was enactment of a 'rule permitting' a person other than the guardian to file an appeal with an application to remove the guardian and appointing him as the guardian for the appeal. In 'In the matter of Sukhdeo Rai (F)', removal of the guardian appointed in the suit was refused by the appellate Court but the removal was envisaged. There also there was no discussion of the law regarding removal of the guardian after the decision of the suit.

17. We have not been called upon to answer the question whether an appeal that cannot be, but has been, filed by a person other than the guardian appointed in the suit, can be entertained if it is accompanied by an application for removal of the guardian and we should not say anything about it in our reply. If we should, the reply must be in the negative.

18. My reply, therefore, to the question is: "A minor defendant against whom a decree is passed cannot validly institute an appeal through a person other than the guardian 'ad litem' appointed in the trial Court so long as such guardian 'ad litem' has not died or resigned or been removed."

V.D. Bhargava, J.

19. The following question has been referred by a Bench for our consideration :

> "Can a minor defendant against whom a decree is passed file an appeal through a person other than the guardian 'ad litem' appointed in the trial Court and whether such appeal would be a validly instituted appeal."

20. The point arose in the following circumstances : One Dr. Mahabir Prasad Tandon along with five others, who are now respondents 1 to 6, filed a suit against, among others, Raj Behari Lal Tandon (major) and his four brothers Jagdish Behari Lal, Sudama, Gulab and Shankar, who were all minors. One Sri Sachchida Nand Sahai, advocate, was appointed guardian 'ad litem' of the four minor brothers of Raj Behari Lal Tandon under Order 32, Rule 3, C. P. C. The suit was decreed. The present appeal in which this question arises has now been filed by Raj Beharilal Tandon and his four minor brothers. But instead of Sri Sachchida Nand Sahai, advocate as being the guardian 'ad litem' Raj Behari Lal Tandon himself has filed this appeal on behalf of his four minor brothers. A preliminary objection was taken by the respondents as to the maintainability of the appeal.

The contention is that since Sri Sachchida Nand Sahai, advocate, had been appointed guardian 'ad litem' in the Court below in view of Order 32, Rule 3, Sub-rule (5), C. P. C. he shall continue to be the guardian throughout all proceedings including the proceedings in the appellate; Court, and that, therefore, this appeal should have been filed by the minors under the guardianship of Sri Sachchida Nand Sahai and not under the guardianship of Raj Behari Lal Tandon.

This contention finds support from the authorities of this Court and of the Madras High Court, which will be presently dealt with, and as the Bench hearing the appeal felt doubtful whether Order 32, Rule 3 Sub-rule (5) applied only to proceedings arising out of a suit directed 'against a minor in which the person instituting those proceedings can implead the minor under the guardianship of the guardian 'ad litem' already appointed or whether it also applied to a case where the minor himself was initiating some proceedings, and therefore this question was referred for the consideration of the Full Bench,

21. It may be mentioned that Order 32, Rule 3, Sub-rule (5) was added by Act 16 of 1937 and before this there was no statutory provision as to the nature of the guardian 'ad litem' appointed whether he continued only for the purpose of the suit or he continued during the pendency of the entire lis. But the authorities of this Court as well as of the other High Courts had held that the appointment whether of the' guardian 'ad litem' or of the next friend continued during the entire lis.

The earliest case which is relevant is 14 All 85 (A). That was not a case of the appointment of a guardian under the Code of Civil Procedure, but was a case arising out of Guardians and Wards Act proceedings and the question arose as to who was the proper person in the appeal to represent the minor and the Court held :

> "Where a guardian 'ad litem' has once been appointed, his appointment enures for the whole of this lis in the course of which it has been made, unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant, the Court will appoint the guardian so named in absence of any special and valid objection to such person."

22. In the above case which related to the appointment of a guardian to a minor, one Pirbhu alias Rabi Shankar, had become a Christian. When his mother Smt. Jwala Dei applied for being appointed his guardian, she was not appointed guardian but one Rev. J. M. Alexander Was appointed the guardian. When appeal was filed and the minor opposite party was represented by Rev. J. M. Alexander the question arose whether Rev. J. M. Alexander was the proper person to represent him or not and the learned Judges held that Rev. J. M. Alexander guardian 'ad litem' properly represented the interest of the minor Rabi Shankar.

At the appellate stage the minor expressed a desire that his mother should be appointed his guardian. Consequently the Court appointed his mother Smt. Jwala Dei as the guardian and removed Rev. J. M. Alexander. This case does not very much apply to the facts of the present case.

23. In 22 Mad 187 (C), the two minor defendants were represented in the Court below by the sheristadar who was appointed guardian 'ad litem'. A decree was passed against them and an appeal was filed on their behalf by their mother without any order constituting her as guardian and without any previous removal of the former guardian.

It was objected that the appeal was incompetent. A Bench of the Madras High Court while holding that the appointment of guardian in a Court of first instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal gave out the following reasoning :

> "Chapter XXXI of the Code of Civil Procedure, which is the chapter relating to the appointment of guardian 'ad litem' and next friend, is not one of the chapters mentioned in Section 582 of the Code, and the omission is a strong argument against the view that defendant and plaintiff when appearing in an appeal are to be taken to mean appellant and respondent.
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> To justify the procedure adopted the appellants are bound to contend that the appointment of guardian in the Court of first instance comes to an end when the decree is passed by that Court or at any rate does not continue for the purpose of an appeal."

24. Section 582 occurs in Chapter XLI of the Code of Civil Procedure of 1882. It is headed "Appeals from Original Decrees" and while dealing with the powers of the appellate Court it says that "in Chapter XXI, so far as may be, the word "Plaintiff" shall be held to include a plaintiff-appellant or defendant-appellant, and the word "defendant" a plaintiff-respondent or defendant-respondent, and the word "suit" an appeal."

In the new Code while dealing with the appellate Court's powers there is no specific mention of any such powers. Section 582 is now represented by Section 107, Clause (2) which is very wide in scope, While the portion quoted above has now been put under Order 22, Rule 11; and, therefore, the reasoning given by the learned Judges of the Madras High Court strictly does not apply under the present Code.

25. 1899 All WN 203 (G) is another case of this Court where a Bench of this Court relying on 22 Mad 187 (C) held that the Court of appeal had no power to hear an appeal purporting to be filed on behalf of a minor by a new guardian without any previous order removing the guardian ad litem.

But in that case they had suggested a remedy that if the minor wanted to proceed with his appeal he should first ask the Court for an order removing the previous guardian of the minor and if he obtained such an order, to present a fresh appeal from the Munsif's decision together with an application under Section 5, Limitation Act, with a prayer that the appeal might be admitted notwithstanding the period of limitation having expired. The learned Judges have not expressed any view whether the filing of the appeal by the new guardian should be treated as a nullity or an irregularity.

26. 2 All LJ 489 (F) was a case in which an application was made by another guardian to file an appeal. Relying on 14 All 35 (A) hia Lordship held that a person appointed as guardian 'ad litem' to a minor for the purpose of a 'lis' continues as guardian so long as the 'lis' continues whether in the Court of first instance or in the Court of appeal unless and until the appointment is revoked by the Court.

After considering the merits of the application his Lordship refused permission to the mew guardian to proceed with the appeal and the application was dismissed. This case, if at all, shows that it is possible for any other person to file the appeal provided he moves an application for the removal of the previous guardian and for appointment of a new guardian and then it would be open to the Court to consider whether it Would be in the interest' of the minor to allow the new guardian to proceed with the case or not.

27. AIR 1922 All 332 (2) (B) is another case which followed 1899 All WN 203 (G) and 22 Mad 187 (C) and therein it was held that-

> "where a guardian 'ad litem' to a minor defendant has once been appointed, such appointment continues for the whole of the 'lis' or until it is revoked by Court and the guardian so appointed is the only person who can file an appeal on behalf of the minor."

In -- 'Bhagelu v. Mt. Dharma', AIR 1924 All 79 (I) it was held that-

> "Where a guardian 'ad litem' to a minor defendant has once been appointed, such appointment continues for the whole of the 'lis' or until) it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor."

And their Lordships thought that they were bound by the decision in 1899 All WN 203 (G).

28. From the above authorities it is clear that if once a guardian is appointed he continues for the whole of the 'lis' and the proper person to file the appeal would be the guardian so appointed. This was the consistent view of most of the Courts. But there appears to be a contrary view taken by the Calcutta High Court in AIR 1825 Cal 23 (D). A Bench of the Calcutta High Court held that-

> "The guardian 'ad litem' appointed in the suit does not continue as such without a fresh appointment during the execution proceeding when the Court of Wards manager appeared and asked to be appointed as guardian 'ad litem' in execution proceedings." And held that-
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> "he should have at once been so appointed under the provisions of Section 51, Court of Wards Act."

It was this conflict of views which necessitated amendment in the Civil P. C. and Order 32, Rule 2, Sub-clause (5) was added by Act 16 of 1937. Among, the objects and reasons given for its amendment it is mentioned that -

> "It has been held by the High Court that an appointment made during the course of original suit enures during proceedings on appeal. There is no provision in the Code requiring fresh appointment of guardian for the execution proceedings following

suits. It might therefore be thought that a guardian 'ad litem' appointed during a suit continues as such till the termination of the execution proceedings.

But some High Courts follow a different interpretation and one of them held that the guardian 'ad litem' appointed by a Court for a minor defendant does not continue to be the guardian for the suit in the execution proceedings without a fresh appointment."

29. Though a provision has been added that a guardian 'ad litem' appointed by Court for a defendant continues to be such in all proceedings, no such provision exists for a next friend. But I think no distinction can be made between a next friend and a guardian 'ad litem'.

30. AIR 1930 All 456 (E) is a case where though their Lordships held that:

"A guardian 'ad litem' appointed for a minor defendant by the trial Court continues to represent him in all stages of the 'lis', until such, guardian has been permitted to retire, or been removed by the Court; and it is he alone who can file an appeal on behalf of the minor." And further say that-

"It must, therefore, now be taken as settled law that even for purposes of appeal it is only the guardian 'ad litem' appointed by the trial court who can represent the minor, and that so long as he has not died, retired or been removed, no one else can be allowed to represent the minor In appeal," yet they held that:

"It seems to us that If the allegation is that the guardian is either not doing his duty or is negligent or has colluded, or if there is other sufficient ground for his removal, any other person interested in the welfare of the minor may prefer an appeal, accompanied by an application for the removal of the guardian and the appointment of himself in his place." They held that a fresh guardian cannot be appointed by the trial Court as it becomes 'functus officio' and it was very doubtful if without any such appeal pending before the appellate court it. would be seized of the case and would have jurisdiction to order the removal of the previously appointed guardian 'ad litem' and, therefore, they suggested as follows:

"We think it would be simplifying procedure if any appeal were allowed to be preferred within the time allowed by law by another next friend, coupled with another application for the removal of the guardian 'ad litem' on any of the grounds mentioned in Order 32, Rule 11; and if such an application is ultimately granted, the appeal may be treated as having been properly filed." The above authority really shows that the guardian already appointed by the trial Court is nob the only person who can file the appeal. Ordinarily he should file the appeal but the appeal can be filed by another guardian provided an application for the appointment of a fresh guardian and the removal of the previous guardian is also made.

31. In order to consider whether an appeal filed by another guardian is a validly instituted appeal or not it is necessary to know the nature of the appeal filed by such guardian, that is whether the filing of an appeal by the new guardian without the permission of the Court amounts to a mere irregularity or is an absolute nullity. In case it is held that it is an absolute nullity then the position would be that the appeal filed can never be treated as a valid appeal, because the defect will be incurable.

But if it is a mere irregularity then the appeal would be a valid appeal as soon as the irregularity is cured. An instance of an irregular appeal may be where an appeal is filed on an insufficiently stamped paper. It is true that under Section 3, Court-fees Act, the Court may refuse to admit the appeal on that day.

But the appeal when filed would be only an, Irregular appeal and as soon as the deficient court-fee is made good the appeal becomes a valid appeal and the validity will date back from the date of the filing and not from the date when, the defect is cured.

32. The case of filing an appeal without guardian or by a guardian other than the one who was appointed by the Court below, to a certain extent will be analogous to a suit filed by a minor without a next friend.

In Order 32, Rule 2 there is a provision which provides that where a suit is instituted by or on behalf of a minor without a next friend the defendant might apply to have the plaint taken off the file and by Clause (2) of Rule 2 notice of such application shall be given to such person and the Court after hearing his objection may make such order in the matter as it thinks fit and in that event the Court can later oh appoint a guardian and according to the decisions the suit will be deemed, even in those cases, to have been filed on the date on which it was filed and not on the date on which the guardian was appointed.

Actually there is no limitation prescribed for appointment of a guardian. Limitation prescribe the period when the suit or appeal should be filed and, therefore, limitation should run from the date of the filing of the suit or the appeal and not from the date of the appointment of the guardian. 'Beni Ram Bhutt v. Ram Lal Dhukri', 13 Cal 189 (J) was a case where the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised as to whether the plaintiffs were minors or not.

The finding of the trial Court was that the plaintiffs were minors and the suit was dismissed. But the learned Judges of the High Court suggested that the procedure should have been to suspend all proceedings and to allow sufficient time to enable the minors to have themselves represented in the suit by a next friend and they held that:

> "even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified dismissing the suit upon, that ground."

Further in that case one of the plaintiffs had attained majority while the suit was pending in the trial Court and the learned Judges held:

> "But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, plaintiff I was admittedly of age, and therefore it would have been un-necessary to suspend proceedings in order to allow him to appear by a next friend. In fact being an adult, he was competent to proceed with the suit himself."

33. The above case was really once remanded toy the High Court and on remand no objection was taken by the respondents on the score of their minority and their Lordships were of opinion that that being so the respondents were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial.

34. If the filing would be a nullity the question of suspension of proceedings and appointment of a new guardian later on and the suit becoming a proper suit if during the pendency of the trial the plaintiff attains majority and the question of precluding the respondents from challenging the decree on that ground would not have arisen.

35. 'Rattonbai v. Chabildas Lalloobhoy', 13 Bom 7 (K) is another case of this nature where a, suit was filed by the plaintiff without a next friend. It was held that-

> "As regards the law of the case, there is no doubt that an infant cannot prosecute an action either in person or by solicitor, but only through an adult person known as "the next friend of the minor." There is no doubt also that if an infant does sue either in person or by solicitor, the defendant may, under Section 442, (Order 32, Rule 2) apply to have the proceedings set aside. The omission 'is not more than an irregularity. It is not a case of nullity'." And they further held that-
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> "When the fact of minority is a 'bona fide' question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend."

36. 'Kamalakshi v. Ramasami Chetti', 19 Mad 127 (L) was a case in which a decree had been passed in favour of a minor who had sued without a next friend. It was observed by Subramania J. who delivered the judgment that-

> "The first question raised in this case is whether the presentation of the plaint and the prosecution of the suit by the plaintiff (appellant) when she was yet a minor and without the aid of a next friend were void or were mere irregularities which the defendants had by their conduct waived."

37. It may be mentioned that in the above case when the original suit was filed and an appeal was filed by the defendant in the lower Court no objection was taken by the defendant about the minority of the plaintiff and his suing without a guardian. It was taken for the first time in the High Court.

Their Lordships relied on in "Ex parte Brockle bank" (1877) 6 Ch D 358 (M) in which case all the Judges proceeded upon the view that an Infant to whom a debt was due had a right to enforce the payment of it by means of a debtor's summons and proceedings in bankruptcy based thereon, and that the Infant having sued out of the writ in the action in his own name with-out a next friend was on irregularity which was waived by the conduct of the defendant, and held that-

> "There is authority, therefore, for holding that the contention of the defendants (respondents) that the proceedings in the present case were altogether void cannot be supported," and as the defendants had not taken any objection in the trial Court and in the district Court, they were of the opinion that it was then too late for the defendants to object to the irregularities they complained of.

38. This Madras case was followed in --'Sulaiman v. Abdul Shakoor', AIR 1940 Nag 99 (N) where it was held that a decree obtained by a minor without appointment of a guardian is merely an irregularity and if no objection was taken by the defendant the irregularity must be deemed to have been waived.

39. In -- 'Pupooth v. Vayisravanath Manakkal Raman', AIR 1923 Mad 553 (O) a Bench off that Court held that:

> "If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. But if, before the Court decided that the plaintiff was a minor, he had become a major, there is no necessity thereafter to have a next friend for him."

40. 'All Ahmad v. Said Mian', AIR 1924 Lah 188 (1) (P) is another case where a suit by a minor was filed and was rejected by the Court below on the ground that the plaintiff who was a minor had sued without a next friend. In that case the Court itself noted that the plaintiff appellant appeared to be under age and this was admitted by the plaintiff. Upon this the Court rejected the plaint. In appeal their Lordships held that the order rejecting the plaint was erroneous and remarked that "a case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice must be considered to be in force. This practice was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend."

41. I am of opinion that an appeal filed by the new guardian or without a guardian would be an irregular appeal and it would not be a nullity.

42. The next question to be considered is when should an application have been made for appointment of a fresh guardian? Was it Incumbent upon the new guardian to file it along with the appeal itself or it could be made at a subsequent stage? And the second question in this connection would be as to from which date the limitation for the appeal would be considered, i.e., whether the appeal would be deemed to have been filed on the date on which it was filed or on the date when the guardian was appointed.

43. In -- 'Khem Karan v. Hardayal', 4 All 37 (Q) a question arose whether the suit was barred by limitation because although the plaint was presented on the 1st June 1880 yet the minor defendants were not formally and properly brought on the record by their guardian until the 14th of that month and by that time the suit had become time barred. Their Lordships repelled that contention and held that-

> "We cannot accede to this view. The objection taken, while professing to be one of limitation, really goes to the validity or otherwise of plaint, and it is too late to consider any question of that kind now. If the plaint was irregular or defective, it might have been attacked, as provided in Chap. V of the Civil Procedure Code.
>
> This, however, was not done, though had that course been followed, we doubt if the grounds now put forward would have demanded more than the amendment or the return for amendment of the plaint. In such a case the limitation would hare counted, not from the date of the amendment or re-presentation, but from the date when the plaint was first presented.....
>
> We think, therefore, that the plain directions of the law that a suit is instituted, "when the plaint is presented to the proper office", are conclusive against the arguments of the appellant's counsel, and that his plea of limitation fails." The reasoning of this case was followed in --Hup Chand v. Desodha', 30 All 55 (R). In this case one of the defendants sued was Mst. Dasodha, who was a minor and was represented in the Court below by a guardian 'ad litem'. In the Memorandum of appeal which was filed the guardian 'ad litem' was not made a party to the appeal. This, it was said, was due to the fact that in the copy of the decree which was furnished to the appellants the fact that there was a guardian 'ad litem' was not stated.
>
> The memorandum of appeal was filed within time, but the application which, was subsequently made to add the name of the guardian 'ad litem' to the record was made some months after the expiry of the time allowed for the presentation of the appeal, and it was contended that the appeal was not complete until the guardian 'ad litem' was added, and that when that was done the appeal was barred by the Statute of Limitation. Their Lordships on these facts held that:
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> "It has been decided in a case in this Court, namely, the case of 4 All 37 (Q) that a suit may be brought against a minor before a guardian has been appointed and that limitation runs from the date of the plaint and not from the appointment of the

guardian. We think that the memorandum of appeal should be governed by the same considerations.

We may point out that a guardian 'ad litem' is net a party to a suit or appeal. He is merely named in the record as the person appointed by the Court to look after the interest of the minor. We think, that the memorandum of appeal was filed within time, and that there is no substance in the objection. We therefore disallow the objection." Thus it appears that the omission of the name of the proper guardian does not make the appeal Invalid and the limitation would run from the date of the presentation of the memorandum of appeal and we are of the same view.

44. As to the time when the application could be made for the appointment of a fresh guardian and removal of the old guardian there appears to be no provision either in the Code, or in the Rules framed by the High Court. In a case where the legal representative of a deceased party wants to file an appeal there is a provision in Chap. X, Rule 1 of the Rules of Court that along with the appeal an application may be filed by the legal representative who desires to appeal for being made a party and he may name himself in the memorandum of appeal as an appellant.

In the case of a new guardian applying for appointment of himself as the guardian and removal of the old guardian no such Rule exists. But on the analogy we consider that it can be made any time before the appeal is disposed of, and there is no necessity of an application under Section 5, Limitation Act.

45. The Court is the guardian of the minors' interests and cannot allow their interests to suffer by the action of others. There are cases, where it may be conceived that the guardian already appointed may not be taking proper interest and it may be necessary that the appeal may be filed through a new guardian.

The guardian may be negligent, may be an utter outsider and may not be willing to file an appeal without provision for money being made by someone, may be requiring money for his fees, may have been won over by the other party, or may be 'bona fide' entertaining, wrong idea about the strength of the case or may be ill owing to which the Court may permit filing of the appeal through another guardian.

46. I am, therefore, of the opinion that ordinarily an appeal on behalf of the minor should be filed through his guardian appointed by the Court. But the appeal can be filed on behalf of the minor by another guardian if the new guardian prays for the removal of the old guardian and for appointment of himself as guardian.

Filing an appeal with a new guardian is merely an irregularity and not a nullity and the irregularity will be cured and the appeal would: become validly filed with retrospective effect from the date of the filing of the appeal, as soon as the application is granted for appointment of a new guardian and the old guardian is removed. It being only an irregularity will also be cured if before the appeal is heard the minor attains majority.

If the appeal is filed within time the application for appointment of the guardian can be made at any time as the limitation in the case of an irregular appeal runs from the date of the filing of the appeal and not from the date of the appointment of the guardian.

47. My answer to the question, therefore, is that a minor defendant against whom a decree is passed can file an appeal through a person other than the guardian 'ad litem' appointed in the trial Court and such an appeal would be a validly instituted appeal, provided that upon an application made by the aforesaid person the Court orders the removal of the guardian 'ad litem' appointed in the trial Court with effect from the date of the institution of the appeal and appoints the person who has filed the appeal on behalf of the minor as the guardian of the minor with effect from that date and that if no such application is made and disallowed, the appeal cannot be considered to be a validly instituted appeal.

48. Our answer to the question referred to us, therefore, is that a minor defendant against whom a decree is passed cannot validly institute an appeal through a person other than the guardian 'ad litem' appointed by the trial Court, who has not resigned or died or been removed, provided that the appellate Court may, on sufficient cause being shown, allow an appeal to be filed on behalf of the minor by a person other than the guardian ad litem appointed by the trial Court by removing such guardian and appointing such other person as the guardian of the minor from the date of the institution of the appeal.