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NAGAIAH AND ANOTHER

v.

SMT. CHOWDAMMA (DEAD) BY LRS. AND ANOTHER
(Civil Appeal No. 22969 of 2017)

JANUARY 08, 2018

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[ARUN MISHRA AND
MOHAN M. SHANTANAGOUDAR, JJ.]

Code of Civil Procedure, 1908:

C Or. XXXII, rr.1,3,6,7,9,12,13 and 14 – Suit by plaintiff No.1
on his as well as on behalf of his minor brother (Plaintiff No.2) –
Against their father (defendant No.1) – Seeking declaration that
they were entitled to 2/3rd share in the property and sale deed
executed by their father (defendant No.1) in favour of defendant
D No.2 was not binding on their 2/3rd share – Trial court dismissed
the suit on merit – First appellate court decreed the suit – High
court, in second appeal, dismissed the suit on the ground that
plaintiff No.1 could not act as the guardian of plaintiff No.2 during
the life-time of their father i.e. defendant No.1 (the natural guardian
of plaintiff No.2) without permission of the court – On appeal, held:
E Plaintiff No.1 does not come within meaning of ‘guardian’ as
specified in sub-section (b) of s.4 of Hindu Guardianship Act –
Present case is governed by Or. XXXII of CPC – A suit by a minor
can be filed by the ‘next friend’ of the minor and no permission is
necessary for the ‘next friend’ to institute the suit – But if suit is
filed against the minor, it is obligatory for the plaintiff to get the
appropriate ‘guardian ad litem’ appointed by the Court – A decree
F cannot be set aside even where formalities for appointment of a
guardian ad litem have not been observed, if no prejudice is caused
to the minor defendant – In the present case ‘next friend’ was
competent to represent the minor – Further no prejudice was caused
to the minor plaintiff – If the natural guardian has adverse interest
G against minor, he cannot represent the minor in a law suit – The
interest of natural guardian, in the present case was adverse to the
minor plaintiff – Rules 12, 13 and 14 also empowers the minor on
attaining majority, either to proceed with or to abandon the suit –
The minor plaintiff in present suit continued the suit after attaining
majority – Principles arising out of Guardian and Wards Act, 1890

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and Hindu Guardianship Act, may not be apposite to the 'next friend' appointed u/Or. XXXII CPC – Therefore, impugned order relying upon provisions of Hindu Guardianship Act to non-suit plaintiff No.2 is not justified – Matter remitted to High Court for fresh decision on merit – Hindu Guardianship Act, 1956 – s.4(b) – Guardians and Wards Act, 1890.

Or.XXXII, rr.1 and 3 - 'Next friend' and 'Guardian-ad-Litem' – Distinction between – Discussed – Hindu Guardianship Act, 1956.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1. Plaintiff no.1 did not and does not come within the meaning of a “Guardian” as specified in sub-section (b) of Section 4 of the Hindu Guardianship Act. But the present facts are not governed by the provisions of Hindu Guardianship Act; rather they are governed by Order XXXII CPC. [Para 6][183-D-E]

2. A bare reading of Order XXXII, Rule 1 of CPC makes it amply clear 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. The next friend need not necessarily be a duly appointed guardian as specified under Sub-Section (b) of Section 4 of Hindu Guardianship Act. “Next friend” acts for the benefit of the “minor” or other person who is unable to look after his or her own interests or manage his or her own law suit (person not *sui juris*) without being a regularly appointed guardian as per Hindu Guardianship Act. He acts as an officer of the Court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The afore-said provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order XXXII of CPC. Order XXXII Rules 1 and 3 of the Code together make a distinction between a next friend and a guardian *ad litem*; i.e., (a) where the suit is filed on behalf of a minor and (b) where the suit is filed against a minor. In case, where the suit is filed on behalf of the minor, no permission or leave of the Court is necessary for the next friend to institute the suit, whereas if

A the suit is filed against a minor, it is obligatory for the plaintiff to
get the appropriate guardian *ad litem* appointed by the Court for
such minor. A “guardian *ad litem*” is a special guardian appointed
by a court in which a particular litigation is pending to represent
a minor/infant, etc. in that particular litigation and the status of
guardian *ad litem* exists in that specific litigation in which
B appointment occurs. [Para 6][140-C-G]

Kaliammal, minor by Guardian, Patta Goundan v. Ramaswamy Goundan AIR 1949 Mad. 859; *K. Kumar v. Onkar Nath* AIR 1972 All 81; *Gopalaswamy Gounder v. Ramaswamy Kounder* AIR 2006 Ker 138 – referred
C to.

3. The decree cannot be set aside even where certain formalities for the appointment of a guardian *ad litem* to represent the defendant have not been observed. In the case of minor defendants, where the permission of the Court concerned under
D Order XXXII Rule 3 of the CPC is not taken, but the decree has been passed, in the absence of prejudice to the minor defendant, such decree cannot be set aside. The main test is that there has to be a prejudice to the minor defendant for setting aside the decree. In the present case, the suit was filed on behalf of the
E minor and therefore the next friend was competent to represent the minor. Further, admittedly no prejudice was caused to plaintiff no. 2. [Para 8][141-G-H; 142-A-C]

Brij Kishore Lal v. Satnarain Lal & Ors. AIR 1954 All. 599; *Anandram & Anr. v. Madholal & Ors.* AIR 1960
F Raj. 189; *Rangammal v. Minor Appasami & Ors.* AIR 1973 Mad. 12; *Chater Bhuj Goel v. Gurpreet Singh* AIR 1983 Punjab 406; *Shri Mohd. Yusuf and Ors. v. Shri Rafiquddin Siddiqui* ILR 1974 (1) Delhi 825 – referred to.

G 4. “Guardian” as defined under the Hindu Guardianship Act is a different concept from the concept of “next friend” or the “Guardian *ad litem*”. Representation by “next friend” of minor plaintiff or by “guardian *ad litem*” of minor defendant is purely temporary, that too for the purposes of that particular law suit.
H [Para 9][142-D]

5. Instituting a suit on behalf of minor by a next friend or to represent a minor defendant in the suit by a guardian *ad litem* is a time-tested procedure which is in place to protect the interests of the minor in civil litigation. The only practical difference between a “next friend” and a “guardian *ad litem*” is that the next friend is a person who represents a minor who commences a lawsuit; guardian *ad litem* is a person appointed by the Court to represent a minor who has been a defendant in the suit. Before a minor commences suit, a conscious decision is made concerning the deserving adult (next friend) through whom the suit will be instituted. The guardian *ad litem* is appointed by Court and whereas the next friend is not. The next friend and the guardian *ad litem* possess similar powers and responsibilities. Both are subject to control by the Court and may be removed by the Court if the best interest of the minor so requires. [Para 16][145-A-C]

6. There is no hurdle for a natural guardian or duly constituted guardian as defined under Hindu Guardianship Act to represent minor plaintiff or defendant in a law suit. But such guardian should not have adverse interest against minor. If the natural guardian or the duly constituted guardian has adverse interest against the minor in the law suit, then a next friend or guardian *ad litem*, as the case may be, would represent the minor in the civil litigation. [Para 10][142-E]

7. The rights and restrictions of the natural guardian provided under the Hindu Guardianship Act do not conflict with the procedure for filing a suit by a next friend on behalf of the minor. Not only is there no express prohibition, but a reading of Order XXXII of the CPC would go to show that wherever the legislature thought it proper to restrict the right of the next friend, it has expressly provided for it in Rules 6 and 7 of Order XXXII [Para 11][142-G-H; 143-A]

8. The principles arising out of the Guardians and Wards Act, 1890 and the Hindu Guardianship Act may not be apposite to the next friend appointed under Order XXXII of the CPC. The appointment of a guardian *ad litem* to represent the defendant or a next friend to represent the plaintiff in a suit is limited only for the suit and after the discharge of that guardian *ad litem*/next friend, the right/ duty of guardian as defined under sub-section

A (b) of Section 4 of the Hindu Guardianship Act (if he has no adverse
interest) automatically continues as guardian. In other words, a
next friend representing the minor in the suit under Order XXXII,
Rule 1 of the CPC, will not take away the right of the duly
appointed guardian under the Hindu Guardianship Act as long as
B such guardian does not have an adverse interest or such duly
appointed guardian is not removed as per that Act. [Para 12][143-
G-H; 144-A-B]

9. Order XXXII, Rules 12, 13 and 14 of the CPC empower
the minor plaintiff to take a decision either to proceed with the
suit or to abandon the suit, after attaining majority. Thus, after
C attaining majority, if the plaintiff elects to proceed with the suit,
he may do so by making an application, consequent upon which
the next friend ceases to represent the minor plaintiff from the
date of attaining majority by the minor. Plaintiff No. 2 on attaining
majority has continued with the suit, which means he has elected
D to proceed with the suit. [Para 11][143-C, F-G]

10. In the present case, respondent No.2/defendant 1,
though was the father of plaintiff No.2 could not have represented
plaintiff No.2 in the present suit as his guardian, because his
interest was adverse to that of plaintiff No.2. A number of
E allegations are made against the natural guardian by plaintiff no.2
in the suit while questioning the validity of the sale deed. On the
other hand, plaintiff no.1 (elder brother of plaintiff No.2) who did
not have any adverse interest to that of plaintiff no.2, has properly
represented plaintiff No.2 as his next friend. The plaintiff No.2
F has not made a single allegation against the plaintiff No.1/his next
friend, after he attained majority. The minor-plaintiff No.2 had
attained majority within one year from the date of filing of the
suit. Evidence of PW1 was recorded much prior to the recording
of evidence of any of the witnesses, plaintiff No.2 had attained
majority and he had by then elected to continue with the suit. It
G is also relevant to note that plaintiff No.2 is pursuing the matter
from the date of attaining majority till this date on his own.
Therefore, it was not open for the High Court to non-suit plaintiff
No.2. [Paras 13, 14][144-C-F]

11. Therefore, the impugned order relying upon the
H provisions of Hindu Guardianship Act to non-suit plaintiff No.2 is

not justified. Having regard to the totality of the facts and circumstances of the case, it would be just and proper if the matter is remitted to the High Court for a fresh decision on merits in accordance with law. [Para 17][145-D] A

Case Law Reference

AIR 1949 Mad. 859	referred to	Para 6	B
AIR 1972 All 81	referred to	Para 6	
AIR 2006 Ker 138	referred to	Para 7	
AIR 1954 All. 599	referred to	Para 8	
AIR 1960 Raj. 189	referred to	Para 8	C
AIR 1973 Mad.12	referred to	Para 8	
AIR 1983 Punjab 406	referred to	Para 8	
ILR 1974 (1) Delhi 825	referred to	Para 8	D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 22969 of 2017.

From the Judgment and Order dated 08.01.2013 of the High Court of Karnataka at Bangalore in Regular Second Appeal No. 1102 of 2004.

Nikhil Majithia (For Yadav Narender Singh), Adv. for the Appellants. E

Nishanth Patil, Parsanna Mohan, Anup Jain, Advs. for the Respondents.

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J. 1. The judgment dated 08.01.2013 passed by the High Court of Karnataka at Bangalore in Regular Second Appeal No. 1102 of 2004 is called in question in this appeal by the unsuccessful plaintiffs. F

2. Brief facts leading to this appeal are: Original Suit No. 228 of 1989 was filed by the appellants herein (plaintiffs 1 and 2 respectively in the suit) praying for a declaration that the suit schedule property is the joint property of the appellants along with their father Kempaiah (defendant no.1 in the suit/respondent no.2 herein) and that they are entitled to 2/3rd share in the said property; that the sale deed executed G

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A by the father-Kempaiah (defendant no.1 in the suit/respondent no.2 herein) in favour of defendant no.2/respondent no.1-Chowdamma was not binding on their 2/3rd share in the suit schedule property. A relief for permanent injunction was also sought. A certain set of other facts was also pleaded which may not be material for the disposal of this appeal.

B It is relevant to note that at the time of filing of the suit, i.e. on 24.01.1985, the appellant no.2 herein, namely, Krishna was aged about 17 years. The appellant no.1/Plaintiff No.1 herein being the elder brother of appellant no.2 filed the suit not only on his personal behalf but also on behalf of the second appellant-second plaintiff (who was a minor).

C 3. The trial Court dismissed the suit on merits. The first Appellate Court allowed the Regular Appeal No. 90 of 2003 filed by the unsuccessful plaintiffs and decreed the suit. Aggrieved by the judgment of the first appellate Court, the unsuccessful defendant no.2-Chowdamma/purchaser of the property filed Regular Second Appeal before the High Court of Karnataka at Bangalore.

D By the impugned judgment, the High Court has allowed the appeal and dismissed the suit mainly on the ground that the plaintiff no.1 being the elder brother could not act as the guardian of plaintiff no.2 during the life-time of Kempaiah, the father of the plaintiffs (defendant no.1), inasmuch as plaintiff no.1/appellant no.1 was not appointed as a guardian

E of the minor plaintiff no. 2 by any competent Court. Since the first defendant is the father of plaintiff no.2, he was the natural guardian and hence he could only represent plaintiff no.2 and none else.

F It is to be noted that no issue was raised in the trial Court with regard to competency of plaintiff No.1 to represent plaintiff no.2 in the suit. Even in the first appellate Court, such question was not raised, hence not considered. However, the High Court seems to have permitted such question to be raised for the first time in the second appeal, since it is purely a question of law.

G 4. Hence, the only question to be decided in this appeal is, whether the first plaintiff being the elder brother of minor second plaintiff (at the time of filing of the suit) could have filed the suit on behalf of the minor as his next friend/guardian.

H 5. The High Court, while coming to the conclusion that the first plaintiff could not have acted as a guardian of the minor- second plaintiff, has relied upon Section 4(b) of the Hindu Minority and Guardianship Act

(hereinafter called as ‘Hindu Guardianship Act’). Sub-Section (b) of Section 4 of the Hindu Guardianship Act reads as under: A

“(b) “guardian” means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(i) a natural guardian, B

(ii) a guardian appointed by the will of the minor’s father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;” C

As mentioned supra, the High Court has ruled that defendant no.1, being the father of minor plaintiff no.2, is the natural guardian of plaintiff no.2 and consequently plaintiff no.1 could not have acted as the guardian in the suit on behalf of minor plaintiff, particularly when he was not appointed as a guardian by any competent court of law. In our considered opinion, the High Court has totally misdirected itself while concluding so. D

6. There cannot be any dispute that the plaintiff no.1 did not and does not come within the meaning of a “Guardian” as specified in sub-section (b) of Section 4 of the Hindu Guardianship Act. But the present facts are not governed by the provisions of Hindu Guardianship Act; rather they are governed by Order XXXII of the Code of Civil Procedure (hereinafter referred to “Code”). To decide the present controversy it would be relevant to note the following provisions as contained in Order XXXII, Rules 1, 3, 6, 7, 9, 12, 13 and 14 of the Code (as amended in Karnataka State, since the matter is from Karnataka State) : E F

1. Minor to sue by next friend.—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.

¹⁸[Explanation: In this Order, “minor” means a person who has not attained his majority within the meaning of Section 3 of the Indian Majority Act, 1875 (9 of 1875), where the suit relates to any of the matters mentioned in clauses (a) and (b) of Section 2 of that Act or to any other matter.] G

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- A **2. Where suit is instituted without next friend, plaint to be taken off the file.**— (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.
- B (2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any) may make such order in the matter as it thinks fit.
- C **3. Qualifications to be a next friend or guardian.**— (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:
- Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff
- D (2) Appointed or declared guardians to be preferred and to be superseded only for reasons recorded.— Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor’s welfare that another person be permitted to act or be appointed as the case may be.
- E (3) Where the defendant is a minor, the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for the minor. A person appointed as guardian under this sub-rule, shall, unless his appointment is terminated by retirement or removal by order of Court on application made for the purpose or by his death, continue throughout all proceedings in the suit or arising out of the suit including proceedings in any appeal or in revision and any proceedings in execution of a decree and the service of any process in any such proceeding on the said guardian if duly made shall be deemed to be good service for the purposes of such proceedings.
- F (4) An order for the appointment of a guardian for the suit may be obtained upon an application in the name and on behalf of the minor or by the plaintiff. The application where it is by the plaintiff
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shall whenever necessary set forth in the order of their suitability A
a list of persons who are competent and qualified to act as guardian
for the suit for the minor defendant.

(5) The application referred to in the last preceding sub-rule whether B
made by the plaintiff or on behalf of the minor defendant shall be
supported by an affidavit verifying the fact that the proposed guardian
has not or that no one of the proposed guardians has any
interest in the matters in controversy in the suit adverse to that of
the minor and that the proposed guardian or guardians are fit
persons to be so appointed. The affidavit shall further state
according to the circumstances of each case particulars of any
existing guardian appointed or declared by competent authority, C
the name and address of the person, if any, who is the de facto
guardian of the minor, the names and addresses of persons, if any,
who, in the event of either the natural or the de facto guardian or
the guardian appointed or declared by competent authority, not
being permitted to act, are by reason of relationship or interest, or D
otherwise suitable persons to act as guardians for the minor for
the suit.

(6) An application for the appointment of a guardian for the suit of
a minor shall not be combined with an application for bringing on
record the legal representative of a deceased party. E

(7) No order shall be made on any application under sub-rule (4)
above except upon notice to the minor and also to any guardian of
the minor appointed or declared by an authority competent in that
behalf, or where there is no such guardian upon notice to the
father or natural guardian of the minor or where there is no father
or natural guardian upon notice to the person in whose actual
care the minor is and after hearing any objection which may be
urged on behalf of any person so served with notice. The notice
required by this sub-rule shall be served at least seven clear days
before the day named in the notice for hearing of the application. F

(8) Where none of the persons mentioned in the last preceding
sub-rule is willing to act as guardian, the Court shall direct notice
to other person or persons proposed for appointment as guardian
either simultaneously to some or all of them or successively as it
may consider convenient or desirable in the circumstances of the G
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A case. The Court shall appoint such person as it thinks proper from among those who have signified their consent and intimate the fact of such appointment to the person appointed by registered post unless he is present at the time of appointment either in person or by pleader.

B (9) No person shall be appointed guardian for the suit without his consent and except in cases where an applicant himself prays for his appointment as guardian notices issued shall clearly require the party served to signify his consent or refusal to act as guardian.

C (10) Where the Court finds no person fit and willing to act as guardian for the suit the Court may appoint any of its officers or a pleader of the Court to be a guardian and may direct that costs to be incurred by that officer or pleader in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give direction for the repayment or allowance of the costs as justice and the circumstances of the case may require.

D (11) When a guardian for the suit as a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may from time to time order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form costs of the plaintiff in the suit. The order shall direct that the guardian as and when required by the Court shall file into Court the account of the moneys so received by him.”—

E **6. Receipt by next friend or guardian for the suit of property under decree for minor.** – (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—

G (a) by way of compromise before decree or order, or
(b) under a decree or order in favour of the minor.

H (2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of

the property of the minor, or, having been so appointed or declared, A
is under any disability known to the Court to receive the money or
other movable property, the Court shall, if it grants him leave to
receive the property, require such security and give such directions
as will, in its opinion, sufficiently protect the property from waste
and ensure its proper application: B

²⁸[Provided that the Court may, for reasons to be recorded,
dispense with such security while granting leave to the next friend
or guardian for the suit to receive money or other movable property
under a decree or order, where such next friend or guardian—

- (a) is the manager of a Hindu undivided family and the decree or C
order relates to the property or business of the family; or
(b) is the parent of the minor.]

Provided that the Court may in its discretion dispense with the
security in cases where the next friend or guardian for the suit is
a manager of a joint Hindu family or the Karnavan of a Tharwad D
or the Ejaman of an Aliyasanthana family and the decree is passed
in favour of such joint family or Tharwad or the
Aliyasanthanafamily as the case may be.

7. Agreement or compromise by next friend or guardian
for the suit.—(1) No next friend or guardian for the suit shall, E
without the leave of the Court, expressly recorded in the
proceeding, enter into any agreement or compromise on behalf of
a minor with reference to the suit in which he acts as next friend
or guardian.

(2) Where an application is made to the Court for leave to enter F
into an agreement or compromise or for withdrawal of a suit in
pursuance of a compromise or for taking any other similar action
on behalf of a minor or other person under disability, the affidavit
in support of the application shall set out the manner in which the
proposed compromise, agreement or other action is likely to effect G
the interests of the minor or other person under the disability and
the reason why such compromise, agreement or other action is
expected to be for the benefit of the minor or other person under
disability, where in such a case the minor or the other person
under disability is represented by counsel or pleader, the said
counsel or pleader shall also file into Court along with the H

A application a certificated to the effect that the agreement or
compromise or action proposed is in his opinion for the benefit of
the minor or other person under disability. If the Court grants
leave under sub-rule (1) of this Rule, the decree or order of the
Court shall expressly recite the grant of the leave sought from the
B Court in respect of the compromise, agreement or other action as
aforesaid after consideration of the affidavit and the certificate
mentioned above and shall also set out either in the body of the
decree itself or in a schedule annexed thereto the terms of the
compromise or agreement or the particulars of other action.

C (3) Any such agreement or compromise entered into without the
leave of the court so recorded shall be voidable against all parties
other than the minor.

D **9. Removal of next friend.**—(1) Where the interest of the next
friend of a minor is adverse to that of the minor or where he is so
connected with a defendant whose interest is adverse to that of
the minor as to make it unlikely that the minor's interest will be
properly protected by him, or where he does not do his duty, or
during the pendency of the suit, ceases to reside within India, or
for any other sufficient cause, application may be made on behalf
of the minor or by a defendant for his removal; and the Court, if
E satisfied of the sufficiency of the cause assigned, may order the
next friend to be removed accordingly, and make such other order
as to costs as it thinks fit.

F (2) Where the next friend is not a guardian appointed or declared
by an authority competent in this behalf, and an application is
made by a guardian so appointed or declared, who desires to be
himself appointed in the place of the next friend, the Court shall
remove the next friend unless it considers, for reasons to be
recorded by it, that the guardian ought not to be appointed the
next friend of the minor, and shall thereupon appoint the applicant
to be next friend in his place upon such terms as to the costs
G already incurred in the suit as it thinks fit

H **12. Course to be followed by minor plaintiff or applicant on
attaining majority.**— (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. A

(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. C

(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. D

13. Where minor co-plaintiff attaining majority desires to repudiate suit.—(1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. E

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs. F

(4) Where the applicant is a necessary party to the Suit, the Court may direct him to be made a defendant.

14. Unreasonable or improper suit.—(1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper. G

(2) Notice of the application shall be served on all the parties

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A concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

B **14-A.** When a minor defendant attains majority either he or the guardian appointed for him in the suit or the plaintiff may apply to the Court to declare the said defendant a major and to discharge the guardian and notice thereof shall be given to such among them as are not applicants. When the Court by order declares the said defendant as major it shall by the same order discharge the guardian and thereafter the suit shall be proceeded with against the said defendant as a major.

C
A bare reading of Order XXXII, Rule 1 of the Code makes it amply clear 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.
D The next friend need not necessarily be a duly appointed guardian as specified under Sub-Section (b) of Section 4 of Hindu Guardianship Act. “Next friend” acts for the benefit of the “minor” or other person who is unable to look after his or her own interests or manage his or her own law suit (person not *sui juris*) without being a regularly appointed guardian as per Hindu Guardianship Act. He acts as an officer of the Court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The afore-said provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order XXXII of the Code.
E Order XXXII Rules 1 and 3 of the Code together make a distinction between a next friend and a guardian *ad litem*; i.e., (a) where the suit is filed on behalf of a minor and (b) where the suit is filed against a minor. In case, where the suit is filed on behalf of the minor, no permission or leave of the Court is necessary for the next friend to institute the suit,
F whereas if the suit is filed against a minor, it is obligatory for the plaintiff to get the appropriate guardian *ad litem* appointed by the Court for such minor. A “guardian *ad litem*” is a special guardian appointed by a court in which a particular litigation is pending to represent a minor/infant, etc.
G in that particular litigation and the status of guardian *ad litem* exists in that specific litigation in which appointment occurs. Various High Courts
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have also adopted this view. The Madras High Court in **Kaliammal, minor by Guardian, Patta Goundan v. Ramaswamy Goundan, AIR 1949 Mad. 859** observed that there is no need of sanction of the Court for a next friend to sue, if he is not incapacitated. This was also the view taken by the High Court of Allahabad in **K. Kumar v. Onkar Nath, AIR 1972 All. 81**.

7. The Kerala High Court upheld the same in no uncertain terms in **Gopalaswamy Gounder v. Ramaswamy Kounder, AIR 2006 Ker 138**. In that case, the High Court observed that any person who does not have any interest adverse to that of the minor can figure as his next friend. It held as follows:

“Law does not contemplate the appointment of a next friend for a minor who institutes a legal proceeding either as a Plaintiff or as a Petitioner. The object of a minor being represented through a next friend is only for the purpose of enabling the opposite party to look upon the next friend for costs, if any, ordered against the minor...”

.....

Where the minor institutes a proceeding as a Plaintiff or applicant any person who does not have any interest adverse to that of the minor can figure as his next friend. The mere fact that the minor’s mother Selvi was appointed as the guardian of the minor in execution proceedings where the minor was impleaded as an additional Respondent, will not disable Gopalaswamy Kounder from styling himself as the next friend of the minor for the purpose of filing the petitions under Order 21, Rule 90 Code of Civil Procedure There was absolutely no necessity for the next friend to seek his appointment as the next friend nor was the court below justified in dismissing the said application. Even in a case where the proceedings are instituted by the minor through his next friend, the real Plaintiff or applicant is the minor himself and not the next friend.”

8. Not only, is there no provision for appointment of next friend by the Court, but the permission of the Court is also not necessary.

However, even in respect of minor defendants, various High Courts are consistent in taking the view that the decree cannot be set aside

A even where certain formalities for the appointment of a guardian *ad litem* to represent the defendant have not been observed. The High Courts have observed in the case of minor defendants, where the permission of the Court concerned under Order XXXII Rule 3 of the Code is not taken, but the decree has been passed, in the absence of prejudice to the minor defendant, such decree cannot be set aside. The
B main test is that there has to be a prejudice to the minor defendant for setting aside the decree. For reference, see the cases of **Brij Kishore Lal v. Satnarain Lal & Ors.**, AIR 1954 All. 599, **Anandram & Anr. v. Madholal & Ors.** AIR 1960 Raj. 189 **Rangammal v. Minor Appasami & Ors.** AIR 1973 Mad.12, **Chater Bhuj Goel v. Gurpreet Singh** AIR 1983 Punjab 406 & **Shri Mohd. Yusuf and Ors. v. Shri Rafiquddin Siddiqui.** ILR 1974 (1) Delhi 825.

In the matter on hand, the suit was filed on behalf of the minor and therefore the next friend was competent to represent the minor. Further, admittedly no prejudice was caused to plaintiff no. 2.

D 9. “Guardian” as defined under the Hindu Guardianship Act is a different concept from the concept of “next friend” or the “Guardian *ad litem*”. Representation by “next friend” of minor plaintiff or by “guardian *ad litem*” of minor defendant is purely temporary, that too for the purposes of that particular law suit.

E 10. There is no hurdle for a natural guardian or duly constituted guardian as defined under Hindu Guardianship Act to represent minor plaintiff or defendant in a law suit. But such guardian should not have adverse interest against minor. If the natural guardian or the duly
F constituted guardian has adverse interest against the minor in the law suit, then a next friend or guardian *ad litem*, as the case may be, would represent the minor in the civil litigation.

G 11. It is by now well settled and as per the provisions of Order XXXII of Code that any person who is of sound mind, who has attained majority, who can represent and protect the interest of the minor, who is a resident of India and whose interest is not adverse to that of the minor, may represent the minor as his next friend. Such person who is representing the minor plaintiff as a next friend shall not be party to the same suit as defendant. Rules 6 and 7 of Order XXXII of the Code specifically provide that the next friend or guardian in the suit shall not
H without the leave of the Court receive any money or immovable property

and shall not without the leave of the Court enter into any agreement or compromise. The rights and restrictions of the natural guardian provided under the Hindu Guardianship Act do not conflict with the procedure for filing a suit by a next friend on behalf of the minor. Not only is there no express prohibition, but a reading of Order XXXII of the Code would go to show that wherever the legislature thought it proper to restrict the right of the next friend, it has expressly provided for it in Rules 6 and 7 of Order XXXII of the Code. Rule 9 of Order XXXII – apart from other factors, clarifies that where a next friend is not a guardian appointed or declared by the authority competent in this behalf and an application is made by the guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded, that the guardian ought not to be appointed as the next friend of the minor. Order XXXII, Rules 12, 13 and 14 of the Code empower the minor plaintiff to take a decision either to proceed with the suit or to abandon the suit, after attaining majority. Thus, after attaining majority, if the plaintiff elects to proceed with the suit, he may do so by making an application, consequent upon which the next friend ceases to represent the minor plaintiff from the date of attaining majority by the minor. Order XXXII Rule 12 of the Code requires the minor plaintiff to have the option either to proceed with the suit or to abandon the suit and does not at all provide that if no such election is made by the minor plaintiff on attaining majority, the suit is to be dismissed on that ground. In case, if the Court discovers during the pendency of the suit that the minor plaintiff has attained majority, such plaintiff needs to be called upon by the Court to elect whether he intends to proceed with the suit or not. In other words the minor who attained majority during the pendency of the matter must be informed of the pendency of the suit and in the absence of such a notice the minor cannot be imputed with the knowledge of the pendency of the suit. So, before any adverse orders are to be made against the minor who has attained majority, the Court has to give notice to such person. Of course, in the present matter, under the facts and circumstances, such occasion did not arise, since plaintiff no. 2 on attaining majority has continued with the suit, which means he has elected to proceed with the suit.

12. The principles arising out of the Guardians and Wards Act, 1890 and the Hindu Guardianship Act may not be apposite to the next friend appointed under Order XXXII of the Code. The appointment of a

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A guardian *ad litem* to represent the defendant or a next friend to represent the plaintiff in a suit is limited only for the suit and after the discharge of that guardian *ad litem*/next friend, the right/ duty of guardian as defined under sub-section (b) of Section 4 of the Hindu Guardianship Act (if he has no adverse interest) automatically continues as guardian. In other words, a next friend representing the minor in the suit under Order XXXII, Rule 1 of the Code, will not take away the right of the duly appointed guardian under the Hindu Guardianship Act as long as such guardian does not have an adverse interest or such duly appointed guardian is not removed as per that Act.

C 13. In the case on hand, respondent No.2/defendant 1, though was the father of the plaintiff no.2 could not have represented plaintiff no.2 in the present suit as his guardian, because his interest was adverse to that of plaintiff no.2. A number of allegations are made against the vendor of the property i.e. against the natural guardian by plaintiff no.2 in the suit while questioning the validity of the sale deed. The action of respondent no.2 herein (defendant no.1) in selling the property without any valid reason and family necessity is the subject matter in the suit. On the other hand, plaintiff no.1 (elder brother of plaintiff no.2) who did not have any adverse interest to that of plaintiff no.2, has properly represented plaintiff no.2 as his next friend. The plaintiff no.2 has not made a single allegation against the plaintiff no.1/his next friend, after he attained majority.

F 14. The minor-plaintiff no.2 had attained majority within one year from the date of filing of the suit. The suit, as afore-mentioned, was filed on 21.04.1985 when the plaintiff No.2 was 17 years of age. Thus plaintiff no.2 attained the age of majority on or about 20.04.1986. Evidence of PW1 (the first witness of the plaintiffs) was recorded on 15.10.1992, which means, much prior to the recording of evidence of any of the witnesses, plaintiff no.2 had attained majority and he had by then elected to continue with the suit. It is also relevant to note that plaintiff no.2 is pursuing the matter from the date of attaining majority till this date on his own. Therefore, it was not open for the High Court to non-suit the plaintiff no.2 for the afore-mentioned reasons.

H 15. Though records are not produced before us to show that plaintiff no.2 had filed a formal application for discharging the next friend after he attained majority, the fact remains that he has continued with the proceedings on his own, from the trial Court to this Court. The same

clearly shows his intention of continuing with the litigation. He has not abandoned his claim but has elected to continue with civil action. A

16. To sum up, instituting a suit on behalf of minor by a next friend or to represent a minor defendant in the suit by a guardian *ad litem* is a time-tested procedure which is in place to protect the interests of the minor in civil litigation. The only practical difference between a “next friend” and a “guardian *ad litem*” is that the next friend is a person who represents a minor who commences a lawsuit; guardian *ad litem* is a person appointed by the Court to represent a minor who has been a defendant in the suit. Before a minor commences suit, a conscious decision is made concerning the deserving adult (next friend) through whom the suit will be instituted. The guardian *ad litem* is appointed by Court and whereas the next friend is not. The next friend and the guardian *ad litem* possess similar powers and responsibilities. Both are subject to control by the Court and may be removed by the Court if the best interest of the minor so requires. B
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17. In view of the above discussion, we are of the opinion that the impugned order relying upon the provisions of Hindu Guardianship Act to non-suit the plaintiff no.2 is not justified. Having regard to the totality of the facts and circumstances of the case, it would be just and proper if the matter is remitted to the High Court for a fresh decision on merits in accordance with law. Accordingly, this appeal is allowed to the aforesaid extent, the judgment of the High Court is set aside and the matter is remitted to the High Court for a fresh decision on merits, in accordance with law. Needless to mention, that we have not expressed any opinion on the merits of the case. There shall be no order as to costs. D
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