REVISIONAL CIVIL

Before R. S. Narula, C.J.

NAND RAM,—*Plaintiff-Petitioner.*

versus

KARNAIL SINGH and another,—*Respondents.*

Civil Revision No. 1278 *of* 1976.

March 11, 1977.

Code of Civil Procedure (Act V of 1908)—Order 6 Rule 17, Order 7 Rule 1(d) and Order 32 Rule 3—Suit against minors—Factum of minority not disclosed in the plaint—Applications after expiry of limitation for amendment to disclose such factum and for appointment of guardian—Whether can be allowed.

Held, that an application, for amendment to comply with the requirement of Order 7 Rule 1(d) of the Code of Civil Procedure is of such a formal nature that no Court should normally disallow it if prayer for making it is made *bona fide* at an early state of the suit. An application for making appointment of a guardian *ad litem* can be made after the expiry of the period of limitation for filing the suit,—An application under order 32 rule 3 of the Code cannot be dismissed merely because the suit, if filed on the date of filing the application, would have been barred by time. (Para 3)

Petition under section 115 *C.P.C. for revision of the order of the Court of Shri V. P. Choudhry, Sub Judge Ist Class, Narwana dated the 7th August,* 1976, *dismissing both the applications of the plaintiff and ordering that the case to come up for further proceedings on* 12*th August,* 1976.

M. S. Jain, Advocate, *for the Petitioner.*

G. C. Mital, Advocate and Arun Jain, Advocate, *for the Respondents.*

JUDGMENT

R. S. Narula, C.J. (Oral).—(1) On March 3, 1975, the plaintiff-petitioner filed a suit for pre-empting the sale effected on March 7, 1974, in favour of three vendees all of whom were minors. Not knowing about their minority the plaintiff did not describe them as such in the plaint. When summonses were issued to the vendee-respondents it was reported back that they were minors. Thereupon

the plaintiff made an application on April 5, 1976, for leave to amend the plaint. The amendment sought was —

(1) to add the word 'minors' after the names of the vendee-defendants and to add thereafter the words *"ba-sarprasti* Dandi Ram *pita khud* under the guardianship of their father Dandi Ram", and

(2) to add paragraph 5(A) in the plaint after the existing paragraph 5, where in was intended to be stated that the three vendee-defendants are minors and they live with their father Dandi Ram whose interest is not adverse to that of minors and that Dandi Ram is entitled to be appointed as their guardian.

The plaintiff also filed a separate application under Order 32 Rule 3 of the Code for appointing Dandi Ram as the guardian *ad litem* of the minor defendants. Both the applications were resisted on behalf of the vendees on the ground that the limitation for filing the suit in exercise of the right of pre-emption had expired on March 7, 1975, and that inasmuch as the two applications were made in April, 1976, these could not be allowed. By his order, dated August 7, 1976, Shri V. P. Choudhry, Sub-Judge, First Class, Narwana, has dismissed both the applications on the same ground. Not satisfied with that order the plaintiff has come up to this Court for revision thereof.

(2) Mr. M. S. Jain, the learned counsel for the plaintiff-petitioner, has submitted that the entire approach of the trial Court to the question before it was contrary to law inasmuch as the non-disclosure of the minority of the defendants in the plaint is not fatal to the suit and an application for appointment of the guardian *ad litem* of minor defendants can be made after the expiry of the period of limitation for filing the suit. It is not disputed that the names and particulars of the vendees have been correctly given in the plaint. What is missing in the plaint is only the requirement of Order 7 Rule 1(d) of the Code which states that the plaint of a suit shall contain the following particulars:—

Order VII, 1.

"(a) * * * *.
"(b) * * * *.
"(c) * * * *.

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;"

Order 32, Rule 3 of the Code requires that where the defendant in a suit is minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. The contention of Mr. Jain is that the appointment of a guardian of a minor for purposes of a suit can be made at any time during the pendency of the suit and need not be made before the expiry of the period of limitation for instituting the suit. Counsel has relied in this connection on the judgment of Vivian Bose J. in *Abdul Aziz Sk. Imam Musalman and others* v. *Sk. Amir Sk. Burham Musalman and another*, (1), where in it has been held that it does not matter whether a defendant is a major or a minor for the purpose of the Limitation Act so long as the suit is brought against the correct person. The learned Judge held that the suit against a minor, so far as the Limitation Act is concerned, is against the proper person whether he is described as a major or a minor and is, therefore, within time if limitation has not expired on the date on which the suit is instituted by the presentation of the plaint. It was held that the question of guardianship is a separate matter and does not relate to the institution of the suit but to the right of the plaintiff to carry it on against the person, who in fact happens to be a minor It was further held that a suit is not a nullity until a guardian is appointed and it is not correct to say that no suit can be deemed to have been instituted until the guardian of the minor defendant has been appointed. Reference has then been made to the Division Bench judgment of the Allahabad High Court (Lindsay and Sulaiman, JJ.) in *Har Lal Singh and another* v. *Rudra Singh and others*, (2). The learned Judges held that where in a pre-emption suit a guardian for a minor defendant is appointed after the expiry of the period of limitation for filing the suit the defect is not fatal to the suit on a plea of limitation. The next case on which Mr. Jain has relied is the judgment of a Special Bench of three Hon'ble Judges of the Allahabad High Court in *Wali Mohammad Khan* v. *Ishak Ali Khan and others* (3). Sulaiman, A.C.J., who gave the final opinion on the question of law involved in the case, held that where a suit has been filed in the name of a plaintiff by his mother acting as guardian and next friend and describing him as a minor while in fact he was

(1) A.I.R. 1941 Nagpur 130.
(2) A.I.R. 1927 Allahabad 787.
(3) A.I.R. 1931 Allahabad 507.

of age and the suit has been authorised by him and is prosecuted by him in person the suit cannot be thrown out on the technical ground that the plaint as originally filed described him as a minor under the guardianship of his mother. This kind of defect was described by the Special Bench of the Allahabad High Court as a defect in the form of the suit and not in the substance thereof and was held to be curable if it is due to *bona fide* mistake. Following the judgment of the Special Bench of the Allahabad High Court, a learned Single Judge of this Court (Pattar, J.) has also held in *Ramavtar* v. *Balbir and others*, (4), that when a suit has been filed in the name of a plaintiff describing him as a minor by another person acting as his next friend through a *bona fide* mistake while as a matter of fact he was major at the time of the institution of the suit then the suit cannot be thrown out on the technical plea that the plaintiff was not a minor at the date of the institution of the suit. It was held that in such circumstances the plaint must be permitted to be amended. Counsel's submission is that no suit can be dismissed merely because the requirement of Order 7, Rule 1(d) has not been complied with and that the object of showing in the plaint that a particular party is a minor is just to bring the fact of the minority of the party to the pointed attention of the Court so that the Court may keep this fact in view at all appropriate stages, for example, for the purpose of ensuring that the party is represented by a guardian whose interests are not adverse to those of the minor or if and when compromise is offered to be filed in the case to make sure that the terms of the compromise are in the interest of the minor and other such matters. He has referred to the judgments of their lordships of the Supreme Court in *A. K. Gupta and Son Ltd.* v. *Damodar Valley Corporation*, (5), and *Jai Jai Ram Manohar Lal* v. *National Building Material Supply, Gurgaon*, (6), in support of the proposition that the mere fact that the suit would be barred by time on the date on which the application for amendment is made or the amendment is allowed is by itself not necessarily a conclusive ground to earn dismissal of the application for amendment of the plaint. One of the tests to be applied in such cases, according to Mr. Jain, is whether the suit could be dismissed merely because the defendants were not described as minor notwithstanding the fact that the Court on coming to know of minority was in a position to appoint their guardian *ad litem*.

(4) 1975 P.L.R. 665.

(5) A.I.R. 1967 S.C. 96.

(6) A.IR 1969 S.C. 1267.

(3) In reply to these submissions, Mr. Gokal Chand, the learned counsel for the vendee defendant-respondents, has first raised a preliminary objection to the effect that the order under revision was passed on two separate applications of the plaintiff-petitioner one for the amendment of the plaint and the other for the appointment of a guiardian *ad litem*—and that one petition for revision of the order passed on two applications is not competent. He submits that inasmuch as limitation is prescribed for filing a petition under section 115 of the Code the petitioner should be put to the choice of selecting the order against which he wants to maintain the petition and the other order of the trial Court should be upheld. I am unable to agree with this contention for more than one reason. Even if the petition be treated as a petition against one of the orders it is within the competence of this Court to set aside the other order if the other order seems to have been passed either in excess of or without jurisdiction or with material irregularity or illegality in the exercise of the jurisdiction of the trial Court. Moreover, it appears to me that the application for amendment is really not a serious matter. Paragraph 5A, which was sought to be added to the plaint, was not quite necessary. All that was necessary was to comply with the requirement of Order 7 Rule 1(d) and to add the word "minors' to the description of the minor defendants. That kind of amendment is of such a formal nature that no Court should normally disallow it if prayer for making it is made bone fide at an early stage of the suit. In view of the lucid judgment of Vivian Bose, J., in *Abdul Aziz Sk. Imam Musalman's case* (supra), it is patent that an application for making appointment of a guardian *ad litem* can be made after the expiry of the period of limitation for filing the suit. I am in respectful agreement with that view. There was, therefore, no question of dismissing the application under Order 32 Rule 3 merely because the suit, if filed on the date of filing the application would have been barred by time. The trial Court relied on the judgment of *Bhim Sain and others* v. *Harish Chander* (7), and *Suraj Bhan and others* v. *Balwan Singh* (8). Those cases are distinguishable on facts. Even otherwise, the law laid down by the learned Single Judge is not wholly consistent with the trend of authorities referred to above.

(4) For the foregoing reasons, I allow this petition, set aside the orders of the trial Court dated August 7, 1976, and allow both the applications of the plaintiff-petitioner and grant him leave to amend

(7) 1971 P.L.J. 259.

(8) 1971 P.L.J. 918.