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or has been carrying on, through agencies other than the Cooperative Society of which he is a member, the same business as is being carried on by the Cooperative Society."

Clearly the disqualification arising from the inactivity of a member attaches to a candidate and not his proposer and I do not see how clause (f) could be said to lay down that a default to a society is a disqualification for a proposer, even if the language of the clause is stretched beyond limits.

(11) In so far as the nomination papers of the petitioners have been rejected on any of the three grounds just above scrutinised, the orders of rejection must be held to be invalid. It appears to me in fact that in rejecting the nomination papers of the petitioners respondent No. 5 was influenced by extraneous considerations. Had the orders passed by him been honest, it is difficult to see why he would press into service non-existent rules and inapplicable principles in the matter of passing them. The evasive denial referred to above also points to the same conclusion, as does the failure of respondents Nos. 7 and 8 to controvert any of the allegations made by the petitioners in regard to them. For this reason also the impugned orders must be held to have been vitiated.

(12) In the result, the petition succeeds and is accepted with costs against respondents Nos. 5, 9 to 13 and 15. The proceedings held by respondent No. 5 on the 3rd of June, 1974, in the matter of scrutiny of the nomination papers of candidates for election to the Committee of the Society from Zones Nos. 1 to 4 and 6 along with the resultant orders are hereby set aside. Counsel's fee Rs. 300/-.

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N. K. S.

REVISIONAL CIVIL

Before P. S. Pattar, J.

RAMAUTAR,—Plaintiff-Petitioner.

versus

BALBIR and others,—Defendants-Respondents.

Civil Revision 168 of 1973

July 15, 1975.

*Code of Civil Procedure (V of 1908)—Order XXXII Rules 3 and 12—Suit by a next friend describing plaintiff as a minor through bona fide mistake—Plaintiff in fact a major on the date of institution of the suit—Plaint—Whether should be permitted to be amended.*

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*Held*, 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 a major at the date of the institution of the suit and the plaint must be permitted to be amended so as to allow the plaintiff to proceed with the suit in his own name and discharge the next friend.

(Paras 9 and 10).

*Petition u/s 115 C.P.C. for revision of the order of Sub Judge 1st Class, Narnaul, dated 1st January, 1973, holding that the plaintiff was not a minor on the date of the institution of the suit and rejecting the application for discharge of the guardian and amendment in the plaint.*

Hari Mittal, Advocate, for the Petitioners.

Nemo,—for the Respondents.

*Pattar, J.—*(1)—This is a revision petition under section 115, Code of Civil Procedure, by Ram Avtar plaintiff, against the order dated January 1, 1973, of the Subordinate Judge First Class, Narnaul, whereby he decided that the plaintiff was a major at the time of institution of the suit and he rejected the application for amendment of the plaint.

(2) The facts of this case are that Ram Avtar petitioner is owner of land measuring 7 *kanals* 16 *marlas* fully described in the heading of the plaint and situated in the area of village Dohar Kalan, Tehsil Narnaul, District Mohindergarh. This land was under mortgage with Balbir and others, for a sum of Rs. 290. Bihari, son of Ganga Sahai, filed suit as next friend of Ram Avtar plaintiff for redemption of this land against Balbir and others, who are respondents-defendants. It was alleged in the plaint that Ram Avtar was a minor. The defendants in their written statements alleged that Ram Avtar plaintiff was not a minor and, therefore, the suit should be dismissed. Ram Avtar plaintiff, made an application under Order XXXII rule 12, Code of Civil Procedure, on August 24, 1971, alleging that he was a minor at the time of the institution of the suit and his date of birth was May 5, 1953 and that during the pendency of the suit, he became major and therefore, it was prayed that his next friend Shri Bihari may be discharged and he may be permitted

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to proceed with the case in his own name and that he may be permitted to make the necessary corrections in the plaint. This application was contested by the defendants. On the pleadings of the parties, the following preliminary issues were framed by the trial Court :

- (1) Whether Ram Avtar plaintiff was major at the institution of the suit ? If so, to what effect ?
- (2) Relief.

After considering the oral and documentary evidence of the parties, the Subordinate Judge held that plaintiff Ram Avtar was not a minor on the date of the institution of the suit and, therefore, he rejected his application under Order XXXII rule 12, Code of Civil Procedure, on January 1, 1973. Feeling aggrieved, Ram Avtar plaintiff has filed this revision petition to set aside that order of the Subordinate Judge.

(3) Actual date notices were issued to the respondent-defendants by registered post (acknowledgement due) for today, but none of them is present and they are proceeded against *ex parte*.

(4) Order XXXII rules 12(1) and 12(2) of the Code lay down that a minor shall, on attaining majority, elect whether he will proceed with the suit or application and if 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 right.

(5) Mr. Hari Mittal, learned counsel for the petitioner argued that the decision of the lower Court that the plaintiff was not a minor on the date of the institution of the suit is incorrect and it may be set aside and that even if the plaintiff was not a minor on the date of the institution of the suit, he should be permitted to amend the plaint. Krishan Kumar A.W. 1 Headmaster, Government Middle School, Dohar Kalan, produced the records of the school and also the admission form marked 'A'. He also produced the copies of the entry registers, Exhibits PA, PB, and PC, pertaining to the age of Ram Avtar petitioner. According to these entries, the date of birth of Ram Avtar petitioner is May 5, 1953. It is well settled law that the entries in the school registers of a Government School regarding the date of birth of a boy are admissible in evidence under section 35 of

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the Evidence Act, as these are the entries made by a public servant in the discharge of his official duties. From these documents, it is clear that the date of birth of Ram Avtar petitioner was May 5, 1953. Admittedly, litigation had been going on between the parties pertaining to this land. In the copies of the orders of the various officers, which are Exhibits PG, PH, PF, PI and PJ, Ram Avtar, petitioner, has been described as a minor by the respondents-defendants, during the years 1969, 1970 and even in the year 1971. These admissions are binding on the respondents-defendants and lend support to the statement of Krishan Kumar, Headmaster, P.W. 1 and the entries in the school records, discussed above.

(6) Budh Ram, P.W. 2, is the natural father of Ram Avtar petitioner. It may be noted that Ram Avtar, petitioner, had been adopted as a son by Shrimati Kalawati and he resides with her. Budh Ram stated in his statement recorded on December 16, 1972, that Ram Avtar, petitioner, was aged about 19½ years and that he was a minor at the date of the institution of the suit. This witness got him admitted in the school and the form marked 'A' was thumb-marked by him. He is an illiterate person. In his cross-examination, he could not state the exact date of birth or the year of birth of Ram Avtar, petitioner. Some time, he gave the age of the petitioner-plaintiff as 21 years or even more. It appears that during the cross-examination, he being illiterate, was confused and could not give the exact date of birth of Ram Avtar, petitioner. As mentioned above, the defendants admitted Ram Avtar, petitioner, to be a minor on November 3, 1969, February 10, 1970, April 10, 1970; January 27 1970 and May 2, 1971, in the copies Exhibits PG, PH, PF, PI and PJ, respectively. The statement of Budh Ram, P.W. 2, was recorded about two years after the institution of the suit. The learned Subordinate Judge laid too much emphasis regarding the wrong age given in cross-examination by this witness who is an illiterate villager. There are no cogent reasons given by the Subordinate Judge to reject the evidence of this witness. For all these reasons, it is held that from the oral and documentary evidence produced by the petitioner it is established that he was a minor at the date of the institution of the suit.

(7) The onus to prove the issue that the petitioner was major at the date of the institution of the suit was on the respondents-defendants. None of the defendants went into the witness box to

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support their allegation that the petitioner was major on the date of the institution of the suit. They relied on Exhibit D4, which is a copy of the written statement to the plaint a copy of which is marked 'DA' wherein the statement of the plaintiff was recorded on April 8, 1970, and he gave the age in the statement as 24 years. It may be noted that this age was given by him not in his statement, but at the time of giving his parentage, age and occupation. This statement regarding age was not made by him, on oath and, therefore, it cannot be accepted as correct.

(8) Next, reliance was placed on Exhibit D6, which shows that the wife of Budh Ram gave birth to a son on March 19, 1951. There is nothing on the file to show that this birth entry relates to the petitioner. The name of the child is not given in Exhibit D5. Budh Ram testified that his one son had died, but could not give the month or the year of his death. The onus on this issue lay on the defendants and they have failed to discharge the same. In this view of the matter, it is held that the petitioner was a minor on the date of the institution of the suit and the decision of the Subordinate Judge is not correct and the same is reversed.

(9) Mr. Hari Mittal, learned counsel for the petitioner argued that even if the allegations of the respondents be accepted that Ram Avtar was not a minor at the institution of the suit, there was a *bona fide* mistake on the part of Bihari who acted as his next friend and, therefore, under Order XXXII rule 3 of the Code, this mistake can be corrected and the petitioner Ram Avtar should be permitted to proceed with the case. In support of this contention, he relied on *Wali Mohammad Khan v. Ishak Ali Khan and others*, (1) wherein it was held,—

“Where a suit has been filed in the name of a plaintiff by his mother acting as guardian and next friend and describing him a minor, while in fact he was 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. Defect in its form should be cured if it is due to a *bona fide* mistake.”

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(1) A.I.R. 1931 Allahabad 507 (Special Bench).

A Division Bench of the Madras High Court in *Shanmuga Chetty v. C. K. Narayana Aliyar and others*, (2), held that Order 1 Rule 10 is wide enough to cover a case where a major is wrongly assumed to be a minor and a suit is brought on his behalf by his next friend. The proper procedure to adopt in a case of this nature is to return the plaint so that it may be presented after making the necessary amendments. In *Narayan Chandra Das v. Dulal Chandra Dutta*, (3), it was held that when a major plaintiff is through a *bona fide* mistake described as a minor and represented by another as a next friend and the lower appellate Court allowed the memorandum of appeal to be amended, then the order of the Court is perfectly correct. To the same effect was the law laid down in *Dulal Chandra Majumdar and others v. Umesh Chandra Majumdar*, (4). The legal position, therefore, is 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 a 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 major at the date of the institution of the suit and the plaint must be permitted to be amended.

(10) In the instant case, it is established that the plaintiff was a minor at the date of the institution of the suit. Even if it be assumed that he was a major, the mistake was *bona fide* and his next friend filed the suit for redemption of the land against the respondent-defendants under a *bona fide* mistake that the plaintiff was a minor. Therefore, this revision petition must succeed. As a result, this petition is accepted and the application made under Order XXXII rule 12 of the Code by Ram Avtar, petitioner-plaintiff is accepted and he is permitted to proceed with the case in his own name and his next friend Bihari is discharged. Necessary amendments/alterations in the plaint may be made. There will be no order as to costs.

H. S. B.

(2) A.I.R. 1918 Madras 916.

(3) A.I.R. 1927 Calcutta 477.

(4) A.I.R.. 1966 Assam and Nagaland 93.