MANU/BH/0030/1950

Equivalent Citation: AIR1950Pat97

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.O.D. No. 85 of 1943

Decided On: 10.03.1948

Appellants: **Kamakshya Narain Singh Bahadur**
Vs.
Respondent: **Baldeo Sahai and Ors.**

Hon'ble Judges/Coram:
C.M. Agarwala, C.J., Herbert Ribton Meredith and Jugal Kishore Narayan, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: L.K. Jha and S.P. Singh, Advs.

For Respondents/Defendant: B.C. De, K.D. De and A.N. Chatterji, Advs.

JUDGMENT

Herbert Ribton Meredith, J.

1. The question which has been referred to this Full Bench is:

> "Can a minor avoid a decree passed against him on the ground of gross negligence on the part of his guardian-ad-litem by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such guardian."

2. I understand that the case in which this reference baa been made was one of alleged negligence on the part of the minor plaintiff's next friend, and I presume, therefore, that an answer is required both as regards a person who alleges gross negligence on the part of his nest friend when he was a minor plaintiff and as regards a person who alleges gross negligence on the part of his guardian-ad-litem when he was a minor defendant.

3. In a recent case decided by Agarwala C. J. and myself (Second Appeal no. 7 of 1946 decided on 4th January 1948) I said;

> "It may be taken as well settled, so far as this Court is concerned, that the minor can avoid the decree if be was not effectively represented in the suit, and where there is gross negligence on the part of the guardian he cannot be said to have been effectively represented,"

Having regard to the fact that learned counsel have been arguing before us on this question for the best part of three days, this statement must be characterized as somewhat optimistic. Nevertheless I do not think it is incorrect to say that until recently the question was regarded as settled in this Court.

4. In Ganganand Singh v. Rameshwar Singh MANU/BH/0054/1927, decided in 1937

Das and Adami JJ. held that even where a minor is represented by a gurdian-ad-litem not disqualified from so acting, he can in a subsequent suit impeach the decree passed in the previous suit on the ground that there was gross negligence on the part of the guardian.

5. In 1984 Fazl Ali and James J. in Kali Charan Singh v. Eirdai NarainA. I. R. 1935 Pat. 24: 154 I. C. 948, observed:

> "It is now well settled that gross negligence, which may be interpreted as culpable neglect of the interest of a minor defendant on the part of his guardian-ad-litem, will entitle the minor to the avoidance of proceedings undertaken against him."

6. In 1935, in Mathura Singh v. Rama Rudra Prasad Sinha MANU/BH/0062/1935, Khaja Mohamad Noor and Dhavle JJ. held that a minor can avoid a decree passed against him on account of the gross negligence of his guardian. Gross negligence, they held, amounts to fraud and affect? the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree.

7. In 1944, in Madhusudan v. Jogindra MANU/BH/0156/1945.Fazl Ali C. J., and Manohar Lall J. held that where a minor is properly a party to a suit, that is to say, is represented by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete and cannot be ousted on proof that the Court did not follow the proper procedure for the appointment of the guardian. Where, however, the minor suffers, the matter is different, and at his instance a decree against him in such action may be set aside.

8. Up to 1947 there was, so far as I am aware, no reported case of this High Court in which a contrary view was taken There was, however, in 1944 a case decided by Fazl Ali C. J. and Reuben J. (unreported); First Appeal No. 163 of 1941, in which Reuben J. in the course of the judgment referred to the remarks of Lord Thaukerton in T. Venkata Seshayya v. T. Kotiswara Rao MANU/PR/0035/1936, and then said:

> "Here all that is alleged against the guardian-ad-litem is gross negligence. This is obviously insufficient to entitle the appellant to claim the protection of Section 44, Evidence Act,"

Gross negligence had been alleged, but it was held that the decision in the previous suit operated as res judicata, nevertheless.

9. During the year 1947, the question came before Benches of this Court in two cases. The first. Kamakshya Narain Singh v. Fateh Kumar MANU/BH/0110/1947, was before Manohar Lall and Bennett JJ. In the course of the judgment Bennett J. remarked that there were apparently conflicting decisions of this Court, and it was desirable that the point, when it again came before the Court, should be referred to a Full Bench for decision he said :

> "Prior to the decision of the Privy Council in Venkata Sheshayya v. Kotiswara RaoMANU/PR/0035/1936, there was a consistent jurisprudence of this Court that gross negligence on the part of the gurdian-ad-litem will entitle the minor to the avoidance of proceedings decided against him . ..."

Following this decision of their Lordships of the Privy Council, there have been two unreported decisions of Division Benches of this Court in First Appeal No. 168 of

1937 and First Appeal No. 163 of 1941 which are directly contradictory to the earlier jurisprudence of this Court. This is a matter of considerable public importance, because, if a minor is not protected against the negligent acts of his guardian, the door is left wide open to undetectable fraud and grave injustice as a result of which minor children would be completely deprived of their inheritance. I do not understand the reservation of their Lordships of the Privy Council in the abovementioned case in any way to reflect upon the principles established by the earlier cases protecting minors from the negligent conduct of a former litigation by their guardians-ad-litem except in so far as those cases purport to extend the provisions of Section 44, Evidence Act, beyond the scope limited by the plain and obvious meaning of the words therein used, and it may well be that the principles protecting a minor from the negligent conduct of a former litigation by his guardian-ad-litem are to be founded not upon or by extension of, or by way of analogy to Section 44, Evidence Act, but upon the proposition that the minor can only properly be considered to have been a party to the former litigation in so far as he was properly represented therein by his guardian-ad-litem, and that when the guardian-ad-litem neglects a plain duty, the minor cannot be said to have been properly represented. Order 32, Civil P. C., contains no express provision to the effect that where a guardian ad litem of a minor is properly appointed thereunder to represent a minor the minor shall be bound by the decision in the litigation as if he had been a party thereto, and it may well be, therefore, that that question has been left open to be decided upon the facts of each particular case in accordance with the principles of justice, equity and good conscience.

10. The two unreported cases referred to were appended in the report as notes to this judgment. That of 1944, "Fazl Ali C. J. and Reuben J., I have already referred to. The other was a case of 1941 before Manohar Lall and Chatterji JJ. In the course of the judgment Chatterji J, referred to Venkata Seshayya v. Kotiswara, RaoMANU/PR/0035/1936and the Bombay Full Bench decision, Krishnadas Padmanabhrao v. Viihoba Annappa Shetti MANU/MH/0301/1999, and said;

> "Assuming . . . . . that the guardian was guilty of gross negligence, it cannot, in view of the aforesaid decisions, justify the setting aside of the decree."

There was no reference in either of the cases to the view expressed in the previous Patna cases which had hitherto prevailed.

11. In 1944 there was another unreported case, civil Revision No. 749 of 1943, disposed of by Manohar Lall and Beevor, JJ. who made an observation:

> "Now In face of the Privy Council decision in Venkata Seshayya v. Kotiswara Rao,MANU/PR/0035/1936, it appears that mere negligence of the guardian-ad-litem would give the present opposite party No. 1 no cause of action."

There was, however, no discussion of the question.

12. The other cage of 1947 to which I referred, Ramudar Singh v. Ramsurat Singh 26 Pat. 862 : A. I. R. 1948 Pat. 28l, was a decision of Bennett and Beevor JJ. In that case Bennett J. made observations to the same effect as those I have already quoted. He said:

> "A minor is not bound by any proceedings taken against him during his minority unless be was a party thereto. Whether a minor was or was not a party to any such proceedings depends, in my opinion, upon whether or not

> he was effectively represented therein."

He said that there was nothing in Order 82 to indicate that provided that the letter of the order is followed, the minor will be bound by the decision, although in fact he was never effectively represented in the proceedings. "Nor", said the learned Judge,

> "in my opinion, can such an intention, which is against the dictates of justice, equity and good conscience, in that it would open the door to undeteotable fraud whereby many minors would be deprived of their rights and inheritance, be attributed to the Legislature. When, therefore, any question arises as to whether a person is bound by any decree or order of a civil Court passed during his minority, the proper and only test, in my opinion, is whether he was so effectively represented in the proceedings . . . as in justice, equity and good conscience to justify, in the circumstances of the particular case, the conclusion that be was in fact a party to these proceedings."

13. It is apparent that the reopening of the question in this Court was due to the observations in Venkata Seshayya v. Kotiswara Rao MANU/PR/0035/1936, and to the Bombay Full Bench case. Before, however, I proceed to examine those observations and that case, it will be well to indicate the position in the other High Courts of this country. The first Calcutta case of importance is Raghubar Dyal v. Bhikya Lal 12 Cal. 69. In the year 1855, Field and C Kinealy, JJ., after examining some English cases, held that while a minor had a remedy against gross negligence of his next friend or guardian-ad-litem it was by way of application for review and not by subsequent suit.

14. In 1894 came the leading case, so far as Calcutta is concerned. In Lalla Sheo Churn Lal v. Ramnandan Dobey 22 Cal. 8, Trevelyan and Ameer Ali JJ. held that a minor is entitled to reopen the matter by a fresh suit where he can show gross negligence on the part of his next friend in the previous suit. The English rule of law on this point, said the learned Judges, being the law of equity and good conscience could be applied by the Court to the case in the absence of any statutory provision. It is perhaps worth noting that Trevelyan J. was the author of a well-known work "The Law Relating to Minors in British India", while, as is well known, Ameer Ali J. subsequently became a member of the Privy Council.

15. Ever since Sheo Churn Lal v. Ramnandan 22 Cal. 8, Calcutta opinion has been consistent and in accordance therewith, and one may skip over nearly 50 years to a case in 1941. In Mahesh Chandra v. Manindra Nath MANU/WB/0013/1941, Mukherjee J. held that gross and culpable negligence on the part of the guardian ad-litem of the minor resulting in serious loss of rights is a sufficient ground to enable a minor to set aside the decree obtained against him. Fraud and collusion of the guardian are not the only grounds. It was observed that Section 44, Evidence Act, could not destroy the minor's right which exists independently of the Evidence Act. Venkata Seshayya v. Kotiswara Rao,MANU/PR/0035/1936, was relied on in support of the view taken.

16. I now turn to Madras. Going back to 1921 in C. Punnayyah v. Rajam Viranna 45 Mad 425 : A.I.R. 1922 Mad. 273, Spencer and Ramesam JJ. held that a person who had been impleaded as a minor defendant represented by a guardian-ad-litem in a suit in which a decree was passed ex parte against him can institute a suit to set aside the decree on the ground of gross negligence, apart from fraud or collusion of the guardian-ad-litem in not defending the suit properly on his behalf.

17. In Subbaratnam Chettiar v. G. Vidya Sankar A. I. R. 1937 Mad. 472 : 169 I. C.

694 Varadachariar J. held that a minor can have a decree set aside not only on the ground of fraud, but also on the ground of gross negligence on the part of his guardian. The learned Judge said that on general principles the Patna High Court had taken the same view as the Madras Court.

18. In 1942 in Egappa Chettiaw. Ramanathan Chettiar MANU/TN/0294/1941. Leach C. J. and Kappuswami Aiyer J. held that it is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit in which the decree was passed against him. In this case the decisions of the other High Courts were reviewed and the effect of Venkata Seshayya v. Kotiswararao 64 I. A. 17 : A. I. R. 1987 P. C. 1, was also considered.

19. Nest the Allahabad High Court. The matter came before a Full Bench in Siraj Fatma v. Mahmud Ali MANU/UP/0010/1932,in the year 1932. Sulaiman and Sen JJ. held that a suit was maintainable based upon gross or culpable negligence on the part of the guardian in the absence of fraud or collusion. Boys J. dissented, holding that

> "to allow evidence of negligence on the part of a guardian for the purpose of destroying the effect of a decree will be to act upon a rule oÂ£ evidence not embodied in the Evidence Act or any statute or regulation, and which is, therefore, prohibited by Section 2, Evidence Act. Section 44 of that Act made an exception to the operation of Section 11, Civil P. C., but no such exception was made in favour of negligence of the guardian-ad-litem. It was an undue straining of language to say that became a duly appointed guardian-ad-litem was negligent the minor was not properly represented,"

He thought that the bar of res judicata could not be overcome. The view of the other Judges was that Section 44 was permissive, not prohibitive, and the Evidence Act, being an adjective law, could not take away a substantive right existing independently of the Evidence Act.

20. In 1940 Bennett and Verma JJ. in Dwarika Halwai v. Sital Prasad MANU/UP/0076/1940, again applied the principle that where a minor has not been properly represented in the suit, he is not a party to the suit in the proper sense of the term, and a suit by him to set aside the decree and sale and execution of that decree on the score of gross negligence of his guardian is not barred.

21. As recently as 1946, there was a Full Bench decision of the Lahore High Court in Iftikhar Hussain Khan v. Beant Singh A. I. R. (1946) Lah. 515 : A. I. R. 1946 Lah. 233 . Abdul Rashid, Ram Lall and Mehr Chand Mahajan JJ. in agreement held, after consideration of all the authorities, that a minor can avoid a decree passed against him on the ground of gross negligence of his guardian-ad-litem even if he has not succeeded in proving fraud or collusion on the part of such guardian. The view of the Bombay Full Bench was examined, and dissented from, as also that of Boys J. in his dissenting judgment in the Allahabad High Court. It was remarked, I may note, that the Patna High Court had uniformly taken the view that it was open to a minor on attaining majority to avoid a decree obtained against him on account of the gross negligence of his guardian. The decision was based on a substantive right of the minor based on justice, equity and good conscience which, they said, was taken from the English law. They held that under the English law a minor possesses the right, though the usual practice was to allow a review in cases of negligence, and a separate action where fraud or collusion was alleged. In India might be difficult for

the Court to be moved by way of review in view of the observations of their Lordships of the Privy Council in Chajju Ram v. Neki 3 Lah. 127 : A.I.R. 1922 P. C. 112. There seemed, therefore, no reason why the minor should not enforce his substantive rights by means of a separate suit, and this could not be taken away either by Section 11, Civil P. C., or Section 44, Evidence Act. Finally, they said :

> "The result of a review of all the available authorities is that with the exception of the Bombay Court it has been laid down by all the High Courts in India that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian-ad-litem."

Having regard to the review of the authorities which I have made, that observation seems to me substantially correct. The question must be taken to be settled so far as the Calcutta, Madras, Allahabad and the Lahore High Courts are concerned, while in Patna it has only recently become unsettled. The view of Oudh Chief Court seems to be similar (see Mohammad Baksh v. Allah Din MANU/OU/0015/1941.

22. There is no direct Privy Council authority on the point, so far as India is concerned, but there is an old Privy Council decision in a case on appeal from the Cape of Good Hope (Orphan Board v. Van Beenen (1829) 1 Knapp 84in which Lord Wynford said:

> "If His Majesty were to dismiss this appeal on account of the neglect of their guardians to bring it to a decision, when the infants attain their full ages they would have a Tight to revive it. Infants are not to be prejudiced by the negligence of their guardians. On the contrary, according to the Civil law, as laid down in the Digest, lib, 4, tit. 1, 1.3 'Minors, although defended by their guardians or curators, may afterwards, on their causes being heard, be released from judgments pronounced against them."

23. So far as India is concerned, there are cases where the Privy Council has reviewed its judgment in favour of minors whose guardians had been guilty of gross negligence, see Rajunder Narain Rae v. Bijai Govind Singh 2 M. I. A. 181 : 1 M. P. C. 117, Birjobuttee v. Pertaub Singh 8 M. I. A. 160 : 13 M. P C. 465 though no doubt in the latter case there were other considerations also.

24. In Ram Autar v. Raja Muhammade Mumtaz Ali Khan 241. A. 107: 24 Cal. 853 , in a suit for cancellation of an order made by the settlement Court, it appeared that the order had been obtained on an admission by the infant's guardian (the Court of Wards), which ought not to have been made, and it was held that the order was not binding on the infant.

25. Mt, Bashid-un-Nisa v. Muhammad Ismail Khan 36 I. A. 168: 31 ALL. 572 bears on the question of proper representation. This was a suit by a minor for a declaration that two decrees and execution sales resulting therefrom were invalid against her as she had not been properly represented in the proceedings. She had in fact been represented by a disqualified person, and the Privy Council took the view that the minor was never a party in the proper sense of the term to the suits in which the decrees were made, and so she was not precluded from bringing her suit.

26. I now come to the two sources for the doubt which has been cast on the view so long and widely accepted in the Indian Courts.

27. The observations in T. Venkata Seshayya v. T. Kotiswara Rao

MANU/PR/0035/1936, do not trouble me at all. The relevant observations of Lord Thankerton are as follows:

> "In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to the judgments are Lalla Sheo Churn Lal v. Ramnandan Dubey, 22 Cal. 8; Punnayyah v. Viranna 45 Mad. 425 : A. I. R. 1922 Mad. 273; Karri Bapanna v. Yerramma, 45 Mad. L. J. 324 ; A. I. R.1923 Mad. 718 and Ananda Rao v. Venkatadri Appa Rao, 47 Mad. L. J. 700 : A. I. R. 1925 Mad. 258 . Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in Karri Bapanna's case 45 M. L. J. 324 : A. I. R.1923 Mad 710 that the principle of Section 44, Evidence Act can be extended to cases of gross negligence.
>
> The provisions of Section 11, Civil P. C., are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Section 44, Evidence Act which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts."

28. It is surely clear that their Lordships have been careful to express no opinion with regard to the validity of the decisions Cited except one, namely, that in Karri Bapanna's case MANU/TN/0080/1923, the Judges were wrong in extending the principle of Section 44, Evidence Act to cases of gross negligence. But the Indian decisions, taken as a whole, do not base the minor's right of suit upon the provisions of Section 44, but on a substantive right which Section 44 cannot affect. There is, therefore, no question of extending the principle of Section 44 to cases of gross negligence.

29. In referring to Section 11, Civil P. C., their Lordships are careful to qualify the word "litigant" by the word "ordinary" which in the context can only mean that they are safeguarding themselves from any expression of opinion with regard to the position of minors mentioned in the preceding paragraph. On the contrary, these observations do show that their Lordships recognised that there was a special protection in law of minors against the negligent actings of their guardians.

30. I now coma to the Bombay Full Bench case, Krishnadas Padmanabhraa v. Vithoba Annappa Shetti, MANU/MH/0097/1938. The leading judgment was delivered by Beaumont C. J. and Bromfield and Norman JJ. agreed with him, though, as it appears to me from their judgments with some hesitation. I think it is worth noticing that Sir John Beaumont rejects the view of Boys J. in the Allahabad Full Bench case. He says:

> "Boys J., in a dissenting judgment considered that such an action would not lie by virtue of Section 2 and Section 44, Evidence Act. That view cannot, I

> think, be supported. Section 44, Evidence Act, deals with defences open against a judgment in a prior suit relied on as res judicata; but if it be part of the substantive Jaw that a minor can challenge a decree on the ground of negligence by his guardian, it must necessarily be open to him to attack the judgment on that ground without reference to Section 44, Evidence Act. The Evidence Act does not destroy substantive rights."

With that opinion I respectfully agree. Next it is to be noticed that Sir John examines Venkata Seshayya v. Kotiswara RaoMANU/PR/0035/1936 and comes to the conclusion that the question at issue has not been determined by the Privy Council. As already indicated, with that view also I am in full agreement.

31. Sir John next recognises that in India there is a preponderance of authority in favour of the view that a minor can challenge a decree in a separate suit on the ground that such decree was passed against him owing to the gross negligence of his guardian-ad-litem. He goes on:

> "The learned Judges however who take this view appear to me to base their judgments on the consideration that such an action lies under English law and that there is no reason why the principles of English law should not be incorporated into India. I therefore propose to consider the question whether the suggested action does lie under English law. I may say at once that I have succeeded in finding no reported case in the English Courts in which such an action has ever been brought."

He then goes on to refer to Simpson on "The Law of Infants", and doubts whether the cases relied on by Simpson really support his conclusion. He cites Halshury with a similar criticism.

He notes the distinction which Halsbury makes between the infant plaintiff and the infant defendant, and says it seems difficult to justify the distinction. He refers to In re Hoghton; Hoghton v. Fiddey (1874) 18 E 673: 43 L. J. C. 768 and Bays that as far as be can see there is no question of setting aside any decree made against an infant since no such decree had been passed, and he goes on:

> "If it be the law that it is open to an infant to challenge a decree passed against him on the ground of the negligence of his guardian-ad-litem, it seems extraordinary that no case on the subject is to be found in the hooks. The Courts in England no doubt exercise great care in the appointment of a guardian-ad-litem but it is too much to suppose that no guardian has ever fallen short of his duty. I may add that in the course of more than 25 years practice at the Chancery Bar, I never myself came across such an action. The conclusion I come to is that under English law an infant cannot challenge a decree properly passed against him on the ground that his guardian ad-litem was guilty of gross negligence in suffering the decree, and it that is so, I can see no reason why such a cause of action should lie in British India. All the Judged in India who take the view that such a cause of action does lie seem to me to base their opinion on a misconception of English law on the subject. I think also that they underrate the danger and inexpediency of destroying the finality of decrees duly obtained in suits against minors."

32. These observations of Sir John Beaumont must naturally command the very greatest respect, and, therefore, it becomes necessary to do my best, by careful examination of the authorities, to examine whether the references to English law are

really correct. I hope to be able to show that in England the right of the minor to avoid a decree obtained by the gross negligence of his next friend or guardian has, from an early period, been well recognised, though the means of enforcing it may not ordinarily have been by suit. Alternative means did, however, I think, exist, and it is owing to the existence of those alternative means of enforcing the right that authorities, wherein the right was allowed to be enforced by suit, are scanty or wanting. The recognition of the right seems to me, however, the important thing, and the means of enforcing it of subsidiary importance. If the right is there, Indian Judges can enforce it in India upon principles of justice, equity and good conscience, and can allow it to be enforced by such means as Indian procedure renders applicable.

33. Then, with regard to the statement that Indian Judges have underrated the danger and inexpediency of destroying the finality of decrees duly obtained in suits against minors, I would only say that, taking for example Calcutta, the right of minors to question the finality in suitable cases for gross misconduct has been uniformly recognised for over 60 years, but the skies have not fallen.

34. Upon the question of English law, let us see first what the commentators say in the text books. In Macpherson on Infants, at page 386, we find the following ;

> "An infant plaintiff, though thus favoured in the course of the suit is as much bound by a decree and by all the proceedings in a cause as a person of full age, and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of the Courts of Justice as much as any other transactions."

35. Simpson on the Law of Infants, 4th edition, in chap XX, deals with the question, taking separately the cases of infant plaintiff and infant defendant. In regard to the infant plaintiff, he says:

> "An infant plaintiff is, as a general rule, bound by a judgment or order in his own action as much as an adult, even though made by consent without any reference whether it is for the infant's benefit, or though, there has been some irregularity in obtaining it, unless fraud, gross negligence, error or new matter is shown."

He says, "An infant may be allowed under special circumstances to amend his claim after judgment or bring a fresh action (Napier v. Effingham (l726) 2 P. WMS. 401: 24 E. R. 786 is relied on). He then comes to the infant defendant, and first as to real estate says:

> "According to the old practice, the infant was always allowed to show cause in analogy to the parol demurrer, and the same rule obtained after the parol demurrer had been abolished both in the case of legal and equitable mortgages.
>
> It should be explained that under the old law the infant was allowed to plead his infancy and that he ought not to answer until he was of age, and upon this all proceedings were stopped until he attained 21 or according to the technical expression, the parol demurrer. The parol demurrer was abolished under 11 George IV and 1 William IV, C. 47, Section 10. But the practice of giving the infant opportunity to show cause after he came of age continued."

Simpson says that,

> "though a day to show cause against a decree is no now given, except in cases of foreclosure, a judgment against an infant may reserve his rights either absolutely or if he cakes proceedings within a certain time, and such time might. It seems, in analogy to the time to show cause, be enlarged, if necessary. A judgment against an infant with a day to show cause becomes absolute on the expiry of the time limited or on the infant's death."

36. Nest, in Section 4 (page 324) Simpson deals with impeachment of a judgment by an infant. He says that subject to what he had said above an infant defendant is as much bound by a judgment or order of the Court as an adult, but he may set it aside for fraud, negligence, error or new matter. He says (and I shall refer to this again later):

> "Fraud may be a cage of direct collusion or allowing a judgment or order to be made on an erroneous view of facts, it being considered fraudulent to take advantage of the incompetency of the infant to defend himself."

Upon the authority of Hoghton's case (1874) 18 E 573: 43 L. J. C 758 he says:

> "A decree has been impeached where there is gross negligence by the next friend in the conduct of the infant's case."

He goes on :

> "If an infant had grounds of defence which were not before the Court, or not insisted on at the original hearing, be might, according to the old practice, apply to the Court by motion or petition for leave to put in a new answer, and this, on the infant attaining 21, was a matter of course ... Under the present practice the form of the motion or petition will be for leave to put in a new defence."

37. I nest take Daniel's Chancery Practice. In Edn. 8 at p. 105 we find :

> "An infant is usually bound by the effect of any action or proceedings instituted on his behalf, and for his benefit, but if there has been any mistake in the form of such action or the proceedings under it, or in the conduct of them, the Court will, upon application, permit such mistake to be rectified . . . and where the persons acting on behalf of an infant plaintiff by mistake make submissions or offers on his behalf, which he ought not to have been called up in to make, the Court will not suffer the infant to be prejudiced thereby."

38. This is with regard to the infant as plaintiff Dealing with the infant as defendant, we find at p. 114 :

> "Where an infant defendant on coming of age is dissatisfied with the defence put in by his guardian he may apply to the Court for leave to amend his defence or to put in a new one and it seems that this privilege applies as well after judgment has been given as before, but an infant wishing to make a new defence must apply to the Court as early as possible after attaining 21."

At p 116,

> "If the late infant, to whom a day his been given to show cause, seeks to impeach a judgment by showing that he had grounds of defence which were either not before the Court or not insisted upon at the original hearing, it is conceived that he should apply for leave to make a new defence."

39. A. 1333 the learned author says :

> "It has been also paid that where an improper judgment has been made against an infant, without actual fraud, it ought to be impeached by original action."

For this proposition three cases are relied on Richmond v. Tayteur 1721 24 E. R. 691 ; Brooke v. Mostyn 1864 46 E. R. 419 and Hoghton's case 1874 18 R 673 : 43 L J C 758.

40. There remains Hulsbury. In the Halisham edition, volume 17, p. 708, para 1456, we find:

> "An infant plaintiff is as much bound as an adult by a judgment or order in the cause, even though there may have been irregularities in the conduct of unless there has been fraud, or gross negligence on the part of his next friend But in special circumstances he may be allowed on coming of age to amend his claim or to bring a fresh action."

At p. 714, Para. 1464, occurs :

> "A judgment in an action is as binding against on infant defendant as it is against an adult. . . .He may, however, even while an infant, bring another action to impeach the judgment on the ground of fraud or collusion."

It will be noticed that a distinction is made between infant plaintiff and infant defendant.

Gross negligence is referred to in the case of the infant plaintiff, but only fraud or collusion in the case of the infant defendant. This distinction, I speak with hesitation, is perhaps due to the fact that whereas the remedy of the infant defendant for gross negligence was a matter of course upon application for review, it was not so certain, but that the infant plaintiff could only avail himself of the remedy by a fresh action.

41. From the above I deduce that the opinion of the writers was that the infant always had a remedy, on coming of age, for gross misconduct. His right was well recognised. His remedy was certainly by showing cause on the day given, and was probably also by suit in exceptional cases.

42. I have cited, I think, a formidable array of authors. Can they all be wrong ? Well, in the year 1841, in John Malone v. John Malone 1841 S E. R. 71 : 2 P. WMS, 401 , Lyndhuret L. C. said :

> "If the question should arise how far a party, who was an infant during the time when a decree was pronounced, afterwards on attaining 21, is entitled to be let in to make a new defence in a case like this; if that question should arise, it is one which I think will require serious consideration. There is very great obscurity and a great deal of contradiction in the authorities upon that subject, and it is a proper subject for very serious consideration whenever the question may arise."

43. It is evident from this that the answer to the question "what is the English law on the subject ?" is not going to be easy or clear. Let us turn to such authorities as I have been able to discover. We go back to the year 1718 for Fountain v. Caine (1718) 24 E. R. 491 : 1 P. W. 50. This was a case where certain creditors sued for the sale of an estate making the infant heir a defendant through his guardian. The suit was decreed, but in accordance with practice as regards the infant a decree nisi was made. The infant on coming of age moved the master of the rolls for permission to put in a new defence as she alleged that the former defence put in by her guardian was not complete. The Master of the Rolls allowed this, saying that he understood it to be a matter of course, and that there was no other way except this for the infant (on coming of age) to set forth his title, which he ought to have an opportunity of doing. There was no reason why he should be bound by the answer of his guardian, for that would be at the same time to give him liberty to show cause and tie up his hands from showing cause.

44. This then was the position of an infant defendant as far back as 1718. It was recognised that the infant was not bound by the defence put in by his guardian, and, on coming of age, was able to put in a better defence to supplement that by his guardian.

45. The nest case is of 1721, Richmond v. Tayleur, 1721 24 E. . 591. Here an absolute decree was made against an infant without giving him a day to show cause, the decree being by consent of the guardian. Subsequently, the infant and her husband brought a suit asking that the decree be set aside as it was gained by fraud and collusion. The Lord Chancellor said that if fraud had been proved, he would have set aside the decree, but there was no fraud. There is a contemporaneous note to the case which seems to me of great importance. It is stated that it was held in this case that the infant is not bound to proceed by way of an application for rehearing or review, but may impeach the former decree by any original suit in which it will be enough for him to say that the decree was obtained by fraud and collusion or that no day was given him to show cause against it. In other words, if by reason of the decree being made absolute, the infant was deprived of the ordinary means of putting in a new defence in his show cause, then it was open to him to impeach the former decree by fresh suit based merely upon that very fact, so that, in any event, a remedy was available to him without showing fraud or collusion.

46. I now come to a case which has been much commented upon, Sir John Napier v. Lady Effingham 1726 2 P. W. 401 : 24 E. R. 786. It is a case of the year 1726, and its importance is that it deals with an infant plaintiff. An infant, Sir John Napier, sued, through his nest friend, his mother Lady Effingham, who had remarried, to set aside a settlement made in her favour by his father, and Lady Effingham also brought a cross suit against Napier to establish the settlement. Napier asked for leave to bring a new suit on the ground that his case had been mismanaged by his former solicitor, and the Court allowed him to do so. Both cases were beard, and a decree was made from which both parties appealed to the Lords, and it was held that, as to so much of the decree as ordered Sir John Napier's suit to stand dismissed, it should be affirmed with the addition that Sir John should have six months to show cause against it after coming of age. Sir John Napier on coming of age asked for leave to amend his original claim or to bring a new or supplemental suit, as be should be advised, and also asked for leave to amend his defence to the cross suit. The Lord Chancellor called to his assistance the Master of the Rolls. It was held that there was no precedent for amendment of a claim which had been dismissed upon the merits. At the same time it could not be imagined that Sir John was tied to the former

proceedings only in showing cause, for that would be the most imperfect relief which could be given.

Therefore the case was to be treated as if there had been an ordinary decree against an infant relating to his inheritance with a nisi cause within six months of coming of age, in which case it would be plain that the defendant might amend his defence. It was observed that all infant defendants by their answers put in an early claim to the care and protection of the Court, and ought to have it, as they are supposed unable to take care of themselves, and all decrees against them give them six months, after coming of age to show cause, Therefore, Sir John Napier should have leave to put in a new defence, and that meant that his defence might be different from what it was before, and he might examine witnesses anew.

47. So the recognised rule giving the infant defendant a means of overcoming any negligence of his guardian was applied to the infant plaintiff who might have suffered in a similar manner. The order in this case was affirmed on appeal to the House of Lords. It is further to be noticed that Sir John Napier was allowed to bring a fresh suit on account of the original mismanagement of his estate by his next friend (the solicitor).

48. The next case is Anonymous (1729) 25 E. R. 274. A suit was decreed against an infant with the usual provision entitling him to show cause within six months after be came of age. The infant showed cause, and asked to amend his defence by putting in a new defence. The Lord Chancellor allowed the motion, and said that the defendant himself was the best judge at present what would be material for his defence, and since the case of Sir John Napier and Lady Effingham this was a motion of course.

49. I 1729 came the case of Trefusis v. Cotton (1729) 25 E. R. 350, The usual six months had been allowed to the infant defendant. He applied to have that time enlarged, and the Lord Chancellor said that the time of six months allowed, by the practice of the Court was not so sacred, but that in particular cases where the matter was of consequence the Court might enlarge it, and the time was enlarged for three months more.

50. What happened on Trefusis showing cause is reported in the same volume at p. 409. In showing cause no fraud or collusion was alleged, but it was asserted that the guardian had not made a proper defence. The Lord Chancellor said that the infant in such a case cannot come in and controvert the decree by a fresh suit, but he could do it in two ways. If there was fraud or collusion or if the matter that then appeared was not insisted on (i. e., negligence of the guardian), by amending his defence and having a bill of discovery, so that he might have the same remedy by amending his defence as was asked for by Trefusis by proposing a new suit. That it to say, whether he proceeded by amending his defence or by a fresh suit, it came in substance to the same thing, and this, I think, affords the answer to the argument that the substantive right of avoidance by showing cause recognised in England as a matter of course is something quite different from the substantive right of bringing a new suit claimed in this country.

51. The next case is of the year 1747, Gregory v. Moleswort (1747) 26 E. R. 1160 : 3 A. 626 . In regard to this case, Broomfield J., in the Bombay Full Bench case said :

> "It could not be seriously suggested that this case was any authority for holding that according to the English law an infant could bring a suit to set aside a decree on the ground of the negligence of his nest friend or

guardian-ad-litem."

It is, however, a case which has been cited by the text books as an authority, and, though the observations of Lord Hardwicke relied upon were in a sense obiter still I think there is no reason to suppose that it was not a considered statement. The infant sought to bring a fresh suit and it was held that an infant is bound by a decree in a cause where he is plaintiff as much as a person of full age. The former decree was pleaded in bar, and the plea was accepted. The Lord Chancellor, however, in saying that the infant was as much bound as a person of full age said :

> "I know but of one case that is an exception, Lady Effingham v. Sir John Napier, where, upon an appeal from Lord Macclessfied's decree with regard to real estate, the House of Lords gave Sin John Napier leave to shew cause, when he come of age, against his own decree. ..... It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age and this is general, unless gross laches, or fraud and collusion appear in the prochein any (next friend) then the infant might open it by a new bill."

52. There was no suggestion that the decision in Napier v. Effingham1726 2 P. W. 401: 24 W. R. 786 needed reconsideration, and it was also treated as a case where the infant was allowed to open the matter by a new bill (fresh suit) on account of the fault of the next friend.

53. I now come to the year 1805, Carew v. Johnston (1805) 2 S. L. 260 . The Lord Chancellor said :

> "I should wish before I finally decide this case to look into the cases where Courts of Equity have proceeded upon decrees against infants. ..... If a decree has been obtained against an infant, which is erroneous, and the error is not in the judgment of the Court but in the facts on which the judgment is founded, the manner in which the infant proceeds to investigate the decree. . . . . . . is generally by original bill. The proceeding on which the decree against him has been founded according to my recollection of the cases (not having looked into them) is treated as fraudulent; it being considered as fraudulent to take advantage of the incompetency of the infant to defend himself."

It is here suggested that the criterion of fraud in cases where infants are concerned is different from that adopted in cases of ordinary litigants. I shall revert to this later.

54. The nest case is of 1834, Kelsall v. Kelsall, (1834) 39 E. R. 1000: 2 M & K. 409 , A decree had been made against an infant defendant, and on coming of age the late infant petitioned for liberty to put in a new and further defence. Lord Chancellor Brougham said:

> "The question whether the infant defendant on coming of age was entitled to make oat a new case was of importance and of a rare occurrence."

He said that in the opinion of some eminent practitioners the right did not exist and, if it existed, it was, in his opinion, fit to be taken away. On the other hand, if some such latitude wore not given, the right of showing cause would be reduced to very narrow limits. A decree against an infant was erroneous if it had not the clause "unless cause be shown within six months". That either meant nothing on it was

intended to secure the infant against any proceedings taken to his prejudice at a time when the taw supposed him to be absent OF at least not present in such a manner as to be capable of sufficiently defending his rights, and the permission was of no avail to his protection if he be only allowed to show for cause error on the face of the decree or record. Otherwise he would have little advantage over an adult defendant who might have an appeal or rehearing upon the same grounds. He went on:

> "Upon such reasons, probably, the decisions have proceeded which render it now too late to question this privilege, however inconvenient to the administration of justice its exercise may prove."

He noted that the statute (1 W. IV, C. 47 Section 10) abolishing the parol demurrer did not alter the law in this particular. "Upon the whole," he said ;

> "there can be no doubt that the infant is entitled of right, when he comes of age to answer shew and make a, better defence, and to support that defence by evidence."

and be provided, in allowing the application, that the parties should proceed in all respects as if the suit with the exception of the bill, were commenced anew. Parties were to proceed on the new answer exactly as if it had been the first.

55. The next case that I notice is of the year 1864, Brooke v. Lord Mostyn (1864) 46 E. R. 419; 2 D.G. J. & S. 373. This case bears on the question of fraud in relation to infants. It was an appeal by the plaintiff from a decree of the Master of the Rolls dismissing his suit. It is unnecessary to state the facts which are lengthy and involved. It was sought to set aside a com promise, which had been sanctioned by the Court on behalf of the infant, on the supposed insufficiency of the estate to pay his legacy. At the time of the enquiry as to the compromise being for the benefit of the infant, a document relative to the valuation of the estate was in possession of the owners of the estate, but was not produced. It was held that the compromise must be set aside because it was the duty of the owners of the estate to supply all material information in their possession. It was observed that to impeach a compromise made under the order of the Court there must be circumstances amounting in the eye of the Court to fraud in the party claiming the benefit of the compromise, meaning by fraud not moral fraud but what in the eye of the Courts of equity was considered as amounting to fraud, and it was held that if there is knowledge on one side which is withheld, the withholding of the knowledge amounts in the view of the Courts of Equity to fraud. Persons were before the Master whose duty to the Court and to the infant it was to bring to the attention of the Master every material fast within their knowledge, but who omitted to do so. This was the position before the Master of the Bolls, whose decision was recovered by the Lords Justices. It was then brought by appeal to the House of Lords where the decision of the Lords Justices was reversed. But the reversal did not affect the statement of the law as laid down in the Courts below (See Law Reports, English and Irish Appeal Cases, volume 4, 1869 page 304).

56. I now skip to 1874, the important case of Hoghton v. Fidey (1874) 18 E. 573: 43 L. J. O. 758 . In the Bombay Full Bench case the writers of the text books have been criticised for treating this case as an authority for the proposition that the late infant could bring a fresh suit to upset the decree, inasmuch as there was no previous decree against the infant, but in her favour, and it was not sought to upset it but to enforce it.

57. So far as I can understand the report, these criticisms do not appear to be

accurate. Whether the decree was against the infant or in her favour, it was still a decree. In fact, I think, it can have been only partly in her favour, and it was undoubtedly sought not to enforce that decree but to go behind it so as to secure rights for the infant which the decree did not give. The petition was in fact for liberty to file a bill or supplemental bill in the nature of a bill of review. The petitioner was one of the children of Lady De Houghton who, by her will, had given her personal estate to trustees of whom two, Colonel Black burn and a Solicitor, Fidday, proved the will and accepted the truate. Under these trusts the estate was to be converted into money and invested for the benefit of her children. After her death a suit was brought in the name of her infant children, through a next friend, against the executors charging Fidday with having misapplied the asset and seeking to have the estate administered by the Court. Colonel Blackburn concurred in the institution of an ordinary administration suit against himself and Mr. Fidday, and an order was obtained staying all further proceedings in the first suit as not being for the benefit of the infants. The usual administration decree was made on the summons, but the order was never carried into Chambers, and no further step was taken in the suit.

58. That is to pay, the suit in which Fidday was charged with misappropriation was stayed as not being for the benefit of the children, and the administration decree in the other suit was never executed. The order staying proceedings in the first suit was obtained upon an affidavit by the Solicitors that Fidday had rendered full and satisfactory accounts, but after Fidday's death, the petitioner alleged, it was discovered that Fidday had been allowed by Colonel Blackburn to obtain sole possession and control of the securities, and had converted them to his own use and died bankrupt. It was now desired to carry on the administration suits with a view to make Colonel Blackburn liable for the losses occasioned by the default of his co-trustee. So practically what the petitioner asked was to re-open the ordinary administration decree and the order staying all further proceedings in the first suit, and to proceed with the suit on a new ground and for a different relief.

59. It was explained for the petitioner that the leave of the Court, which might ordinarily have been unnecessary, was sought because the petitioner desired to be free to add to the decree, if necessary, without running the risk of having to meet an objection that the leave of the Court was required. The objection made on behalf of Colonel Blackburn was that permission should not he given unless the Court was satisfied that the facts on which the petition was based, bad come to the knowledge of the applicant and her agent since the period when it could have been used in the original suit. This objection was rejected.

60. The order of Sir Richard Malins, Vice Chancellor, shows clearly that he treated it as an application to go behind the consent decree, for he said :

> "The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence at want of knowledge on the part of her then next friend. .... The case was one of a next friend having taken a common administration decree at a time when there was no reason to suspect that anything more could be required, and having grossly and inexcusably neglected his duty in not even having carried the decree so obtained into Chambers."

He pointed out that had the consent decree been prosecuted Fiddey might possibly have been able then to find the money. ''However that may be," he said,

> "the proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to ft. She is entitled to have a next friend who is diligent and will protect her interests."

He held that the infant was entitled to file a bill. He said that possibly the leave of the Court might not be necessary, but, on the other hand, it might be necessary to add an enquiry to the decree in the suit, and so it might be more proper that there should be the leave of the Court to make that addition. in short, the leave of the Court was given for a fresh enquiry; in other words for going behind the consent decree, and not merely executing it. With regard to the proposition that it was necessary to show that the mistake could not have been earlier discovered by reasonable diligence, he said that the case of Thomas v. Rawtings (1865) 34 Beav. 60 : 11 L. T. 721, in which it was held that that was necessary in a person sui juris, had no application to an infant of tender years who can be guilty of no negligence and cannot be answerable for the negligence of her next friend.

61. Upon this examination of the decisions, I have formed the conclusion that it is not a case of the test book writers unanimously making a mistake. The substantive right of an infant, on attaining majority, to avoid a decree obtained against him owing to the gross negligence of his next friend was, in my opinion, undoubtedly recognised in England from early times. The reason why Sir John Beaumont was unable to find cases where that right was exercised by fresh suit was that a different procedure was adopted, whereby it could be successfully enforced, so that there was ordinarily no reason to resort to a suit. But if by any reason the late infant was unable to adopt that procedure, then a fresh suit could be brought based on that ground alone. Sir John Beaumont speaks only of the infant defendant, and negligence on the part of the guardian-ad-litem. The procedure for his relief was so clear and universally followed that it could hardly be expected that cases would be found where he had to resort to suit But the position of the infant plaintiff was somewhat more obscure. The cases do, however, in my view, establish that his right was equally recognised. It was recognised in Napier v. Effingham 1726 P. W. 401 : 24 W. R. 786) and Houghton v. Fiddey 1874 18 E. Q. 673 ; 43 L. J. C. 768, and it was referred to in Gregory v. Molesworth 1747.26 E. R. 1160 ; 3 A. 626.

62. The right of the infant to make a new answer was for all practical purposes the same as a right to bring a fresh suit since it entitled him to take new grounds and to adduce fresh evidence, The existence of the right is the main thing. The procedure adopted for enforcing it is quite another thing and of comparatively minor importance. In England there was a special procedure. In India, where a substantive right exists, it can be enforced by suit under Section 9, Civil P. C., unless there is anything in law to prevent it. I find nothing in the laws of India to prevent the exercise of that right. Whether it can also be enforced by an application for review seems to me doubtful. If it can be, BO much the better.

63. I would respectfully adopt the remarks of the learned Judges in Lalla Sheo Churn Lal v. Hamanandan Dobey 22 Cal. 8 :

> "According to the law as administered in England, the gross negligence of his nest friend would entitle an infant to obtain the avoidance of proceedings undertaken on his behalf. We can see no reason why in this country an infant should be in a worse position . . . . These rules (of equity and good conscience) cannot be more restricted than the rules of equity administered

> in England. There is no authority in this country which could prevent us giving effect to the English rule,"

I would also adopt with respect the observations of Bennett J. in the two cases in Kamakshya Narain v. Fatehkumar, MANU/BH/0110/1947and Ramudar Singh v. Ramsurat Singh MANU/BH/0096/1947 which I have quoted. They seem to me, if I may say so, to express the progressive and enlightened view. As law has developed, the principle that an infant needs and is entitled to the special protection of the Courts has become more and more clearly recognised, and many laws have been made in England to secure that end. To hold now at this late stage that an infant is to be debarred, when he comes of age, from asserting his just rights, merely because some one, taking upon himself the burden or opportunity to represent the infant, at a time when the latter had no say in the matter, chose to put forward the claim before the Courts in a manner so negligently as to result in a decree shutting out that claim for ever, would be to put back the clock of progress and upon grounds unsustainable in law and wholly unjustified in equity. In India the right of the minor to special protection has been recognised from the earliest times. In the Laws of Manu, Ch. 8, verae 27, we find :

> "The King shall protect the inherited (and other) property of a minor, until he has returned (from his teacher's house) or until he has passed his minority."

(Sacred Books of the East, edited by Max MulIer, Vol. 26, p. 257). I would without hesitation answer the question referred to us in the affirmative.

64. Before I conclude I refer with considerable hesitation to another possible aspect of the matter, namely, the observation in some of the text books that, in the case of infants, withholding of information, which it is the duty of all concerned in cases of infants to place before the Courts, amounts to fraud in the eye of equity. I have referred to at least two cases where that seems to have been recognised in the English Courts. If this is so, there may well be cases where the infant may be able to assert fraud is the nature of gross negligence on the part of his nest friend or guardian-ad-litem where them would be no question of fraud as between ordinary litigants. If the gross negligence is wilful negligence, in the shape of neglect by the guardian to bring forward the available materials which it is his duty to the infant and to the Court to supply, then, I think, that will be fraud, though not moral fraud, in the eye of equity. The Privy Council has said in Venkata Seshayya v. Koteswara Rao MANU/PR/0035/1936.

> "It is not for the Court to treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper Inference from the facts."

But it may well be that where infants are concerned fraud will be a proper inference from the facts where in the case of adult litigants it would not be so.

65. I do not like the expression 'gross negligence' as it makes it difficult to fix the dividing line between cases where negligence will enable the avoidance of the decree and where it will not. I would prefer to say, quoting Trevelyan on the Law Relating to Minors, Edn. 5 p. 284 :

> "It is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened up. It must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful."

C.M. Agarwala, C.J.

66. I have had the advantage of reading the judgment of Meredith J., and agree that the question referred to us must be answered in the affirmative. I was at first impressed by the absence of any cases in the English Courts in which a decree against a minor defendant had been set aside in a suit on the ground of negligence, and by the observation of Sir John Beaumont, Chief Justice of the Bombay High Court, that in his twenty five years' experience as a Chancery practitioner, he had not come across such an instance. A thorough examination of the question at the hearing of the present appeal, however, has shown that the reason for this is that in Chancery there was a procedure which enabled a minor defendant on attaining majority to reopen the entire litigation. The existence of this procedure explains the absence of cases in which a decree against a minor has been set aside in a suit on the ground of negligence. The authorities in England, however, are quite clear as to the existence of the minor's right to have a decree set aside on the ground of negligence of his guardian and that there was an effective remedy in chancery of which he could avail himself on attaining majority. The existence of that eight has also been consistently recognised in this country until a note of dissent was sounded in Bombay and in the later cases of this Court. There being no procedure equivalent to the procedure in chancery, to which reference has been made, the minor's remedy in India must be looked for elsewhere. As a remedy by way of review is not available in view of the restricted meaning given to the provisions of Order 47, Rule 1, Civil P. C., the only remedy left is by way of suit.

Jugal Kishore Narayan, J.

67. The question referred to the Full Bench is as follows :

> "Whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit even if he has not succeeded in proving fraud or collusion on the part of such guardian."

The question raised has now become a complicated question, because there is considerable divergence of judicial opinion with regard to it in this country, and because up till now there is no clear pronouncement upon the point by the Judicial Committee of the Privy Council.

68. Their inciple of res judicata has been incorporated in Section 11, Civil P. C., and the rules regarding suits by or against minors are embodied in Order 32 of the present Code of Civil Procedure which are equivalent to Sections 440, 441, 442 and certain other sections of the old Code. The provisions of Section 11, Civil P. C., to quote the language used by their Lordships of the Privy Council in the case of T. Venkata Seshayya v. T. Kotiswara RaoMANU/PR/0035/1936, are mandatory, and the Privy Council cage of Mt. Bibi Walian v. Banks Behari Pershad Singh30 I. A. 182: 30 Cal. 1021 , is an authority is support of the view that whenever it is found that a minor's interest has been effectively represented in suit, it would not be open to the minor attaining majority to challenge the decree passed against him even if it is found that there were certain defects of procedure or irregularities with regard to the fact of the appointment of the guardian in the suit. There was some discussion at the Bar even with regard to the question as to in what circumstances a decree against a minor can be treated as void or voidable, though, in my opinion, in view of the Privy Council decision referred to above and certain other cases decided by this Court as

well as by the Calcutta High Court this question should not have been raised at all in this present litigation. Their Lordships of the Judicial Committee in the case of Hari Saran Moitra v. Bhuneshwari Debi 15 I. A. 195: 16 Cal. 40 approved of the decision that had been made by the Calcutta High Court in the case of Suresh Chander v. Jagut Chander 14 Cal. 204. The decision of the Calcutta High Court in Suresh Chander v. Jagut Chunder 14 Cal. 204 , was that if there is an error of description in a plaint of a suit which is substantially brought against the minor that error of description cannot without proof of prejudice invalidate a decree against the minor and also that the want of a formal order appointing a guardian ad litem is not fatal to the suit, when it appears from the face of the proceedings that the Court has sanctioned the appointment. This Court held in the case of Satdeo Narain v. Ramayan Tewari MANU/BH/0031/1923, that where a minor is properly a party to a suit, that is, if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. This case was referred to with approval in a very recent case of this Court, namely, Madhusudan v. Jogendra 23 Pat. 640: A. I. R. 1915 Pat. 133, and in this case the distinction between a void decree and a voidable decree was pointed out, and Manohar Lall J, with whom Sir Fazl Ali C. J , agreed, further observed that the words that the decrees are null and void against the minors are often loosely used. The ratio deoidendi from the decisions of this Court and the Calcutta High Court and also from the Privy Council cases certainly is that even if a minor is represented by a negligent guardian, it cannot be said that he is not represented at all. Even if some of the decisions say that a minor represented by a negligent guardian is to be treated as though he is not represented at all, I would not be able to follow those decisions, it being entirely another point if on the basis of the substantive law or on the basis of the rules of justice, equity and good conscience as they prevail in England, we are inclined to hold that gross negligence on the part of a guardian ad litem is a ground for avoiding the decree against a minor and that the principle of res judicata would not operate as a bar to a suit instituted by the minor on attaining majority for setting aside the decree passed against him during the period of his minority on the ground of gross negligence on the part of his guardian ad litem. Probably, this sort of discussion would not have at all been raised before us in this case but for certain observations of Sulaiman J. in the Full Bench case of the Allahabad High Court reported in Siraj Fatma v. Mahmud Ali, 54 ALL. 646: A. I. R. 1982 ALL. 293 . His Lordship observed as follows:

> "It therefore follows that the real basis of the binding character of a decree again at a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there be such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even it there be any defeat in the formal appointment of a guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected."

In a subsequent decision of the Allahabad High Court reported in Dwarika Halwai v. Sitla Prasad, A.I.R. 1940 ALL. 266I.L.R. (1940) ALL. 344 Bennett and Yerma JJ interpreted this passage to mean that even where there was an order appointing a person as guardian, but that if that guardian did not properly represent the minor, the decree would not be binding on the minor. Their Lordships say that the Full Bench meant that such a decree would be void ab initio and not merely voidable. The Full Bench case of the Allahabad High Court as well as the case of Dwarika Halwai v. Sitla

Prasad MANU/UP/0076/1940 were considered by the Oudh Chief Court in Mohammad Baksh v. Allah Din MANU/OU/0015/1941by Bennett and Madtley JJ. and their Lordships in this case held that though the minor has on attaining majority the right to set aside a decree obtained against him on the ground of his guardian's negligence, it is not open to him to assume such negligence and to treat the decree as void on that ground. Their Lordships in disagreement with what had been held by the Allahabad High Court observed that the existence of a flaw in the appointment of a guardian, resulting in the minor not being properly represented, is one thing and the negligence of a properly appointed guardian is quite another. In the Full Bench case of the Allahabad High Court Sulaiman J. made another important observation, and it is this; that it is possible to avoid the effect of the provisions of Section 11, Civil P. C. by holding that the minor ceased to be a party to the suit when his guardian ad litem was grossly negligent and that there can be no bar of res-judicata when a party in a subsequent suit was not properly speaking a party to the previous suit. I cannot go so far as his Lordship has gone and assent to the proposition that if a guardian is found to have acted negligently in a cause there would be deemed to have been no representation in that cause at all on behalf of the minor. I say with the greatest respect that because the decision of the Full Bench of the Allahabad High Court has proceeded on the assumption that if a guardian acts negligently there would be deemed to have been no representation on behalf of the minor at all. I find it difficult to follow it. I am altogether unable to subscribe to the view which his Lordship, Sulaiman J., has taken so far as the question, of representation on behalf of the minor is concerned. The question that has been referred to us for decision by Manohar Lall and Ray JJ. presupposes that the minor was properly represented. What we are called upon to determine is whether a minor who was quite properly represented in a particular suit can avoid the decree passed against him in that suit on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit. I cannot hold that a guardian who is negligent is no guardian at all, and in view of the conflicting decisions on this point I have no hesitation in agreeing at least with this observation of Broomfield J. in the case of Krishnadas Padmanabhrao v. Vithoba Annappa MANU/MH/0097/1938, that the question whether minors are properly represented and whether decrees obtained against them are legally valid or not cannot without risk of hopeless confusion be left to depend on "the illusory distinction between negligence and gross negligence". That there has been a confusion with regard to this point cannot be doubted. The Full Bench case of the Allahabad High Court Siraj Fatma v. Mahmud Ali64 ALL. 646: A. I. R.1982 ALL. 293 was decided before the pronouncement by the Privy Council in T. Venkata Seshayya v. T. Kotiswara RaoMANU/PR/0035/1936 and his Lordship, Sulaiman J., repelled the contention that a litigant who wants to avoid the provisions of Section 11, Civil P. C. can do so only by taking advantage of Section 44, Evidence Act. His Lordship has observed at p. 661, that in his opinion there can be no doubt that the right to avoid a judgment exists independently of Section 44, Evidence Act, and at p. 659, while discussing the rule of res judicata, his Lordship has observed as follows :

> "In India we have codified law. The rule of res judicata is contained in Section 11, Civil P. C. That section may not be absolutely exhaustive, and the principle of res judicata may apply for instance to execution proceedings, although execution proceeding do not come within the letter of the section. But to say that Section 11 has certain exceptions not get forth therein is quite another matter. We here have a statutory enactment prohibiting a Court from re-trying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit between the same parties litigating under the same title, in a Court competent to try the

> subsequent suit and which has been heard and finally decided by such a Court. In the face of the express language of the Act it cannot be said that the section is not of general application but that there are certain exceptions to it which are not set forth therein.

His Lordship has recognised that we in India have a statutory enactment prohibiting a Court from re-trying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit and also that in the face of the express language of the Act it cannot be said that the section is not of general application, but that there are certain exceptions to it which are not set forth therein. But the difficulty arises when his Lordship Bays that a right to avoid judgment on the ground of fraud exists independently of Section 44, Evidence Act. No further discussion on this point would be necessary or even permissible if we find that his Lordship's view that a right to avoid judgment on the ground of fraud exists independently of Section 44, Evidence Act, cannot be sustained because of the dictum that was laid down by the Privy Council. In Venkata Seshayya v. Kotiswara RaoMANU/PR/0035/1936, their Lordships of the Judicial Committee have said that the provisions of Section 11, Civil P. C. are mandatory and that the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of Section 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. I am at present discussing the case of an ordinary litigant and the view of Sulaiman J. that a right to avoid a judgment on the ground of fraud exists independently of Section 44, Evidence Act cannot be supported when their Lordships of the Judicial Committee have clearly expressed themselves on the point and said that the ordinary litigant can avoid the provisions of Section 11, only by taking advantage of Section 44, Evidence Act. The view taken by Sulaiman J. has been adopted by a Full Bench of the Lahore High Court in Iftkhar Hussain Khan v. Beant Singh A. I. R. 1946 Lah. 233: I. L. R. (1946) Lab. 515 and by a Single, Judge of the Calcutta High Court in Mahesh Chandra v. Manindra NathMANU/WB/0013/1941though these cases were decided after the pronouncement by the Privy Council, and the view of Sulaiman J., that Section 44, Evidence Act is permissive and not prohibitive, and that the right to avoid a judgment exists independently of the Evidence Act has been adopted without considering the observation that was made by the Privy Council. Eashid J., as he then was, who delivered the leading judgment of the Lahore High Court expressed his agreement with the views of Sulaiman and Sen J J. without noticing, that the question whether the provision of Section 11, Civil P. C., could be avoided in any other manner except by taking recourse to the provisions of Section 44, Evidence Act stood concluded by the observation of the Privy Council which was made subsequent to the decision of the Full Bench of the Allahabad High Court. I can say with the greatest respect to the learned Judges who decided the Lahore case, and to Mukarji J. who decided the Calcutta case that the Full Bench of Allahabad High Court had not the advantage of the decision of the Privy Council which their Lordahips had. Mukharji J. in Mahesh Chandra v. Manindra NathMANU/WB/0013/1941 : 45 C. W. N. 508:A.I.R. 1941 Cal. 400, felt bound by an earlier decision of the Calcutta High Court in the case of Lalla Sheo Churn Lal v. Ramnandan Dobey 22 Cal. 8. But this decision had been made long before the Privy Council came to decide the case of T. Venkata Seshayya 64 I. A. 17: MANU/PR/0035/1936 . The Full Bench decision of the Lahore High Court was no doubt made after the pronouncement of the Privy Council, but in the Lahore case I do not end any reasoning independent of those which had been adopted by Sulaiman J., in Siraj Fatma v. Mahmud AliMANU/UP/0010/1932The Madras case, Subbaratnam Chettiar v. Vidyasankar, reported in A. I. R.1937 Mad. 472: 169 I. C. 694, which is the decision of Varadachariar J., as he then was, does not make any reference to the

Privy Council decision and almost all the cases which have been referred to in this decision are cases which were decided before the pronouncement by the Privy Council. The Madras case, Egappa Chettiar v. Ramanathan-Chettiar. A. I. R. 1942 Mad. 384: I.L.R. (1942) Mad. 526is no doubt a case which was decided after the pronouncement by the Privy Council, but the Judges of the Madras High Court were of the opinion that their Lordships of the Judicial Committee had not decided the question whether a person could rely on the gross negligence of his guardian ad litem in a previous suit when he sought to set aside a decree passed therein. In this case there is an observation that the judgment of the Privy Council does not effect any change in the law, but this is an observation with which I cannot agree. What was held by Sulaiman J., in Siraj Fatma v. Mahmud AliMANU/UP/0010/1932, concerning Section 11, Civil P. C. and Section 44, Evidence Act cannot be regarded as good law in face of what the Privy Council have laid down and if there is any decision of any of the High Courts in India subsequent to the decision of the Privy Council, ignoring the pronouncement made by the Privy Council, then that decision cannot also be followed by us.

69. It is true that their Lordships of the Judicial Committee refused to discuss the validity of the decisions of the Indian High Courts which lay down that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem by bringing a subsequent suit. But their Lordships did make certain observations which to my mind have considerably shaken the authority of the Calcutta case in Sheo Churn Lall v. Ramnandan, 22 Cal. 8, the Allahabad Full Bench case reported in Siraj Fatma v. Mahmud Ali MANU/UP/0010/1932and the Lahore case reported in Ifthkar Husain v. Beant Singh A. I. R. 1946 Lah. 233: I. L. R. (1946) Lab, 515 .

70. The first principle which their Lordships of the Judicial Committee have laid down is that the provisions of Section 11, Civil P. C., being mandatory, and the ordinary litigant can only avoid its provisions by taking advantage of Section 44, Evidence Act. Boys J., in his dissentient judgment in the case of Siraj Fatma v. Mahmud Ali MANU/UP/0010/1932 had observed that while by Section 11, Civil P. C., the judgment, given that other necessary conditions exist, is conclusive, an exception was provided by Section 44, Evidence Act and he further observed that there was no distinction between the rule of evidence permitting proof of fraud or collusion and the rule of evidence permitting evidence of negligence and that consequently evidence can not be given of negligence on the part of a guardian in order to arrive at a conclusion that a decree can be treated as a nullity. According to his view, gross negligence had been omitted from Section 44, deliberately and the idea of putting gross negligence of guardian on the same footing as fraud and collusion was absent from the minds of the Legislature. In my opinion the Privy Council decision lends considerable support to the opinion of Boys J. Though the opinion of Boys J., was not accepted by Sir John Beaumont in Krishnadas v. Vithoba MANU/MH/0097/1938, it ought to be accepted by me now because of the pronouncement of the Privy Council. It gets amply established by the Privy Council decision that the provisions of Section 11, Civil P. C., can be avoided only by taking advantage of Section 44, Evidence Act, and the Privy Council does not speak of any substantive right to avoid the provisions of Section 11, Civil P. C., independently of Section 44, Evidence Act, it being another matter what their Lordships meant by using the word "ordinary litigant". The point whether they wanted to exclude a minor from the category of an ordinary litigant is a different point, and for the present I am only pointing out that it is now a principle well-recognised by the Privy Council that the provisions of Section 11, Civil P. C., can be avoided only by taking advantage of Section 44, Evidence Act. I cannot now agree

with the view of Sir John Beaumont that there is a substantive right in any litigant independently of what is contained in Section 44, Evidence Act to avoid a judgment.

71. The second thing which gets established by the Privy Council decision is that the distinction between negligence and gross negligence is elusive, and that negligence or gross negligence cannot be treated as fraud or collusion. Their Lordships when they pointed out that the distinction between negligence and gross negligence was merely elusive certainly meant that no line of demarcation could be fixed between negligence and gross negligence, and when they said that the Court should not treat negligence or gross negligence as fraud or collusion they had in mind the confusion that had often been created on account of treating negligence as gross negligence and gross negligence as fraud or collusion. As for example, in the case of Mathura Singh v. Rama Rudra Prashad Sinha MANU/BH/0062/1935, Khaja Mohammad Noor and Dhavle JJ. observed that gross negligence amounts to fraud and affects the proper representation of the minor and thus takes away the jurisdiction of the Court to pass a decree, as a Court cannot pass a decree against a minor unless he is represented by a guardian. With the greatest respect for the learned Judges who decided that case, I should say that I am not able to adopt the principle enunciated by their Lordships and I respectfully agree with the observation of Broomfield J. in the Full Bench case of the Bombay High Court that the question whether minors are properly represented and whether decrees obtained against them are legally valid or not cannot without risk of hopeless confusion be left to depend on the illusory distinction between negligence and gross negligence. In actual practice it would be at times very difficult to distinguish between negligence and gross negligence, and in deciding the question referred to us we have to bear in mind the observation of their Lordships of the Judicial Committee that the distinction between negligence and gross negligence is after all elusive.

72. The third important observation of their Lordships of the Judicial Committee is that they are not prepared to agree with the view expressed in Kari Bapanna v. Sunkari Yerramma MANU/TN/0080/1923, that the principle of Section 44, Evidence Act can be extended to cages of gross negligence. In order to understand what their Lordships meant we will have to look to the decision in Kari Bappanna's case MANU/TN/0080/1923which was to the effect that cases of gross negligence are on the same footing as cases of fraud and that on principle no distinction could be made between the one class of cases and the other. Their Lordships of the Judicial Committee expressed their disapproval of this view and definitely laid down that the principle of Section 44, Evidence Act cannot be extended to cases of gross negligence. We should consider all the three principles laid down by their Lordships together, namely : (i) that the distinction between negligence and gross negligence is elusive, (2) that the principle of Section 41, Evidence Act cannot be extended to cases of gross negligence and (3) that the provisions of Section 11, Civil P. C., can only be avoided by taking recourse to the provisions of Section 44, Evidence Act, The cumulative effect of these three principles to my mind is that a minor cannot avoid a decree passed against him by alleging gross negligence on the part of his guardian ad litem by instituting a subsequent suit. On behalf of the appellant, very great stress was laid on the use of the word "ordinary" by their Lordahips of the Privy Council and it was argued that their Lordahips intended to exclude a minor from the operation of the rule laid down by them. I would have attached some weight to this argument had not their Lordships said that they were not prepared to agree with the view expressed in Kari Bapanna's case MANU/TN/0080/1923. This is a case in which it had been pleaded that a previous decree was invalid because it had been obtained owing to negligence of the guardian and their Lordships laid down that they were not prepared

to agree with the view expressed in this case. Their Lordships certainly meant that either according to Section 44, Evidence Act or on the principle on which that section was based a minor cannot avoid it decree on the ground of gross negligence by the guardian, and I need not repeat that the result of all the observations made by their Lordships is that the authority of the cases on which the appellant's learned lawyer has relied before us has been considerably shaken. It cannot be said that all kinds of litigants except a minor litigant are ordinary litigants. A pardanashin lady, a mutwalli of a wakf property and an asthaldhari or the mahanth of a Hindu temple are not ordinary litigants, but it cannot be asserted that they can avoid the provisions of Section 11, Civil P. C. There was at least one case in this Court, namely, the unreported case of Ganesh Prasad Singh v. Prem Lall Chowdhury (A. P. C. D. No. 163 of 1941) in which relying on the Privy Council decision Reuben J. and Sir Fazl Ali C. J., held that gross negligence was obviously insufficient to entitle a minor on attaining majority to claim the protection of Section 44, Evidence Act. I need not refer to the other cases of this Court, when my view is that the question referred to us can be decided on the basis of the Privy Council ruling.

73. As, however, some English decisions have been cited before us, it is necessary that I should express my view as to how far we should depend upon the English decisions for the determination of the point raised. Even, Sulaiman J. recognised that in India we have statutory enactment prohibiting the Court from retrying an issue in which the matter directly and substantially involved had been directly and substantially in issue in a former suit between the same parties litigating under the same title, in a Court competent to try a suit which had been heard and finally decided by the Court. His Lordships says that in the face of the express language of the Act, the question is of general application admitting of no exceptions. His Lordship further recognised that though in England gross negligence of the guardian is good ground for the avoidance of a decree the general practice in England is to allow review in a case where negligence is asserted and by a separate action where fraud or collusion is asserted. Besides the statutory rule of the res judicata we have got elaborate rules here to secure the proper representation of minors in civil actions provided by Order 32, Civil P. C. After having considered the English cases which have been cited before us or which we could find out, I am inclined to agree with the views of Broomfield J. as expressed in the Full Bench case of the Bombay High Court that the, infant's right in English law seems to be no more than the compliment of the Court's duty to protect his interest. It used to be the practice in England to give infants six months' time after they came of age to show cause against the decree and the infants could put in a new answer and examine witnesses in defence which may be different from what it was before. Naturally, because of such a provision and because the right to fair hearing had been reserved for the infants before the decree became final in English law some cases cropped up in which the minors on attaining majority were permitted to question the decrees passed against them. The case of Gregory v. Molesworth 1747 3 A . 626 :26 E. R . 1160, is generally cited as an authority for the general rule that a minor is as much bound by a decree as an adult, and Lord Hardwicke who delivered the judgment in this case made the following observation :

> "It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, of fraud and collusion appear in the prochein amy, then the infant might open it by a new bill."

It seems to me to be doubtful that this case is a clear authority for holding that

according to English law an infant can bring a suit to set aside a decree on the ground of gross negligence on the part of his guardian ad litem. Another case which is often cited is the case of Hoghton v. Fiddey (1874) 18 E . 573: 43 L. J. C. 758. So far as this case is concerned, I would respectfully adopt the comments of Broomfield J. This was a case in which there was no decree against infant's father; there was a decree in their favour, for administration. The decree had not been enforced for seven years and then the infant through a next friend wanted to reopen the proceedings in order to make the decree effective. There is ample force in the argument that in this case there was no recognition of any right to bring a suit to set aside a decree. In Brooke v. Lord Mostyn (1864) 46 E. R. 419 there is an observation which runs as follows :

> "The rule which applies between adults seems to me to be not less applicable to compromises by the Court on behalf of infants. The orders of the Court cannot be set aside on grounds less strong than those which would be required to set aside the transaction between competent parties. Whether the grounds which would be sufficient to set aside a compromise between competent parties would in all cases be sufficient to set it aside when sanctioned by this Court, I do not think it necessary for us in this case to determine. There is not, as I apprehend, any doubt that a decree or order may be impeached for fraud by original bill, and I pass by therefore the argument which WHS urged at the Bar as to a bill for review being necessary to set aside the order, and the consequences which would follow upon that argument. It is sufficient to say, that in my opinion the plaintiff, in order to entitle himself to relief in this suit, must make out a case of fraud and that this bill, therefore, is properly founded and the case was properly rested at the Bar upon that ground, This is the principle which, in my judgment, ought to be applied to the determination of this case, and it is upon this principle I rest my judgment upon it."

As was pointed out in Kelsall v. Kelsall. (1834) 39 E.R 1000 :2 M & K..409, a decree against an infant is erroneous, if it has not the clause, "unless cause be shown within six months", and that this is intended to secure the infant against any proceedings taken to his prejudice, at a time when the law supposes him to be absent, or at least not present, in such a manner as to be capable of sufficiently defending his rights. This to my mind explains the position of an infant as it prevails under the English law. The case of Richmond v. Tayleur (1721) 24 E. R. 591, contains the following note :

> "In this case it was held, that where an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit (but see Bennet v. Lee (1742) 2 A . 487 : 26 E. R. 694, neither is he bound to proceed by way of rehearing or bill of review, but may impeach the former decree by an original bill, In which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to shew cause against it..."

The following observation was made by the Lord Chancellor in Sir John Napier v. Lady Efingham, (1726) 24 E. R. 786 : 2 P. wms. 401 :

> "All infant defendants by their answer put in an early claim to the care and protection of the Court in relation to their right, and ought to have it, for as

> much as they are supposed unable to take care of themselves; which arises from the general superimendency this Court has over infants; all decrees against them give six months after they come of age, to shew cause; and therefore Sir John Napier in the present case ought to have leave to put in a new answer."

On the basis of the decision in Hoghton's case, (1874) 18 E. 573 : 43 L. J. C. 758, Simpson in his book on Infants says as follows :

> "A decree has been impeached, where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree."

But in the subsequent paragraph of his book where he points out the mode of proceeding, be has observed that though an infant may commence a fresh action to set aside the judgment on the ground of fraud, collusion or error, the prudent and proper course is first to apply in the original action for the leave of the Court. Simpson has quoted the decision of Kelsall v. Kelsall, (1834) 39 E. R. 1000 : 2 M. & K. 409, in support of his view that an infant on attaining the age of 21 may set up a new defence. But that decision appears to be based mainly on the assumption that under the English law the infant enjoys a certain kind of special privilege. Undoubtedly, there are some observations in some English cases which go to show that an infant on attaining majority can challenge the decree passed against him during the period of his minority but on a perusal of the cases which have been placed before us I am of opinion that an infant in England enjoys such a privilege because of certain statute. In Halsbury's Laws of England the gist of the law on the subject is given in the following language :

> "A judgment in an action is as binding against an Infant defendant as it is against an adult ; but if it was obtained on the footing of his being of age, it is in the discretion of the Court to set it aside. He may, however, even while an infant, bring another action to impeach the judgment on the ground of fraud or collusion."

If it is found, as it must be found, that in the English law there is a particular statute giving certain privileges to infants, I do not think it will be quite safe to base the decision on the English cases. Such a right has not been pre served to infants by the Code of Civil Procedure which instead contains elaborate rules for making the decree effective against the minors. These elaborate rules would not have been framed by the Indian Legislature bad it not been the intention of the Legislature in this country to protect the interest of the innocent plaintiff.

74. I would sum up my views on the question referred to us in the following sentences : (1) A minor if he is properly represented in a suit is bound by the decision arrived at therein just as an adult is, and this is the combined effect of Section 11 and Order 32, Civil P. C. (2) A minor seeking to avoid the provisions of Section 11, Civil P. C. can only do so by taking advantage of Section 44, Evidence Act. (3) The principle of Section 44, Evidence Act cannot be extended to cases of gross negligence. (4) The point referred to us should not be decided on the basis of English cases, firstly, because in England there is a statute which gives protection to infanta, and, secondly, because in India we have stereotyped and statutory rules for making effective decrees against the minors.

75. I am, therefore, of the opinion that the question referred to us should be

answered in the negative.