

VENKATASAMI  
P.  
KRISHNAIA.

it would not have required registration, section 17 (h). The agreement to transfer the mortgage was so far carried out that the deed of transfer was executed and no suit will lie to compel defendant to do that which he has already done. The only act wanting on his part to complete the contract was to register the deed of transfer, and this act, as we have shown, he could only be compelled to do by the proper proceeding under the Registration Act, followed by suit under section 77, if plaintiff failed to obtain his rights by such proceedings.

We must reverse the decrees of the Courts below and dismiss the suit throughout, but without costs, as it has been found that defendant was not justified in his refusal to register the document.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

KASI DOSS, PLAINTIFF,

*v.*

KASSIM SAIT, DEFENDANT.\*

*Civil Procedure Code—Act XIV of 1882, s. 443—Defence of minority—  
Procedure on trial of preliminary issue.*

When minority is pleaded as defence to an action, a guardian should be appointed for the defendant and a preliminary issue should be framed and tried as to whether defendant is or is not a minor.

CASE referred for the decision of the High Court by P. Srinivasa Rau, Second Judge of the Court of Small Causes, Madras, under Civil Procedure Code, s. 617, and Presidency Small Cause Courts Act, s. 69.

The case was stated as follows :

“ In this suit the plaintiff sues for Rs. 550 as being the principal and interest due upon a promissory note alleged to have been executed to him by the defendant at Madras on the 5th May 1890.

“ Mr. King, Attorney-at-Law, appearing under a vakalatnama granted to his firm by defendant, stated that the defendant

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\* Referred Case No. 35 of 1891.

“ was a minor, and requested that a guardian might be appointed  
 “ for him. Mr. Branson, the plaintiff’s attorney, stated that the  
 “ defendant was not a minor, and objected to the appointment of  
 “ a guardian, unless the fact of his minority was first proved. I  
 “ held that this contention was correct under section 443 of the  
 “ Code of Civil Procedure.

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“ Then Mr. King requested that an issue might be framed for  
 “ proof of defendant’s minority. Mr. Branson objected to the  
 “ framing of an issue at this early stage.

“ I think the objection is valid. If an issue be framed, the  
 “ Court would be obliged to receive evidence on both sides and  
 “ record a finding upon the question of defendant’s minority,  
 “ a course which would be quite irregular, as the defendant, who  
 “ is said to be a minor, cannot be considered to be properly repre-  
 “ sented in the suit until a guardian is appointed for him; and  
 “ there would, therefore, be no person legally capable of joining  
 “ issue with the plaintiff. Moreover no defence can be put in  
 “ until a guardian is appointed for the minor defendant under  
 “ section 443 of the Code of Civil Procedure; and the framing of  
 “ an issue before the defence is advanced is nowhere sanctioned  
 “ in the Code.

“ It is provided in section 443 of the code that the Court  
 “ should be ‘ satisfied of the fact of his (defendant’s) minority ’ ;  
 “ but the procedure to be adopted for the production of evidence  
 “ is not prescribed. The proper course, I think, to be pursued  
 “ under the circumstances is to adopt the provision made in  
 “ section 456 for the verification of facts by means of affidavits.  
 “ It is true that this section applies to the appointment of a guar-  
 “ dian, and not to the question of minority itself; but I think  
 “ that the application for the appointment of a guardian neces-  
 “ sarily involves the fact of minority also. If this is so, affidavits  
 “ will have to be put in by the defendant himself if he is suffi-  
 “ ciently old to take an oath, and also by the would-be guardian,  
 “ and such others as may be deemed necessary, subject to the  
 “ provisions contained in chapter XVI of the code on affidavits;  
 “ and then the question of the appointment of a guardian, as well  
 “ as that of defendant’s minority, so far as it may concern the  
 “ appointment of a guardian, would be summarily decided, and  
 “ the further progress of the suit would abide by the result of  
 “ such decision.

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“As the subject is not altogether free from doubt, and as the suit is for a sum above Rs. 500, the defendant’s attorney requires that I should state a case for the opinion of the High Court, and I respectfully submit the following question accordingly:

“Whether an issue can be framed for proof of defendant’s minority before the appointment of a guardian and before the defence is put in; or whether the evidence of minority, so far as may be necessary for the appointment of a guardian, should be confined to affidavits.”

Plaintiff was not represented.

Mr. *R. F. Grant* for defendant.

JUDGMENT.—A minor cannot be treated as if he was of full age during the investigation of any material averment in a suit. He must always be represented by a guardian, and no order made without his being so represented is valid under section 444 of the Code of Civil Procedure. The general rule is that though a minor may appear by an attorney or pleader, he can only plead or conduct the defence by his guardian. Section 443 is taken from Rule 11 of the Calcutta High Court, dated 10th June 1874, the words ‘on being satisfied of the fact of his minority’ being added(1). The apparent intention is *not* to treat one who alleges that he is a minor as not being a minor and thereby to ignore the general principle that a minor cannot act for himself, but to indicate that a finding that he is really a minor is necessary to the appointment of a guardian for the suit and to act on his behalf generally in the conduct of the case. No sufficient reason appears from the letter of reference for trying the question of minority, which is as material as any other question in the suit, by affidavits instead of in the regular way. We are of opinion that on minority being alleged and denied, a guardian should be appointed for the purposes of the inquiry contemplated by section 443; that a preliminary issue should be recorded raising the question whether or no the defendant is a minor; that it should be tried and adjudicated upon in the same way in which any other material issue is tried and decided; that if the defendant is found to be a minor, a guardian for the suit should be appointed for him; and that if he is found not to be a minor, the guardian appointed for

(1) See *Belchamber*, 570.

the inquiry indicated by section 443 should cease to act, the defendant conducting his own case.

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*Wilson and King*, Attorneys for defendant.

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## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and  
Mr. Justice Shephard.*

QUEEN-EMPRESS

v.

KONDA.\*

1893,  
March 1, 3.

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*Criminal Breach of Contract Act—Act XIII of 1859, s. 2—Limitation of civil claim—  
Order by the Magistrate for repayment of advances.*

In a prosecution for breach of contract under Act XIII of 1859, it appeared that the complainant had advanced certain sums of money to the accused, but that a suit to recover the same was barred by limitation; and the Magistrate thereupon dismissed the charge:

*Held*, that there was no reason why the Magistrate should not have ordered repayment to be made by the accused under section 2.

CASE referred for the orders of the High Court under Criminal Procedure Code, ss. 435 and 438, by J. D. Rees, District Magistrate of Nilgiris.

The case was stated as follows:

“ On the 13th April 1888 one Konda received an advance of Rs. 10 from the complainant, Tanora maistry, and agreed in writing to work with one cooly on the Guynd Estate in the Oucherlony Valley from 1st August 1888 to 31st March 1889, and it was further agreed that, in case of default in the due performance of the contract, the advancee should continue to work after the expiry of the term for as many days as he or his cooly should have neglected to work during the prescribed term.

“ The complaint in the case was filed before the Lower Court on 4th October 1892, *i.e.*, more than three years after the expiry of the contract period. The Sub-Magistrate gives the following reasons for dismissing the complaint under section 203, Criminal Procedure Code.

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\* Criminal Revision Cases Nos. 715 to 718 of 1892.