DORAIVELU MUDALIAR v. NATESA GRAMANI.

WALLACE, J

to put my view in another form. If we take the procedure which is laid down in section 9, we find that any tenant, i.e., by definition "any tenant of land, liable to pay rent on it" not excluding a tenant of land owned by a trust, is entitled to move the Court for an order that his landlord shall be directed to sell the land. It is admitted that the trustee of trust lands comes within the definition of the term "landlord." When the Court has made that order and not earlier, as I conceive it, can a trustee landlord come in to object that such an order cannot be valid because he is not entitled in law to sell the land or to alienate it permanently except for necessity. To that the Court rejoins that the order itself has just provided the necessity required and it seems to me that on that the objection of the trustee landlord must vanish, as it cannot be argued that such an order of the Court directing him to sell the land is not a necessity justifying his conveyance of the land. In this view there seems to me nothing in the Act from which one may reasonably conclude that it was not intended to apply to a trustee landlord.

N.R.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice, Mr. Justice Ramesam, and Mr. Justice Wallace.*

1924, April, 9.

MINOR SUYAMPRAKASAM ALIAS MINATCHISUNDARAM BY NEXT FRIEND VALLI AMMAI ACHI (PLAINTIFF), APPELLANT,

*v.*

MURUGESA PILLAI (DEFENDANT), RESPONDENT.*

*Minor, suit by, against agent appointed by guardian—Maintainability of.*

* Appeal No. 218 of 1921.

A minor can maintain a suit against an agent appointed by his guardian for the benefit of his estate (*a*) generally, as well as (*b*) in respect of properties received by the agent, and not accounted for to the guardian. *Ramanathan Chettiar* v. *Muthiah Chetty*, (1920) I.L.R., 43 Mad., 429, overruled.

APPEAL against the decree of C. S. MAHADEVA AYYAR, Subordinate Judge of Cuddalore, in Original Suit No. 13 of 1919.

The facts are given in the Order of Reference of RAMESAM, J.

The plaintiff whose suit was dismissed preferred this Appeal.

This Appeal coming on for hearing on Friday and Monday, the 18th and 21st days of January 1924, and having stood over for consideration, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

RAMESAM, J.—In this case the plaintiff, being minor by his mother and next friend, sued the defendant (his maternal uncle) for an account of his management, generally, of the plaintiff's estate from October 1910 to March 1916 and, in particular, of certain items of moveables (paddy and outstandings). The Subordinate Judge dismissed the suit, following *Ramanathan Chettiar* v. *Muthiah Chetty*(1).

The plaint does not expressly say that the defendant was appointed as agent by plaintiff's mother nor have we in this case any power of attorney, as in *Ramanathan Chettiar* v. *Muthiah Chetty*(1) and in *Ramayya Chettiar* v. *Sappanimuthu Chettiar*(2). The plaint was filed prior to the decision in *Ramanathan Chettiar* v. *Muthiah Chetty*(1) and it cannot be said that it was cleverly worded with a view to evade that decision. The allegations are loose and general, equally

(1) (1920) I.L.R., 43 Mad., 429. (2) A.S. No. 90 of 1921 (unreported).

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consistent with the defendant being regarded as an agent appointed by the plaintiff's guardian as well as with the defendant being a mere intermeddler and the guardian passively acquiescing and remaining content with the defendant's promises of accounting. I do not think the allegations in paragraph 3, sub-paragraphs (2) and (3), necessarily amount to an allegation that defendant is an agent. At the same time it must be conceded that all the allegations will cover and are consistent with a case of agency. The defendant denied agency. But the Subordinate Judge without inquiring into the fact of agency and on the allegations in the plaint, held that the suit was not maintainable.

I find several difficulties in applying *Ramanathan Chettiar* v. *Muthiah Chetty*(1) to this case. First, the English cases *Barnes* v. *Addy*(2), *In re Barney*; *Barney* v. *Barney*(3), *Mara* v. *Browne*(4) are all cases where the defendants had dealings with *trustees* and the *cestuis que trustent* sued to make them liable. The defendants were not dealing with guardians. Now I do not think the legal position of a guardian is identical with that of a trustee. It may be readily conceded that, for several purposes, their positions are analogous (vide section 88 of the Indian Trusts Act) and we may speak of guardians who hold a fiduciary position, loosely as trustees. I do not think the statement of ROMILLY, M.R., in *Mathew* v. *Brise*(5) amounts to more than this. In *Muthusubbia Chettiyar* v. *Rangiagoundan*(6) it has been held that the powers of a guardian are less extensive than those of a trustee although the soundness of such a wide proposition has been doubted in *Vembu Iyer* v. *Srinivasa Iyengar*(7). The latter case suggests that the position

(1) (1920) I.L.R., 43 Mad., 429.
(2) (1874) 9 Ch. App., 244.
(3) [1892] 2 Ch., 265.
(4) [1896] 1 Ch., 199.
(5) (1851) 14 Beav., 341.
(6) (1897) 7 M.L.J., 191.
(7) (1912) 23 M.L.J., 638.

of a guardian is in some respects wider than that of a trustee (see the judgment of MASILAMANI PILLAI, J., in *Ramayya Chettiar* v. *Sappanimuthu Chettiar*(1). Whatever may be the position of guardians in English law, it is impossible to bring a guardian under the definition of "trusts" and "trustee" in the Indian Trusts Act. If every guardian is a trustee, the legislature might have easily said so. The fundamental difference is that the legal estate vests in the trustee, but does not vest in the guardian. The *cestui que trust* if *sui juris* may require the trustee to convey the estate to him (section 56 of the Trusts Act), but until this is done the estate vests in the trustee. No such conveyance has to be executed by the guardian to his ward on his attaining majority.

There is no law prohibiting a guardian from entering into contracts on behalf of his ward. When such contracts are entered, they are not void. When they are not completely executed, the question of enforcing them against minors in Courts will be decided with reference to the test how far they are binding on the minors. In so far as such contracts impose a mere personal liability on the minor, they may not be enforced, [*Waghela Rajsanji* v. *Shekh Masludin*(2), *Indur Chunder Singh* v. *Radha Kishore Ghose*(3)] and there may be difficulties in giving effect to them [*Ramajogayya* v. *Jagannadhan*(4)]. But these difficulties need not trouble a Court in cases where all that remains is something to be enforced on behalf of and for the benefit of the minor; see MASILAMANI PILLAI, J.'s judgment in *Ramayya Chettiar* v. *Sappanimuthu Chettiar*(1). Mr. Sitarama Rao, the learned vakil for the respondent, suggested

(1) A.S. No. 90 of 1921 (unreported). (2) (1887) I.L.R., 11 Bom., 551 (P.C.).
(3) (1892) I.L.R., 19 Calc., 507 (P.C.). (4) (1919) I.L.R., 42 Mad., 185 (F.B.).

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that in such a case the minor may sue on the principle that the general rule that only parties to a contract can sue does not apply where a benefit is reserved under or arises out of the contract in favour of a third person in such circumstances as to amount to a trust (vide Pollock on Contracts, 9th Edition, pages 222–223). This suggestion leads me to doubt the soundness of applying the English decisions to a case of a guardian. If the contract entered into by the guardian was made on behalf of the minor and the unexecuted part of it relates not to a liability but to a right of the minor, I do not see why the minor cannot sue on a contract of agency just as he can on any other contract. Even PHILLIPS, J., who differed from MASILAMANI PILLAI, J. [in *Ramayya Chettiar* v. *Sappanimuthu Chettiar*(1)], does not seem to question such a proposition. On the terms of the power-of-attorney in that case, he held that the contract of agency in it was not created on behalf of the minor but personal to the principal.

Secondly, Lord SELBOURNE's judgment in *Barnes* v. *Addy*(2) indicates an exception to the main principle he was laying down :—

> "Unless those agents receive and become chargeable with some part of the trust property or unless they assist with a knowledge in a dishonest and fraudulent design on the part of the trustees" (at page 251).

When we examine the facts in the English cases this aspect of the matter seems to become important. In *Barnes* v. *Addy*(2) the two solicitors (Mr. Duffield and Mr. Preston) were sought to be made liable on the ground that Mr. Duffield prepared the deed of appointment of Barnes as sole trustee and the deed of indemnity and introduced Addy to a broker for the purpose

(1) A.S. No. 90 of 1921 (unreported). (2) (1874) 9 Ch. App., 244.

of selling out some of the stock to pay some amounts to which the trust estate was liable and that Mr. Preston settled the deed of indemnity on behalf of Mrs. Barnes. These acts were alleged to amount to a fraud on the part of the solicitors. In *In re Barney; Barney* v. *Barney*(1) the widow of the testator acting as executrix decided to carry on the husband's business, but this amounted to a breach of trust. Two friends assisted her by initialling all cheques issued by her on the bankers with whom the funds were invested, it being understood that the cheques were not to be honoured without their initials. On this ground they were sought to be made liable. In *Mara* v. *Browne*(2) the defendants were acting solely as solicitors.

NORTH, J., held that Hugh Browne was

"a principal in the matter and was not a mere agent for persons under whose lawful directions he was acting."

The Court of Appeal reversed this Judgment (SMITH, L.J., being more guarded in his opinion on one point in the case).

In the first two cases, the defendants did not get possession of any part of the trust property. They were sought to be made responsible solely for their acts in advising and co-operating with the trustees. In the third case though Hugh Browne came into possession of the trust funds, he carried out the directions of the trustee. I am far from saying that an agent (of the guardian) lawfully entering into possession of the property under the directions of the guardian and carrying out all the directions of the guardian should be liable to the ward solely on the ground that the acts of the guardian were in excess of his powers and therefore the agent's entry is tortious. In such a case the agent ought not to be liable. But when the agent has not

(1) [1892] 2 Ch., 265. (2) [1896] 1 Ch., 199.

SUYAMPRAKASAM v. MURUGESA PILLAI.

carried out the directions of the guardian and has not accounted for property that came into his possession, I do not see why, while those acts may give rise to an obligation *ex contractu*, there should not be also an obligation *ex delicto* making him liable to the ward if property is actually received. That the same act, while giving rise to relations *ex contractu* between A and B may also give rise to relations *ex delicto* between B and C is a common conception known to law. In all such cases no doubt it is necessary for the protection of the defendant from a multiplicity of actions that the guardian also should be a party. In *Ramanathan Chettiar* v. *Muthiah Chetty*(1) and in *Ramayya Chettiar* v. *Sappanimuthu Chettiar*(2) the guardian was not a party and this fact was relied on as a ground of decision by ABDUR RAHIM, J., in the former case and PHILLIPS, J., in the latter. Again I do not see why, in such a case, if the fact that the estate was that of a minor was known to the defendant, the minor's action should not be held to lie on the principle of the exception (I have stated already) to the rule that only the parties to a contract can sue. When property is received for the purpose of being dealt with for the benefit of the ward and has not been accounted for to the guardian, I do not see why the facts do not amount to a trust in favour of the ward and the ward should not be entitled to sue. In the present case, though the frame of the suit is one for accounting, the allegations disclose that considerable items of property have come to the hands of the defendant. I do not know if that was the case in *Ramanathan Chettiar* v. *Muthiah Chetty*(1). But if it was alleged that some properties came to the hands of the defendants in that case, I doubt the correctness of that decision. It seems to me a large and

(1) (1920) I.L.R., 43 Mad., 429. (2) A.S. No. 90 of 1921 (unreported).

dangerous extension of the English cases to apply them to cases of guardian's agents who have received properties and have not accounted for them even to the guardian. The position is so anomalous that it has only to be stated—a guardian deals with an agent on behalf of the minor's estate but cannot sue to enforce the agent's liabilities on the minor's behalf, but should sue in his own right though he has no rights *ex hypothesi* and the minor cannot sue.

For all these reasons, I am inclined to doubt the correctness of the decision in *Ramanathan Chettiar* v. *Muthiah Chetty*(1). Even if it is not entirely erroneous it requires to be limited. I would therefore refer to a Full Bench the question whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor's estate (*a*) generally and (*b*) at least in respect of properties received by the agent and not accounted for to the guardian.

JACKSON, J.—I agree.

ON THIS REFERENCE

*S. Varada Achariyar* for appellant.—As it is the *guardian* who appointed the agent that now sues the agent, the suit is maintainable; *Surendra Nath Sarkar* v. *Atul Chandra Roy*(2). *Ramanathan Chettiar* v. *Muthiah Chetty*(1) is distinguishable on the facts. Even otherwise some of the observations therein are open to objection, especially in view of English authorities. See Simpson on Infants, page 99.

*T. V. Gopalaswami Mudaliyar* for respondent.—The suit should have been filed by the mother in her personal capacity, and not as guardian. There is no direct contractual relationship between a minor and the agent.

(1) (1920) I.L.R., 43 Mad., 429. (2) (1907) I.L.R., 34 Calc., 893.

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*Ramanathan Chettiar* v. *Muthiah Chetty*(1) is right. See also *Chidambaram Chetti* v. *Pichappa Chetty*(2) and *Branson* v. *Appasami*(3). If the law be otherwise, the agent may be sued twice.

## OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The question referred to us is "whether a minor cannot maintain a suit against an agent appointed by the guardian for the benefit of the minor's estate (*a*) generally and (*b*) at least in respect of properties received by the agent and not accounted for to the guardian."

The reference was really necessitated—I do not gather that the learned Judges had much doubt about the point themselves—by the decision of a Bench of this Court in *Ramanathan Chettiar* v. *Muthiah Chetty*(1) which, in my opinion, applied itself to the wrong angle of view in looking at these matters. It is not a question of trustee *de-son-tort*; it is a question of a contract made by a minor with an agent to manage his property and a contract which no one can suggest is void though it may be voidable at the instance of the minor. It may be that the minor cannot be sued upon it; but here the minor is seeking to enforce his rights of property against a person who has undoubtedly had control of his estate and whom it is sought to make accountable for the estate and its funds which have passed into his hands. The English rule is perfectly clear; it has been clear, ever since the case of *Dormer* v. *Fortescue*(4), decided as early as 1744 by Lord HARDWICKE, that in a position of this kind, the minor is entitled to call upon the agent to account.

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(1) (1920) I.L.R., 43 Mad., 429.
(2) (1907) I.L.R., 30 Mad., 243.
(3) (1894) I.L.R., 17 Mad., 257.
(4) (1744) 3 Atk., 124; 26 E.R., 875.

I do not wish to say more, because my learned brother RAMESAM in the Order of Reference has given his reasons for believing that *Ramanathan Chettiar* v. *Muthiah Chetty*(1) is wrongly decided and can no longer be regarded as good law, and I am entirely of the same opinion. I think that this reference must be answered in the affirmative as regards both (*a*) and (*b*).

COUTTS TROTTER, C.J.

RAMESAM, J.—I agree.

RAMESAM, J.

WALLACE, J.—I agree and have nothing to add.

WALLACE, J.

N.R.

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## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Victor Murray Coutts Trotter, Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.*

VASIREDDI SRIRAMULU (FIRST DEFENDANT), APPELLANT,

1924, April 9.

*v.*

PUTCHA LAKSHMINARAYANA (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code, O. XXXII, r.* 4 (3)—*Consent of guardian* ad litem—*Express consent not necessary.*

Order XXXII, rule 4 (3), Civil Procedure Code, does not require that the consent of a person for his appointment as guardian *ad litem* should be express; it may be an implied one.

APPEAL preferred against the decree of B. VENKATESWAR RAO, Second Additional Subordinate Judge of Guntūr, in Original Suit No. 72 of 1919.

The facts are given in the Order of Reference by PHILLIPS, J.

The Subordinate Judge gave a decree for the plaintiff holding on the preliminary issue that there was no express or implied consent of the guardian to act as

(1) (1920) I.L.R., 43 Mad., 429.

* Appeal No. 101 of 1921.