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In the result I agree with the order proposed by my learned brother.

By the Court.—The memorandum of objections in Appeal No. 216 of 1921 is dismissed. There will be no costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Waller.

1923, November 22.

YEZZU MALLAYYA (FIRST DEFENDANT), APPELLANT

v.

TULLURI PUNNAMMA, MINOR BY NEXT FRIEND, PUNNAYYA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Sec. 11, Expl. 4, O. XXXII, r. 4 (iii)—Guardian ad litem—Consent of guardian—Consent in writing, unnecessary—Consent, whether can be inferred from circumstantial evidence—Suit on a promissory note executed by a guardian—Suit against minor represented by such guardian as guardian ad litem—Decree and sale in execution—Validity of—Res judicata.

Although under Order XXXII, rule 4 (iii), Civil Procedure Code, no person can be appointed guardian ad litem for a minor without his consent, there is nothing in the rule which requires that the consent should be expressed in writing; the consent may be inferred from circumstantial evidence.

Chhattar Singh v. *Tej Singh*, (1921) I.L.R., 43 All., 104, followed.

Where a minor was sued on a promissory note executed by his maternal uncle, who had been appointed a guardian of the person of the minor under the Guardians and Wards Act and was also appointed guardian ad litem in the suit, it cannot be

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* Second Appeals Nos. 836 and 850 of 1922.

said that his interest was adverse to that of the minor, or that he would not have put forward a proper defence for the minor if there was one; consequently a decree obtained against the minor in such suit and the sale of the minor's property in execution of such decree are not invalid.

Where it appeared that a suit had been instituted on behalf of a minor by a next friend to set aside a sale in execution of a decree obtained against him in the above circumstances, but the ground that the decree was invalid because the appointment of the guardian ad litem was improper had not been taken and the suit was dismissed, the same objection cannot be taken in a subsequent suit instituted on behalf of the minor to set aside the decree and sale. *Arunachalam Chetty* v. *Mayyappa Chetty*, (1898) I.L.R., 21 Mad., 91, and *Muhammad* v. *Abdul Rehman Rowther*, (1923) I.L.R., 46 Mad., 135, followed.

SECOND APPEALS against the decree of K. S. MENON, District Judge of Guntūr, in Appeal Suit No. 157 of 1921, preferred against the decree of M. H. ISPAHANI, Principal District Munsif of Guntūr in Original Suit No. 414 of 1919.

These two connected Second Appeals arise out of a decree of the District Judge in an appeal in a suit which was instituted on behalf of a minor represented by a next friend for a declaration that a previous decree in O.S. No. 187 of 1917 obtained against the minor as defendant therein, was fraudulent, collusive and invalid, that it was not binding on the minor plaintiff and that the sale of the minor's property in execution of that decree was likewise invalid, for the issue of a permanent injunction against the present first defendant (who was the decree-holder therein) restraining him from executing the decree and for other reliefs. The former decree was impeached principally on the ground that the minor plaintiff (who was the defendant in O.S. No. 187 of 1917) was not properly and validly represented by a guardian ad litem, inasmuch as the guardian had not given his consent in writing, and as he had himself executed the note sued on in that suit. The other facts

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appear from the judgment. The District Munsif dismissed the suit. On appeal the District Judge held that the decree in O.S. No. 187 of 1917 was void but upheld the execution sale. The plaintiff and the first defendant filed separate second appeals.

B. Somayya for appellant.

B. Satyanarayana for respondent.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.

KRISHNAN, J.— These are Second Appeals which arise in a suit brought on behalf of a minor by his next friend for setting aside the decree in O.S. No. 187 of 1917 obtained against that minor with the present second defendant as his guardian for a certain sum of money due on a promissory note, and also for the setting aside of a sale in execution of that decree, in which the third defendant became the purchaser of certain properties belonging to the minor. The learned District Judge has declared the decree to be invalid, but he has upheld the sale in execution of that decree, and in consequence the plaintiff has appealed in S.A. No. 850 of 1922 and the decree-holder in O.S. No. 187 of 1917 has appealed in S.A. No. 836 of 1922. Both the Second Appeals have been heard together.

Now, the first question we have to consider is whether the decree in O.S. No. 187 of 1917 should be treated as null and void and not binding against the minor. The only reason urged before us for holding so is that the consent of the second defendant who was appointed as guardian ad litem of the minor, was not obtained beforehand and that therefore his appointment should be treated as a nullity and the suit should be looked upon as having been decreed against the minor without his being properly represented on record. The learned District Judge has no doubt found in the minor's favour

on this point. But after considering the point carefully, we are unable to agree with him.

The second defendant was appointed in 1913 as the guardian of the person of the minor under the Guardians and Wards Act. The suit No. 187 was brought in 1917, that is, at a time when the second defendant was the certificated guardian of the minor. Notice was issued to the second defendant before he was appointed guardian and the notice was in these terms: "Take notice hereby that Yezzu Mallayya, the plaintiff in the above-mentioned suit (O.S. No. 187 of 1917) has presented an application to this Court praying that a guardian ad litem for the minor may be appointed and that after receipt by you of the notice of application in the matter of the said minor, you or any friend of the minor be appointed as such before 14th March 1917 the date fixed; and that, in default, the Court shall appoint a separate person as guardian of the minor for purposes of the suit." That notice was served on the defendant personally and it bears an endorsement in these terms: "On 27th February 1917 the Court peon having come to the village of Thadikonda and given me, the guardian of the defendant mentioned in this order, a copy of the notice of application for appointment of a guardian for the minor, herewith attached, I have received the same. (Signed) Konagalla Venkatasubbarayudu (that is, the second defendant)." It is not disputed that this notice was served on the second defendant personally. On the date fixed for the appointment of the guardian, the second defendant no doubt did not appear, and the learned District Munsif evidently holding that the second defendant was willing to act as guardian, appointed him as guardian of the minor for the suit. He notes "Served—absent—appointed." Now, it is contended that, unless there is an express consent on

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record by the person proposed as guardian that he would act as guardian, his appointment as guardian is illegal and the case should be treated as if no guardian had been appointed for the minor. We are unable to accept this argument. All that Order XXXII, Rule 4 (iii) says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted, but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardians and Wards Act, and under clause (ii), Rule 4 of Order XXXII he was the person who ought to be appointed as guardian for the suit unless the Court considered, for reasons which have to be recorded, that it was for the minor's welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chhattar Singh* v. *Tej Singh*(1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit. It is also suggested that, as the second defendant was the person who executed the promissory note, he had an interest that was adverse to the minor; but in the particular case he was not a party himself, he not having been sued but only the minor, and there is no

(1) (1921) I.L.R., 43 All., 104.

reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have, therefore, come to is that the decree itself cannot be set aside. It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of S.A. No. 836, but there is still another ground why the minor is bound by this decree and that is the ground of res judicata. The minor's present next friend had brought a suit, O.S. No. 79 of 1920, to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void; but no such plea was put forward. The suit was dismissed against the minor both in the first Court and in appeal. We think the ground that is put forward at present, viz., that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question res judicata under explanation 4 of section 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam Chetty* v. *Mayyappa Chetty*(1) and *Muhammad Rowther* v. *Abdul Rehman Rowther*(2). On this ground also the plaintiff's claim to set aside the decree fails.

We must, therefore, allow S.A. No. 836 of 1922 with costs throughout, and set aside the decree of the Lower

(1) (1898) I.L.R., 21 Mad., 91. (2) (1923) I.L.R., 46 Mad., 135.

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Appellate Court in so far as it holds that the decree in O.S. No. 187 of 1917 is invalid.

S.A. No. 850 of 1922 will fail in this view. We have already held that there was nothing illegal and invalid in the decree under which the sale took place, and, therefore, there is no ground for holding that the sale in pursuance of that decree was in any way affected by illegality or was void. We agree with the District Judge in his view that the plaintiff's claim is affected by res judicata as regards the sale also. S.A. No. 850 of 1922 must, therefore, be dismissed with costs.

K.R.