APPELLATE CIVIL.

Before Mr. Justice Curgenven.

KATHASWAMY CHETTIAR AND ANOTHER (RESPONDENTS 1 AND 2, PLAINTIFFS 1 AND 2), PETITIONERS,

v.

RAMACHANDRAN AND ANOTHER (PETITIONERS, DEFENDANTS 2 AND 3), RESPONDENTS.*

1934, February 8.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Minor defendant—Guardian—Non-appearance of minor defendant through wrongful default of guardian—Whether constitutes "sufficient cause".

The default of a guardian who wrongfully allows a claim against a minor defendant to be decreed *ex parte* constitutes a "sufficient cause" for the non-appearance of the minor within the terms of Order IX, rule 13, of the Code of Civil Procedure.

Neelaveni v. *Narayana Reddi*, (1919) I.L.R. 43 Mad. 94 (F.B.), and *Kesho Pershad* v. *Hirday Narain*, (1880) 6 C.L.R. 69, followed.

PETITIONS under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the District Munsif of Coimbatore, dated 7th August 1933 and made in Interlocutory Applications Nos. 1351 and 1350 of 1933 in Original Suit No. 716 of 1932 respectively.

S. Muthiah Mudaliar and *M. Krishna Bharati* for petitioners.

K. P. Ramakrishna Ayyar for respondents.

JUDGMENT.

These two revision petitions are preferred against two orders of the District Munsif of Coimbatore (i) discharging a guardian *ad litem* and

* Civil Revision Petitions Nos. 1543 and 1544 of 1933.

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appointing another and (ii) setting aside an *ex parte* decree. The plaintiffs, who are the petitioners in both the petitions, sued three brothers to recover some money said to be due in respect of a deposit made with their deceased father. The first defendant was a major and the second and third defendants were minors. The plaintiffs applied in the ordinary way for appointment of a guardian *ad litem* to them, proposing first the mother and later the brother, that is, the first defendant. The mother declined to act but agreed that her son might act, and the first defendant undertook the duties and was appointed. In the suit he took time to file a written statement, but in point of fact he did not file one and made no defence either for himself or on behalf of his minor brothers, and the suit was decreed *ex parte*. Then followed the two applications out of which these petitions arise.

It was alleged that the brother had failed in his duties as guardian and accordingly the mother applied to be made guardian and at the same time application was made to set aside the *ex parte* decree. The learned District Munsif has granted both applications. The substantial one relates to setting aside the decree, and in the order relating to this he has given his reasons for finding that the first defendant had interests adverse to his brothers and had failed to discharge his trust with regard to them by defending the suit. He accordingly concluded that there was no representation of the minors and that the *ex parte* decree against them is invalid and he therefore set it aside.

This is not a logical way of putting the matter. If the *ex parte* decree was, as I understand the

learned District Munsif to have held, void there was no need to set it aside. On the other hand if he did set it aside he must have found that one of the reasons laid down in Order IX, rule 13, of the Code of Civil Procedure for adopting such a course existed. There are various early decisions which held that the reasons which this rule requires for setting aside an *ex parte* decree are not the only ones, and that the Court has inherent power, in appropriate circumstances, to set aside an *ex parte* decree even though summons has been duly served and it has not been shown that the defendant has sufficient cause for not appearing. The question later came before a Full Bench in *Neelaveni* v. *Narayana Reddi*(1), and it was there held that the Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* decree passed by itself. Accordingly such an early decision as that of OLDFIELD J., in *Adyapadi Ramanna Udpa* v. *Krishna Udpa*(2), holding on general grounds that the gross negligence of the next friend of a minor plaintiff is sufficient reason for setting aside an *ex parte* decree, can no longer be regarded as good law. It has been argued in the present case that the District Munsif has not recorded any finding as to whether the minors had sufficient cause for not appearing and allowing an *ex parte* decree to be passed and that omission *ipso facto* renders the order liable to revision. I think that, if materials exist in the record and in the lower Court's order for drawing the conclusion that such sufficient cause did exist, it is not

(1) (1919) I.L.R. 43 Mad. 94 (F.B.). (2) (1912) 27 M.L.J. 167.

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desirable to interfere with the order although it may have been passed on incorrect grounds.

The question accordingly arises whether the default of a guardian who wrongfully allows the claim to be decreed *ex parte* will constitute a sufficient reason for the non-appearance of the minors within the terms of the rule. The case is in many respects analogous to that of an Advocate who has failed to put in an appearance after undertaking to represent a party. I have no doubt that, if it is a real case of default and the party is in no respect to blame, this would be accepted as "sufficient cause" within the rule. The case of a minor is in some respects stronger, as he has neither the option to put in an appearance himself nor power to choose his own representative. He has been declared *ex parte* in circumstances over which he had no control whatever. The position has been excellently put on behalf of the respondents in a case reported as *Kesho Pershad* v. *Hirday Narain*(1), by MARKBY and MITTER JJ. That too was an instance of the first defendant—in that case the mother—appearing personally and as guardian of the minor sons and allowing an *ex parte* decree to be passed. Application was made to set it aside on the ground that summons was not duly served, but this ground failed. Nevertheless the learned Judges said that it could be put upon the alternative ground that sufficient cause existed for the failure of the minors to appear. They observe :—

"We think that we may legally and fairly deal with this matter as regards the minors under the clause which provides that if the defendant be prevented by any sufficient cause

(1) (1880) 6 C.L.R. 69.

from appearing when the suit was called on for hearing, the Court should pass an order to set aside the judgment. It is not to be expected that the defendants themselves could have appeared in person and they had a right to expect that their lawful guardian would take the proper, and what in this case was obviously a necessary, step to protect their interest. By a neglect of duty for which they are not in any way responsible, no one appeared on their behalf when the case was called on. We think it would be contrary to justice to hold that they are responsible for their non-appearance. We think they have a right to say, in the words of the Act, that they have been prevented by sufficient cause from appearing when the case was called on. That being so, whether the summons was served or not, the Court below had power to set aside these decrees."

This judgment has been referred to as one example of sufficient cause for non-appearance by SESHAGIRI AYYAR J., in the Full Bench case already referred to, where he says at page 104 :—

"A suggestion was made that the default of a guardian of a minor defendant will not be covered by this clause (the clause relating to sufficiency of cause). There is no reason for limiting the language of the clause in that way. Further, there is the authority of *Kesho Pershad* v. *Hirday Narain*(1) against this suggestion."

I think accordingly that the finding of the learned District Munsif that the first defendant had betrayed his trust as guardian is sufficient to bring the case within the terms of Order IX, rule 13, of the Code of Civil Procedure, and that the order setting aside the decree can be justified on these grounds.

A further point is taken that the application is time-barred. This point does not seem to have been taken, and if at all taken, does not seem to have been pressed, in the lower Court. Having regard to the fact that section 5 of the Limitation

(1) (1880) 6 C.L.R. 69.

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Act applies to such petitions, I do not think that an order of this kind should be revised on this ground.

The order of the learned District Munsif appointing the mother as guardian in the place of the son necessarily follows from his finding of the existence of an adverse interest in the son. The civil revision petitions are accordingly dismissed with costs. One Vakil's fee.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1934, January 30.

VATAKKETHALA THOTTUNGAL CHAKKU'S SON MATHU (PLAINTIFF), APPELLANT,

v.

ACHU AND TWELVE OTHERS (DEFENDANTS 1 TO 10 AND LEGAL REPRESENTATIVE OF DEFENDANT 5), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 6 (e)—Debt—Assignment of—Exact amount of debt not mentioned—Data for ascertaining same available in document—Validity of assignment.

V had contracted with a railway company to execute certain works for them. He entered into a sub-contract in connexion with the same with three persons by which he agreed to retain ten per cent of the moneys paid to him by the railway company and pay the balance to them. M was the assignee of the right of the sub-contractors to recover their shares of the said amounts from V. Before the assignment the value of the works executed had been ascertained and the amounts had been received by V from the railway company. In a suit by

* Appeal No. 132 of 1932.