APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetti and Mr. Justice Pandrang Row.

RAO BAHADUR SUNA. ANA. RAMANATHAN CHETTIAR (DEFENDANT), APPELLANT,

1934, February 13.

v.

MEYNA. PANA. PALANIAPPA CHETTIAR AND SIX OTHERS (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXXII—Provisions as to minor defendant in—Applicability of, in suit instituted in firm's name—O. XXX, r. 10, of Code—Applicability and effect of—Minor sued in firm's name—Guardian ad litem *for—Appointment of—Compromise affecting minor—Leave of Court for—Necessity—Absence of—Effect of.*

A suit was instituted *inter alia* against the S.A. firm under which name and style S had during his lifetime carried on a money-lending business as the sole proprietor. The second defendant was adopted by the widow of S and was at the time of the institution of that suit a minor. No guardian *ad litem* was, however, appointed for him. A decree was passed in that suit on the basis of a compromise but no petition for leave of the Court to compromise on behalf of the minor second defendant was ever put in.

Held that there was no representation at all of the second defendant in that suit and that the decree passed therein was a nullity as against him and therefore was unenforceable.

Rule 10 of Order XXX of the Code of Civil Procedure simply justifies the introduction of the assumed name instead of the real name of the defendant, but does not absolve the plaintiff from his liability to propose a proper guardian if the defendant represented by such a name is really a minor.

Quaere whether the words "any person carrying on business" in rule 10 of Order XXX should be taken to mean one who is himself actually carrying on business and whether they

* Appeal No. 400 of 1928.

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apply to one who as the guardian or agent or representative of another person is carrying on the business.

APPEAL against the decree of the Court of the Temporary Subordinate Judge of Devakottah in Original Suit No. 33 of 1927.

V. V. Srinivasa Ayyangar and *A. Swaminatha Ayyar* for appellant.

S. Srinivasa Ayyangar for *K. Rajah Ayyar* and *V. Ramaswami Ayyar* for respondents.

SUNDARAM CHETTI J.

The JUDGMENT of the Court was delivered by SUNDARAM CHETTI J.—This appeal arises out of a suit filed by the plaintiffs (respondents) for the recovery of a sum of Rs. 15,446 alleged to be due on account of the payment of a decree debt in C.R. No. 55 of 1912 in the Chief Court of Lower Burma instituted by the Bank of Rangoon against the present plaintiffs' firm as first defendant and S.A. firm as the second defendant. The suit is one for contribution and interest also is claimed at what is called the Rangoon Nadappu rate, namely, 0-13-6 per cent. per mensem. In paragraph 4 of the plaint, it is alleged that in respect of a joint loan of Rs. 20,000 contracted by the aforementioned two firms from the Bank of Rangoon the said decree was obtained. The defendant in his written statement raised several pleas, one of which is that he was not really a party to the said suit, as there was no S.A. firm as a legal entity and no business was carried on under that style by the defendant or by any persons on his behalf. He further stated that the plaintiffs should strictly prove the truth, the validity and the binding character of the loan and the decree passed thereon. The lower Court passed a decree in favour of the plaintiffs.

The way in which the suit proceeded to trial and the nature of the issues framed clearly show that the plaintiffs wanted to enforce the defendant's liability for contribution on the basis of the decree alleged to have been obtained against both the firms. It is curious that the plaint is silent as to who was really represented by the S.A. firm mentioned as the second defendant in that suit. We find from the evidence that the defendant's late adoptive father Subramaniam Chetti was carrying on the money-lending business as the sole proprietor under the name and style of S.A. firm. He died leaving a will in which he gave authority to his widow to make an adoption. Sometime after his death, the present defendant, while he was a minor, is said to have been adopted by the widow in pursuance of her husband's authority. There is no doubt that at the time of the institution of the former suit the present defendant was a minor. This fact is not alleged in the plaint at all, but is indicated in the written statement. However, the question of his minority arises for consideration in determining his objection that he was not a party at all to the said suit. The evidence adduced on the plaintiffs' side is to the effect that subsequent to the death of Subramaniam Chetti the business of the S.A. firm was slowly wound up and they had to run that business for sometime before winding it up. One Chinniah Chettiar is said to have been the executor appointed under the will of Subramaniam Chetti, and his power-of-attorney agent was Chokkalingam Chettiar (P.W. 2). The loan of Rs. 20,000 referred to in the plaint was borrowed by P.W. 2 as the agent appointed by the

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executor. He was succeeded by another agent Murugappa Chettiar who was mentioned in the former suit as the agent of the S.A. firm. The question is whether the present defendant who was then a minor was really represented at all in the former suit as the second defendant. It is argued that under Order XXX, rule 10, Civil Procedure Code, any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name. The rule may probably justify the suit as against Subramaniam Chettiar or the executor appointed by him, if the words "any person carrying on business" occurring in the aforesaid rule 10 should be taken to mean one who is himself actually carrying on business. It is doubtful if those words apply to one who as the guardian or agent or representative of another person is carrying on the business. Be this as it may, the question that is pertinent to the present case is, whether the defendant who was really a minor at the time of the institution of that suit could be simply sued in the name of S.A. firm, and if so, whether the other requisites laid down in the Civil Procedure Code for a proper representation of a minor by the appointment of a guardian by the Court need not be fulfilled. There is nothing in rule 10 of Order XXX, Civil Procedure Code, to obviate the necessity of fulfilling the other mandatory provisions of the Civil Procedure Code. That rule simply justifies the introduction of the assumed name instead of the real name of the defendant, but does not absolve the plaintiff from his liability to propose a proper guardian, if the defendant represented by such a name is really

a minor. From the available records in this case, we are satisfied that the idea of the present defendant having been a minor at that time never occurred to the plaintiff in that suit, nor was that fact brought to the notice of the Court that passed the decree. The decree, we find, was one passed on a compromise. The B Diary in that case shows that no petition for leave of the Court to compromise on behalf of the second defendant was ever put in. That being so, we must hold that there was no representation at all of the present defendant who was then a minor, when the former suit was instituted or when the compromise decree in that suit was passed. If one who was a minor at the time of the suit is sought to be made liable on a decree passed in that suit, it is open to him to plead that that decree was a nullity and might be disregarded by him without instituting a suit to set aside that decree. This principle has been clearly laid down by the Privy Council in the decision in *Khiaraj-mal* v. *Daim*(1). If the present defendant was really no party to the former suit, it goes without saying that the decree passed in that suit would be a nullity as against him and therefore would be unenforceable.

Even if the decree as such is not binding on the present defendant, it is open to the plaintiffs in a suit for contribution like this to enforce the defendant's liability on the strength of the original joint loan of Rs. 20,000 alleged in paragraph 4 of the plaint on proof of facts necessary for the establishment of such liability.

(1) (1904) I.L.R. 32 Calc. 296, 312 (P.C.).

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[After observing that that was the main point for determination in the suit but that the Court below missed it and that the trial of the suit was therefore defective, their Lordships proceeded as follows :—]

We therefore think fit to set aside the decree of the lower Court and remand the suit for fresh trial and disposal, after allowing the plaintiffs an opportunity to amend the plaint by making the necessary allegations as regards the nature and binding character of the original loan, which subsequently was sued upon, and by allowing the defendant also to put in an additional written statement to traverse those allegations. The necessary issue or issues arising from the additional pleadings will have to be framed and tried. With these observations, we remand the suit to the lower Courts for its restoration to file. Having regard to the indulgence we are showing to the plaintiffs and the success of the appellant on the question involved in the first issue, we direct the plaintiffs (respondents) to pay one half of the appellant's costs in this appeal. The court-fee paid on the memorandum of appeal will be refunded to the appellant. Costs of the lower Court will abide the result.

A.S.V.