APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice King.

NOOKALA PEDA SATYAM AND ANOTHER (PETITIONERS—DEFENDANTS SIX AND SEVEN), APPELLANTS,

1935, February 12.

v.

THUMMALAPALLI KRISHNAMURTY (RESPONDENT—PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (*Act V of* 1908), *O. IX, r.* 13—*Minor*—Ex parte *decree against—Setting aside of—"Sufficient cause" for—Non-appearance of guardian deliberate and due to his honest conviction that plaintiff's claim is just, if a.*

When a guardian realises that the plaintiff's claim is just and that the minor defendant has no case to put forward and, exercising his judgment honestly and deliberately and in the interests of the minor defendant, decides that no good purpose can be served by putting in an appearance and for that reason fails to appear, the non-appearance of the guardian is not a "sufficient cause" within the meaning of Order IX, rule 13, of the Code of Civil Procedure.

Kathaswamy Chettiar v. *Ramachandran*, (1934) I.L.R. 57 Mad. 1069, followed.

Venkataratnam v. *Nagappa*, (1934) 67 M.L.J. 387, considered.

APPEALS against the orders of the Court of the Subordinate Judge of Ellore dated 16th April 1932 and made in Interlocutory Applications Nos. 74 of 1932 and 1004 of 1931 respectively in Original Suit No. 63 of 1930.

Ch. Raghava Rao for appellants.

K. Bhimasankaran for *N. Rama Rao* for respondent.

Cur. adv. vult.

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* Appeals Against Orders Nos. 474 and 475 of 1932.

JUDGMENT.

KING J.—Original Suit 63 of 1930 on the file of the Subordinate Judge of Ellore was a suit upon a mortgage. The mortgagors were defendants 1 to 5 of whom defendants 2 to 5 are brothers, and the first defendant their mother. Two other defendants were impleaded, defendants 6 and 7, the minor sons of the second defendant, and their mother was proposed as their guardian. Of these defendants, defendants 1 to 3 filed a written statement but did not further contest the plaintiff's claim; defendants 4 and 5 and the mother of defendants 6 and 7 remained *ex parte*. A decree was accordingly passed against all the defendants and in due course two applications were filed under Order IX, rule 13, to set this decree aside. One was filed by the fourth defendant and the other by defendants 6 and 7, appearing this time by their maternal grandmother. Both applications were heard together by the learned Subordinate Judge and dismissed, and against this order of dismissal the two appeals now under consideration have been filed.

[His Lordship considered Civil Miscellaneous Appeal No. 475 of 1932, the appeal preferred by the fourth defendant, upheld the finding of the Subordinate Judge that the fourth defendant must be deemed to have had at least constructive notice of the date of hearing of the suit, and dismissed his appeal with costs.]

The other appeal (Civil Miscellaneous Appeal 474 of 1932) raises a very interesting point of law. It is this—what is the effect with reference to Order IX, rule 13, or rule 9, of the failure of a guardian or next friend of a minor party in a suit

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to appear? Three points of view are possible. The first is what may be called the complete identification of the minor with his guardian. If that guardian does not appear and cannot satisfy the Court that he or she was prevented from appearing by sufficient cause, then no application under Order IX, rule 13, can be successful and the remedy of the minor, if he has any grievance against his guardian, is by separate suit. This is the view adopted by the learned Subordinate Judge.

The second view is that the mere fact of the non-appearance of the guardian is sufficient proof that the minor party, who is precluded from appearing in person or from choosing his own guardian, has been prevented by sufficient cause from appearing. This is the view which has been taken by the learned CHIEF JUSTICE sitting alone in a recent case reported as *Venkataratnam* v. *Nagappa*(1).

The third view is intermediate between these two. It finds expression in a case decided by my learned brother, also sitting alone, and reported as *Kathaswamy Chettiar* v. *Ramachandran*(2). It is there held that

> "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, Civil Procedure Code."

The first of these views is not seriously pressed before us. Neither the learned Subordinate Judge nor the learned Advocate for the respondent has referred to any authority in support of it, and it is in direct conflict with the principle that the

(1) (1934) 67 M.L.J. 387. (2) (1934) I.L.R. 57 Mad. 1069.

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Court is under a duty to show a special solicitude for the interests of minor parties in suits which come before it.

In the case of *Venkataratnam* v. *Nagappa*(1), which has been quoted as authority for the second view, the minor parties were plaintiffs whose next friend (their mother) failed to prosecute their suit, and the suit was dismissed on a day on which the defendants also were not ready to go on with it. An application was then made for the restoration of the suit on the plea that the next friend was prevented from appearing by illness. This plea was rejected by the District Munsif, and the application in consequence dismissed. In dealing with this order in revision the learned CHIEF JUSTICE begins by saying that the District Munsif had not addressed himself to the question whether the interests of the minors could be allowed to be prejudiced by the absence of the mother. Then three possible explanations for the mother's failure to appear are considered. She may have been ill, she may have been negligent, she may have been deliberately acting adversely to the minors' interests. In all these cases it is pointed out that the minors' interests should not be allowed to be prejudiced. Then follows the general conclusion, expressed in these words :—

"It appears to me, therefore, that the position in justice is that, if there are minor plaintiffs and defendants who are represented as they must be by a next friend and the next friend is absent, through whatever cause it may be, at the trial, then that fact alone is a sufficient reason for setting aside an *ex parte* decree passed against minor defendants or for setting aside an order of dismissal of the suit in the case of minor plaintiffs. I am supported in this view by a decision of

(1) (1934) 67 M.L.J. 387.

the Calcutta High Court in *Kesho Pershad* v. *Hirday Narain*(1) and by a decision of CURGENVEN J. in *Kathaswamy Chettiar* v. *Ramachandran*(2).

If I may say so with very great respect, it seems to me that the general conclusion does not necessarily follow from the reasoning of the judgment, and that the two authorities quoted do not go so far as to support this conclusion expressed as it is in its widest form and without any reservation. There is a fourth possible explanation for non-appearance which has not been considered; an explanation which no doubt would very rarely apply in the case of the next friend of a plaintiff whose change of attitude is itself *prima facie* indication of the neglect of the plaintiff's interests, but may well apply to the guardian of a minor defendant. It is this, that the minor defendant has no case to put forward, and that his guardian realises this and, exercising his judgment honestly and deliberately and in the interests of the minor defendant, decides that no good purpose can be served by putting in an appearance. In such circumstances it seems to me that the non-appearance of a guardian is not a "sufficient cause" within the meaning of Order IX, rule 13. A party can be said to be "prevented" from appearing only when he wishes to appear, and he wishes to appear only when he has some point of view to press upon the Court's attention. If he recognises the justice of the plaintiff's claim and is content to have a decree passed against him and for that reason fails to appear, he is in no sense prevented from appearing.

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(1) (1880) 6 C.L.R. 69. (2) (1934) I.L.R. 57 Mad. 1069.

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Kesho Pershad v. *Hirday Narain*(1) is a case decided in Calcutta in 1880. The crucial passage in that judgment is quoted by my learned brother in *Kathaswamy Chettiar* v. *Ramachandran*(2). It is there pointed out that the guardian's default was a "neglect of duty" and that he failed to take "what was obviously a necessary step to protect the minors' interests". And in *Kathaswamy Chettiar* v. *Ramachandran*(2) itself the same stress is laid upon the conduct of the guardian. The discussion which begins on page 1072 proceeds upon the finding of fact that the guardian had wrongfully allowed the claim to be decreed *ex parte*, and ends with that finding of fact, again expressed in another form, that the first defendant had betrayed his trust as guardian.

With great respect I find myself in entire agreement with this decision of my learned brother in *Kathaswamy Chettiar* v. *Ramachandran*(2) and unable to extend the principle so far as it has been extended in *Venkataratnam* v. *Nagappa*(3). It seems also to me that if the mere absence of a guardian without any enquiry into the reasons for that absence is to be accepted as sufficient cause for setting aside an *ex parte* decree, the door is opened wide for fraudulent conduct on the part of a group of defendants who desire unduly to protract the trial of a suit against them.

[Portion of the judgment is omitted as not being necessary for the purposes of the report.]

CURGENVEN J.—I agree.

A.S.V.

(1) (1880) 6 C.L.R. 69. (2) (1934) I.L.R. 57 Mad. 1069.
(3) (1934) 67 M.L.J. 387.