APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr Justice Cornish.

MAJETI VENKATASURYA SUBBARAYUDU SOWCAR, BEING MINOR BY MOTHER AND NEXT FRIEND VENKATASURYA SATYAPARVATAMBA NOW DECLARED A MAJOR AND THE GUARDIAN DISCHARGED (PLAINTIFF-PETITIONER), APPELLANT,

1935, January 30.

v.

MAJETI BAPANNARAO SOWCAR AND THIRTY-THREE OTHERS (DEFENDANTS-COUNTER-PETITIONERS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *O. IX, rr.* 9 *and* 13—*Minor plaintiff or defendant—Non-appearance of next friend or guardian* ad litem—*Dismissal of suit for default or passing of* ex parte *decree in case of—Restoration of suit or setting aside of* ex-parte *decree—Minor's right of—Non-appearance of next friend or guardian deliberate and in pursuance of a plan to obstruct litigation or not* bona fide.

A minor is not entitled to have a suit which has been dismissed for default restored to the file or to have an *ex parte* decree set aside where it is shown that the next friend or guardian absented himself or herself deliberately in pursuance of a plan to obstruct the litigation, or that the absence was not *bona fide*. To such cases the principle of the decisions in *Venkataratnam* v. *Nagappa*, (1934) 67 M.L.J. 387, *Kesho Pershad* v. *Hirday Narain*, (1880) 6 C.L.R. 69, and *Kathaswamy Chettiar* v. *Ramachandran*, (1934) I.L.R. 57 Mad. 1069, is inapplicable.

APPEAL against the order of the Court of the Subordinate Judge of Masulipatam, dated 14th August 1931 and passed in Civil Miscellaneous Petition No. 77 of 1931 in Original Suit No. 144 of 1925.

* Appeal Against Order No. 147 of 1932.

SUBBARAYUDU v. BAPANNA RAO.

K. Ramamurthi for *K. Kameswara Rao* and *C. K. Chandra Mouleswar* for appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for respondents.

BEASLEY C.J.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—This is an appeal against the order of the Additional Subordinate Judge of Masulipatam refusing, on the appellant's application under Order IX, rule 9, of the Code of Civil Procedure, to set aside a previous order dismissing the suit and to restore the suit to the file. The appellant is the plaintiff's next friend and the plaintiff is the son of the first defendant. There are a large number of defendants most of them alienees of property from the first defendant, the father of the plaintiff. The suit was filed in 1925 ; and various reliefs were claimed in it, one relief of course being to set aside the alienations as not binding on the joint family. The other matters in the suit as between the father and the plaintiff, his son, were compromised in 1927 and the matters remaining, namely, the questions relating to these alienations, stood over and the suit did not come up for final hearing until 21st January 1931 nearly four years after the compromise, which fructified into an interlocutory decree, had been come to. Some explanation is required for this very long pendency and the learned Subordinate Judge, who had all the records in the case including the B diary before him which we have not, was in a better position than ourselves to arrive at a conclusion as to whether this long pendency was due to the plaintiff's act or the action of the defendants ; and this is a matter which has a somewhat strong bearing upon the

question of the *bona fides* of the petition which he had before him to set aside the order dismissing the suit and to restore the suit to the file. The next friend of the plaintiff was the plaintiff's mother. She, being a woman, was not taking an active part in the litigation and that part was being taken by the plaintiff's maternal grandfather and he seems to have been in charge of the litigation. On the date in question, namely, 21st January 1931, the pleader for the plaintiff was unfortunately called away to another place. Owing to a sudden death in the family he left Masulipatam and, before going away, does not appear to have taken the necessary steps to get somebody else to represent him. He accordingly did not appear. The maternal grandfather of the plaintiff did not appear either, although according to him he made an effort to get to the Court which effort was frustrated by an accident to the vehicle in which he was travelling. It is one of those accidents which always seems to happen to persons who are going to Courts and who fail to arrive there in time and whose suits are accordingly dismissed in their absence and who seek thereafter to have the *ex parte* order set aside. The learned Subordinate Judge appears to accept as reasonable the explanation put forward with regard to the pleader. He did not appear and the suit was dismissed. Then a petition was filed nine days later to set aside the *ex parte* order. The Subordinate Judge is not satisfied with the *bona fides* of the petition and he observes that the other matters in the suit had been compromised between the plaintiff, the son, and his father, the first defendant. He thinks that the suit was

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allowed to be dismissed for default purposely leaving the minor plaintiff to reopen the question of alienations by the first defendant within three years of his becoming a major. He is, therefore, not unfamiliar with the tactics which minor litigants so frequently pursue. He thinks that it was to the advantage of the plaintiff to put off a final decision on this issue and he might possibly rightly have come to the conclusion that the plaintiff was not anxious to get a decision upon that question at that moment and thought that it was better to have the pending litigation hanging over the heads of the alienees with the object—and this is one of the allegations made in the counter-affidavit—of forcing them to a compromise. This case of course is not so strong a one as the cases where minor members of a family are seeking to set aside mortgages executed by the managing member. In such cases they are in possession of the property and nothing is to be gained by a speedy decision of the issues which they themselves have raised. They are prepared to remain in possession for as long a time as they possibly can and there is therefore no incentive to have the case speedily disposed of. In the present case most of the alienations were sales. However, there is something to be said for the view expressed by the Subordinate Judge here that it was possibly to the advantage of the plaintiff to postpone a decision of this issue and to keep the litigation hanging over the heads of the other defendants. He doubts the *bona fides* of the petition. He had before him the records and the B diary which neither party has thought necessary to produce here and he was able, on an examination of the

B diary, to see who was to blame for the long pendency of the suit; and he says: "the plaintiff took no steps in the matter". That, Mr. Lakshmanna argues, means that the plaintiff had not taken any steps in the matter up to that time. If that was so and if the records before the Subordinate Judge supported that view, that certainly was a very material consideration in coming to the conclusion that the petition was not *bona fide* in that the plaintiff was not really ready to go on with his case and that, even if his pleader had turned up, he would only have asked for an adjournment and, if it had been refused, would have reported no instructions. In my opinion, there is no reason for thinking that the view taken by the learned Subordinate Judge with regard to the *bona fides* of the petition is incorrect.

I think it necessary, however, to say something with regard to some decisions which were relied upon in the course of the argument of the learned Counsel for the appellant. He referred to *Venkataratnam* v. *Nagappa*(1), a decision of mine. In that case, I held that if there are minor plaintiffs and defendants who are represented, as they must be, by a next friend or guardian, and the next friend or guardian 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. In the course of my judgment and in support of it, I relied upon a decision of the Calcutta High

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

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Court, namely, *Kesho Pershad* v. *Hirday Narain*(1) and the decision of CURGENVEN J. in *Kathaswamy Chettiar* v. *Ramachandran*(2). I see no reason for thinking that I wrongly decided that case or that the cases on which I relied were wrongly decided. I think indeed that they were all correct; but this decision of mine has been quoted recently in other cases in support of the argument that, whenever a minor is a plaintiff or a defendant and is represented by a next friend or a guardian *ad litem* and that next friend or guardian *ad litem* is absent and the suit is dismissed or decreed *ex parte* on account of that absence, the Court is bound to restore the suit to the file or set aside the *ex parte* decree because the minor has not been represented in the suit. It is argued that, it does not matter what the cause of the absence may be, these decisions are to be taken as decisions that whenever the next friend or the guardian *ad litem* is absent, the minor is entitled to have the suit restored to the file or the *ex parte* decree set aside irrespective of other considerations. That is not so. The three cases to which I have referred are cases in which there was *bona fides*. They cannot be taken to apply to cases where, as a manoeuvre or in pursuance of tactics agreed upon between the plaintiff and the defendant or between the defendants themselves, the next friend or guardian *ad litem* deliberately absents himself or herself in order to gain some advantage in the litigation. Cases like those are not cases of *bona fide* negligence. They are cases where for ulterior and improper motive and as part of a deliberate plan this manoeuvre is resorted to. I wish it to be

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

clearly understood that the three cases to which reference has been made are cases which deal with *bona fide* conditions and none other. I think it necessary to say this about this decision because, as I have said before, this is not the first time in which it has been relied upon in support of a contention that, whatever happens, whenever there is an absence of a next friend or guardian, the minor is entitled to have the case restored to the list or the *ex parte* decree set aside. This would of course lead to manifest injustice. Take, for example, the case of an alienation made by a father of a joint Hindu family. The mortgagee files a suit making the father the first defendant and the other members of the family the other defendants. These other members of the family are very often represented by the father or if not by somebody else and the father remains *ex parte* and an *ex parte* decree is passed against him. Colluding with the father the guardian of the minor is absent. If an *ex parte* decree is passed in the absence of the guardian, then it is liable to be set aside because the minor was not represented at the trial; and such a decree is rightly set aside where the absence of the guardian is *bona fide*; but the guardian cannot be permitted to go on absenting himself time after time. If such a thing as that were to be allowed, it would mean that an *ex parte* decree could never be passed against a minor during the minor's minority. Every time the guardian was absent the minor would be able to say that he was not represented by his guardian and his guardian was absent through neglect, illness or otherwise. There must be some limitation to the rule stated in those cases

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and the limitation must be that, where it is shown that the guardian absents himself or herself deliberately in pursuance of a plan in order to obstruct a litigation, or the absence is not *bona fide*, the minor cannot claim the benefit of these decisions.

This appeal must be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

1934, December 21.

KARRI SEETARAMAYYA (COUNTER-PETITIONER), PETITIONER,

v.

PAPPU SUBRAHMANYAM (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. XXI, r. 58—Claim petition under—Permanent occupancy rights in lands attached set up by claimant in—Investigation of—Permissible under r. 58, if—Order against claimant on petition—Order stating that claimant's interests will not be affected by sale and directing that a note to that effect shall be made in sale list and that sale shall be held subject to that note, if an—O. XXI, r. 97—Obstructor found to be entitled to permanent occupancy rights in land possession of which sought—Proper order to be made in case of—Failure to go into merits of claim to permanent occupancy rights in application under r. 97 by reason of misconstruction of order on claim petition—Failure to exercise jurisdiction, if—Interference in revision under sec. 115 in case of.

A claim petition put in by the petitioner under Order XXI, rule 58, of the Code of Civil Procedure, alleging that he had

* Civil Revision Petition No. 1473 of 1928.