

The Court delivered the following

JUDGMENT:—We think that the suit is within the jurisdiction given by the Small Cause Courts' Act. It is simply a suit to recover in respect of the breach of the express contract to make the stipulated annual allowance.

1870.  
November 2.  
R. C. No. 44  
of 1870.

### Appellate Jurisdiction. (a)

*Referred Case No. 48 of 1870.*

G. CHINNIAH *against* BAUBUN SAIB.

An infant cannot sue except by next friend, and when an objection is made on the ground of the disability of the plaintiff the suit ought to be dismissed.

THIS was a case referred for the opinion of the High Court by G. Ramanjulu Naidu, the District Munsif of Cuddappah, in Suit No. 830 of 1870.

1870.  
November 4.  
R. C. No. 48  
of 1870.

The case stated was as follows:—

The plaintiff sued defendant to recover Rupees 40-0-0 on a bond, dated 22nd September 1869.

The plaint was signed and verified by the plaintiff.

The defendant was summoned to appear on the 8th September 1870, but owing to his absence the summons was affixed to his house.

He appeared, however, on the 5th September 1870 and put in a Petition No. 954, stating that the claim was the result of enmity between him and two relatives of plaintiff, that the plaintiff himself was a *minor* under the guardianship of one of the said relatives, as may be seen from inspection at the hearing of the suit.

On that petition it was ordered that the plaintiff should accordingly be present in Court, and this order was made known to his Vakil.

The suit was heard on the 8th September 1870. The plaintiff did not appear as ordered, but his paternal aunt, one of his said relatives, applied by Mis. Petition 966 to be joined as guardian to the plaintiff, on the ground that the plaintiff, a *minor*, had omitted to include her as such by mistake.

(a) Present: Innes and Kernan, JJ.

1870.  
November 4.  
It. C. No. 48  
of 1870.

I rejected this petition 966, because the minor plaintiff had already signed and verified the plaint, and because if I admitted the Aunt as plaintiff's guardian I could not get the plaint formally signed and verified by her. Neither is there any provision in the Civil Procedure Code to meet such cases. It did not appear that Section 73 was applicable to persons coming in as guardians of plaintiffs.

At the same time I also dismissed the suit in question, seeing that Mis. Petition 966, para. 6, was proof of plaintiff's minority noticed in Mis. Petition 954, para. 4, that according to the general practice of Mofussil Courts (Section 31, Act IX of 1850, with note 1 on Section 26 thereof, is applicable to the Presidency Small Cause Court) a minor should sue and be sued through a guardian or friend, that there could be no bar under Section 2 of Act VIII of 1859 to the plaintiff's guardian re-suing the defendant upon the same bond, since the dismissal of the suit was a mere non-suit, without any determination on the merits, and that the plaintiff being a minor could not come under Section 170 of the Act, although he failed to attend the Court.

But it is said in *Broom's Commentaries*, page 596, that "an infant, however, although for his own sake protected by an incapacity to bind himself by contracts, except for necessities, may be *doli capax* in a civil sense, and for civil purposes in the view of a Court of Equity." Again in *Chitty Junior on Contracts*, eighth edition, page 150, it is said, "It is laid down as a general rule that infancy is a personal privilege of which no one can take advantage, but the infant himself, and that therefore although the contract of the infant be voidable, it shall bind the other party, for being an indulgence which the Law allows to infants to protect and secure them from the fraud and imposition of others, it can be intended for their benefit only, and is not to be extended to relieve those with whom they contract from liability on such contracts. Were it otherwise, the infant's incapacity instead of being an advantage to him might in many cases turn greatly to his detriment."

From these authorities I now doubt whether the suit in question was rightly dismissed or wrongly; the

point therefore, for the decision of the Honorable High Court is

1870.  
November 4.  
R. O. No. 48  
of 1870.

Whether the minor plaintiff was competent to sue the defendant in his own name as if he were of full age without taking in any one as his guardian?

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The general principle is that an infant cannot sue except by “next friend;” but advantage of this point must be taken by plea or objection. We understand that such objection has been made in this case. Therefore the District Munsif was quite right in dismissing the infant’s suit.

### Appellate Jurisdiction. (a)

Regular Appeal No. 73 of 1869.

SOOBRAMANIA TELAVAR and another..... *Appellants.*

SOKKA TELAVAR and 8 others..... *Respondents.*

The plaintiff’s father, a member of an undivided Hindu family, signed an agreement by which he agreed to accept a provision in satisfaction of his claim for maintenance. The agreement was signed by reason of a mistaken belief entertained by the plaintiff’s father and the other members of the family that there existed an established custom in the family which rendered the property indivisible.

*Held*, in a suit by the plaintiff for a partition of the family property liable to partition, that the agreement having been come to under a mutual mistake, it was no bar to the plaintiff maintaining the suit, for it would not have prejudiced the right of the plaintiff’s father if he had chosen to insist upon a partition.

THIS was a Regular Appeal against the decision of F. S. Child, the Civil Judge of Tiinevelly, in Original Suit No. 8 of 1868.

1870.  
November 4.  
R. A. No. 73  
of 1869.

The plaint was as follows:—

This is a claim, in the matter of division, for the recovery of moveable and immoveable properties valued at Rupees 19,880-1-10.

The Ayen villages, &c., of the Elayirampannai Mutah referred to in the schedule are the ancestral property of Bhulokapandia Sokka Telaver (father of the 1st, 3rd, 4th and 5th defendants, and late Zemindar of Maniyachi) and

(a) Present: Scotland, C. J. and Innes, J.