RAMAN CHETTY *v.* ABDUL RASAC.

1903.
January 28.

D. C., Galle, 6,681.

Partition suit against minors—Guardian ad litem*—Certificate of curatorship—Civil Procedure Code, ss. 5, 6, and 582—Position of guardian* ad litem *in the suit.*

In a partition suit a motion to take the plaint off the file, because the shares alleged to belong to the plaintiff do not belong to him, is irregular.

It is frivolous on the part of one who had allowed himself to be appointed a guardian *ad litem* to represent certain minors in a partition suit, and given a proxy to his proctor to appear and defend the action, to object to the action on the ground that the minors have not been properly represented.

The proceeding in which he was made a guardian *ad litem* and added as a defendant is a proceeding which comes within the definition of the word " action " in section 6 of the Civil Procedure Code.

It is not necessary that such a guardian *ad litem* should obtain a certificate of curatorship under section 582 of the Code.

The person appointed as a guardian to represent a minor in an action should not be made a defendant in the action. His name should appear in the caption of the plaint as the next friend of the minors by adding to the names of the minor defendants the words " by their next friend,——."

THE plaintiff instituted this action for a partition of certain lands alleging that the first and second defendants, who were minors, were joint owners. The third defendant was the duly appointed guardian *ad litem* of the first and second defendants.

Without filing answer the defendants moved the Court to take the plaint off the file because (1) the caption of the plaint showed that the plaintiff sued as " N. K. Y. R. M. Ramen Chetty of Galle," meaning thereby that the land in respect of which the action was brought belonged not only to Ramen Chetty, but also to the other members of the firm N. K. Y. R. M.; and (2) the first and second defendants being minors could not be represented by a guardian *ad litem* but by a guardian or curator.

The Court (Mr. J. D. Mason) ruled as follows:—

" In a partition suit a minor should be represented by a curator appointed under section 582. Section 479 applies when the minor is a defendant to an action which is defined to be a proceeding for the prosecution or redress of a wrong. A partition suit therefore is not an action.

" The defendants' motion that the plaint be taken off the file is irregular, but the Court holds that the plaintiff cannot proceed

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with the suit until a legal representative of the minor has been appointed."

The plaintiff appealed.

Van Langenberg, for plaintiff, appellant.

H. A. Jayawardene, for respondent.

28th January, 1903. LAYARD, C.J.—

Before this action was commenced the third defendant was, on the 17th day of March, 1902, duly appointed guardian *ad litem* of the first and second defendants. He then, after the action was instituted, gave a proxy in favour of Mr. Abeywardene as guardian *ad litem* of the first and second defendants. The proxy authorized Mr. Abeywardene to appear and defend this action. Mr. Abeywardene filed proxy on the 14th August, and moved for two weeks' time to file answer. On the 29th August Mr. Abeywardene moved for notice on the plaintiff to show cause why the plaint should not be taken off the file, giving three reasons. The first reason was that the shares claimed by the plaintiff did not belong to him. I am entirely unable to understand how any proctor could suggest to a District Court in a partition suit that the plaint should be taken off the file because the shares alleged to belong to the plaintiff did not belong to him. The second objection taken was that the first and second defendants are not properly represented. The District Judge has upheld this second objection, and taken no notice of either the first or the third objection. The action of the guardian *ad litem* in taking this objection seems to me to be purely frivolous. He showed no cause originally against being appointed guardian *ad litem* for the defendants in this partition suit, and he came into Court on the strength of his appointment and gave his proctor a proxy to defend this action.

It may be, however, that the action has been wrongly instituted by the plaintiff. It has been argued that, under the Ordinance No. 10 of 1863, a minor, in view of the definition given of a "representative" in section 1, can only appear by his guardian or curator, because, at the time of Ordinance No. 10 of 1863 being passed, the Ordinance No. 2 of 1889, which I shall presently deal with, was not in force. Now, curiously enough, in the Ordinance No. 10 of 1863, except in the interpretation clause, the word "representative" nowhere occurs; but, assuming that the meaning of that section is that a minor can only be represented by a person legally entitled to act for and on behalf of him as his guardian, it appears to me that we

must look to the law in force at the time the partition suit is instituted to see whether it is necessary that a minor must be represented by a guardian specially appointed for that purpose *ad litem*. The District Judge is of opinion that under the Civil Procedure Code an action can only be brought for the prevention or redress of a wrong, because " action " is so interpreted in section 5 of that Code. By that section, however, the word " action " is only so interpreted if there is nothing in the subject or context repugnant thereto. If we were to limit all actions in our Courts to the prevention or redress of wrongs, no person could bring an action to compel the fulfilment of an obligation. However, it is not necessary for us to so hold, because section 6 of the Ordinance expressly defines action, and lays down that " every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action."

A partition suit is an application for relief or remedy obtainable through the exercise of the power and authority of the District Court. Such being the case, there is no difficulty in interpreting the word action in chapter 35 so as to make it include partition suits. Under the provisions of that chapter the Court has power, where the defendant to the action is a minor, to appoint a proper person to be guardian in the action for such minor, and generally to act on his behalf in the conduct of the case. The defendants' motion that the plaintiff's plaint be taken off the file must be dismissed, and the plaintiff allowed to proceed with his action, provided he amends the caption of his plaint by striking off the third defendant as a separate party, and adds to the names of the first and second defendants the words " by their next friend, Bamat Hakim Tuan Hanifa."

The appellant is entitled to the costs of his appeal. The objection taken by this guardian *ad litem* appears to us to be so frivolous that we think it right that he should pay himself the costs of the District Court and of this appeal, and that he should not be allowed to charge the same to the estate of the minors.

MONCREIFF, J.—

I am of the same opinion. The Judge thought that a legal representative should be appointed to the minors before the case could proceed. I think a legal representative has been appointed. I agree with the Chief Justice that the proceeding in which the third defendant was added as guardian *ad litem* was a proceeding

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which is included in the definition of action under section 6 of the Code. That section appears under the heading of "actions in general" and "general provisions."

As to the other point, to the effect that the guardian *ad litem* should obtain a certificate of curatorship under section 582 of the Code, the learned Judge is mistaken. It has been decided by the Supreme Court that even a curator must be appointed guardian *ad litem*.

But the converse proposition, that a next friend or guardian *ad litem* must be appointed curator does not hold good. The provision contained in section 582 is to the effect that a person cannot defend or institute an action of this description until he has obtained a certificate of curatorship, where the action is connected with the estate of a minor of which he claims the charge of the estate of the minors, and there is no necessity for his obtaining a certificate of curatorship.