

(1934) 07 BOM CK 0012
In the Bombay High Court
Case No : O.C.J. Suit No. 790 of 1933

Babu alias Vrajlal Ratansey

APPELLANT

Vs

Alibhai Dawoodbhai

RESPONDENT

Date of Decision : 02-07-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 14, 35

Citation : (1934) 36 BOMLR 1201

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Judgement

Rangnekar, J.—In this case after I delivered my judgment dismissing the plaintiff's suit the learned Counsel on behalf of the defendants asked that the next friend should be ordered to pay the costs of the suit and stated that that was the ordinary rule. Mr. Desai on the other hand contended that the suit being for the benefit of the minor and there being nothing to show that it was unnecessary or improper, there was no reason to make the next friend liable for the costs of the suit. He further said that as he had no notice of this application he was not prepared to argue the point fully. As it seemed to me that the question involved was of considerable importance and as counsel stated there was no direct decision bearing on the point, I allowed the case to stand over to the following Friday so that I should have the benefit of a fuller argument on the question. Accordingly, the question has been argued fully and a number of decisions, mainly of the English Courts, have been cited at the bar, and I may at once say that I am much obliged to the learned Counsel for their arguments. The question that I have to determine is, whether, where a suit is brought by a minor by his next friend and the suit is dismissed, the next friend should ordinarily be directed to pay the costs of the suit, or whether the next friend should be ordered to pay the costs only if the Court holds that the suit was not a proper suit or was unnecessary and not for the benefit of the minor. In this case it is conceded by Mr. Vakil on behalf of the defendants that the suit was for the benefit of the minor and that he is not in a position¹ to say that the suit was

unnecessary or was conducted improperly.

2. The old practice in England, if the infant was unsuccessful, was either to make the next friend personally liable for the costs, or to dismiss his action with costs generally without specifying who should pay such costs; and where the action was dismissed with costs generally without anything more, execution for costs always issued against the next friend, and this practice is evident from *Turner v. Turner* (1726) 2 Str 708 and *Slaughter v. Talbott* (1739) W 90 Sin 1767, however, the practice seems to have been altered, and the rule rather than the exception seems to be that in such cases the next friend is liable ordinarily to pay the costs of the successful defendant. This is clear from *Buckly v. Buckeridge* (1767) 1 Dick. 395. This was a motion on behalf of the plaintiff, an infant, to restrain the defendant, the executor, from receiving any more of the personal estate of the testator, and the rents and profits of the real estate, and for a receiver. Lord Camden did not make any order on the motion, but directed the prochein amy to pay the costs of the application. It is said that the order was made because the proceedings were unjustified and were improper. No such ground, however, is mentioned in the judgment as justifying the order and the order, seems to me to have been made as a matter of course.

3. Now, according to English law, an infant cannot in person assert his right in a Court of law as plaintiff or applicant, and cannot make himself liable to a defendant or respondent for costs, with the single exception that he may sue in a County Court for a sum not exceeding ?100 due to him for wages, or piecework, or for work as a servant in the same manner as if he were of full age. We have a similar exception in the Presidency Small Cause Courts Act, and the amount is Rs. 500. Consequently, an infant must institute and carry on all proceedings by his guardian or some other person who is called his prochein amy or next friend, and who is for most purposes dominus litis. (See Halsbury, Vol. XVII, para. 312 and 133). At p. 135 the learned author says that a next friend is liable to be ordered to pay the costs of the proceedings; but he will not be ordered to give security for costs. Then at p. 138, paragraph 317 is in these words:

An infant plaintiff is not liable personally for the costs of the proceedings, unless after attaining full age he elects to continue the proceedings or obtain an order for their discontinuance. But the defendant is entitled to recover from the next friend his costs of the proceedings if they are dismissed. The next friend is liable to the ;solicitor acting on behalf of the infant for the costs incurred by him in the proceedings.

4. Several cases are cited as authorities for the statement of the law contained in this paragraph in footnote (i) to the paragraph. I need not refer to the authorities which are cited in footnote (i) to paragraph 317. Some of these, undoubtedly, are clear authorities for the proposition laid ?down in that paragraph. Others, it is said, do not support the proposition as put by Halsbury but show that the next friend was directed to pay the costs of the successful defendant as it was held that the action was not a proper one and not for the infant's benefit. That,

undoubtedly, is true.

5. Now, it seems to me that there is a clear distinction between the liability of the next friend to pay the costs of the successful defendant as between himself and the latter, and the question as to the position between the next friend and the infant, and, if I may say so, the confusion in the argument seems to be due to ignoring this distinction. As far as I can see, the authorities are quite clear. Where the defendant succeeds, the next friend is liable to pay his costs, and the defendant is entitled to get his costs from him irrespective of the question whether the action was for the benefit of the minor or whether it was proper or not. But in such a case, according to the English practice, the judgment directed that the next friend should pay the costs of the successful defendant without prejudice to his right to be indemnified out of the estate of the minor or with liberty to reimburse himself, to the extent of the costs paid by him to the successful defendant, out of the estate of the minor. Where the next friend is entitled to have recourse to the estate of the minor in exercise of his right of indemnity or under the liberty reserved to him to recover the same when paid out of the estate of the minor, such directions are usually given in the judgment itself. Where, however, it appears to the Court, either at the hearing of the action or when an application is made by the next friend to that effect, that the action was improper, or not for the benefit of the minor, or not properly conducted, or that the next friend was guilty of negligence, in such cases the order is that the next friend should be liable to pay the costs of the successful defendant personally. When the order is that he is to pay the costs personally, it amounts to this that he can have no recourse to the estate of the minor. That is clear from paragraph 318 in Halsbury (Vol. XVII) which is in these terms:

Where the infant is entitled to property, the next friend can recover from that property any costs and damages which he has been ordered to pay, if the action was a proper one and for the infant's benefit. But he will have to bear the costs personally, if the proceedings were not for the infant's benefit or were improperly instituted. Where costs are allowed to the next friend as against the infant, he may have a charge for them on the infant's property; and in a proper case takes them as between solicitor and client, including all just allowances.

6. The practice is stated to be the same also in Daniell's Chancery Practice. At p. 101 of Vol. I, 8th Edn., it is said as follows:

The next friend is liable to the defendant for the costs, of the action, and of all motions and proceedings therein ;and if he has been ordered to pay any costs in the action, he will riot, in the absence of any reservation in the order, directing the payment, be allowed such costs out of the estate.

7. Then proceeding further the learned author states as follows (p. 108):

The rule above referred to (i.e. the rule which I have just mentioned), that a next friend is liable to the costs of the action, is applicable only as between the next friend and the defendant in the cause; for the Court is extremely anxious to

encourage, to every possible extent; those who will stand forward in the character of next friend on behalf of infants, and will, wherever it can be done, allow the next friend the costs out of the infant's estate of any proceeding, instituted by him on behalf of the infant, even though it has been unsuccessful, provided he appears to have acted bona fide for the benefit of the infant.

8. Then at p. 109:

If it should appear that the next friend has acted from improper motives, and has not instituted the action for the benefit of the infant, he will not be allowed his costs; or he may be ordered to pay the costs personally;....

9. The observations in Daniell's Chancery Practice, set out above were cited with approval by Scrutton L. J. in *Masling v. Motor Hiring Company (Manchester), Ltd.* (1919) 2 K.B. 538.

10. To the same effect are the observations in *Simpson on the Law of Infants*, at pp. 303-305.

11. It is argued that the next friend is not a party to the action, and, therefore, ordinarily he should not be ordered to pay the costs of the successful defendant. Now it is true that a next friend is not a party to the action, but the reason for allowing a minor to bring an action or to sue by his next friend appears to be to enable the opposite party to know whom to resort to for his costs in case of the suit being dismissed and to protect him in that respect. It is unnecessary to refer to cases where the Court has held that the Court has jurisdiction in some cases to order even a stranger to pay the costs of the suit, but the present case is a much-stronger case. Although the action is of the minor plaintiff, the next friend is dominus litis, and all the proceedings which are taken in the suit or the action are the proceedings of the next friend. The solicitor for the plaintiff is the solicitor of the next friend. I have already referred to the observation in *Halsbury* which says that the solicitor can recover his costs only from the next friend, and that is so because the contract of employment can only be between the next friend and the solicitor, a minor being incapable of entering into the contract. That the next friend is a surety for the costs of the opponents of the infant is clear from the *Yearly Practice*, 1934. The observations in the footnote under heading "Next Friend," p. 221, are as follows:

The next friend is not a party to the action; nor does he represent the infant; he is brought in simply to protect the interest of the infant and to guarantee the payment of the costs.

12. The authority cited in support of this proposition is *Dyke v. Stephens* (1885) 30 Ch. D. 189. In that case Mr. Justice Pearson observed as follows (p. 190) :- "The next friend is not a party to the action, he is put there simply to protect the interest of the infant, and to shew that the interest is of such nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action,....

13. The statement in the Annual Practice, 1934, on this point, is also to the same effect.

14. I now come to deal briefly with some cases which were cited at the bar, and the first case I should like to notice is one on which Mr. Desai relied, *Slingsby v. The Attorney-General* (1916) 32 T.L.R. 364. This was a legitimacy suit in which the Judge of the first instance held that the infant was the legitimate issue of his parents but ordered the parties to pay their own costs. There was an appeal, and the Appeal Court reversed the decision holding that the plaintiff had failed to establish legitimacy or that he was born of his parents. The appeal was allowed. The appellant's counsel argued that the costs should be ordered to be paid by the next friend of the infant. Mr. Tindal Atkinson for the next friend said that though it was usual where an action was brought by an infant plaintiff to order the next friend personally to pay the costs, this was not done in the case of the guardian ad litem of an infant defendant unless he had been guilty of misconduct. No imputation had been made on the next friend's honour, and the proceedings had, by the consent and for the convenience of all parties, been substituted for a Chancery action, in which the infant was made a defendant. He, therefore, asked that no order should be made as to costs. It is clear from this that a counsel in the position of Mr. Atkinson conceded that the ordinary practice was to make the next friend personally liable to pay the costs, but he sought to distinguish this case on the ground that, -having regard to the form of the proceedings, the legitimacy suit being converted into a Chancery action and the infant plaintiff being made the defendant, -the rule by which the guardian for the suit is not ordinarily directed to pay the costs of the successful plaintiff should be, made applicable. The Master of the Rolls said that vthe Court must order the infant and his guardian to pay the costs both in the Court of Appeal and below. My difficulty is to see how this case supports Mr. Desai.

15. The next case is *Bligh v. Tredgett* (1851) 5 De G. & Sm. 74. The facts appear to be as follows :- In 1849 a bill was filed purporting to be exhibited by & mkrried woman suing in respect of her separate estate by a person named as her next friend, but who, it afterwards appeared, had died two days before the bill was filed. A year afterwards a new next friend was, without his-knowledge, substituted for the deceased. The plaintiff's solicitor afterwards became insolvent and left the country. A notice of motion to dismiss the plaintiff's bill for want of prosecution, with costs, was served on the agent of the insolvent, the solicitor for the plaintiff in the cause and thereupon an order was made, dismissing the bill with costs, to be paid by the new next friend. Upon a motion by the new next friend to vary the order, by charging the costs on the plaintiff's solicitor, or to limit the liability of the new next friend to the payment of costs whilst he was on the record as such, it was held that the notice of motion to dismiss had been sufficiently given by service on the agent of the plaintiff in the cause, and that the form of the order, charging all the costs on the new next friend, was correct. The judgment of the Vice-Chancellor seems to me to be important on the question which I have to decide. The Vice-Chancellor said (p. 75):

...the motion had several objects; the first and principal one being that Mr. Baker should be relieved from the costs of this suit Mr. Baker being the new next friend. The practice of the Court was quite clear, and there was no reason why Mr. Baker should be relieved from his liability as between him and the defendants. The cases which had been referred to went to this length, that, where the solicitor improperly used the name of an individual as plaintiff or next friend in a suit, he was liable to indemnify the person whose name he had made use of; yet that circumstance did not affect the right of the defendants to look to the plaintiff or next friend for payment of the costs.

16. The learned Vice-Chancellor then refers to *Dundas v. Dutens* (1790) 1 Ves. Jun. 196 as settling the practice. In that case Lord Thurlow, Lord Chancellor, said (p. 200):

The Defendants must have their remedy against the Plaintiffs, and this Plaintiff against him, who pretended to be his agent. If a man's name stands upon the record, down to the hearing, which I can hardly conceive, without his knowing it, he must pay costs, if the bill is dismissed with costs.

Then the Vice-Chancellor proceeded (p. 76)

The practice had ever since been as it was settled in that case; and, under these circumstances, he could not relieve the next friend from the liability which the order imposed on him to pay the costs.

17. Another point which was raised on behalf of the new next friend in, *Bligh v. Tredgett* was that if he could not altogether be relieved from liability to pay costs, in any case that liability should be limited to the costs that were incurred after he was brought on record as next friend. Dealing with that the Vice-Chancellor said (p. 76):

There was, however, no authority to shew that it was the practice of the Court to sever such costs; and his opinion was that a party on becoming next friend became also liable to pay all the costs that had been previously incurred. He could, therefore,, grant him no relief in this respect.

18. This is one of the cases which is cited in footnote (i) to para. 317 in *Halsbury*, Vol. XVII, and seems to me to be against the contention advanced by Mr. Desai.

19. Another case which is referred to is *In re Hicks: Lindon v. Hemery* (1893) W.N. 138.

20. Now in that case the proceedings taken by way of an originating summons were undoubtedly improper. The summons was taken out by the plaintiff in two capacities, one as being a trustee of a settlement and the other as the next friend of two infants. The action failed and in both capacities he was ordered to pay the costs personally. It is argued that this case shows that the order was made against the plaintiff in his capacity as next friend because the summons was improper and there was no case. That undoubtedly is true But the point is

that the next friend " was asked to pay the costs personally, i.e., he could not have any recourse to the estate of the infants to reimburse himself to the extent of the costs he was called upon to pay or for which he was liable, and the case seems to me to be an authority for the proposition that as between the infant and the next friend, the latter cannot have recourse to the infant's estate when the proceedings taken by him were unnecessary.

21. The next case is *Rutter v. Rutter* (1921) P. 136. The head-note runs as follows:

The guardian ad litem of an infant husband who is a petitioner in the Divorce Division is in the same position as a next friend in the Chancery and King's Bench Divisions as to costs, and is liable to be ordered to pay the costs of an unsuccessful petition apart from any question of misconduct.

22. At p. 140 Mr. Justice Horridge observed:

It is not disputed that by the practice of the King's Bench and Chancery Divisions the next friend of an infant plaintiff is liable for the costs of the suit; but it is said that no such status as that of next friend is known in the Divorce Division where the rules provide that an infant must sue by his guardian.

23. The learned Judge then refers to *Beaven v. Beaven* (1862) 31 L.J 166 and *Slingsby v. The Attorney-General* (1916) 32 T.L.R. 364 and observes as follows (p. 142):

These two decisions are direct decisions that the person who acts as guardian to an infant petitioner is liable for the respondent's costs of the proceedings. I am glad that the cases so decide, because I think that is the right rule. In my opinion the same rule that applies in the Chancery and King's Bench Divisions ought to apply in the Divorce Division and for the same reasons.

24. The case seems to me to be clearly against the contention of Mr. Desai.

25. Another case to which Mr. Desai referred is (1876) L.R. 4 I.A. 23 (*Privy Council*) , which seems to me to be entirely irrelevant to the issue before me.

26. I do not propose to refer in detail to a point of practice which Mr. Desai has made. Although I have endeavoured to the best of my ability to follow his argument, I am unable to appreciate it. He referred to a decision of Mr. Justice Mirza and stated that a similar view was taken by Mr. Justice Wadia, the point being that it is open to the Court on the application of the defendant to direct an inquiry at an early stage of the litigation as to whether a suit was properly brought and was for the benefit of the minor. Mr. Justice Mirza held that the Court had jurisdiction to do so, and so did Mr. Justice Wadia. Undoubtedly, the Court has that jurisdiction. That is the practice in England, and no decisions are really necessary to support an old standing practice of this nature. But how does that help the present issue? The question still would remain at large. Supposing, for instance, as the result of such inquiry the Master reported that the action was

proper or was for the benefit of the minor, what then? The action would then still go on. Supposing it fails, as it has failed in this case, the question would still remain open. If, on the other hand, the report of the Master is that the action is improper and not for the benefit of the minor, the action will have to be dismissed, or, as Mr. Desai said, stayed. The practice of making an order of stay would lead to nowhere. Supposing an action is stayed or is dismissed, what then? In that case clearly the next friend would be liable, to pay costs. Does that mean that in no other case the next friend is liable to pay the costs of the successful defendant? I think, therefore, the argument as to this practice is really irrelevant. There is no liability under the provisions of the CPC on the defendant to make any such application. There are provisions in the Code which can be invoked by the defendant for his protection in certain cases in order to secure his costs in the event of the suit being decided in his favour, but there is no provision which compels a defendant to apply for a reference to ascertain whether an action brought by an infant by his next friend is or is not for his benefit or enables him to apply for security for his costs and the defendant is not bound to make any such application. For one thing, the defendant who may be a stranger and unacquainted with the minor and his affairs would generally not be in a position initially to say that the suit was not bona fide. That fact would be more within the knowledge of the next friend than of the defendant. I think the authorities clearly show that when the next friend comes forward to set the machinery of the law in action on behalf of a minor, the presumption is that he does so because it is for the benefit of the minor and that he is taking sufficient care to acquaint himself with the facts of the case and the position of the minor, and in doing so undoubtedly in some cases he takes a risk; but as between him and the defendant there is no reason why the defendant should be put in the position of having to proceed against the minor who may have no estate rather than the next friend who takes upon himself to bring the action and set the machinery of the law in motion. There is no harm or prejudice to him. If his conduct is bona fide, if the action is proper and for the benefit of the minor, he can always have recourse to the estate of the minor. If it happens that the minor has no estate, it is for him to consider whether he ought to move. Undoubtedly, as Mr. Desai stresses, the policy of the law is to encourage people to come forward and act as next friend, but I have to consider that policy in connection with the law, and the law is that the costs must follow the event, and the successful party is entitled to get his costs from the person from whom he can more easily recover them than from an infant minor. Of the two, I think the balance of hardship and inconvenience is certainly in favour of the defendant.

27. It may, therefore, be taken as established that according to the English practice the rule ordinarily is that the next friend is liable to pay the costs of the successful defendant, and the latter is entitled in a proper case to get them from him. At the same time the next friend has a right to ask that he should have liberty, to proceed against the estate of the minor in exercise of his right of indemnity, or to protect himself, as he is entitled to get not only these costs out

of the estate of the minor but all costs, charges and expenses which have been properly incurred in conducting the suit on behalf of the minor. It was held in *Wkittaker v. Marlar* (1786) 1 Cox 285, that nothing short of a dishonest intention will be sufficient to render a next friend liable personally for the costs and that no degree of mistake or misapprehension will be sufficient. But negligence in bringing an unnecessary or improper suit or impropriety in the conduct of the suit would be sufficient. This is recognized in Order XXXII, Rule 14, of the Civil Procedure Code.

28. The question then is, whether there is anything in the law of this country to the contrary. Section 35 of the CPC lays down the general rule and gives discretion to the Court in regard to the payment of costs. There is nothing in terms about costs in Order XXXII of the Code which deals with this case. In the old Code of 1882 there was a provision at the end of Section 440, which now corresponds to Order XXXII, Rule 1, and it was that the next friend " may be ordered to pay any costs, in the suit as if he were the plaintiff." I do not think it will be disputed that the omission of these words has made no change in the law, nor is it contended that it has. Section 35 of the CPC is general in its terms and would apply to such suits. Order XXXII, Rule 1, says that although it is the suit by an infant as the plaintiff, it is instituted and brought by the next friend, and suggests that it is the next friend who is primarily responsible for the suit. It cannot be disputed that all proceedings in the suit are taken by the next friend and that the infant is not liable to comply with the provisions of the Code or to do anything. Order XXXII, Rule 8, seems to suggest that the legislature intended to hold the next friend responsible for the costs of the litigation. Sub-rule (I) of that rule is in the following terms:

Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

29. There is no reason why the next friend if he is not liable personally for the costs of the suit should give security for the costs already incurred. The decisions in this country as well as in England clearly show that it is not right to make a minor plaintiff to pay costs personally, and it would not be proper to make a personal decree against him for costs, except in cases which would justify a personal decree for money against a minor, as for instance, where a minor like an adult is liable for damages in respect of any wrong which he has committed independently of a contract. Of course in certain cases the circumstances may justify the estate of the minor being charged with the payment of the costs, but generally speaking Courts in this country as in England are reluctant to order a minor to pay the costs in an unsuccessful action personally. In *Steed v. Preece* (1874) 18 Eq. 192 Jessel M. Rule said (p. 196) : "An infant has no costs: the costs incurred on his behalf in a suit are the costs of his guardian or next friend." The minor's estate sometimes may be liable, as, for instance, in a suit for partition there is no reason why the share of the minor's costs should not be

charged on his share in the property. That being so, the only reasonable rule to lay down would be to make the next friend ordinarily liable for the payment of the costs of the successful defendant.

30. I have already stated that there is no direct authority on the point, but the nearest authority which supports the conclusion to which I have come is *Bai Porebai v. Devji Meghji* I.L.R(1898) . 23 Bom. 100, where Farran C.J., dealing with the question of security for costs, observed as follows (p. 102):

The practice has always, so far as we are aware, been not to demand security for costs either from an infant directly or from his or her next friend...; and no order as to costs is made against an infant plaintiff.

31. Then he referred to *Simpson on Infants*, 2nd Edn., p. 468, and" continued : "The next friend of an infant is liable for the costs of the suit if unsuccessful." Then His Lordship referred to *Morgan and Simpson on Infants* and said (p. 102):

How complete this liability is, and how far it extends, is shown by Section 447 of the Code, which provides that a next friend cannot, ipso motu, retire from his position without giving "security for the costs already incurred, unless the Court relieves him from that obligation.

32. Section 447 there referred to corresponds to the rule which I have mentioned, Order XXXII, Rule 8(I).

33. Upon the whole, therefore, I have come to the conclusion that the ordinary rule is that the next friend must be ordered to pay the successful defendant's costs with a reservation in the judgment itself in his favour to the effect that he should have liberty to proceed to reimburse himself out of the estate of the minor. It may be possible in the suit itself to the Court to come to a conclusion on this point and to make the order at once; but if it is not possible, then liberty should be reserved and it should be open to him to apply by proper procedure for getting his costs, which he has been directed to pay, out of the estate of the minor. But if the Court is of opinion that the next friend should be personally ordered to pay the costs, that is to say that the next friend is not entitled to have recourse to the minor's estate, then that should be stated clearly in the judgment or order.

34. The order, therefore, will be that the suit is dismissed with costs to be paid by the next friend without prejudice to the next friend's right to recover the costs from the minor's estate.