
(1894) 07 CAL CK 0014
In the Calcutta High Court

Doorga Mohun Dass

APPELLANT

Vs

Tahir Ally and Another

RESPONDENT

Date of Decision : 04-07-1894

Acts Referred:

Citation : (1895) ILR (Cal) 270

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

Sale, J.—It appears that upon the death of one Shaik Abdool Tyeb in 1879, both these suits were revived in the names of Tahir Ally and Amiruddin, who were made co-plaintiffs in the second mentioned suit; and as Amiruddin was then a minor, Tahir Ally acted as his next friend. The second mentioned suit was a suit for an account against Abdool Hossain and Abdool Kyem as the executors of the estate of Ally bin Allabux. An account was taken, and in the result the executors were, by an order made on further directions on the 17th July 1879, directed to pay into Court two sums, Rs. 406-0-4 and Rs. 1,251-10-8. By a subsequent order, dated 21st March 1882, the executors were directed to pay these sums into Court within a specified time.

2. Tahir Ally died in 1884. Amiruddin, who then and thereafter had no next friend, applied in his own name for and obtained a rule as against the surviving executor, Abdool Kyem, to show cause why the order of the 21st March 1882 should not be complied with. The application was made at the last moment, apparently with the object of saving limitation. Abdool Kyem has appeared to show cause against the rule, and the cause which he has shown is of a twofold character. He says that the order of the 21st March 1882 had become barred by lapse of time before this rule was obtained, and therefore that he is exempted from all liability in respect of that order. He also contends that the application itself is irregular, inasmuch as the applicant, when he obtained the rule, did not show that he had attained his full age, and also did not obtain leave u/s 451 of the Procedure Code to proceed in these suits in his own name. Both objections

ate of a purely technical character, and the question is whether they are sufficient to prevent the Court from compelling the defaulting executor to obey the order of 21st March 1882,

3. As regards the question of limitation the facts are these:

On the 17th March 1894 the present applicant presented a tabular statement for execution of the order of 21st March 1882. The tabular statement was returned as not being in proper form. It was amended and again presented on the 4th April, supported by an affidavit, when an order was made for a notice to issue u/s 248 of the Procedure Code. In consequence of a further objection, which it is not necessary to specify, the application upon to came tabular statement and affidavit was again mentioned, and was finally disposed of on the 23rd of April. It must be taken upon these facts that the application, though not finally disposed of till the 23rd of April, was made on the 17th of March, or at latest on the 4th of April, and was in either case in time.

4. The next question is as to the effect of the objection u/s 451.

5. By that section a minor plaintiff, or a minor not a party to a suit, on coming of age, is required to elect whether he will proceed with the suit or application. If he elects to proceed with the suit or application, he is required to apply for an order discharging his next friend, and for leave to proceed in his own name.

6. That section does not in strictness apply to the facts as they appear in the present application, inasmuch as it is shown that the next friend had long been dead, and it further appears that the applicant himself attained his full age long previous to the present application.

7. Is the applicant, nevertheless, precluded from making the present application by the fact that he had not in the first instance obtained leave to proceed with the suit in his own name?

8. It is to be observed that the CPC requires every application on behalf of a minor to be made by his next friend, and provides that such application, if not so made, may be discharged. The words of the Code appear to give discretionary power to the Court to discharge the application made by minors who appear without a next friend. The procedure is the same as in the Courts in England. In the case of *Flight v. Bolland* 4 Buss. 298 the Court, in its discretion, allowed a bill which had been filed by a minor to be amended by appointing a next friend for the plaintiff and inserting his name as next friend. That order was made on an application for dismissal of the suit by the defendant. The reason why no proceeding can be taken by an infant without the assistance of a next friend is, as stated in *Daniell's Chancery Practice*, 6th Edition, p. 105, "on account of an infant's supposed want of discretion, and his inability to bind himself and make himself liable for costs." And it would seem that the rule was intended for the protection and benefit of defendants, for it has been held that when a defendant waives this benefit and protection, the suit may proceed without a next friend. Ex

parte Brocklebanh, Inre Brocklebank IL.R. Ch. D. 358.

9. That being so as regards persons who are still minors, it appears to me that unless there is an absolute bar created by positive enactment, a person, who has attained his full age, is prima facie entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and that, if necessary, the Court would, as a matter of course, give him leave to proceed or act in his own name.

10. I have already alluded to the death of the next friend as a circumstance which produced an alteration in the state of facts to which it was intended that Section 451 should apply.

11. In consequence of his death no application for his discharge could be made. But this it may be said would not affect the section, so far as it requires a minor plaintiff, who, on coming of age, elects to proceed with the suit, to obtain leave to proceed in his own name. Accepting that view, still the present application would, in itself, be an indication that the applicant had elected to proceed with the suit, and that the Court in allowing him to proceed in his own name in effect gave him the leave referred to in the section; but if that were not so, and the case required it, I should be prepared to give formal leave to the applicant now.

12. As to the provision in that section requiring the title to be corrected, that would apply to a pending suit, and not to a suit after final decree, in which it only remains to proceed in execution.

13. No doubt Amiruddin proceeded irregularly in not first satisfying the Court that he had attained his full age. This he has now done by affidavit in answer to the objections taken by Abdool Kyem, and his having done so at this stage can only affect the question of costs.

14. An application u/s 451 is not required to be made on notice. An ex parte application under that section may be made at any time, but as the facts are now fully before the Court, it is not necessary that a fresh application should be made merely pro forma, nor is it necessary that these suits should be revived. They are, as I have already said, not pending suits, and it seems to me that for the purposes of the present application the proper parties are before the Court. It is true that one of the executors has died, but that circumstance does not absolve the surviving executor from obeying the order of the 21st March 1882. The rule against Abdool Kyem will be made absolute, but, having regard to the irregularities in the inception of the application, I shall make no order as to costs.

15. There will be an attachment against the person of Abdool Kyem, and also an attachment against his property as prayed, but the writ against his person will not be issued for a fortnight, and will then be issued only if the money be not previously paid.