ORIGINAL CIVIL.

Before Chaudhuri J.

1915

Dec. 20.

KUMAR KRISHNA DUTT

v.

HARI NARAIN GANGULY.*

Costs—Solicitor's lien for costs—Minor—Next friend—Attorney's costs for proceedings undertaken on the next friend's instructions—Whether attorney is entitled to a charge on the minor's property for his costs so incurred—Practice.

Where a suit has been brought by a minor through his next friend for declaration of the infant's title to and possession of property, the attorney is entitled to have a charge declared on the properties for the amount of costs incurred by him and he is entitled to recover the same in a suit.

Shaw v. *Neale* (1), *Baile* v. *Baile* (2), *Pritchard* v. *Roberts* (3), *In re Howarth* (4), *Helps* v. *Clayton* (5), *Ex parte Tweed* (6), *Nerendra Nath Sircar* v. *Kamalbasini Dasi* (7), *Devkabai* v. *Jefferson*, *Bhaishankar and Dinsha* (8), *Khetter Kristo Mitter* v. *Kally Prosunno Ghose* (9), *In re Wright's Trust* (10), *Watkins* v. *Dhunnoo Baboo* (11), *Sham Charan Mal* v. *Chowdhry Debya Singh Pahraj* (12), *Ispahani* v. *Chundi Charan Pal* (13) and *Branson* v. *Appasami* (14) referred to.

THE plaintiff in this suit sought to recover from the defendant, who is an infant, the sum of Rs. 446-2 for balance of taxed costs in a suit, which had been instituted in this Court on the infant's behalf by his mother as next friend, for a declaration of the infant's

* Original Civil Suit No. 1300 of 1914.

(1) (1858) 6 H. L. C. 581, 601.
(2) (1872) L. R. 13 Eq. 497.
(3) (1873) L. R. 17 Eq. 222.
(4) (1873) 8 Ch. App. 415.
(5) (1864) 17 C. B. (N.S.) 553.
(6) [1899] 2 Q. B. 167.
(7) (1896) I. L. R. 23 Calc. 563, 573.
(8) (1886) I. L. R. 10 Bom. 248, 253.
(9) (1898) I. L. R. 25 Calc. 887, 889.
(10) [1901] 1 Ch. 317.
(11) (1881) I. L. R. 7 Calc. 140.
(12) (1894) I. L. R. 21 Calc. 872.
(13) (1905) 9 C. W. N. cxcvii.
(14) (1894) I. L. R. 17 Mad. 257.

title to and possession of certain house property in Calcutta. The plaintiff claimed that he was entitled to a charge on the infant's property for the amount of his claim and he also submitted that he was entitled in this suit to an order for the sale of the property in default of the payment of the amount claimed. On behalf of the infant defendant a written statement had been filed in which it was submitted that there could be no decree for costs against the defendant personally and that costs could not be recovered from the estate. It was also contended that the plaintiff should have proceeded by way of an application in Chambers, or that if a suit were instituted, it should have been instituted in the Small Cause Court. It was also urged that unnecessary costs had been incurred in the suit filed on the infant's behalf.

Mr. C. C. Ghose and *Mr. N. Sircar*, for the plaintiff.
Mr. I. B. Sen and *Mr. S. G. Ghose*, for the defendant.

CHAUDHURI J. This is a suit by an attorney to recover from the defendant, who is is an infant, the sum of Rs. 446-2 for balance of taxed costs in suit No. 158 of 1912, which was instituted in this Court on the infant's behalf by his mother as next friend, for declaration of the infant's title to and possession of certain houses in Calcutta. The plaintiff submits that he is entitled to a charge for the said sum on the said premises, and further that he is entitled in this suit to an order for sale of the premises in default of the payment of the amount claimed.

The defendant by his guardian *ad litem* Sarat Chunder Chatterjee, has filed a written statement in which he submits that there can be no decree for costs against the infant defendant personally, nor can such costs be recovered from the infant defendant's estate; that the plaintiff should have proceeded by way of an

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application in Chambers on summons, or, if referred to a suit, such suit ought to have been instituted in the Small Cause Court; he does not admit that Rs. 446-2 is due and submits that the costs in suit No. 158 of 1912 were unreasonably and unnecessarily incurred by the engagement of two counsel, one of them a senior counsel, inasmuch as the suit was undefended; and that further the plaintiff is not entitled to the costs (i) of procuring the attendance of two witnesses named in the 8th paragraph of the written statement, and (ii) of the production of records from the Small Cause Court when certified copies would have been sufficient; he also states that the taxation of the plaintiff's bill in the first suit was *ex parte* and submits that the infant defendant is not bound thereby.

No witnesses have been examined on behalf of the defendant, and I hold upon the evidence on behalf of the plaintiff that the original suit No. 158 of 1912 was properly instituted and was for the benefit of the infant; that it also became necessary to execute the decree obtained in that suit, and possession of the properties has been recovered on behalf of the infant defendant; that two counsel, including a senior, were properly engaged and the costs of procuring the attendance of the witnesses above mentioned, and of the production of records were justly incurred; and that the taxation was properly made. The present guardian *ad litem* attended for the greater part of the time when the bill was under taxation. He did not attend at the final stage, when an undertaking, which had been given on behalf of the next friend to file a warrant of attorney, was not complied with, and no letter of authority was produced by him on the mother's behalf. In fact learned counsel appearing, instructed by the attorney for the guardian *ad litem*, stated that he could not press any of the charges as the guardian was

not prepared to give any evidence. This suit I hold has been properly instituted. The mother had no doubt signed a warrant of attorney in Suit No. 158, and she was primarily liable for its costs. An application in chambers for realisation upon the allocatur could only have been made against her in that suit. A suit for declaration of a charge on immoveable property is not maintainable in the Small Cause Court. Besides, the question raised in this suit, as to whether immoveable property belonging to an infant can be so charged, is a question of some difficulty, and a fit one for this Court.

Formerly in England before statutory provision was made, it was undoubtedly the law that a solicitor could not claim a lien on real estate, even if recovered by his services: *Shaw* v. *Neale* (1). It was said by the Lord Chancellor in that case that "To hold that a solicitor obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property, unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor, or, if through a solicitor it is conveyed to the client, the solicitor is not in possession of the estate, but his client is in possession of it. All that the solicitor has are the deeds and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say, that he has any such lien upon the estate as, within the principle of the doctrine which I have suggested, can entitle him to maintain it as a charge upon the property." Since that case the principle has been largely extended and its applicability to cases other than those of

(1) (1858) 6 H. L. C. 581, 601.

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possession recognised, and a statutory charge on all classes of property has been created in England in favour of solicitors, by 23 & 24 Vict. c. 127. The law in England has since been more and more liberally construed in favour of solicitors.

In Baile v. *Baile* (1), it was argued that the employment of a solicitor by the next friend could not be construed as his employment by the infant plaintiff within the meaning of section 28 of the English Statute, but this contention was overruled by the Vice-Chancellor.

In *Pritchard* v. *Roberts* (2), the solicitor had at first applied under the Declaration of Titles Act of 1862, in the name of the infant and got a declaration in his favour, but not possession of the estate. Then a bill was filed in the infant's name for partition or sale, and ultimately the infant's share was sold and money was paid into Court to the credit of the partition suit. Then the solicitor applied to have it declared that he had a lien on the fund in Court for the costs incurred on the petition under the Declaration of Titles Act, of the partition suit and of the suit he had instituted to have the lien on the funds recovered. It was argued on his behalf that the costs might have been recovered in an action at law against the infant on the strength of *In re Howarth* (3), and might be treated as necessaries: *Helps* v. *Clayton* (4). Sir Charles Hall, V. C., held that the plaintiff was entitled to all the costs he had asked for and to have his lien declared. He held that, inasmuch as those costs might in a circuitous manner be made to come out of the infant's estate, namely, if the solicitor had sued the next friend of the infant for those costs and recovered them, the next friend might have recovered them

(1) (1872) L. R. 13 Eq. 497.
(2) (1873) L. R. 17 Eq. 222.
(3) (1873) L. R. 8 Ch. App. 415.
(4) (1864) 17 C. B. (N. S.) 553.

against the infant's estate, it was right and equitable to make the order.

In *Ex parte Tweed* (1), section 28 of the Solicitors' Act of 1860 was held applicable to a solicitor who had acted for the executor in certain probate proceedings to a charge for his costs in an action upon the property devised and bequeathed by the will as property "recovered and preserved" through his instrumentality. The bulk of the property was realty. Originally the probate of a will did not affect the realty, or those interested in it in any way. But the effect of 20 & 21 Vic. c. 77, sections 61, 62, one of the learned Judges held, had done away with the distinction between personalty and realty, and the order was accordingly made. In this country it has been laid down by the Privy Council that there is no difference between real and personal property : *Norendra Nath Sircar* v. *Kamalbasini* (2).

That an attorney has a lien for his costs on the funds recovered has long been recognised in our Courts. In *Devkabai* v. *Jefferson Bhaishunkar & Dinsha* (3), Sargent C. J. said : "It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vict. c. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in suit." The mere fact of the appointment of a receiver in that case did not, according to him, bring it within the ordinary rule as to solicitors' lien. It was an administration suit and the learned Chief Justice held that the trial Court could, if it thought fit, have allowed the next friend

(1) [1899] 2 Q. B. 167. (2) (1896) I. L. R. 23 Calc. 563, 573.
(3) (1886) I. L. R. 10 Bom. 248, 253.

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his costs out of the estate. It was not so ordered by the trial Court, and that was also one of the grounds why the lien claimed in that case was not allowed.

In *Khetter Kristo Mitter* v. *Kally Prosunno Ghose* (1), the learned Judge said as follows: "Whether the attorney's lien on the fund recovered in suit is the most appropriate mode of description, it is unnecessary to discuss, for the nature of the right is free from doubt. It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court." In this Court it has been held such right extends to immoveable property. In fact in later English cases it has been held that it is not quite correct to say that the solicitor's lien is a "common law lien": see the observation of Rigby L. J. in *In re Wright's Trust* (2) endorsed by the Lord Chief Justice (on page 324). It is a lien which has been recognised by every branch of the High Court in England, and since there is no distinction in this country between personal and real property, we are not hampered by a distinction which used to be made in England, where justice and equity are in favour of the right claimed. The broad principle underlying the recognition of the charge is, that a solicitor ought to be secured the fruits of his labour, although, in the case of absence of contractual liability, the charge has sometimes been described as in the nature of salvage lien, and in the case of absence of contractual capacity as arising out of the supply of necessaries.

In *Watkins* v. *Dhunnoo Baboo* (3), the solicitor instituted a suit to recover certain costs from the minor's estate. The infant through his mother as next

(1) (1898) I. L. R. 25 Calc. 887, 889. (2) [1901] 1 Ch. 317, 321, 324.
(3) (1881) I. L. R. 7 Calc. 140.

friend had originally sued his uncle for an account and partition of the estate of his grandfather, and partition was directed, and the infant's share upon such partition was delivered to the receiver of this Court. Then a suit was instituted against the infant and others challenging the infant's title. That suit was dismissed, but no costs could be recovered from the adverse party although attempts were made to execute the decree for costs. It was contended against the solicitor's claim that there was no contract by or on behalf of the infant who, under the Civil Procedure Code, had to act vicariously through other persons. The learned Judge held that the costs of a proper suit, or defence of a suit in which the property was involved, were recoverable from the infant's estate and that the attorney was entitled to succeed. Such costs were treated as being in the nature of "necessaries" for an infant.

In *Sham Charan Mal* v. *Chowdhry Debya Singh Pahraj*(1), the learned Judges followed the above case, although they said that it was not necessary to discuss whether the principle, which underlay the decision in *Watkins* v. *Dhunnoo Baboo*, (2) could be supported in its entirety.

In *A. M. B. Ispahani* v. *Chundi Charan Pal* (3), Harington J. held that a solicitor's charge on property recovered, was a first charge.

Branson v. *Appasami* (4) has been cited as opposed to the ruling in *Watkins* v. *Dhunnoo Baboo* (2)—but in that case the suit was repudiated by the minor on attaining majority, and it was held that *Watkins* v. *Dhunnoo Baboo* (2) had no application, inasmuch as the infant in that case had not repudiated, but was still an infant when the suit was instituted.

(1) (1894) I. L. R. 21 Calc. 872.
(2) 1881) I. L. R. 7 Calc. 140.
(3) (1905) 9 C. W. N. cxcvii notes.
(4) (1894) I. L. R. 17 Mad. 257.

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I quite agree with the contention that there cannot be a personal decree against the infant, but I hold, upon the consideration of the facts of this case and the law as it at present stands, that the attorney is entitled to have a charge declared on the properties for the amount claimed in this suit and he is entitled to recover same in this suit. There is evidence that he has not been able to realise the amount from the lady, although he has not proceeded in execution against her. She is a lady apparently without any property. I would have required the attorney to exhaust his remedies against the mother before allowing him to proceed against the infant following the observation made in *Baile* v. *Baile* (1), that the attorney was bound to show the incapacity of the next friend to pay, or at least to attempt to make her pay, those costs before coming to assert the charge, if I felt that there was any reasonable chance of getting any relief from the mother. It seems to me that to ask him to take such proceedings against the lady would be to throw the burden of additional costs upon the infant, which ought to be avoided. I am also specially inclined to make this order, inasmuch as I understood from learned counsel. who appeared instructed by the guardian *ad litem*, that he was at one stage prepared to pay the costs claimed in this suit if the charges made by him against the attorney of incurring costs unnecessarily were shown to be unjust. Such charges have clearly been shown to have been altogether unjust and were improperly made. The attorney would be entitled to add his costs of this suit to his claim and enforce them against the infant's properties recovered in the original suit. I would have directed the guardian *ad litem* personally to pay the costs of this suit, if I felt

(1) (1872) L. R. 13 Eq. 497.

there was any chance of recovering such costs from him. The infant should not be ordinarily burdened with such costs if they can be avoided. This case has not taken beyond a day's hearing and was necessary to institute to have the charge declared, and it does not seem to me unjust to make the order for costs as above made.

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CIVIL REFERENCE.

Before D. Chatterjee and Beachcroft JJ

In re POORNA CHANDRA ADDY.*

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Dec. 22.

Unprofessional Conduct—Pleader as litigant—Letter to Munsif threatening legal proceedings to recover costs, in execution proceedings, incurred owing to the negligence of the Court Officer—Legal Practitioners Act (XVIII of 1879) ss. 13(b) and 14—Anonymous communication—Contempt of Court.

Where a pleader who was a decree-holder in a certain suit associated himself with his co-decree-holder in a notice to the Munsif threatening legal proceedings to recover costs in an execution proceeding incurred owing to the negligence of the Court Officers though the pleader did not sign the notice :—

Held, that what was done by the pleader was done by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally, and that this case was not one within s. 13(*b*) of the Legal Practitioners Act.

In re Wallace (1), *In the matter of Jogendra Narayan Bose* (2), *In re a Pleader* (3), *In the matter of a first grade Pleader* (4), and *In the matter of Sarat Chandra Guha* (5) referred to.

* Civil Reference No. 6 of 1915, under s. 14 of the Legal Practitioners Act, by H. Allanson, District Judge of Cuttack, dated May 1, 1915.

(1) (1866) L. R. 1 P. C. 283.
(2) (1900) 5 C. W. N. 48.
(3) (1907) 18 Mad. L. J. 184.
(4) (1900) I. L. R. 24 Mad. 17.
(5) (1900) 4 C. W. N. 663.