ORIGINAL CIVIL.

Before Panckridge J.

KALACHAND BASAK

v.

AMULYADHAN BANERJI.*

1933

Nov. 16, 17

*Guardian—Guardian-*ad-litem, *Authority of, to appear at the various proceedings for which he would be allowed costs—Instructions of the natural guardian of the minor, if the guardian-*ad-litem *compelled to carry out—Costs of the guardian-*ad-litem, *if Court has power to order payment out of the minor defendant's estate where there is an undertaking by the plaintiff to be responsible for them—Code of Civil Procedure (Act V of 1908), s. 35 ; O. XXXII, r. 4.*

It is for the Taxing Officer to decide, having regard to the terms of the guardian-*ad-literm's* appointment, how far the latter was entitled to appear at the various proceedings for which he charges costs.

A guardian-*ad-litem* is to use his own judgment as to what steps he should take in the litigation and is not bound to carry out the instructions of the natural guardian when he does not approve of them.

Section 35 and Order XXXII of the Code of Civil Procedure give the court power to order payment of the guardian-*ad-litem's* costs out of the minor's estate even where the plaintiff has undertaken to be responsible for such costs.

ORIGINAL SUIT.

The facts of the case and arguments of counsel on either side appear sufficiently from the judgment.

S. C. Ray and *K. P. Das Gupta* for the plaintiffs.

B. C. Ghose and *S. Banerjee* for the defendant.

Cur. adv. vult.

PANCKRIDGE J. This is a suit of a somewhat unusual kind. There was a suit of 1904 relating to a certain *debattar* estate. It appears there were two families, each of which sought to have its members appointed as *shebâits*. One family may conveniently be referred to as the Basaks, and the other family as the Sets. Litigation was prolonged, and, in 1919, there was an appeal to the Privy Council. At that stage, a gentleman named Atulchandra Basak was a

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defendant in the suit, and as such, a respondent in the appeal. It is stated, however, that he took no great interest in the litigation, either when it was before this Court or when the appeal was pending before the Judicial Committee. He died in 1922, leaving him surviving his wife, a lady named Nandaranee Dasee, and the three plaintiffs before me, all of whom were then infants.

In December, 1922, Mr. J. C. Dutt, an attorney, who was acting for a certain member of the Set family, took out notice of motion for delivery by certain of the Basaks of the *thâkur* to his client. This notice was served on the present plaintiffs as the sons and heirs of Atulchandra Basak.

On January 5, 1923, Mr. Dutt wrote to Nandaranee that, unless she applied as natural guardian to have herself appointed as guardian-*ad-litem* of her minor sons, he would make an application to have an officer of the Court appointed as such guardian under Order XXXII, rule 4(*4*).

On January 10, 1923, Mr. C. C. Bose, an attorney, wrote on behalf of Nandaranee to Mr. Dutt saying that, owing to the fact that she was in mourning occasioned by the recent death of her husband, she was unable to consider her position and asking that the application should stand over for a fortnight. Apparently no notice was taken of this letter, and on January 15, 1923, an order was made by which the defendant was appointed guardian-*ad-litem*.

The defendant states that he was orally examined to ascertain if he had any interest adverse to the minors, and he satisfied the Master on that point. It is not suggested that, in fact, he had any adverse interest.

I here wish to draw attention to the fact that the defendant was in no way responsible for the fact that the lady's request contained in the letter to Mr. Dutt was disregarded.

On January 16, the defendant wrote to the lady informing her of his appointment and asking for her instructions.

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On January 18, the lady replied that she was herself willing to act as guardian, and that the defendant should acquaint the Court of the fact. The defendant states that he informed the Court of the contents of the lady's letter as soon as he had the opportunity, and I see no reason to think he is not telling the truth. Although apprised of the appointment, the lady took no steps to have it set aside or to substitute herself for the defendant. I myself cannot see that there was anything irregular in the appointment.

Much has been said on the question of the terms of the appointment, and my attention has been very properly drawn to the fact that it was of a limited character, inasmuch as the summons only asked that the defendant should be appointed to represent, appear and act for the plaintiffs on the hearing of the application to be made on January 15, 1923, for delivery of the *thâkur*.

I do not think, for reasons which I shall presently give, that it is necessary to deal with the subsequent litigation at any great length. The application apparently stood over, and on July 17, 1923, notice was given to the defendant as guardian-*ad-litem* that the applicant proposed to renew it on July 23. The defendant forwarded the letter to Nandaranee and asked for her instructions.

The maternal uncle of the infants, Babu Gaganchandra Basak, has given evidence for the plaintiffs, and he says that, on receipt of that letter, he went to Mr. C. C. Bose, and, after consulting him, had a letter typed in Mr. Bose's office on Mr. Bose's advice for the signature of Nandaranee, to the effect that, as the minors had no separate interest, and, as their uncles were attending to the matter, the defendant need not appear and incur expense. Gagan says that the letter was taken to Nandaranee, who signed it and kept the draft, and Gagan says he personally took it to the defendant's office and got a receipt which,

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however, he is unable to produce. The defendant denies receipt of the letter.

On this part of the case, I have no hesitation in preferring the defendant's evidence to the evidence of Gagan.

I notice that, in the affidavit of documents, what is now described as a "draft" is called a "copy". Perhaps this has no very great significance, and is explicable upon the hypothesis of carelessness or insufficient instructions; but when there is no corroboration from Mr. Bose's office of this letter having been drafted, and when the receipt, which is stated to have been given, is not forthcoming, I consider that in face of the denial it would be quite impossible to accept Gaganchandra's evidence.

I may also say that, even if I believed that the instructions given in the letter were received, that would not conclude the matter, because the defendant was still at the time guardian-*ad-litem*, and he was bound to use his own judgment as to what steps he should take in the litigation. He was not compelled to carry out the instructions of the natural guardian unless he approved of them.

There were various enquiries ordered, and the officer, to whom they were deputed, duly made his report. Exceptions were taken, and on one occasion at least the matter came before the court of appeal. On these various occasions the defendant appeared in person as guardian-*ad-litem* of the infants. Complaint is made of this, and it is said that the infants were not interested in the matter, which concerned the appointment of *shebâits*, a position for which they were disqualified on account of their age. I do not think that it necessarily follows that they were not interested in the matter. The dispute was one as between two families, and I am not prepared to say that the defendant was wrong in appearing to support the contentions of the family of which the infants were members. If he did not do so, I think there was some possibility that the infants,

on attaining majority, might complain that he had not adequately protected their interests.

Moreover, it has been clearly established that, on the only occasion on which counsel was briefed on behalf of the infants, it was at the direct request of their uncle Gagan who supplied the money required for counsel's fee.

The application was finally disposed of on March 9, 1929. By an order of that date, Gagan was appointed a *shebâit*, and it was directed that the defendant as guardian-*ad-litem* should be discharged, and that his costs, after taxation as between attorney and client, should be paid out of the estate of the infants. The costs have now been taxed. The *allocatur* has remained in abeyance pending the result of this suit.

The main relief prayed for is that the order of March 9, 1929, should be set aside, in so far as it relates to the payment of costs to the defendant out of the minors' estate. The eldest of the three infants has now attained majority, and he sues on behalf of himself and his minor brothers.

It is said comprehensively that the order is without jurisdiction. Many points have been raised in the case with which I cannot possibly deal. I do not see how I can consider the validity of the defendant's appointment as guardian-*ad-litem*, though in point of fact I would say that I see no reason at all for supposing that he was not validly appointed.

I may also say that I do not think that I can entertain the question as to how far, in view of the terms of this appointment, the defendant was entitled to appear at the various proceedings for which he has been allowed to charge costs.

It was for the Taxing Officer to decide the extent of the defendant's authority, and to construe the order from that point of view. Moreover, I do not think I can go into the question of the general jurisdiction of the court, to award costs against infants.

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Various cases have been brought to my notice as to the power of the court to order infants to pay the costs of opponents. I entertain no doubt that the court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs and *vice versa.* I also entertain no doubt that orders can be made on a next friend or guardian-*ad-litem* to pay such costs personally.

Further, I do not think that I can consider whether this order, in so far as it directs the costs to be paid out of the infants' estate, is right or not.

I think, having regard to the very wide terms of section 35 of the Code, and having regard to the terms of Order XXXII, that if the court had power, in the circumstances, to deal with the matter at all, it had power to direct that costs should be paid out of the minors' estate, and that being so it is not for me to say whether in this particular case such an order was correct or not.

The only hesitation which I have felt is occasioned by the fact that the order has undoubtedly been made in favour of the defendant, and in a sense against the plaintiffs, in circumstances which precluded the possibility of the plaintiffs' being heard with regard to it.

I should have mentioned before, that, at the time the defendant was appointed guardian, he stated that he was only willing to accept the position on condition that provision was made for his costs. Thereupon Mr. J. C. Dutt's client undertook to be responsible for the costs. It now turns out that that undertaking is of no value, as far as the defendant is concerned, because Mr. Dutt's client has since been adjudicated insolvent. In my opinion, however, the existence of this undertaking cannot possibly deprive the court of the jurisdiction to make any order that it thinks fit with regard to the costs.

With regard to the point as to the absence of any one to protect the interests of the plaintiffs when the order was made,

I have come to the conclusion that this is not a fatal objection. If it were a fatal objection, the result would follow that an order could never be made providing for the reimbursement of a guardian-*ad-litem* at the expense of those whom he represents without getting the minors separately represented, simply for the purpose of dealing with the question of their liability to costs. I do not think this is necessary or that an order made against the infants and in favour of their guardian in circumstances like the present, can be regarded as a nullity.

I do not say that the infants are altogether without a remedy. I see no reason why when such an order is made that they should not thereafter be able to apply in the suit to have the guardian discharged and the order as to costs set aside or varied.

Again, if a guardian-*ad-litem* has been negligent, or wasteful, or otherwise imprudent in looking after the interests of the minors, and if he has obtained an order for costs, I should suppose that a suit lies for damages which may be set off against the costs payable under the order. It is true that the plaint does contain an alternative prayer for damages, and did I think any case had been made out for saying that Mr. Banerji has been negligent or culpably remiss in the performance of his duties, I should be prepared to entertain the claim on this basis, but as I have indicated I do not think such a case has been established.

In the circumstances, I do not think that the infants can say that the order passed, is, as regards their liability, a nullity, and that they are not bound by it. It follows that the suit is dismissed with costs.

Suit dismissed.

Attorneys for the plaintiffs: *K. K. Dutt & Co.*

Attorney for the defendant: *B. Dutt.*

P. K. D.