ORIGINAL CIVIL.

Before Mr. Justice Broughton.

1881
May 4.

WATKINS *v.* DHUNNOO BABOO.

Infant—Minor—Next Friend—Costs of Minor—Necessaries—Contract Act (IX of 1872), s. 68.

Where a suit has been brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the costs of successfully defending that suit on his behalf may, when his property is in the hands of the Receiver of the Court, be recovered from the minor as necessaries, in an action brought against him by his attorney.

THIS was a suit brought by the plaintiff, an attorney of the High Court, for the recovery of Rs. 1,469-4 from the defendant, who is a minor, on account of work done and money paid for the defendant as his solicitor. It appeared from the plaint and the evidence in the cause, that, on the 8th of April 1876, the defendant, by his mother and next friend Champa Beebee, brought a suit against his paternal uncle, one Chunnoololl Johurry, seeking for an account and partition of the estate of his grandfather, Inder Chund Johurry. Shortly after the institution of the suit, Champa Beebee was removed, and Mr. C. F. Pittar, an attorney of the High Court, was appointed next friend of the minor in her place.

On the 28th of July 1876, a decree was made in the above suit, whereby it was ordered that the partition asked for should be carried out, and that the share of the plaintiff should be handed over to the Receiver of the Court, to be retained and managed by him for the plaintiff until the latter should attain his majority. A commission of partition was issued out, and on its return it was found that the value of the minor's share was about a lakh of rupees.

On the 20th of March 1877, one Paunch Cowrie Mull and others instituted a suit in the High Court, against Chunnoololl Johurry, Champa Beebee, and the minor, claiming that the property, the subject of the partition suit, was not the property

of the defendants, but belonged to Paunch Cowrie Mull and his co-plaintiffs, who claimed to be trustees thereof for the purpose of carrying out certain religious trusts. Mr. Pittar was appointed next friend of the infant in that suit also, and the plaintiff in the present case was the infant's attorney. The suit was dismissed with costs on the 20th of August, and this decree having been appealed from, the suit was finally dismissed on the 21st of March 1879. On the 25th of September 1879, a writ of attachment was issued out against Paunch Cowrie Mull and others for the recovery of the taxed costs as between party and party, but the writ was not executed, as the plaintiff could not be found. The plaintiff, Mr. Watkins, who had paid all the costs of the infant both in the Court of first instance and in the Court of Appeal, then instituted the present suit to recover them from the minor's estate.

Mr. *Trevelyan*, for the plaintiff, contended, that the costs paid by the plaintiff, and incurred in the suit and appeal, were necessaries within the meaning of s. 68 of the Contract Act; see *Collins* v. *Brook* (1), *Brown* v. *Ackroyd* (2), and *Wilson* v. *Ford* (3).

Mr. *T. A. Apcar*, for the defendant.—The case is covered by *Radhanauth Bose* v. *Suttoprosono Ghose* (4) and *Denonauth Bose* v. *Ruggoobardial Singh* (5). *Collins* v. *Brooke* (1) has nothing to do with this case. The other cases cited have no reference to infants.

Mr. *Trevelyan*, in reply, said, that the question as to whether costs are "necessaries" was not entered into in the cases cited by Mr. Apcar.

BROUGHTON, J.—The plaintiff, an attorney of this Court, seeks to recover Rs. 1,469-4, with interest, on account of certain costs incurred by him in defending a suit for the present defendant, who was, and still is, an infant under age.

(1) 5 H. and N., 700.
(2) 5 E. and B., 819.
(3) L. R., 3 Exch., 63.
(4) 2 Ind. Jur., N. S., 269.
(5) Unreported, *per* WHITE, J., 8th June 1880.

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He contends, that these costs are "necessaries" within the meaning of the Indian Contract Act, s. 68, which enacts, that "if a person, incapable of entering into a contract, &c., is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

The infant, on the 8th of April 1876, through his mother and next friend, sued his uncle for an account and partition of the estate of his grandfather, and a decree was made by consent, on the 28th of July 1876, for partition. It was directed that the infant's share should be delivered to the Receiver of this Court. Mr. C. F. Pittar, an attorney of this Court, was substituted for the mother as the next friend of the infant. The partition was made, and the property allotted to the defendant is now in the hands of the Receiver.

Afterwards, on the 20th of March 1877, one Paunch Cowrie Mull and others sued the infant and others, praying that the will of one Hoolassee Lall might be construed; and that the rights of the plaintiffs, as members of a certain Punch and the other religious trusts under this will, might be ascertained, and that, if necessary, this suit might be treated as supplemental to the former suit.

In this second suit Mr. Pittar also was appointed guardian *ad litem* for the infant.

This second suit was dismissed with costs. The plaintiffs appealed, and ultimately the appeal was dismissed also with costs.

Attempts have been made to execute these decrees for costs, but the persons against whom this execution was sought cannot be found, and have no property.

If Paunch Cowrie Mull had succeeded in his suit, the property adjudged to the infant in the first suit would have been swept away.

There was, however, a good defence to the suit; and it was therefore necessary, in the ordinary acceptance of the term, that proceedings should be taken to protect the interests of the infant from this attack which was made on his property.

A proper and responsible person was appointed to act as

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guardian to the infant, and to see that no unnecessary proceedings should be taken on his behalf; and the guardian protected himself from personal liability by an agreement with the present plaintiff, who was retained by him to act as attorney for the infant defendant.

It is contended, upon the authority of a case decided by Mr. Justice Phear—*Radhanauth Bose* v. *Suttoprosono Ghose* (1), and a late case decided by Mr. Justice White on the 8th of June 1880—*Denonauth Bose* v. *Ruggoobardial Singh* (2), that these costs, although they have been properly incurred in defending an action which ought to have been defended, are, nevertheless, not recoverable.

In the first case Mr. Justice Phear held, that there was no contract by or on behalf of the infant, and the reasons are given why an infant is not permitted to enter into this particular contract, but must act vicariously under the established rules of Court. These rules are now embodied in the Code of Civil Procedure, Act X of 1877, and the Contract Act, s. 11, does not allow an infant to enter into any contract.

In the case decided by Mr. Justice White, it appears that the guardian was also a party to the suit, and that the infant's estate was in his hands.

The notes of the judgment are very short, and, as I understand them, it was held that the decree should be against the guardian, and that he could recoup himself out of the infant's estate.

The infant in this case comes within the description of a person incapable of entering into a contract, and the question is, whether the work done for him by the plaintiff comes under the head of "necessaries."

It has been decided in the case of *Collins* v. *Brook* (3), cited by Mr. Trevelyan, that payment made to avoid arrest is a necessary. In *Brown* v. *Ackroyd* (4), a suit to protect the person from violence was considered in the same way necessary.

In *Wilson* v. *Ford* (5) it was contended, that *Brown* v. *Ackroyd* (4) went as far as the law allowed in this direction;

(1) 2 Ind. Jur., N. S., 269.
(2) Unreported.
(3) 5 H. and N., 700.
(4) 5 E. and B., 819.
(5) L. R., 3 Exch., 63.

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but it was considered by the Barons of the Exchequer, who were unanimous, that where a wife had been deserted by her husband, who had deprived her of her property, and when she had failed in her endeavours to persuade him to return to her, and had instituted proceedings for the restitution of conjugal rights, the costs of all reasonable proceedings incurred in this manner were necessaries, including the expenses of taking Counsel's opinion upon the construction of a settlement and expenses incurred by her to protect the husband's property from a distraint. If an infant is liable for necessary food and raiment suitable to his condition in life, on the ground that they are necessaries, it would be strangely anomalous if the law were to hold that proceedings properly taken to preserve him from complete ruin and destitution must be taken at the risk and expense of those persons who act for his benefit, and who may, or may not, recover the money so spent, as the infant, on coming of age, may chance to approve of or repudiate the arrangements, and be willing or unwilling to repay them. I think that the case of *Wood* v. *Ford* (1) is sufficient authority for the proposition that the costs of a proper suit or defence of a suit in which property is involved are recoverable from the infant's estate, and as the costs appear to have been taxed and to be reasonable in the present instance, the plaintiff is entitled to succeed. It was, however, very right that the question should have been discussed. The costs of both parties must be paid out of the estate of the infant. (2)

Attorney for the plaintiff: Mr. *Farr.*

Attorney for the defendant: Mr. *M. Camell.*

(1) L. R., 3 Exch.

(2) See the observations of the Master of the Rolls, Sir George Jessel, in *Steed* v. *Preece*, L. R., 18 Eq., 192.