

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Ranquekar.

MESRS. JHAVERY & Co., APPELLANTS (ORIGINAL RESPONDENTS), v.
HIRACHAND GANGJI, RESPONDENT (ORIGINAL PLAINTIFF AND APPLICANT).*

1938
April 1

Solicitor's lien—Minor suing by next friend—Lien only against next friend—Client of solicitor—Whether next friend or minor.

Where a solicitor is engaged by the next friend of a minor, the client who instructs the solicitor and who is liable to pay him the costs is the next friend and not the minor.

The lien of a solicitor is a lien against his own client. As against third parties he does not possess rights higher than his own client possesses ;

Smith v. Chichester,⁽¹⁾ referred to.

Where after a change of the next friend of a minor the newly appointed next friend appoints his own solicitor the solicitor appointed by the old next friend is bound to hand over the documents, etc., to the new next friend or his solicitor.

APPEAL from an order of Somjee J. made in chambers (March 17, 1938) on an application in Suit No. 1950 of 1935.

Solicitor's lien.

The material facts are stated in the judgment of the Chief Justice.

M. C. Setalvad, Advocate General, for the appellants.

V. F. Taraporewala, for the respondents.

BEAUMONT C. J. This is an appeal against an order made by Mr. Justice Somjee in chambers by which he directed the present appellants, who are attorneys of this Court, to hand over to the present attorneys for the plaintiff in a suit, to which I will refer in a moment, certain documents without prejudice and subject to the lien, if any, which the appellants may have against the minor plaintiff for their costs. The circumstances in which the order was made are these. There

*O. C. J. Appeal No. 17 of 1938 : on an application in Suit No. 1950 of 1935.

⁽¹⁾ (1842) 2 Dr. & War. 393.

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is a suit pending in this Court by a minor, Hirachand Gangji, in which he claims to be the adopted son of one Gangji Sojpal and he asks for partition of the joint family property. In that suit one Kanji Velji was next friend for the minor plaintiff. Originally he employed as his attorneys Messrs. Smetham, Byrne & Lambert. In the course of the suit the plaintiff through his next friend Kanji Velji arrived at terms of compromise, and in order to carry out the terms of the compromise, and I suppose, to get them recorded by the Court, Kanji Velji changed his solicitors and went to the present appellants, Messrs. Jhavery & Co. Eventually the documents relating to the matter were handed over to the present appellants by Messrs. Smetham, Byrne & Lambert. On February 1, 1938, an order was made dismissing Kanji Velji from the position of next friend of the minor plaintiff, and appointing one Kanji Lalji to be next friend in his place. Shortly after that Kanji Lalji appointed Messrs. Rustomji & Ginwala to act as his solicitors in place of Jhavery & Co., and he requested Jhavery & Co. to hand over the deeds and documents in their possession to Rustomji & Ginwala, and the former next friend Kanji Velji concurred in that request. Messrs. Jhavery & Co. refused to hand over the documents unless they were paid the costs due to them in relation to this suit. Thereupon a summons was taken out on which the order under appeal was made, that order, as I have said, being in effect that Jhavery & Co. should hand over the documents to Rustomji & Ginwala without prejudice to their lien after the hearing of the suit. No doubt there is force in the contention that in point of fact the order does prejudice the lien of the present appellants, because at the moment they may be able to prevent the suit from being proceeded with by withholding the documents, and in that way they may be able to compel the parties interested to pay them. To be in a position to exert pressure of that sort is one of the advantages conferred by a solicitors' lien. The

question therefore is whether Messrs. Jhavery & Co. have got a lien, and if so, whether they can enforce that lien against the present next friend of the minor and his solicitors, to whom they have been ordered to hand over the documents. Now in my opinion it is clear that the client who instructed Jhavery & Co. was the next friend Kanji Velji, and not the minor. It is to the next friend, and not to the minor, that a solicitor looks for his costs, and the next friend is liable to pay those costs. It may be that in a proper case the solicitor ultimately can get the costs out of the minor's estate, but the next friend is the person directly liable to the solicitor. It is, I think, clear that Jhavery & Co. had and have a lien enforceable against Kanji Velji. But a solicitor's lien is a lien against his client, and as against third parties he has no higher right than the client possesses. As an illustration of that I may refer to the case of *Smith v. Chichester*,⁽¹⁾ where it was held the mortgagee being entitled to the title-deeds of the mortgaged property, the mortgagor's solicitors, who had a lien on the deeds as against the mortgagor, could not resist an order directing them to hand over the deeds to the mortgagee. Now here Kanji Velji having been removed from the position of next friend, the Court could undoubtedly direct him to hand over the documents relating to the suit to the new next friend, and there would be no answer to an application for such an order. If that is so, the appeal must fail, since the appellants are in no better position than their client Kanji Velji, and cannot resist an order to hand over the documents to the new next friend or to his solicitors on his behalf. The learned Advocate General has tried to escape from that position by contending that the real client of both sets of solicitors is the minor, and therefore it is against the minor that the lien exists, and there is no question of any third party demanding the documents. But, in my opinion,

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⁽¹⁾ (1842) 2 Dr. & War. 393.

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that is not the correct legal position. I think the client of the solicitors is the next friend, and as the old next friend cannot resist an order to hand the documents over to the new next friend, the old next friend's solicitors, that is, the appellants, are in no better position. I think therefore the order made by the learned Judge was right. The appeal must be dismissed with costs.

RANGNEKAR J. I agree.

Attorneys for appellants: Messrs. *Jhavery & Co.*

Attorneys for respondents: Messrs. *Rustomji & Ginnwala.*

Appeal dismissed.

N. K. A.

PRIVY COUNCIL.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND
 ADEN, APPELLANT v. CHUNILAL B. MEHTA, RESPONDENT.

1938*
 June 16

[On Appeal from the High Court at Bombay]

Income-tax Act (XI of 1922), s. 4 as amended by Act XXVII of 1923—Contracts by merchant in British India for purchase and sale of goods in foreign markets—No delivery taken and profits not brought into British India—Place where profits arise or accrue.

Profits from contracts for purchase and sale of commodities in foreign markets, where no delivery is taken and the profits are not brought into British India, are not profits which arise or accrue in British India though directions for the purchase and sale are given from a place in British India.

Decree of the High Court reported in 59 Bom. 719, affirmed.

Income-tax Commissioner v. Shaw, Wallace & Co.,⁽¹⁾ *Sulley v. Attorney-General,*⁽²⁾ *Erichsen v. Last,*⁽³⁾ *Board of Revenue, Madras v. Ramanadhan Chetty,*⁽⁴⁾ *Aurangabad*

*Present: Lord Thankerton, Lord Romer, Sir Lancelot Sanderson, Sir Shadi Lal and Sir George Rankin.

⁽¹⁾ (1932) L. R. 59 I. A. 206, s. c. 59 Cal. 1343.

⁽²⁾ (1860) 5 H. & N. 711 at p. 717, s. c. 157 E. R. 1364.

⁽³⁾ (1881) 8 Q. B. D. 414.

⁽⁴⁾ (1919) 43 Mad. 75, s. c. 1 I. T. C. 37.