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he had got a lien to secure the price he could retain that lien, but he cannot bring a suit to enforce the cause of action relating to goods delivered more than three years before the filing of the suit. That seems to me to be the plain effect of art. 52.

Therefore, as I have said, I agree with the conclusion at which the learned trial Judge arrived, though for different reasons. I think the plaintiffs' claim is barred in respect of all goods delivered more than three years before the filing of the suit.

The application will be allowed with costs both here and in the Full Court. The plaintiffs to refund to the defendant the excess over Rs. 5-14-6 paid by the defendant into Court.

WASSOODEW J. I agree.

Rule made absolute.

J. G. R.

ORIGINAL CIVIL.

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

1939
October 3

RATANCHAND DHULAJI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* JESRAJ KASTURCHAND (NEXT FRIEND OF PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 12, 14—Minor plaintiff—Next friend—Minor attaining majority—Dismissal of suit at minor's instance—Costs—Liability of next friend.

When a minor, suing by his next friend, on attaining majority elects not to proceed with the suit he can only do so on submitting to an order to pay the costs of the defendant and also the costs of the next friend. It is only in a case of misconduct by the next friend which falls within O. XXXII, r. 14 that any order for payment of costs can be made against him after the minor has attained majority.

Anonymous,[1] followed.

Babu Vrajlal v. *Alibhai*,[2] referred to.

*O. C. J. Appeal No. 10 of 1939 : Suit No. 758 of 1938.

[1] (1819) 4 Madd. 461.

[2] (1934) 36 Bom. L. R. 1201.

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COSTS.

On May 12, 1938, Himatlal, a minor, by his next friend Jasraj, filed a suit against his father Ratanchand and brother for a partition of the family property.

On January 18, 1939, the minor plaintiff attained majority and on January 26, 1939, he took out a chamber summons for an order that the suit be dismissed and that his next friend Jasraj be ordered to pay the costs of all parties.

The summons was heard on February 4, 1939, by B. J. Wadia J., when his Lordship ordered that the suit should be dismissed with costs and that the plaintiff should pay the next friend and the defendants the costs of the suit.

The defendants appealed.

F. J. Coltman, with *C. J. Pratap*, for the appellants.

Sir Jamshedji Kanga, for the next friend, respondent.

The contentions are sufficiently set out in the judgment of the Chief Justice.

BEAUMONT C. J. This is an appeal from an order made by Mr. Justice B. J. Wadia in chambers which raises an interesting question as to the liability of a next friend of a minor for the costs of the suit. The question arises in this way: The suit was instituted in 1938, the plaintiff being described as a minor aged seventeen years by his father-in-law and next friend Jasraj Kasturchand, and the object of the suit was to obtain partition of the joint family property alleged to belong to the minor and his father and brother. There were some applications in the suit in which costs were incurred. On January 18, 1939, the plaintiff attained his majority, and on January 26 he took out a summons asking for an order that this suit filed in his name by the next friend be directed to be dismissed and the next friend be ordered to pay the costs of all parties of and incidental to the suit. The matter came before the learned Chamber Judge, and counsel for the late minor plaintiff, who had attained his majority,

realising that in order to establish his right to costs against the next friend he would have in effect to fight the question in issue in the suit, decided to abandon the claim that the suit had been improperly instituted by the next friend and that he ought, on that ground, to pay the costs. The contention which had been put forward by the next friend was that he had been instructed in all materials by the minor himself and that the suit was a perfectly proper suit. The rival contentions were not fought out before the learned Judge who made an order that the suit should be dismissed, and that the applicant (the late minor plaintiff) should pay to the next friend and to the defendants the costs of the suit. Defendants Nos. 1 and 2 appeal against that order and contend that they were entitled to an order for payment of their costs against the next friend irrespective of any misconduct on his part.

There seems to be no case directly in point and therefore we have to consider the matter on principle. Where it is desired to file a suit on behalf of a minor it is necessary under the rules to do so by a next friend. The plaintiff must sue in the name of the next friend and there is no doubt whatever that the next friend, although he is not a party to the suit, is the person who is liable for the costs of the defendant. In a proper case he may recover any costs for which he is held liable from the estate of the minor, but, as between the next friend and the defendant, so long as the plaintiff remains a minor, the next friend is the person to whom the defendant looks for his costs. The cases on the question of a next friend's liability for costs were recently discussed by Rangnekar J. in *Babu Vrajlal* v. *Alibhai*,[1] and he came to the conclusion that the ordinary rule is that where a suit is dismissed the next friend must be ordered to pay the successful defendant's costs with a reservation where practicable in the judgment to the effect that he should have liberty to reimburse himself out of the estate of the minor. We are

[1] (1934) 36 Bom. L. R. 1201.

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not concerned in this appeal with the form of the order to be made against the next friend, where the plaintiff is still a minor; what we are concerned here with is the liability of the next friend after the minor has attained his majority. The position arising in that event is dealt with in Order XXXII, rr. 12 to 14, of the Civil Procedure Code. I will first refer to r. 14, which provides that a minor on attaining majority may apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper, and if the Court is satisfied as to such unreasonableness or impropriety the Court may grant the application and order the next friend to pay the costs of all parties. That was the rule under which an order was in the first instance asked for in this case. The claim made under that rule, as I have said, was abandoned, and an order was sought under r. 12 which deals with the case of a minor attaining his majority where the suit has been properly brought. That rule provides that a minor plaintiff shall on attaining majority elect whether he will proceed with the suit or not. Where he elects to proceed with the suit, he has to apply for an order discharging the next friend and for leave to proceed in his own name. Then the title of the record has to be amended so as to show that the late minor has become a major plaintiff. Then it is provided that where he elects to abandon the suit he must apply for an order to dismiss the suit and he has to pay the costs of the suit of the defendant and of the next friend. Now, Mr. Coltman on behalf of the appellants has argued that the rule does not say what is to happen with regard to the existing liability of the next friend. His contention is that the next friend when he files the suit undertakes liability to the defendant to satisfy his costs: a liability which cannot be imposed on the minor because he is a minor; and he points out that there is nothing in the language of Order XXXII, r. 12, which brings to an end the liability of the next friend to the defendant incurred before the minor attained his majority. Nor have

we been referred to any case which covers the exact point. The liability of the next friend for costs is discussed in the 2nd edition of Halsbury's Laws of England, Volume XVII, paragraphs 1455 to 1457 (inclusive), and it is, I think, apparent from that discussion that the provisions of Order XXXII, r. 12, are taken from the English law. The only case to which we were referred which deals with the position arising when the minor attains his majority is an anonymous case, *Anonymous*,[1] decided by Sir John Leach as long ago as 1819 where the learned Vice-Chancellor said (p. 461) :—

> " Where a bill is filed in the name of an infant, he may abandon the suit when he comes of age; but he cannot compel the *prochein amy* to pay the costs, unless it be established that the bill was improperly filed. Let the bill be dismissed, upon the late infant plaintiff giving an undertaking to pay the costs, and the costs of the next friend."

It does not appear whether the defendant was represented on the making of that order, nor does the order deal with the difficulty which may arise if the minor who has attained majority is in fact unable to pay costs, so that the liability of the next friend is more valuable than the liability of the former minor. We have, therefore, to deal with the question as one of principle and it seems to us that the scheme of the Code is this: So long as the plaintiff is a minor you must have a next friend shown on the record who is answerable for costs; but as soon as the minor attains his majority, the next friend is *functus officio* and *prima facie* his liability ceases. The former minor plaintiff is bound under Order XXXII, r. 12, to elect whether he will proceed with the suit or not. If he elects to proceed with the suit, the title to the record is altered by showing him as a major plaintiff, and he thereupon becomes liable for the costs as from the commencement of the suit (*Dunn* v. *Dunn*[2]) and the defendant is therefore placed in exactly the same position as he would have been in if the plaintiff had never been a minor. If the minor elects not to proceed with the suit, he can only do so on submitting to an order to pay the costs of the defendant and also the

[1] (1819) 4 Madd. 461.

[2] (1855) 7 De G. M. & G. 25.

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costs of the next friend. There also the defendant is placed exactly in the same position as he would have been in if the plaintiff had never been a minor. No doubt he is losing the liability of the next friend but in place of that there is substituted the personal liability of the former minor who may or may not be more solvent than the next friend. In my opinion it is only in a case of misconduct by the next friend, which falls within r. 14, that any order for payment of costs can be made against the next friend after the minor has attained his majority. That seems to me the scheme of the Code which is founded on the English law. In my view the order which the learned Judge made was not only right, but was the only order which he could properly have made in the circumstances of this case.

The appeal must, therefore, be dismissed with costs.

KANIA J. I agree.

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

Attorneys for respondents: Messrs. *Mulla & Mulla.*

Appeal dismissed.

N. K. A.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

1939
October 9

BAI RATANGAVRI w/o RAO BAHADUR GUNWANTRAI HIRALAL DESAI, AS HEIR AND LEGAL REPRESENTATIVE OF THE DECEASED RAO BAHADUR GUNWANTRAI HIRALAL DESAI AND OTHERS (ORIGINAL PLAINTIFF NO. 1'S HEIR AND PLAINTIFFS NOS. 2 AND 3), APPELLANTS *v.* MANILAL MAHIPATRAM MEHTA (ORIGINAL DEFENDANT), RESPONDENT.*

Party wall—Wall cannot be joint where there is no raising—Wall can be joint if subsequently raised or agreed to be treated as joint—Onus.

The appellants and the respondent owned adjoining houses. There was admittedly a common wall up to the roof of the respondents' house. Above that there was a wall containing two apertures which the appellant claimed to be exclusively his. The respondent began reconstructing and raising his house in such a way that the apertures were likely to be blocked.

*Second Appeal No. 465 of 1937.