1900 DEC. 12.

APPELLATE CIVIL.

28 C. 256.

referred to as inadmissible consisted of the statements of one of the parties to the transaction and of a pleader, which went to show that at the time when the negotiations were going on, which led to the execution of the deeds under consideration, one of the parties said that he would not execute the deed, unless it was a mortgage, and the other answered, and that answer was supported by the pleader, that the two deeds which they were going to have would together amount to a mortgage only. That was adduced as evidence of the intention of the parties, and that evidence was considered inadmissible. That evidence consisted only of oral statements of the parties, and therefore comes directly within the scope of s. 92. There was no other evidence of the acts and conduct of the parties adduced in that case, which was considered by the Privy Council. We are, therefore, of opinion that the case of *Balkishen Das* v. *Legge* (1) does not in any way affect the rule laid down in the case of *Preonath Shaha* v. *Madhu Sudan Bhuiya* (2). The first question raised in this appeal must therefore be answered in the affirmative.

As to the second question, there is nothing in s. 86 of the Bengal Tenancy Act, which contains the provisions of the Act relating to surrender of a ryot's holding, to show that such surrender must be in writing. It was argued that as the surrender was made in consideration of the remission of certain arrears of rent, it should be viewed in the light of a transfer by sale of the ryots' occupancy rights, for which a writing was necessary. One simple answer to this argument is this, that it proceeds **[260]** upon an erroneous assumption that an occupancy right is always transferable by sale. The second question must also, therefore, be answered in the affirmative.

That being so, the appeal fails, and must be dismissed with costs.

Appeal dismissed.

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28 C. 260.

SMALL CAUSE COURT REFERENCE.

Before Sir Francis W. Maclean, Kt., K.C.I.E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Hill.

JUGAL KISSORE (*Plaintiff*) *v.* SEWMUK ROY AND OTHERS (*Defendants*).* [7th February, 1901].

Small Cause Court, Presidency Town—Practice and procedure—Reference to High Court—Presidency Small Cause Courts Act (XV of 1882), ss. 69, 70—Contingent judgment—Security for the amount of the judgment and the costs of reference—Time for furnishing such security—Power to extend time to furnish the security.

In cases of reference from the Presidency Small Cause Court the provisions of the statute which governs the matter should be strictly complied with.

In a suit for damages the Officiating Chief Judge of the Presidency Small Cause Court, on May 28, 1900, gave judgment for the plaintiff contingent upon the opinion of the High Court, and a reference was made to the High Court under s. 69 of the Presidency Small Cause Courts Act. The defendants, at whose request the contingent judgment was given, did not fully deposit the amount of the judgment and the costs of the reference until November 14, 1900. A preliminary objection having been taken to the hearing of the reference on the ground that it was not properly before the Court:

***Held*, that as security for the amount of the judgment and the costs of the reference was not furnished "at once" as required by s. 70 of the Presidency Small Cause Courts Act, the preliminary objection must prevail, and that the reference must be dismissed, the defendants paying the costs of the reference.**

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* Reference from the Presidency Small Cause Court, suit No. 4 of 1900.

(1) (1899) L. R. 27 I. A. 58. (2) (1898) I. L. R. 25 Cal. 603.

Farnaro v. *Ramnarain Sookdeb* (1) discussed.

[261] *Quære.*—Whether there is any power in the High Court to extend the time for furnishing such security.

1901 FEB. 7.

SMALL CAUSE COURT REFERENCE.

28 C. 260.

THIS was a reference made by Mr. E. W. Ormond, the Officiating Chief Judge of the Court of Small Causes, Calcutta, under s. 69 of the Presidency Small Cause Courts Act, 1882, and s. 617 of the Code of Civil Procedure.

The plaintiff brought an action in the Court of Small Causes, Calcutta, to recover damages from the defendants for breach of contract.

On May 28, 1900, the Officiating Chief Judge, before whom the case came on for hearing, decreed the suit for Rs. 1,809-3-6 in favor of the plaintiff, making the judgment contingent upon the opinion of the High Court at the request of the defendant's attorney.

On May 30, 1900, the defendants deposited into Court Rs. 1,743-2-6 —a sum not sufficient to cover even the amount of the judgment.

On June 20, 1900, the defendants deposited a further sum of Rs. 66-1-0 as the balance of the debt and costs; but no deposit was made, or security given, for the costs of the reference on that date.

On July 13, 1900, the case for the opinion of the High Court was stated; and on July 16, 1900, the reference was received at the High Court.

On November 14,1900, the defendants tendered Rs. 323 as costs of the reference, which was accepted, on an *ex parte* application, subject to any objection which might be taken by the plaintiff.

On February 7, 1901, the reference came on for hearing before the High Court.

Mr. *Garth* (with him Mr. *A. Chaudhuri*) for the plaintiff took the preliminary objection that the hearing of the reference should not be proceeded with, inasmuch as the defendants by not depositing the full amount of the judgment, and security for the costs of the reference, "at once" within the meaning of s. 70 of the Presidency Small Cause Courts Act, should be deemed to have submitted to the contingent judgment given against them. The [262] defendants took nearly six months to deposit the full amount of the security after the judgment was pronounced, which was not in compliance with the provisions of the Presidency Small Cause Courts Act.

There being no power to extend the time by the Small Cause Court to pay in the security, which was deposited long after the judgment, this reference should not have been made at all; and it is, therefore, not properly before the Court, and should be dismissed: *Farnaro* v. *Ramnarain Sookdeb* (1).

Sir *Griffith Evans* (with him Mr. *J. G. Woodroffe*) for the defendants.—The Warrant Department of the Small Cause Court made a mistake in calculating the amount of the security, and hence the delay in depositing the full amount "at once." There being an error in calculation on the part of an officer of the Court, the defendants cannot be said to have contravened the provisions of s. 70 of the Small Cause Courts Act. [MACLEAN, C. J.—Have you any affidavit to that effect?] Not at present, My Lord. In the case of *Farnaro* v. *Ramnarain Sookdeb* (1) the High Court allowed the reference to be heard on the security being deposited, and it appearing that the opposite party would not be prejudiced by such a course.

(1) (1875) 14 B. L. R. 180.

1901 FEB. 7.

SMALL CAUSE COURT REFERENCE.

28 C. 260.

1901, February 7. The Court (MACLEAN C. J., PRINSEP and HILL, JJ.) delivered the following judgments :—

MACLEAN, C. J.—I think that the preliminary objection must prevail. It is very important that in cases of this class, that is of a reference from the Small Cause Court to this Court, that the provisions of the statute which governs the matter should be strictly complied with.

The judgment in this case was given on the 28th of May 1900. It was a judgment contingent upon the opinion of this Court, and it was submitted to the Court upon a reference under s. 70 of the Act (Act XV of 1882).

S. 70 says, that " when judgment is given under s. 69, contingent upon the opinion of the High Court, the party against whom such judgment is given shall at once furnish **[263]** security to be approved by the Small Cause Court for the costs of the reference and for the amount of such judgment, " and then the section goes on to say, that " unless such security is at once furnished the party against whom such contingent judgment has been given shall be deemed to have submitted to the same. "

It appears that, on the 30th of May 1900, the defendant deposited a sum of Rs. 1,743 odd in Court. That was not a deposit sufficient to cover the costs of the reference and the amount of the judgment. The judgment was, as I understand, for Rs. 1,809 odd ; therefore, the deposit made on the 30th of May was not a deposit, within the meaning of s. 70. On the 20th of June the balance of the debt and costs was deposited, but no deposit was made for the costs of the reference : though on the 14th of November the costs of the reference were tendered and accepted by the Court on an *ex parte* application and subject to any objections.

In the meantime apparently the reference was sent up some time in July ; objection is now taken that the money was not deposited " at once " within the meaning of s. 70, and that being so, that the defendant, against whom the contingent judgment was given, must be deemed to have submitted to the same. The security is to be furnished " *at once.* " It would be absurd to say that it was furnished " at once " ; for the judgment was on the 28th May, and the money was not fully deposited until the 14th November, nearly six months afterwards.

It is urged that this delay was attributable to some mistake on the part of some officer of the Court, but no affidavit in support of this suggestion has been filed, though there has been ample time to file it. On this head then there are no materials upon which we can act judicially. It is suggested that the case of *C. Fornaro* v. *Ramnarain Sookdeb* (1) assists the defendants. There is a distinction between the provisions of the section under which that case was decided and the section we are discussing, inasmuch as here we have the words, " unless such security, as aforesaid, is at once furnished, the party against whom such contingent judgment has been given shall be deemed to have submitted to the same," which **[264]** are not to be found in the section upon which the decision in the above case turned. But apart from this, I should feel much doubt whether there is any power in this Court to extend the time for furnishing security ; no such power is given by the Small Cause Court Act, and it is not easy to see whence this Court has acquired any such power.

(1) (1875) 14 B. L. R. 180.

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SMALL CAUSE COURT REFERENCE.

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As soon as the judgment is given, the party against whom such contingent judgment is given should at once furnish the required security; in the present case that was not done until nearly six months after the judgment was pronounced. The preliminary objection must prevail, and the reference must be dismissed and the defendant must pay the plaintiff's costs of the reference.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I am entirely of the same opinion.

Attorneys for the plaintiff : *Messrs. Wilson & Co.*

Attorneys for the defendants : *Messrs. Pugh & Co.*

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28 C. 264.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, Kt., K.C.I.E., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Hill.

DINENDRA NATH DUTT (A MINOR) *v.* T. H. WILSON (AND OTHERS).*

[5th & 6th February, 1901.]

Practice—Attorney and client—Change of attorneys on record—Application for change of attorney by next friend—Right of next friend of minor plaintiff to change attorney—Groundless charges against solicitors—Costs.

The next friend of an infant-plaintiff is just as much entitled to change his attorney as any other plaintiff who is *sui juris*, as long as he continues to act in that capacity.

***Manick Lal Seal* v. *Sarat Kumari Dassi* (1), *Ram Chunder Roy* v. *Poorna Chunder Roy* (2), and *Sarat Chunder Dawn* v. *Kristo Dhone Dawn* (3) dissented from. *Brown* v. *Brown* (4) referred to.**

[265] The rights and obligations of next friend discussed.

***Semble.*—If the next friend of an infant-plaintiff is not doing his duty and is acting in a manner detrimental to the interests of the infant, the proper course under such circumstances would be to apply for his removal and for the substitution of a new next friend—*Peyton* v. *Bond* (5) approved.**

THIS was an application for an order for change of attorneys by the natural father and duly constituted guardian of Dinendra Nath Dutt, the minor-plaintiff, whose late adoptive mother brought an action, in 1889, against her co-executor for construction of the will and adminstration of the estate of her deceased husband. The co-executor was discharged upon passing his accounts ; and Mr. Beeby was appointed Receiver in 1890, and is still acting in that capacity. The minor, Dinendra Nath, was substituted as plaintiff on the record in 1898 upon the death of his adoptive mother. Messrs. Wilson, Chatterjee, and Mitter (briefly Wilson & Co.) were, in July 1899, appointed attorneys for the minor-plaintiff on the resignation of the former attorney, Babu Sita Nath Dass, who was too ill to attend to the business.

In September 1900 the next friend and guardian of the said minor-plaintiff applied for an order to substitute Babu Priya Nath Sen, another attorney, for Messrs. Wilson & Co., and filed an affidavit making certain charges and imputations against the said Messrs. Wilson & Co., as grounds of his said application. Messrs. Wilson & Co. also filed a

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* Appeal from Original Civil No. 84 of 1900 in Suit No. 465 of 1889.

(1) (1888) Unreported.
(2) (1900) 4 C. W. N. 175 (notes).
(3) (1901) 5 C. W. N. 88 (notes).
(4) (1849) 11 Beav. 562.
(5) (1827) 1 Sim. 890.