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to depose to the facts of the case. That evidence in the case of these written statements must therefore be supplied by affidavit, and on that being done, the written statements may be presented to the Registrar for admission. The provision in the Code, relating to verification of written statements, being intended for the protection of the plaintiffs, their observance may, I think, be waived by the plaintiffs. If, therefore, the plaintiffs are prepared to waive all objections to the sufficiency of the verification of the written statements, further evidence of the nature indicated may be dispensed with.

Attorney for the plaintiff: Mr. *A. G. Barrow.*

Attorney for the defendant Company: Messrs. *Morgan & Co.*

J. V. W.

Before Mr. Justice Sale.

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July 4.

DOORGA MOHUN DASS *v.* TAHIR ALLY AND ANOTHER:

AND.

TAHIR ALLY AND ANOTHER *v.* KOORSOMBOO AND OTHERS. *

Practice—Suit instituted on behalf of minor by next friend—Application for execution of decree by plaintiff on attaining majority and after death of next friend without complying with requirements of section 451, Civil Procedure Code.

Unless there is an absolute bar created by positive enactment, a person who has attained his full age is *primâ facie* entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and, if necessary, the Court will as a matter of course give him leave to proceed or act in his own name.

When a person, on whose behalf a suit had been revived and carried on by his next friend, made, after attaining his majority and long after the death of the next friend, an application in his own name for execution of the decree in the suit without having complied with the requirements of section 451 of the Civil Procedure Code as to electing to proceed with the suit and obtaining leave of the Court to do so, and the application was admitted and notice of execution given to the defendant: *Held*, under the circumstances, that such omission to comply with the requirements of section 451, though an irregularity, was not a bar to the application being allowed to proceed.

An application under section 451, for leave to proceed with a suit, does not require any notice, but may be made *ex parte* at any time. Even if the applica-

* Application in Original Civil Suits Nos. 336 of 1876 and 171 of 1875.

tion in this case therefore were not itself a sufficient indication that the applicant elected to proceed with the suit, and that the Court in allowing him to proceed in his own name gave him the required leave (and *semble* that would be the case), the Court could give such leave at the hearing of the application *nunc pro tunc*.

The provision of section 451 which requires the title of a suit to be corrected in such a case applies to a pending suit, and not to a suit after final decrée in which it only remains to proceed in execution.

THIS was the hearing of a rule to show cause why an order, dated 21st March 1882, which had been made in suit 171 of 1875, should not be enforced.

Suit 336 of 1876 was a suit on a mortgage brought by Doorga Mohun Dass against one Abdool Tyeb, and on his death in 1879 revived against his sons and representatives Tahir Ally and Amiruddin, in which the plaintiff had obtained a decree for Rs. 3,675. Suit 171 of 1875 was brought originally by Abdool Tyeb, and on his death revived by Tahir Ally and Amiruddin against (among others) Abdool Hossain and Abdool Kyem, the executors of the will of one Bunkerbhoy bin Allabux, the father of Abdool Tyeb, for a declaration of the right of the plaintiff in the estate and effects of Adam bin Allabux, one of the brothers of Bunkerbhoy, and for an account, &c. In both the suits on their revival after the death of Abdool Tyeb, Amiruddin, being then a minor, was represented by Tahir Ally as his next friend. In suit 171 of 1875 a decree was made on 17th July 1879, by which the executors were ordered to pay into Court to the credit of the suit two sums of Rs. 406-0-4 and Rs. 1,251-10-8; and by a further order made in the suit on 21st March 1882, they were directed to pay those sums into Court in two weeks from the date of the service of that order upon them. The order was served on them on 5th April 1882. Tahir Ally died in 1884, and Abdool Hossain in 1886, and on 17th March 1894, application for execution of the order was made by Amiruddin in his own name (he having then attained his majority) in the form of a tabular statement, but there being some irregularity in the application, it was returned and presented again on 4th April 1882. This application was to enforce the order of the 21st March 1882 against the surviving executor Abdool Kyem, and a notice was ordered to issue to him under section 248 of the Civil Procedure Code.

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On 23rd April, on the application of Amiruddin, a rule was issued on Abdool Kyem to show cause why he should not pay into Court to the credit of these suits the sums of Rs. 406-0-4 and Rs. 1,251-10 8, which he had been directed to pay by the order of 21st March 1882.

The applicant did not comply with the requirements of section 451 of the Civil Procedure Code as to obtaining an order of Court for the discharge of the next friend, and for leave to proceed in his own name, and at the hearing of the rule objection to the application being allowed to proceed was taken on this ground. The applicant was allowed, in answer to this objection, to put in an affidavit that he had attained majority.

Mr. *T. A. Apcar* and Mr. *Dunne* showed cause.

Mr. *Sinha* and Mr. *R. Mitter* in support of the rule.

The arguments are sufficiently stated in the judgment of the Court.

SALE, J.—It appears that upon the death of one Shaik Abdool Tyeb in 1879, both these suits were revived in the names of Tahir Ally and Amiruddin, who were made co-plaintiffs in the second mentioned suit ; and as Amiruddin was then a minor, Tahir Ally acted as his next friend. The second mentioned suit was a suit for an account against Abdool Hossain and Abdool Kyem as the executors of the estate of Ally bin Allabux. An account was taken, and in the result the executors were, by an order made on further directions on the 17th July 1879, directed to pay into Court two sums, Rs. 406-0-4 and Rs. 1,251-10-8. By a subsequent order, dated 21st March 1882, the executors were directed to pay these sums into Court within a specified time.

Tahir Ally died in 1884. Amiruddin, who then and thereafter had no next friend, applied in his own name for and obtained a rule as against the surviving executor, Abdool Kyem, to show cause why the order of the 21st March 1882 should not be complied with. The application was made at the last moment, apparently with the object of saving limitation. Abdool Kyem has appeared to show cause against the rule, and the cause which he has shown is of a twofold character. He says that the order of the 21st March 1882 had become barred by lapse of time before

this rule was obtained, and therefore that he is exempted from all liability in respect of that order. He also contends that the application itself is irregular, inasmuch as the applicant, when he obtained the rule, did not show that he had attained his full age, and also did not obtain leave under section 451 of the Procedure Code to proceed in these suits in his own name. Both objections are of a purely technical character, and the question is whether they are sufficient to prevent the Court from compelling the defaulting executor to obey the order of 21st March 1882.

As regards the question of limitation the facts are these :—

On the 17th March 1894 the present applicant presented a tabular statement for execution of the order of 21st March 1882. The tabular statement was returned as not being in proper form. It was amended and again presented on the 4th April, supported by an affidavit, when an order was made for a notice to issue under section 248 of the Procedure Code. In consequence of a further objection, which it is not necessary to specify, the application upon the same tabular statement and affidavit was again mentioned, and was finally disposed of on the 23rd of April. It must be taken upon these facts that the application, though not finally disposed of till the 23rd of April, was made on the 17th of March, or at latest on the 4th of April, and was in either case in time.

The next question is as to the effect of the objection under section 451.

By that section a minor plaintiff, or a minor not a party to a suit, on coming of age, is required to elect whether he will proceed with the suit or application. If he elects to proceed with the suit or application, he is required to apply for an order discharging his next friend, and for leave to proceed in his own name.

That section does not in strictness apply to the facts as they appear in the present application, inasmuch as it is shown that the next friend had long been dead, and it further appears that the applicant himself attained his full age long previous to the present application.

Is the applicant, nevertheless, precluded from making the

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present application by the fact that he had not in the first instance obtained leave to proceed with the suit in his own name?

It is to be observed that the Civil Procedure Code requires every application on behalf of a *minor* to be made by his next friend, and provides that such application, if not so made, *may* be discharged. The words of the Code appear to give *discretionary* power to the Court to discharge the application made by minors who appear without a next friend. The procedure is the same as in the Courts in England. In the case of *Flight* v. *Bolland* (1) the Court, in its discretion, allowed a bill which had been filed by a minor to be amended by appointing a next friend for the plaintiff and inserting his name as next friend. That order was made on an application for dismissal of the suit by the defendant. The reason why no proceeding can be taken by an infant without the assistance of a next friend is, as stated in Daniell's Chancery Practice, 6th Edition, p. 105, "on account of an infant's supposed want of discretion, and his inability to bind himself and make himself liable for costs." And it would seem that the rule was intended for the protection and benefit of defendants, for it has been held that when a defendant waives this benefit and protection, the suit may proceed without a next friend. *Ex parte Brocklebank, In re Brocklebank* (2).

That being so as regards persons who are still minors, it appears to me that, unless there is an absolute bar created by positive enactment, a person, who has attained his full age, is *primâ facie* entitled to proceed with a suit instituted on his behalf during his minority, or to make any application therein, and that, if necessary, the Court would, as a matter of course, give him leave to proceed or act in his own name.

I have already alluded to the death of the next friend as a circumstance which produced an alteration in the state of facts to which it was intended that section 451 should apply.

In consequence of his death no application for his discharge could be made. But this it may be said would not affect the section, so far as it requires a minor plaintiff, who, on coming of age, elects to proceed with the suit, to obtain leave to proceed in

(1) 4 Russ., 298. (2) L. R., 6 Ch. D., 358 (360.)

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his own name. Accepting that view, still the present application would, in itself, be an indication that the applicant had elected to proceed with the suit, and that the Court in allowing him to proceed in his own name in effect gave him the leave referred to in the section; but if that were not so, and the case required it, I should be prepared to give formal leave to the applicant now.

As to the provision in that section requiring the title to be corrected, that would apply to a pending suit, and not to a suit after final decree, in which it only remains to proceed in execution.

No doubt Amiruddin proceeded irregularly in not first satisfying the Court that he had attained his full age. This he has now done by affidavit in answer to the objections taken by Abdool Kyem, and his having done so at this stage can only affect the question of costs.

An application under section 451 is not required to be made on notice. An *ex parte* application under that section may be made at any time, but as the facts are now fully before the Court, it is not necessary that a fresh application should be made merely *pro forma*, nor is it necessary that these suits should be revived. They are, as I have already said, not pending suits, and it seems to me that for the purposes of the present application the proper parties are before the Court. It is true that one of the executors has died, but that circumstance does not absolve the surviving executor from obeying the order of the 21st March 1882. The rule against Abdool Kyem will be made absolute, but, having regard to the irregularities in the inception of the application, I shall make no order as to costs.

There will be an attachment against the person of Abdool Kyem, and also an attachment against his property as prayed, but the writ against his person will not be issued for a fortnight, and will then be issued only if the money be not previously paid.

Rule made absolute.

Attorney for the applicant: Babu *Surendro Nath Das*.

Attorney for Abdool Kyem: Mr. *A. H. Gillanders*.

J. V. W.