1901

JUGAL KISSORE v. SEWMUK ROY.

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.

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.*

B. D. B.

APPEAL FROM ORIGINAL CIVIL.

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

1901

Feb. 5, 6.

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

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 Daseee* (1), *Ram Chunder Roy* v. *Poorno Chunder Roy* (2), and *Sarat Chunder Dawn* v. *Kristo Dhone Dawn* (3), dissented from. *Brown v. Brown* (4) referred to.

* Appeal from Original Civil No. 34 of 1900 in Suit No. 465 of 1889.

(1) (1883) Unreported.
(2) (1900) 4 C. W. N., 175 (notes).
(3) (1901) 5 C. W. N., 83 (notes).
(4) (1849) 11 Beav., 562.

1901

DINENDRA NATH DUTT v. WILSON.

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* (1) 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 administration 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 counter affidavit in repudiation of the charges made against them by the next friend.

The summons was taken out and served upon Messrs. Wilson & Co. by the said Priya Nath Sen on behalf of the next friend of the infant-plaintiff.

The matter came on for hearing on September 24, 1900, before Mr. Justice Pratt then sitting as a vacation Judge. The learned Judge found that the allegations and insinuations made in the applicant's own affidavit had been fully answered and satisfactorily refuted by the counter affidavit made by two of the members of Messrs. Wilson & Co.'s firm, and he came to the conclusion that no satisfactory reason had been made out for a

(1) (1827) 1 Sim., 390.

1901

DINENDRA NATH DUTT v. WILSON.

change of attorneys, and, following certain decisions of this Court, dismissed the application with costs.

The next friend of the minor plaintiff appealed.

1901, FEB. 5, 6. Sir *Griffith Evans* and Mr. *Knight* for the appellant.

Mr. *Garth* and Mr. *A. Chaudhuri* for the respondents.

Mr. *Garth* took the preliminary objection that the appeal was wrongly entitled, and that no appeal lay from this order. He contended that the next friend of the infant plaintiff could only appear through the attorneys on the record, *viz.*, Messrs. Wilson & Co.

Sir *Griffith Evans*.—The next friend in such an application as this must *ex necessitate rei* appear through an attorney other than the attorney on the record. An infant cannot appoint an attorney, and the next friend cannot act without one, but must appoint one. As to the question whether this is an appealable order see *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1) and *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (2). The judgment in the present matter decides a right of a grave and substantial character, *viz.*, the right to change my attorney. There are, no doubt, several decisions of this Court to shew that where an infant plaintiff sues through a next friend a change of attorney cannot be made without good cause being shewn. I question the soundness of those decisions. This is a matter of right: it cannot be taken away from the party by any rule of procedure, but only by statute. There is no special rule of the High Court as to next friend: see Belchamber's Rules and Orders, 1900, Rule 635, p. 267. The Indian cases on the point referred to above are: *In re Manick Lall Seal* (3); *Ram Chunder Roy* v. *Poorno Chunder Roy* (4); and *Sarat Chunder Dawn* v. *Kristo Dhone Dawn* (5). It is clear that no such rule as is laid down in these cases has ever existed in England. There,

(1) (1872) 8 B. L. R., 433.
(2) (1874) 13 B. L. R., 91.
(3) (1883) Unreported (See Court Minute Book, Aug. 23, 1883).
(4) (1900) 4 C. W. N., 175 (notes).
(5) (1901) 5 C. W. N., 83 (notes).

until the procedure was changed by the Judicature Act, an order of Court was necessary, but it was obtained as of course on a petition in common form, without any special application. The procedure was the same whether the applicant was an adult, or an infant, by his next friend. Now it is done by a simple notice sent to the Registrar: See *Brown* v. *Brown* (1). As to the present English Practice, see the Annual Practice, 1901, Order VII, p. 42. As a next friend has power to appoint and is personally liable for costs, so has he power to discharge, an attorney. In the case of *Brown* v. *Brown* (1) the next friend had obtained an order as of course for changing the solicitors, and it was discharged only because some of the infants had come of age. There is one passage in Simpson on Infants (2nd Edition, p. 482) which lends countenance to the contention of the respondents, but the cases cited do not support the proposition of that text-writer.

The Indian decisions already referred to are unwarranted by any law or rule. These cases lay down that it is not enough that the next friend cannot get on with the attorney, but he must show substantively some misconduct on the part of the solicitor on record, or that the change is for the benefit of the infant. How can the practice of the Original Side of the High Court affect the rights of suitors? See Daniell's Chancery Forms and Precedents, Note to Form 2117, p. 1129, where there is a reference to an order made on a petition in the common form of an infant by his next friend: *Peyton* v. *Bond* (2).

Mr. *Garth* (contra)—The Court will exercise some supervision when a change of attorney is applied for. A next friend has not the same rights as a party to a suit. The case of *Peyton* v. *Bond* (2) supports my contention. [MACLEAN, C. J.—Who contracts with the solicitor?] The next friend,—who is liable for costs. He being in a fiduciary position should not be allowed to change attorneys without sufficient cause. The charges made against the attorneys on the record are merely colorable and have been proved to be without any foundation.

Mr. *Garth* then read the affidavits, and Sir *Griffith Evans* replied upon them, but was not called upon on the question of law.

(1) (1849) 11 Beav., 562. (2) (1827) 1 Sim., 390.

1901

DINENDRA NATH DUTT v. WILSON.

1901, FEB. 6. The Court (MACLEAN, C. J. PRINSEP and HILL, JJ.) delivered the following judgments :—

MACLEAN, C. J.—This is a summons taken out by the infant plaintiff in the suit asking for an order that upon payment of their taxed costs including the costs of, and incidental to, this application, to Messrs. Wilson, Chatterjee and Mitter, the attorneys on the record for the plaintiff, the name of Babu Priyanath Sen be placed on the record in the said suit as such attorney for the plaintiff, with directions for taxing the costs.

Upon that summons being served upon them, the solicitors, Messrs. Wilson & Co., intimated to the plaintiff's solicitor that they should appear by counsel at the hearing of the application, and, in consequence apparently of that intimation, the plaintiff said that he would file an affidavit showing grounds of application, and in consequence a long affidavit was filed on behalf of the plaintiff making certain charges against the solicitors, and that affidavit was replied to by the solicitors in repudiation of the charges. The matter came on under these circumstances before Mr. Justice Pratt, then sitting as a vacation Judge.

Mr. Justice Pratt following, and properly following, certain decisions of this Court to the effect that the next friend of an infant plaintiff was not entitled to change his solicitors unless he could satisfy the Court that either owing to the misconduct of the solicitor or for some other cause, the change was for the benefit of the infant, dismissed the application with costs. Hence the present appeal by the plaintiff through his next friend, who is his father. There is nothing to indicate that the father is actuated by any improper or sinister motive in desiring to change his solicitors, nor has anything been said against the solicitor whom he desires to appoint.

It is, however, abundantly clear that, rightly or wrongly, he has ceased to place confidence in his present solicitors, the present respondents.

I ought to mention—it is a minute matter—that the heading of the paper-book is wrong ; it ought to have been entitled "In the suit and in the matter of the present application" and in this respect it ought to be amended.

It has been objected that in a case of this nature, no appeal lies.

We have not had the advantage of hearing Mr. *Garth* on this point, owing to the shape which the discussion before us has taken, but it would I think have been difficult to convince us that no appeal lay.

The appellant contends that the next friend of an infant plaintiff, although, no doubt, he must under the rules come to the Court, if he desire to change his solicitor and to have a new solicitor placed upon the record in the place of the old one, is entitled to change that solicitor, if he desires so to do, just as much as an ordinary litigant who is *sui juris*.

The contention of the solicitors is that that is not so, that according to certain decisions, to which I will refer in a moment, the next friend of an infant plaintiff is not entitled to change his solicitor as of right, but that he must make out a case of something approaching misconduct on the part of the solicitor, and satisfy the Court that the change is for the benefit of the infant.

There are no doubt authorities to that effect in this Court. The first is an unreported case before Mr. Justice Norris, dated the 23rd August 1883, the case of *Manick Lal Seal* v. *Sarat Kumari Dassi*. There Mr. Justice Norris held, after consultation as he tells us with Mr. Justice Pigot, that the next friend of an infant plaintiff was not entitled to change his solicitor unless he made out a case warranting such a change. Mr. Justice Norris says that he was following a similar decision of Mr. Justice Norman. Speaking with every respect for this judgment I am unable to follow the reasoning upon which it is based, nor does it convey to my mind the impression of a carefully considered judgment. Mr. Justice Norris says that he does not agree with Mr. Bonnerjee, who was making the application, that a next friend is in the same position as an ordinary suitor: he says that the next friend is in a fiduciary position. I suppose he means in relation to appointing his own solicitor. I doubt if the expression is directly pertinent in that connection, and I would prefer to say that the next friend is bound to do his very best to protect the interest of the infant plaintiff.

1901

DINENDRA NATH DUTT v. WILSON.

I am unfortunately unable to accept either the reasoning or the conclusion of Mr. Justice Norris. That case was followed by Mr. Justice Sale in the case of *Ram Chandra Roy* v. *Poorno Chunder Roy* (1) and also by Mr. Justice Stanley in the case of *Sarat Chunder Dawn* v. *Kristo Dhone Dawn* (2), but neither of these learned Judges would appear to have considered the matter independently, but rather to have regarded themselves as bound by Mr. Justice Norris's view as laying down the practice of the Court. I respectfully dissent from these decisions as, in my opinion, the next friend of an infant plaintiff is as much entitled to change his solicitor as any other plaintiff who is *sui juris*. To my mind the difficulty has arisen through a confusion between the rights and the obligations of the next friend. His right is such as I have stated; his obligation is not to make such an appointment as would be detrimental to the interest of the infant plaintiff; and if the next friend were to come to the Court and ask for a change of solicitors, and it was made apparent to the Court that he was asking for such change for some sinister motive, that he was proposing for instance to appoint as his solicitor one who was acting for defendants with interest adverse to those of the infant plaintiff, or that he was colluding with the defendants or generally that he was not acting in the matter for the benefit of the infant, I entertain no doubt but that the Court has ample power to interfere and would interfere to protect the infant, but the proper course to my mind in such a state of circumstances would be, as was done in the old case of *Peyton* v. *Bond* (3) to apply for the removal of the next friend and for the substitution of a new next friend on the ground that the next friend was not doing his duty. As long as he continues next friend, I think he is entitled to appoint his own solicitor.

Before the suit is instituted he can appoint his own solicitor, and it has never been suggested that it was necessary that such appointment should be sanctioned by the Court after the suit was instituted, yet logically this ought to be done, if Mr. Justice Norris's decision be well founded.

(1) (1900) 4 C. W. N., 175 (Note.)
(2) (1901) 5 C. W. N., 83 (Notes.)
(3) (1827) 1 Sim., 390.

1901

DINENDRA NATH DUTT v. WILSON.

No authority in the English Courts has been cited in support of Mr. Justice Norris's decision and personally I have never known of such a case. The case of *Brown* v. *Brown* (1) has no bearing on the present case, though, if at all, it tends inferentially to support my present view. I may add that I do not think it can be for the benefit of the infant that the solicitor should continue fastened upon the next friend, when the latter has lost confidence in the former. Is it likely that in such a condition of affairs, the suit can be beneficially conducted for the infant? I should say no.

This is the first occasion upon which the point has been submitted to the Court of appeal here, and speaking with every respect, I think the view hitherto taken is erroneous.

The appeal must therefore succeed. This being so, it is not strictly necessary to go into the question of the charges made against the solicitors; but I propose to do so as it is important upon the question of costs and only fair to the solicitors themselves.

We are all satisfied that there is no ground whatever for the imputations or *quasi* imputations which were made against them.

The only question then is the question of costs, and that has caused me some difficulty. In the first instance in my view of the law the next friend was right in making this application, as he did; but then he was wrong and inconsistent in making the charges against the solicitors, and equally the solicitors were not well advised in not offering to retire when their clients were unwilling to retain their services any longer. At the same time there is some force in the view they took, that having regard to the authorities I have mentioned their removal might be taken to imply some imputation upon them, and that they wished to clear themselves of such imputations. This they have done, and very properly through their counsel have now desired to retire. Under all these circumstances, feeling as I do, that the difficulty has arisen from the above decisions, and although one ought to be very careful as to throwing the burden of costs on an infant's estate, I am of opinion that the costs of both parties in both Courts must come out of that estate.

(1) (1849) 11 Beav., 562.

1901

DINENDRA NATH DUTT v. WILSON.

It would be unjust, under the circumstances, to make the solicitors pay any costs.

The result is that the appeal must be allowed and an order must be made in terms of the summons with such order as to costs, as I have intimated.

PRINSEP, J.—I am of the same opinion.

HILL, J.—I agree.

Appeal allowed.

Attorney for the Appellant: Babu *Priya Nath Sen*.

The Respondents appeared in person.

B. D. B.

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

1901
Jany. 7, 8.

THE ROYAL INSURANCE COMPANY AND OTHERS (DEFENDANTS) *v.* AUKHOY COOMAR DUTT AND OTHERS (PLAINTIFFS).*

Practice—Registrar's Report—Application to discharge or vary Report—Exceptions to Report—Notice of motion—Time for such Notice—Belchambers' Rules and Orders of High Court, Original Side (1900), Rules 615, 617—Solicitor's mistake as to course of procedure—"Fraud, surprise or mistake, or such other special ground" under Rule 617.

If a party to a suit desires to discharge or vary a report, he must adopt the procedure laid down by Rule 615 (Belchambers Rules and Orders of the High Court, Original Side, 1900) and must apply by motion upon notice to be given within the time prescribed therein. Mere filing of exceptions to the report cannot be deemed to be notice under Rule 615.

The words "fraud, surprise or mistake, or such other special ground" in Rule 617 refer to fraud, surprise or mistake or some other special ground incident to, or connected with, or which resulted in the making of, the certificate or report itself; and not to something which has occurred quite outside and independent of the certificate or report.

A mistake in not complying with the procedure laid down in Rule 615 is not a "special ground" within the meaning of Rule 617, for reopening the report.

* Appeal from Original Civil No. 11 of 1900 in suits No. 445, 446 and 447 of 1897.