Vinayakrao Pandurangrao Desai Vs Sharanappa Ramanna Metri

Court: Bombay High Court

Date of Decision: April 2, 1943

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 43, 35

Citation: AIR 1944 Bom 100 : (1943) 45 BOMLR 1029

Hon'ble Judges: Sen, J; N.J. Wadia, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sen, J.
This appeal arises out of proceedings in execution of a decree in a suit filed by seven plaintiffs all of whom, except plaintiff No. 7,

were minors represented by their next friend. The suit was dismissed and the decree, as it stood after the appeal to this Court, contained these

words : ""defendant No. 9 to get his costs from the plaintiffs.

2. Defendant No. 5, the present appellant, filed darkhast No. 590 of 1940 for his costs and sought to recover them from the property of the next

friend of the minor-plaintiffs. The Court asked him to show how the darkhast was tenable against the property of the next friend. Defendant No. 5

relied on Babu alias Vrajlal Ratansey Vs. Alibhai Dawoodbhai, in support of his contention that the next friend was personally liable for the costs.

The Court remarked :-

I have gone through the judgment in that case but I find that the next friend was directed by the Court to pay the costs of the defendant. The

principle that the next friend is ordinarily liable to pay the costs applies and comes into operation only when there is such direction in the judgment

or decree.

As there was no such direction in the judgment or the decree in this case, the learned Judge held that the darkhast was not tenable against the

property of the next friend and ordered the issue of a warrant under Order XXI, Rule 43, Civil Procedure Code, 1908, against the moveables of

the plaintiffs. Defendant No. 5 has appealed.

3. The case relied on by him, Babu Vrajlal v. Alibhai, was a suit filed by a minor plaintiff represented by his next friend which was tried on the

Original Side of this Court; it was dismissed on the ground that it was barred by limitation. Counsel on behalf of the defendants thereupon

submitted that the costs of the suit should be ordered to be paid by the next friend of the minor plaintiff. Counsel for the plaintiff, on the other hand,

contended that the suit being for the benefit of the minor, and there being nothing to show that it was unnecessary or improper, there was no reason

to make the next friend liable for the costs of the suit. The question, therefore, that arose for determination was, whether, where a suit is brought by

a minor by his next friend and the suit is dismissed, the next friend should ordinarily be directed to pay the costs of the suit, or whether the next

friend should be ordered to pay the costs only if the Court holds that the suit was not a proper suit or was unnecessary and not for the benefit of

the minor. A number of authorities, mostly of English Courts, were cited, and Mr. Justice Rangnekar held it established that according to the

English practice the rule ordinarily is that the next friend is liable to pay the costs of the successful defendant and that the latter is entitled in a proper

case to get them from him.

4. Accordingly the order made was that the suit was dismissed with costs to be paid by the next friend without prejudice to the next friend''s right

to recover them from the minor''s estate. Mr. Justice Rangnekar has pointed out that the old practice in England, that if the infant plaintiff was

unsuccessful, was either to make the next friend personally liable for costs, or to dismiss the action with costs generally, without specifying who

should pay such costs, and that in the latter case execution for costs always issued against the next friend. [Turner v. Turner (1726) 2 Stra 708 and

Slaughter v. Talbot (1739) Willes 190 It was next pointed out that since the case of Buckly v. Buckeridge (1767) 1 Dic. 395 this practice seems

to have altered and the rule, rather than the exception, seemed to be that in such cases the next friend was made liable ordinarily to pay the costs of

the successful defendant. We are not concerned in this case with the part of the judgment in Babu Vrajla''s case which deals with the question of

the next friend being indemnified or protected, in case he was made liable for the successful defendant''s costs, out of the estate of the minor. But

on the main question, i.e. whether the next friend should be ordinarily directed to pay the costs of the suit in such a case, the important authorities

relied on in this case were Halsbury, Vol. XVII, pp. 133, 135 and 138, corresponding to Vol. XVII of the Hailsham''s edition, pp. 702, 704 and

709, Dyke v. Stephens (1885) 30 Ch. D. 189 Bligh v. Tredgett (1851) 5 De. G. & Sm. 74, Rutter v. Rutter [1921] P. 136 and Steed v. Preece

(1874) 18 Eq. 192 besides the provisions of Order XXXII, Rule 8, and Bai Porebai v. Devji Meghji ILR (1898) 23 Bom. 100. The effect of the

English authorities was thus stated (p. 1208) :-

It may, therefore, be taken as established that according to the English practice the rule ordinarily is that the next friend is liable to pay the costs of

the successful defendant and the latter is entitled in a proper case to get them from him, At the same time the next friend has a right to ask that he

should have liberty to proceed against the estate of the minor in exercise of his right of indemnity, or to protect himself, as he is entitled to get not

only these costs out of the estate of the minor but all costs, charges and expenses which have been properly incurred in conducting the suit on

behalf of the minor.

At p. 702, para. 1450, of Halsbury (Hailsham edition), it is pointed out that an infant cannot in person assert his right in a Court of law as plaintiff

or applicant and cannot make himself liable to a defendant or respondent for costs with the single exception that he may sue in a County Court for

a sum not exceeding Ã¯Â¿Â½ 100 due to him for wages, or piecework, or for work as a servant, in the same manner as if he were of full age; and that

he must consequently institute and carry on all proceedings by his guardian or some other person who is called his prochein any or next friend and

who is for most purposes dominus litis. At p. 704 it is stated that a next friend is liable to be ordered to pay the costs of the proceedings, but that

he will not be ordered to give security for costs. In Dyke v. Stephens (supra); Mr. Justice Pearson observed that the next friend is not a party to an

action, but that he is put there simply to protect the interest of the infant, and to show that the interest is of such a nature that he is willing to

guarantee costs. In Bligh v. Tredgett (supra) notice of motion to dismiss the minor plaintiff"s bill for want of prosecution, with costs, was served on

an agent of the plaintiff"s solicitor who had become insolvent, and thereupon an order was made dismissing the bill, with costs, to be paid by the

plaintiffs next friend. In the judgment of the Vice-Chancellor it was stated [following Dundas v. Dutens (1790) 1 Ves. Jun. 196 that the next friend

could not be relieved from the liability which the order imposed on him, to pay the costs, as his name had stood on the record down to the hearing,

even though his name had been substituted for the original next friend, who had died, without his knowledge. In Rutter v. Rutter (supra) it was

pointed out that it was not disputed that by the practice of the King"s Bench and Chancery Divisions that the next friend of the infant plaintiff is

liable for the costs of the suit where the defendant is successful. In Steed v. Preece (1874) 18 Eq. 192 Jessel M.R. said (p. 196) :-

An infant has no costs; the costs incurred on his behalf in a suit are the costs of his guardian or the next friend.

All these authorities undoubtedly support the conclusion of Mr. Justice Rangnekar that the ordinary rule in English practice is that the next friend is

liable to pay the costs of the successful defendant. In order to see whether there is anything in the law of this country to the contrary, Order

XXXII, Rule 8, was referred to, Sub-rule (1) of which is in the following terms :

Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for

the costs already incurred.

And it was remarked (p. 1209) :-

There is no reason why the friend if he is not liable personally for the costs of the suit should give security for the costs already incurred.

5. In Bai Porebai v. Devji Meghji ILR (1898) 23 Bom. 100 the question that arose for consideration was whether a minor female plaintiff suing by

her next friend can, and ought to, be ordered to give security for the costs before allowing her to proceed with the suit. It was held that except in

exceptional cases neither the infant female nor the next friend should be required to give security for costs. Farran C.J. remarked (p. 101) :-

Doubtless it is not intended that an infant party to a suit should personally obey such orders. It is evident from the provisions of Chapter XXXI of

the Code that it is intended that his next friend or guardian should obey the orders of the Court on his behalf. Hence in construing the Code we

cannot read an exception as to infants into its provisions generally, but rather a proviso that orders given to an infant may be obeyed for such infant

by his next friend or guardian,....

6. It has been contended that though no doubt in Babu''s case the order that was passed was that the suit was dismissed with costs to be paid by

the next friend without prejudice to the next friend''s right to recover the costs from the minor''s estate, the principles and observations to be found

in that judgment clearly show that the direction in the decree we are concerned with, viz. ""defendant No. 5 to get his costs from the plaintiffs,

should be interpreted to mean that defendant No. 5 was to recover his costs from the next friend of the minor plaintiffs. The decision in Babu

Vrajlal''s case is principally an authority for the proposition that ordinarily the next friend must be ordered to pay the successful defendant''s costs,

with liberty to reimburse himself from the minor''s estate. But Mr. Justice Rangnekar was not there concerned with interpreting any decree which

had omitted to mention the next friend''s liability. Bai Porebai v. Devji Meghji (Supra) appears to have given a new reason why any liability, which

the Court may impose on the minor plaintiff, must be discharged by his next friend. But in that case the Court was concerned with the question

whether the minor plaintiff ought to be ordered to give security for costs before being allowed to proceed further with the suit. In the decree we are

concerned with, there is however, no order to the plaintiffs but a direction that defendant No. 5 was to get costs from the plaintiffs. This direction

can hardly be construed to mean that there is such an order to the plaintiffs as they must obey without any further steps being taken by the decree-

holder; and it seems to us that the reasoning adopted in Bai Porebai v. Devji Meghji will not apply to the present case.

7. Mr. Jathar on behalf of the appellant has also invited our attention to Amar Chand v. Nem Chand AIR [1942] All. 150. It was there held that

the expression ""a next friend"" has come in modern times to assume the technical meaning of the person by whom a minor or an infant, as the case

may be, is represented as a plaintiff in litigation, and that the real object of; having the next friend is that there may be somebody to whom, the

defendant or the opposite party may be able to look for costs. There can be no doubt that Babu Vrajlal v. Alibhai correctly states the general

liability of the next friend of a minor plaintiff for costs where the defendant is successful, nor has this proposition been disputed by the learned

advocate for the respondents. It seems to us that none of the cases relied on by Mr. Jathar deals with the specific question with which we are

concerned, viz. where a decree merely mentions that the successful defendant"s costs are to be recovered from the plaintiff, who happens to be a

minor, whether it is open to the executing Court to construe such direction to mean that the costs are recoverable from the next friend of the minor

plaintiff. This question was specifically dealt with in Mulchand Jivraj v. Low (1938) 41 Bom. L.R. 521. The plaintiff in that case, was a minor who

sued by his next friend to recover a sum of RS. 2,503 from the defendant. The suit was dismissed and the Court further ordered the plaintiff to pay

to the defendants their costs of the suit. It was held that in such a case the Court, if it intends the next friend of the minor to pay the costs, should

give an express direction to that effect and that in the absence of such a direction, the estate of the minor plaintiff is liable to satisfy the costs

awarded. This case was decided in 1938 and it is to be observed that the earlier decision in Babu Vrajlal v. Alibhai was not cited before the Court

nor was it noticed in the judgment. Mr. Justice Engineer who decided this began by noticing the two earlier decisions of the English Courts, Turner

v. Turner (supra) and Slaughter v. Talbot (supra), which were also referred to in the first part of the judgment in Babu Vrajlal"s case. The case,

however, was decided mainly on the authority of three English decisions, Harrison v. O"Donnell [1919] W.N. 104 Hulbert v. Thurston [1931]

W.N. 171 and In re Picton : Picton v. Picton [1931] W.N. 254. In all these cases judgment was entered for the defendants with costs, the

plaintiffs being minors, and an application was subsequently made to amend the certificate of the judgment by adding in the judgment the words

that ""the next friend should pay the costs."" In the first of these cases the learned Judge observed (p. 104) :-

As an infant was not liable for costs, it might well be argued that the judgment as delivered and as recorded in the associate''s certificate amounted

to a direction that the costs should be paid by the next friend; but it was a better and safer practice that the judge, when delivering judgment,

should be asked to deal in express terms with any question that might arise as to the liability of the next friend in reference to costs.

Accordingly the amendment prayed for was allowed. In Hulbert v. Thurston the action had been brought by an infant plaintiff represented by his

next friend to recover damages in respect of personal injuries sustained by the plaintiff. The plaintiff was at first successful in the trial Court, but on

appeal that judgment was reversed and judgment was entered in favour of the defendant "" with the costs including the costs of this appeal."" The

costs having been taxed, the defendant''s solicitor proposed to issue a writ against the infant plaintiff''s next friend, but was informed that as there

was no direction as to this in the order as drawn up, the writ could not issue against the next friend. Accordingly an application was made for the

order to be amended so as to make it an order for costs against the next friend. The application having been made six months after the original

order had been made, it was dismissed, Greer L.J., dissenting, who said that in his opinion the application should be granted and the order

amended so as to carry out what, in his judgment, must have been the intention of the Court when it gave costs to the defendant. In In re Picton :

Picton v. Picton a similar application for amending the original judgment was allowed. In making the order the learned Judge observed that he did

not intend to make an abortive order so as to defeat his decision and the order was amended to "" dismissed with costs to be paid by the next

friend without prejudice to any right to indemnity."" It is to be observed that in all these three cases it was found necessary to have the original

judgment amended so as to include the direction that the next friend should pay the costs, and that even in the case of Hulbert v. Thurston (supra),

where the application was dismissed, no remark was made that it was immaterial whether the application was dismissed or not as in any case it

was possible for the successful defendant to get the costs from the next friend of the infant plaintiff. Such a remark would be expected at least in

the dissenting judgment of Greer L.J. who was of the opinion that the application for amendment should be granted. It seems, therefore, that not

only the applicants concerned but also the Judges in these English cases were of the opinion that where it had not been expressly stated that the

costs were recoverable from the next friend he would not be liable As pointed out in Babu Vrajlal v. Alibhai by Rangnekar J. the general practice

in England since 1767 has been in cases of this nature to direct the next friend or prochein amy to pay the costs of the application and this was the

practice that was followed by him. The principle therefore appears to have been accepted that unless the liability is expressly placed on the next

friend, costs cannot be recovered from him. In Harrison v. O''Donnell (supra) there is no doubt a remark that though the judgment originally did

not make the next friend liable for costs ""it might well be argued that the judgment as delivered and as on record in the associate''s certificate

amounted to a direction that the costs should be paid by the next friend."" But none of the three cases referred to in Mulchand Jivraj v. Low

decided that no amendment of the original judgment was necessary. The statement that it might well be argued that the judgment amounted to a

direction that the costs should be paid by the next friend cannot be said to mean that the judgment should be taken to amount to such a direction.

8. It has, however, been argued before us that if ordinarily in a case like the present the liability to pay costs is on the next friend and if there is

nothing to show that the Court intended to cast that liability on anybody else, the execution Court would be perfectly justified in treating the decree

as if it directed that the costs should be recovered from the next friend. That, however, it appears to me, would be not only acting on an

assumption but also would be reading a meaning into the decree which might not have been intended by the Court. It has been argued that if the

intention was that the plaintiff should be personally liable, the decree would be a nullity and that the Court certainly had no intention to make an

abortive decree. It has further been urged that if the Court intended that the costs should be recovered from the minor plaintiffs'' estate, a specific

direction in those terms would have been made in the decree. That may be so, but on the other hand it is never safe for an executing Court to travel

far from the actual words of the decree. In Brijessuree Dossia v. Kishore Dass (1876) 25 W.R. 316 the guardian of a minor plaintiff had obtained

permission to sue in forma pauperis on behalf of the minor and the suit was rejected and the decree did not in express terms say that the next friend

was to pay the costs. On execution proceedings being taken out against the next friend, they were set aside and it was pointed out that the rights of

the parties depended on the terms of the decree. In Chandra Shekhar v. Manohar Lal [1934] A.L.J.R. 383 a decree on the face of it was against

the minor plaintiffs, and it was held (though it was contended that the minor plaintiffs were merely benamidars for their next friend, the father who

had represented them) that the executing Court was powerless to go behind the decree and that the decree-holders could not execute their decree

for costs against the next-friend who was not a party to the decree. In that case the main contention urged was as to the benami character of the

minor judgment-debtors, and it was apparently not even considered necessary to advance the argument that ordinarily it is the next friend of the

unsuccessful minor plaintiff who would be liable for costs. In Mulchand Jivraj v. Low it was held that in the absence of the direction against the next

friend there was no reason why under the decree in the form in which it was drawn the defendants could not proceed against the estate of the

minors as they had done. In Elumalai Naicker v. Kuppammal ILR (1929) Mad. 716 it was remarked (p. 720) :-

Which person is liable, whether the minor or the next friend, is a matter governed by the general discretion given to the Court u/s 35 of the Civil

Procedure Code,

and the direction that was given to the respondents was that they were at liberty to recover costs from the next friend or from the minor appellant

as they chose. This case suggests that an order entitling the defendants or the respondent to recover costs from the minor plaintiff or appellant is a

perfectly valid order for the Court to pass. In Kalachand Basak v. Amulyadhan Banerji ILR (1933) Cal. 227 Panckridge J. remarked (p. 227) :-

I entertain no doubt that the court has power to order an unsuccessful infant plaintiff to pay the defendant"s costs and vice versa.

I do not think that the infants can say that the order passed is, as regards their liability, a nullity, and that they are not bound by it.

Under Section 35 of the CPC the Court has the discretion to determine and order by whom and to what extent the costs of a party should be

paid. The discretion must be a judicial discretion and an order as to costs can never be automatic, i.e. it can never be said of such an order that no

other kind of order could possibly have been made. That being so, it seems to us correct to say that the executing Court must deal with the decree

as it finds it and cannot assume in the absence of any indication that the Court must have so clearly intended to impose the liability for costs on the

next friend of the minor plaintiffs that it has no option but to give effect to such intention. What the appellant now really wants is to get the original

judgment and decree amended. This was in fact the final prayer of Mr. Jathar on behalf of his client in the arguments he addressed to us. But such

a prayer, having been made about four years after the date of the decree, is made too late. It is likely that the appellant, defendant No. 5, thought

that he would be able to recover his costs from the property of the minor; plaintiffs and that he has now found that the minors do not possess

sufficient property to enable the costs to be recovered in full.

9. The result of the above discussion is that though the next friend of an unsuccessful minor plaintiff is ordinarily liable for costs, in the absence of a

clear expression in the decree of the Court"s intention to enforce such liability, the matter cannot be left to the interpretation of the executing Court,

which must deal with the decree as it finds it, i.e. in its ordinary meaning, without importing anything which is not to be found in its language.

10. We think that the lower Court was right in not construing the decree as if it was a decree against the next friend of the minor plaintiffs. The

appeal, therefore, fails and is dismissed with costs.