Calcutta High Court
Dinendra Nath Dutt (A Minor) vs T.H. Wilson And Ors. on 6 February, 1901
Equivalent citations: (1901) ILR 28 Cal 264
Author: Maclean
Bench: F W Maclean, Kt., K C.J., Prinsep, Hill
JUDGMENT Maclean, C.J.

1. 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 Priya Nath Sen be placed on the record in the said suit as such attorney for the plaintiff, with directions for taxing the costs.

2. 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 applications 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.

3. 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.

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 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.

10. 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 Chunder Roy v. Poorno Chunder Roy (1900) 4. C.W.N. 175 (note) and also by Mr. Justice Stanley in the case of Sarat Chunder Dawn v. Kristo Dhone Dawn (1901) 5. C.W.N. 83 (notes) 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 intance to appoint as his solicitor one who was acting for defendants with intserest 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 (1827) 1 Sim. 390 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.

11. 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.

12. 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 (1849) 11 Beav. 562 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.

13. 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.

14. 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.

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

16. 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 of an infant's estate, I am of opinion that the costs of both parties in both Courts must come out of that estate.

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

18. 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.

19. I am of the same opinion.

Hill, J.

20. I agree.