1910.

SIDICK HAJI HOOSEIN v. BRUEL & CO.

In our judgment this contention was correct. The abandonment to the insurers by the defendant was effected for his benefit and, in the absence of evidence that the insurers and their vendee Gulam Mahamad kept the sugar in the godown in spite of protests by the defendant, we think that as between the plaintiffs and defendant, the latter must be taken to have been in occupation, either under his original tenancy or under a similar one resulting from his holding over.

In our judgment the respective tenancies of the plaintiffs and the defendant terminated upon Lakhamsey entering into possession on the 16th of February by the consent of all parties interested. The defendant is, therefore, liable for the rent to plaintiffs up to that date.

We accordingly affirm the decree of the lower Court and dismiss the appeal with costs.

Attorneys for the appellant: Messrs. *Thakurdas and Co.*

Attorneys for the respondents: Messrs. *Pestonji, Rustomji and Colah.*

Decree affirmed.

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

BHAISHANKER AMBASHANKER, PLAINTIFF, *v.* MULJI ASHARAM AND OTHERS, DEFENDANTS.*

1910. *September* 10.

Practice—Security for costs—Infant plaintiff—Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1.

It is not desirable to run any risk of stopping a suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs.

PROCEEDINGS in Chambers.

The plaintiff was a minor, and sued by his next friend (*inter alia*) for an injunction restraining the defendants from per-

* Suit No. 401 of 1910.

1910.

BHAI-SHANKER AMBA-SHANKER v. MULJI ASHARAM.

forming the marriage of one Bai Mani to the fourth defendant, and for a declaration that the said Bai Mani was lawfully betrothed to the plaintiff himself. The first defendant took out this summons calling upon the plaintiff's next friend to show cause why he should not give security for costs. The summons was argued before Mr. Justice Robertson.

Desai appeared for the plaintiff to show cause.

Setalwad appeared for the defendants in support of the summons.

ROBERTSON, J.:—This is a summons whereby the next friend of the plaintiff is called upon to show cause why he should not be made to deposit in Court such sum as the Honourable Judge may deem sufficient as security for the first defendant's costs of this suit.

It appears that the next friend and the plaintiff are both residents outside the jurisdiction of the Court and do not own immoveable property in British India, and under those circumstances, it is urged, the next friend ought to be directed to give security for costs.

The decision in Bombay, which has the most bearing upon this point, is the case of *Bai Porebai* v. *Devji Meghji*[1]. It appears from that case that it was laid down that except in exceptional cases neither an infant female plaintiff nor her next friend ought to be required to give security for costs. In his judgment Sir Charles Farran says at page 102: "If, then, the next friend of an infant plaintiff and not the infant plaintiff himself or herself is and has always been liable for the costs of the suit, a provision that a woman shall not be imprisoned for debt gives rise to no inference that the Legislature intended in any way to change the practice as to a female infant plaintiff giving security for costs. We think, therefore, that except in exceptional cases, the old practice ought still to be observed. The Advocate-General urges that this ruling will permit of improper suits being filed . . . as next friends of female infant plaintiffs. The same argument, if of weight, applies with equal cogency to the

(1) (1898) 23 Bom. 100.

next friends of male infant plaintiffs. The answer to this appears to us to be that the Courts can be moved to stay a suit improperly brought on behalf of an infant and to remove an improper next friend of an infant and to substitute a proper person in his place."

The English practice is laid down in the case of *Hind* v. *Whitmore*[1] referred to by Sir Charles Farran in the case of *Bai Porebai* v. *Devji Meghji*[2]. That case was of a married woman, where she was actually suing in *formâ pauperis*, and also deals with the case where she sues by a next friend. Vice-Chancellor Sir W. Page Wood says at pages 461 and 462:

"The circumstances which make a difference between the case of a feme coverte and an infant are, not only that a feme coverte selects her own next friend, but also that this Court is always anxious that cases in which infants are concerned should be brought to its notice, and it has a jurisdiction over suits by infants, which it has not in the case of suits by married women, to stay such suits if not for the infant's benefit, and can for that purpose avail itself of any impropriety on the part of the next friend in bringing the suit. But it is not so in the case of a married woman. Her suit must go on, however impossible it may be for the defendant to have any remedy for costs, in case they should be ordered to be paid to him."

Cases will be found collected in the Annual Practice for 1909, Vol. I, page 183, where it is said with regard to next friends: "Security for costs. He (the next friend) is not obliged to give security for costs, although he may be impecunious and a stranger but if he appeals and is insolvent he may have to give security."

The practice therefore seems to be that in the case of an infant it is not desirable to run any risk of stopping the suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs, and the Courts have apparently considered that the interests of other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the infant, or, if there is a just cause other than the poverty of the next friend, to have him removed.

(1) (1856) 2 Kay. & J. 458. (2) (1898) 23 Bom. 100.

1910.

BHAI-SHANKER AMBA-SHANKER v. MULJI ASHABAM.

Therefore, it seems to me that I should be departing from the principles and practice both of this Court and of Courts in England, if I were to make any order directing security to be given in this case.

Summons will, therefore, be discharged.

Costs costs in the cause.

Attorneys for the plaintiff: Messrs. *Khunderao, Laud and Mehta.*

Attorneys for the defendants: Messrs. *Hiralal and Co.*

K. McI. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Robertson.

1910. *September* 22.

MANJI KARIMBHAI, APPELLANT AND SECOND DEFENDANT, *v.* HOORBAI, RESPONDENT AND PLAINTIFF.*

Civil Procedure Code (Act XIV of 1882), section 317, (Act V of 1908), section 66—Court-sale in execution—Certified purchaser—Benami—Mortgagee of certified purchaser—Protection—Doctrine of constructive notice—Transfer of Property Act (IV of 1882), sections 3 and 41.

The mortgagee of the certified purchaser at a Court-sale is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title. Section 66 of the Civil Procedure Code (Act V of 1908)—which may be called in aid for the purpose of assisting in the construction of section 317 of the Civil Procedure Code (Act XIV of 1882)—supports this conclusion.

Hari Govind v. *Ramchandra*(1), followed.

The doctrine of constructive notice applies in two cases, first, where the party charged had actual notice that the property in dispute was charged, incumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and, secondly, where the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice.

* Appeal No. 21 of 1910. Suit No. 667 of 1905.

(1) (1906) 31 Bom. 61.