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(1910) 02 CAL CK 0052

Calcutta High Court

Case No: None

Nanda Lal Sirkar — APPELLANT

Vs

Benode Behary Roy — RESPONDENT

Date of Decision: Feb. 11, 1910

Citation: 9 Ind. Cas. 313

Hon'ble Judges: Teunon, J; Mookerjee, J

Bench: Division Bench

Judgement

1. We are invited in this rule to set aside an order of the Court below by which an application for amendment of a decree in a partition-suit has been allowed at the instance of the Commissioner appointed to effect the partition, and a similar application by the plaintiff has been dismissed, It appears that on the 15th February 1905, a consent decree was made between the parties to the litigation. Subsequently a Commissioner was appointed to divide the properties by metes and bounds and the plaintiff deposited in Court a sum of Rs. 30 to meet the costs of the Commissioner. At one stage of the proceedings, the Commissioner reported to the Court that, the amount deposited was insufficient and he prayed that the decree-holder might be asked to deposit an additional sum. The Court, however, directed the Commissioner to proceed with his work, and informed him that his fees would be paid as soon as they were deposited by the decree-holder: at the same time, a notice was issued upon the defendant and he was called upon to deposit the necessary amount. The result was that the Commissioner finished his work and submitted a report. Two orders were then made on the 6th and 24th April 1908, by which the decree-holder was directed to deposit a sum of Rs. 110-9 for payment to the Commissioner. On the 23rd May, the decree-holder filed a petition of objection, in which he alleged that the report was incomplete, and that the amount demanded by the Commissioner as his fees and travelling expenses was excessive. A question was raised at this stage as to whether the decree should be drawn up till a non-judicial stamp had been filed, and there was some controversy as to the precise amount of stamp required. It was settled on the 10th June that a stamp of Re. 1 would be sufficient, and on the 11th June, the stamp was filed. On the day following, an order was

recorded to the effect that a decree be drawn up in terms of "the petition put in by the decree-holder and the case be disposed up. The Commissioner may realise his fees which will be embodied in the decree thus drawn up". The decree drawn up showed that the Commissioner was entitled, not to Rs. 110-9 which, had been directed to be paid on the 6th and 24th April, but a smaller amount mentioned in the application of the decree holder dated the 23rd May. This led to some correspondence between the Commissioner and the Munsif; subsequently the Commissioner approached the District Judge and obtained from him a decision as to the amount legitimately payable to him. The decision of the District Judge was to the effect that the amount claimed by the Commissioner was excessive, while that named by the decree-holder was too small, consequently, he fixed an intermediate sum. Subsequently upon the application of the Commissioner, the decree was amended by the Munsif, and the amount of costs payable to him was inserted in the decree on the basis of the order of the District Judge. At the same time, the decree-holder applied for amendment of the decree on the ground that no provision had been made therein for realisation by him of the costs incurred subsequent to the preliminary decree. This application was refused. We are now invited by the decree-holder to, set aside the order for amendment in so far as it is in favour of the Commissioner; we are also asked to amend the decree in so far as it omits to make any provision for realisation by the decree-holder of the costs incurred by him subsequent to the preliminary decree.

2. In support of the first ground it is urged that the District Judge had no jurisdiction to interfere in the matter, and that consequently the order for amendment made by the Munsif on the basis of the order of the District Judge ought not to stand. It is needless for us to express any, opinion upon, the question, whether the, District Judge had any jurisdiction in the matter or not, because we are of opinion that the amendment made by the Munsif is not open to objection by the decree-holder; in fact it does not do full justice to the Commissioner. The order, of the 24th April was to the effect that, the Commissioner was entitled to realise the whole amount demanded by him. That order was never set aside. It is no doubt suggested that the order of the 18th June did by implication revoke the order; but we do not think that such an effect can be properly attributed to the order of the 12th June. Consequently, so long as the order of the 24th April stood unreversed, the decree ought to have allowed the full costs claimed by the Commissioner. The order of amendment, therefore, does not go far enough; but as the Commissioner has not invited us to modify it, we do not interfere with it. The decree-holder has undoubtedly no grievance. We may further point put that the decree as drawn up is inappropriate and unfair to the Commissioner from another point of view; The decree entitled the Commissioner to realise by execution the sum-awarded to him on account of his fees and expenses. The Commissioner who is an officer of the Court clearly ought not to be placed in this position. The proper course for the Court would have been to call upon the plaintiff, decree-holder, to deposit in Court the full amount determined to be payable to the Commissioner and the decree ought not to have been drawn up till such sum had been deposited. The Commissioner, in our opinion, ought not to be driven to execute the decree for the purpose of realisation of the sum payable to

him while the parties reap the fruits of litigation on the basis of his labours. The plaintiff, decree-holder, ought to have been compelled to deposit the sum before the decree was drawn up, and provision might have been made in the decree so as to enable him to realise by execution a proportionate share of the costs from his co-sharers, the defendants in the suit. In so far, therefore, as the Commissioner is concerned, the order of the Court below must be affirmed.

3. In support of the second ground, it has been urged that no provision has been made in the decree for payment by the defendants of a proportionate share of the costs incurred by the plaintiff subsequent to the preliminary decree. No sum was mentioned in the application to the Court below as to costs so incurred, and there is nothing to show that any attempt was made to prove the precise sums which had been so spent. We are told that the total costs incurred by the plaintiff come up to a, decree of Rs. 14 and that he is entitled to realise three-fourths of this sum from the defendants. No details, however, are given in the application, and there are no materials on the record from which we may hold that this is the amount of costs actually incurred. We are unable to hold that the Court below has improperly refused the application for amendment when no details were furnished, and no attempt was made to prove the costs actually incurred. The second ground must consequently be over ruled.

4. Both the grounds on which the order of the Court below has been attacked fail. The rule is, therefore, discharged. In so far as the Commissioner is concerned, we are of opinion that the present proceedings are clearly vexatious, and he must be allowed the costs of this rule. We assess the hearing fee at two gold mohurs.