

(1925) 02 CAL CK 0041

Calcutta High Court

Case No: None

Nandalal Roy
Choudhury and
Another

APPELLANT

Vs

Mukundalal De

RESPONDENT

Date of Decision: Feb. 19, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33

Citation: AIR 1926 Cal 57 : 89 Ind. Cas. 24

Hon'ble Judges: Mukerji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukerji, J.

This appeal arises out of a suit for accounts instituted by the plaintiffs against the defendant who, it is alleged, was their manager, Muktear and Pleader at various times. A preliminary decree was passed by the Subordinate Judge of Backarganj who gave in that decree certain directions to a Commissioner to be appointed in order to ascertain the liabilities of the defendant. Those directions were to a certain extent modified by the learned District Judge on an appeal preferred from the said preliminary decree by the plaintiffs. There was another suit instituted by the defendant against the plaintiffs for certain sums of money alleged to have been due to him. With that suit we are not concerned in the present appeal. The appellants' objections in this appeal are two in number. The first objection relates to the directions which were given by the learned District Judge in connection with issue No. 6 in the suit. The issue runs in these words "Are the plaintiffs entitled to the papers mentioned in schedule ga to the plaint or any price thereof? " The papers in question were certain registers of suits, execution cases and establishment charges, certain copies of judgments and decrees, accounts for various periods, bills and vouchers and receipts for the payment of Government revenue. The defendant's

case was that so far as the accounts were concerned they had already been furnished, that the bills were not in his possession and that the receipts had already been made over by him to the plaintiffs; and in short that he was not liable to make over any of these papers to the plaintiffs. The learned District Judge in his judgment states that these papers may be classified under two heads; firstly, papers which are alleged to be necessary for the settlement of accounts in the present suit, and secondly, papers which would be required by the zemindars for the future management of the estate. So far, as the first kind of papers is concerned the learned District Judge was of opinion that upon the materials on the record it was not possible for him to, say whether the defendant had submitted all the, necessary accounts but he did not think it necessary to decide the point as it would be duty of the Commissioner to go into the matter and to decide against the defendant, where the latter had not produced accounts and vouchers in support of his claims. As for the second class, of papers the learned Judge was not. satisfied with the defendant's answer and he directed the defendant to submit all papers in his possession and all information that he could before the Commissioner, and he asked the Commissioner to state in his report whether what has been submitted is adequate and also whether the defendant should not be ordered to pay money compensation to the plaintiffs for what has not been supplied. After the report has been submitted by the Commissioner, the, matter will necessarily be considered by this Court. On behalf of the appellants, it is urged that the learned District Judge instead of directing the. Commissioner to come to his decision on these points should have decided the matter, himself. It will appear that the learned District Judge, upon the materials on the record, was unable to come to any decision; but he thought, it necessary that there should be an investigation by a Com" missioner who would submit his. report before that Court is this to the of in be are p can In finally decides question. our objection this. We opinion there no substance contention.

2. The next objection relates to the decision of issue No. 4 in the suit. That issue related to the liabilities of the defendant to submit his accounts from Asar 1324 to Aswin 1325. The learned Subordinate Judge decided as regards this issue,, that, the plaintiffs were entitled to a, decree for accounts for this period. The learned District Judge has varied the direction of". the Subordinate Judge and has held that the accounts from Asar 1324 till, Aswin. 1325 will be taken as being fully adjusted except as regards the item of Rs. 300 which, does not appear to have been entered, in the accounts and the learned District, Judge has directed in his order, that the Commissioner will have nothing to do with the accounts of this period except to consider the admissibility of this sum of Rs. 300. It is urged on behalf of the appellants that the learned District Judge was wrong in treating the accounts as having been fully adjusted except as regards the sum of Rs. 300 and that he was not competent to vary the decision of the Subordinate Judge in this respect inasmuch as there was no appeal or cross-appeal before him on behalf of the defendant. With regard to this matter the findings" of the Subordinate Judge are not very clear and

in fact on a close examination of his findings it will appear that they cannot be easily reconciled. On the whole, however, it seems to us that what the Subordinate Judge found was this; that although the plaintiffs examined the accounts for this period and did not object to the items contained therein there was only a partial adjustment of accounts and there was no final adjustment thereof. The learned Subordinate Judge was of opinion that until the Recounts were finally adjusted the plaintiffs were entitled to object to the accounts and to say that they were not correct. In that view of the matter he gave directions to the effect that the accounts for this period should not be held as having been finally adjusted and, that, therefore, they should be taken. In our opinion there is no good reason for dissenting from the view taken by the learned Subordinate Judge in this respect; and upon the circumstances disclosed in his judgment it cannot reasonably be held that the accounts for this period were finally adjusted as between the parties in such a way that they may not be re-opened. In our opinion, the learned District Judge was not right in taking a different view. A contention was put forward on behalf of the appellants as to the jurisdiction of the learned District Judge to deal with this matter inasmuch as there was no appeal or cross-appeal before him on behalf of the defendant. As an answer to this contention the respondent relied upon the provisions of Order XLI, Ruler 33 of the C.P.C. as justifying the position that the learned District Judge had jurisdiction to modify a decision in this respect although there was no cross-appeal. In the case of *Triecomdas Cooverji Bhoja v. Gopinathji Thakur* 39 Ind. Cas. 156 : 44 I.A. 65 at p. 71 : 1 P.L.J. 262 : 15 A.L.J. 217 : 25 C.L.J. 279 : 32 M.L.J. 357 : 21 11. L.T. 282 : 21 C.W.N. 577 : (1917) M.W.N. 363 : 5 L.W. 644 : 19 Bom. L.R. 450 : 44 C. 759 (P.C.). and to the case of *Tarini Charan Sarkar v. Bishun Chand* 44 Ind. Cas. 301 : 22 C.W.N. 505 at p. 511 23 M.L.T. 147 : 7 L.W. 315 : 27 C.L. 303 : 34 M.L.J. 361 : 4 P.L.W. 249 : 16 A.L.J. 271 : (1918) M.W.N. 295 : 20 Bom. L.R. 553 (P.C). Now the facts of both these cases are widely different from those of the present case, and the observations of their Lordships of the Judicial Committee can hardly be taken to mean that the provisions of Order XLI, Ruler 33, would apply to a case like the one before us. Although it cannot be gainsaid that the terms of Order XLI, Ruler 33 are very wide and, that they do confer on an Appellate Court wide powers, for the purposes of making such decree, or order as the exigencies of the case or ends of justice may require, still, as has been held by this Court in the case of *Ganga Dhar Muradi v. Banabashi Padihari* 21 Ind. Cas. 208 : 22 C.L.J. 390, ordinarily the powers contained in Ruler 33, Order XLI should be limited to those cases where as a result of the Appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust; the rights of the parties in accordance with justice, equity and good conscience. It has also been laid down by Mookerji, J., in the case of *Shib Chandra Kar v. Dulcken* 48 Ind. Cas. 78 : 28 C.L.J. 123, on a review of the cases on the point that the provisions of this rule should; be cautiously applied and should only be applied to cases where, but for recourse to it, the ends of justice would be defeated/ In our opinion, this is not a case in which the District Judge was justified in resorting

to the provisions of Order XLI, Ruler 33 for the purposes of varying the decision of the Subordinate Judge in this respect. This contention put forward on behalf of the appellants, therefore, succeeds. The appeal, therefore, succeeds in part. The decision of the learned District Judge in so far as it relates to issue No. 4 of the, suit is set aside and the decision of the Subordinate Judge with regard to that issue is restored. The rest of the decision of the learned District Judge will stand.

3. Each party will bear its own costs in this appeal.

4. The cross-objection is not pressed and is dismissed.

Greaves, J.

5. I agree.