APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and B. B. Ghose J.

NATIONAL INSURANCE CO., LTD.

v.

NISSIM ABRAHAM GUBBAY.*

1928.
July 12.

Procedure—Administration suit—Parties—Costs—Who should have carriage of proceedings.

Orders for costs, in administration suits, should be made in such a form that a person who has not encumbered his share will be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share.

Greedy v. Lavender (1) referred to.

APPEAL from a judgment of Costello J.

This appeal arose out of an administration suit between Nissim Abraham Gubbay and another on the one side and Ezekiel Abraham Gubbay and others on the other.

The suit was instituted on the 15th May, 1917, by two of the legatees. On the 21st December following, preliminary decree was passed in the suit, declaring rights of parties, directing accounts and enquiries and appointing Ezekiel Abraham Gubbay, the sole executor under the will of the testator, the receiver. On the 28th April, 1919, Elias Abraham Gubbay, the second plaintiff, assigned his 3/16th share to Ezekiel (the executor). On the 2nd May of the same year, Seemah Abraham Gubbay, one of the defendants, also assigned her 1/16th share to the said Ezekiel. On the 17th November, 1919, Nissim Abraham Gubbay, the first plaintiff, mortgaged his 4/16th share to one Barendranath Mitra for Rs. 85,000. On the 2nd October, 1920, Nissim further mortgaged his share to Ezekiel for Rs. 75,000. On the 10th December next,

* Appeal from Original Civil, No. 44 of 1928, in Suit No. 534 of 1927.

(1) (1848) 11 Beav. 417; 50 E. R. 878.

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Barendranath Mitra filed his mortgage suit against Nissim and obtained a preliminary decree on the 11th January, 1922. On the 12th July next, Ezekiel took an assignment of the mortgage and the benefit of the mortgage-decree. On the 1st December, 1923, Ezekiel mortgaged his own share under the will and all that he had by assignment and mortgage to the National September, 1924, Ezekiel executed a deed of further Insurance Co., Ltd., for Rs. 2,00,000. On the 1st charge in favour of the said insurance company for Rs. 60,000 and on the 2nd December following he still further mortgaged his share to that company for Rs. 50,000. As a further security for the repayment of Rs. 50,000, Ezekiel sub-mortgaged the 4/16th share of Nissim which had been mortgaged to him to Mitra (whose assignee he was).

Meanwhile, on the 26th November, 1924, an order was made in the suit, at the instance of Nissim, directing the Registrar to sell the trust properties as soon as possible by public auction, the minimum sale price being fixed at Rs. 10,00,000. Since that date various proceedings were going on for holding the sale and for settlement of suit.

On the 26th March, 1928, Ezekiel was adjudicated an insolvent and on the 17th April, the Official Assignee was added as a defendant in the suit as assignee of the estate of Ezekiel.

On the 23rd May, the National Insurance Co., Ltd. applied to be made parties to the suit and prayed further that they might have the carriage of the proceedings under the aforesaid order of the 26th November, 1924, directing sale. The application was disposed of by Costello J. in the following way :—

"The mortgagee applicants will be added for the purpose of "watching the proceedings on the condition that they will not realise "any costs incurred by them and no costs will be incurred by any of "the other parties. The applicants shall not be entitled to add their "costs to their claims as mortgagees. They are not to make any "costs of any kind as against any of the other parties in the suit. "Costs of the plaintiff and the costs of the guardian of Joseph (who "was insane) out of the estate. Other parties to pay their own costs."

The company appealed.

Mr. N. N. Sircar (with him *Mr. A. C. Bantra*) for the appellants. It is difficult to understand the effect of the order of Costello J. All that I can do is to watch the proceedings and nothing else. I would much rather have my application rejected. I have 15/16th of the estate of the testator, whose estate is administered. The executor (defendant No. 1) is the eldest son.

[*Sir B. L. Mitter* (with him *Mr. S. N. Banerjee, Jr.*) for Joseph. I do not object to the company being added as a party, so long they do not incur additional cost. Any order that costs should come out of the estate cannot be supported. My share in the estate is unencumbered.]

[*Mr. B. K. Ghosh* for Nissim. The order for carriage of proceedings is naturally in my favour, as I am the plaintiff. I have 4/16th share, Joseph is of unsound mind.]

[*Sir B. L. Mitter.* Mr. Sircar assures me that my share will not be affected. That satisfies me. The mortgage is sufficiently covered. Therefore, either the mortgagor or an unencumbered party should have the carriage of proceedings. There is no appeal against the order as to costs.]

Mr. Sircar, continuing. I do not know on what basis Sir B. L. Mitter values the matter. There is nothing on record. As things stand, I shall not disturb you on the question of my being a necessary party. See *Greedy* v. *Lavender* (1), *Perceval* v. *Perceval* (2). In *Greedy's Case* (1), the form of the order is given. See also *Re Prime's Estate* (3) and Daniell's Chancery Practice, 8th Ed., p. 1075, where *Greedy's Case* (1) is referred to. It is said that the last mentioned case has not been followed in *Belcher* v. *Williams* (4). That is not so. That was a partition suit. Woodroffe J. allowed the mortgagee the carriage of proceedings in a case.

(1) (1848) 11 Beav. 417; 50 E. R. 878.
(2) (1870) L. R. 9 Eq. 386, 394.
(3) (1883) 48 L. T. 208, 210.
(4) (1890) 45 Ch. D. 510.

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[*Sir B. L. Mitter.* See *Whittaker* v. *Wright* (1).]

But see the later case, *Re Prime's Estate* (2), where the later view of Sir John Romilly is cited.

I have 15/16th share of the property, as also every scrap of title deed and, therefore, I should have the carriage of proceedings. Nissim, at any rate, should not have it.

Mr. B. K. Ghosh, for the respondent, Nissim. The appellant has hardly any case. He never even alleged that his interest would be seriously prejudiced. See *Vassonji Tricumji and Co.* v. *Esmailbhai Shivji* (3).

[*Mr. Sircar.* That was a representative suit under O. I., r. 8, C. P. C. The remarks about administration was *obiter.* The law is settled. I am prepared to deal with the case law.]

No, that was also a suit for administration.

In the present case, there was assignment pending suit and long after mortgage decree.

Adding parties would add to costs. But we do not object to mere adding of parties. The mortgage is sufficiently covered. My client is most vitally interested. I am more interested in seeing that there is proper value at sale—as I have only the equity of redemption.

[*Sir B. L. Mitter.* The test is, out of whose pocket, the cost will eventually come.]

[*Mr. Sircar.* As regards that, will not 15/16th of the costs come out of my pocket?]

RANKIN C. J. This is an application made by the present appellant before the learned Judge on the Original Side in the course of an administration suit to administer the estate of one Abraham Ezekiel Gubbay, who died in November, 1906—the suit being brought in 1917. It appears that, with the exception of a certain wine business, the testator left all the properties to his executor, upon a trust for conversion and for distribution, in the following shares:—7/16th to Ezekiel Abraham Gubbay, who was the executor;

(1) (1843) 7 Jurist 320; 67 E. R. 128.

(2) (1883) 48 L. T. 208, 210.

(3) (1909) I. L. R. 34 Bom. 420.

4/16 to Nissim, who, in the administration suit, was the plaintiff; 3/16 to Elias; 1/16 to Seemah and 1/16 to Joseph. In the end, by various assignments, Ezekiel became entitled, in his own right, to 11/16th share absolutely of the fund and, by various transaction made between him and the appellants—the National Insurance Co., Ltd.—the present position is this:—The appellants are in the position of mortgagees as regards 11/16th share, where the equity of redemption is in the estate of Ezekiel, who has become insolvent and they are in the position of being sub-mortgagees of the 4/16th share of Nissim. This application was made to enable the appellants to be made parties to the suit and they also asked that they might have the carriage of the proceedings under the order dated the 26th November, 1924, directing the sale of certain properties belonging to the estate. It appears that the suit has been going on for a very long time and the order for sale was made almost four years ago. It does not seem as if the parties had been prosecuting the order for sale with any great diligence, because, although the order was completed in January, 1925, and summons was taken out on behalf of the unencumbered share of Joseph amounting to 1/16th in March, 1926, nothing practically had been done till the time when this application was brought on. In these circumstances, the learned Judge made an order to the effect that the applicants should be added to the suit as party defendants, but he qualified that with various words, to say, "for "the purpose of watching the proceedings in this suit "on the condition that the applicant do pay its own "costs and be not entitled to any costs as against any "of the other parties to this suit: And it is further "ordered that the said applicant shall pay its own "costs and shall not be at liberty to add its costs of "and incidental to this application to its claim as "such mortgagee and sub-mortgagee as aforesaid.".

The first question is whether or not the appellants should be made parties to this administration suit. It appears to me to be a mistake to make an order for

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a person to be a party "for watching the proceed-"ings.". I see neither meaning nor purpose in such an order. In my judgment, the appellants who have sufficiently shown in this case that they have an interest to the extent of 15/16th share in the property ought to be allowed to become parties to the proceedings in order that there may not be any delay in carrying out the order for sale. I have no doubt, therefore, that the words "for the purpose of watch-"ing the proceedings in this suit" ought not to be present in this order.

As regards the conditions as to costs. It seems to me that the argument of the appellants is right. The position is that the share of Joseph which is entirely unencumbered ought not to be made to pay a larger share of the costs because another party has encumbered its own share. This appears to be a matter which has often been considered and we have been referred to the case of *Greedy* v. *Lavender* (1). In my judgment, there can be no doubt that the correct course, in such a case, when orders for costs are made, is to make them in such a form that the person who has not encumbered his share shall be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share. The practice seems to me to be clearly enough laid down in the following passages in Daniell's Chancery Practice, 8th Edition, P. 1075, to which we have been referred. "Where "a person entitled either to a legacy or share "of a residue incumbers his legacy or share, or by "any act of his own occasions additional expense in "respect of it beyond what is necessary for the due "administration of the estate, the additional expense "will be thrown upon the legacy or share; and only "one set of costs will be allowed out of the estate to "the person entitled and his incumbrancers, and such "costs will in general be made payable to the first "incumbrancer, or to the incumbrancers in order of "their priorities, and then to the person entitled.

(1) (1848) 11 Beav. 417; 50 E. R. 878.

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"Where, however, each of the incumbrancers stood "first upon some portion of the share included in his "incumbrance, the costs were directed to be divided "among them equally." It appears to me that, both as regards the present application and as regards any other future application, that is the principle which the Court would do well to apply. It is not, however, correct that an order should now be made purporting to govern or control future orders for costs, and as any order for costs is made, it will be for Joseph to represent to the Court that this principle is one which is to be applied and in that way to make sure that the Court administers this estate without throwing any improper burden on him. It is not necessary in my opinion, that the present order should be qualified by a condition purporting to bind the hands of the Court as regards future orders for costs.

The next question is whether or not the second part of the prayer should be granted, namely, that the appellants should be given the carriage of the proceedings under the order for sale. It seems to me that this matter is very largely academical. It will be for the Registrar to effect the sale and so far as the questions of getting proper price, issuing sufficient advertisement, choosing suitable date and so forth are concerned, the matter will be in the hands of the Registrar. What it is necessary to make sure of is that the person who shall be given the carriage of the proceedings under the order for sale will not make delay in perfecting the order and carrying it out. As to that matter, the position seems to be this: Neither Nissim nor indeed Joseph appears to have been particularly active in insisting upon the order for sale being carried out. Both of them had certain merits at different stages of the suit. Nissim got the order in November, 1924, and it is noticeable that he has done nothing since then. In the same way, in March, 1926, Joseph's attorney asked for the carriage of these proceedings. But he does not appear to have been prosecuting that matter since then with any particular diligence. We have to consider

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whether it would not be better that the carriage of these proceedings should be given to these mortgagees who presumably will desire to get back their money within a reasonable time. It is said that these mortgagees are amply secured. But that is no sufficient answer. As regards Nissim, it is said that he is the plaintiff and he has a possible chance—but that is not made out to my satisfaction—of getting something for himself if the sale is properly effected. As regards Joseph, the objection to him is that he is a lunatic, which does not, in itself, go very much against him. In my opinion, for the present purpose, the price to be fetched does not depend upon the person who should have the carriage of the proceedings. That will depend upon the efficiency of the Registrar at the sale. The main thing we ought to look at is to give the carriage of the proceedings to somebody who will carry them out forthwith without any chance of the matter being hung up for a year. On the whole, considering that the appellants have got interest to 15/16th of the property, it appears to me that the best course would be that they should have the carriage of the proceedings. They are given only the carriage of the proceedings under the order for sale. When the sale is effected and the money is brought in, this order will have no effect.

As regards costs both before Mr. Justice Costello and of this Court, I think the proper order should be that Joseph and Nissim should get their costs out of the general estate and the appellants should add their costs to their mortgage. Costs will be taxed on Scale No. 2 so far as applicable.

B. B. GHOSE. I agree.

Appeal allowed.

Attorney for the appellant: *P. C. Kar.*

Attorneys for the respondents: *N. C. Mandal, K. L. Mandal and Orr. Dignam & Co.*

S. M.