

ORIGINAL CIVIL.

Before Panckridge J.

KASHIRAM BUDHIA

v.

CHAJURAM BUDHIA.*

1934

Feb. 5, 6, 9.

Procedure—Practice—Reference—Commissioner of partition—Special Referee—Examination of witness—Deposition, if must be read over and explained to witness—Code of Civil Procedure (Act V of 1908), O. XVIII, rr. 5, 6; O. XXVI, r. 17—High Court (Original Side) Rules, Chap. XIV, r. 1; Chap. XXII, r. 3.

In proceedings conducted by a commissioner of partition and Special Referee appointed by the Original Side of the High Court, the provisions of rules 5 and 6 of Order XVIII of the Code of Civil Procedure apply and the deposition of a witness should be read over and explained to him after it is completed and, if necessary, translated into a language which he understands.

Neither rule 1 of Chapter XIV of the Rules and Orders of the High Court (Original Side) dealing with proceedings at the hearing of suits, nor rule 3 of Chapter XXII dealing solely with the procedure upon commissions to take evidence, issued under Order XXVI, rules 1 and 4 of the Code of Civil Procedure is applicable to the proceedings before a Special Referee.

APPLICATION.

The relevant facts and arguments of counsel appear from the judgment.

B. C. Ghose and H. K. Mitra for the applicant.

S. N. Banerjee and S. R. Das for the respondents.

Cur. adv. vult.

PANCKRIDGE J. This application is made in a family partition suit, which was instituted in 1929. The parties agreed to terms of settlement on February 13, 1930. In pursuance of those terms, an order was made on July 28, 1930, that Mr. J. M. Ghose, Barrister-at-Law, should be appointed Special Referee

*Application in Suit No. 1471 of 1929 and Ex. 1 of 1930.

to take the accounts and should also be appointed Commissioner of Partition. The order proceeded to give the commissioner liberty to examine witnesses upon oath or solemn affirmation, and to take depositions in writing, and return the same with the commission. The order further directed the Special Referee to report whether or not there were any fluid assets belonging to the joint estate in the hands of the defendant which ought to be invested.

The Special Referee entered upon the reference both as to accounts generally, and as to the fluid assets specified in the order. I understand that the evidence with regard to the fluid assets is now complete, but the reference, so far as it concerns the accounts generally, has not been concluded, and at the moment there is a witness of the defendant named Surajmull Kesriwal, who is still under examination.

It appears that, while the reference has been proceeding, Surajmull has been prosecuted before the Presidency Magistrate under section 162 read with section 120B of the Indian Penal Code, that is to say, of conspiracy to give illegal gratification to a public servant. He was convicted by the Chief Presidency Magistrate, and he appealed against his conviction and sentence. This Court in its Criminal Appellate Jurisdiction set aside the conviction and sentence and acquitted Surajmull. I have had an opportunity of perusing the judgment of the Court, from which it appears that the learned Judges dealt with the case on the merits, but, at the same time, they expressed the opinion that certain important evidence, which was relied on by the prosecution, was of doubtful admissibility. This evidence consisted of statements made by Surajmull in his deposition before the Special Referee. The learned Judges were inclined to hold that, inasmuch as the depositions had not been read over and explained to the witness, they were not admissible under section 80 of the Evidence Act. They were further inclined to the view, for which there is considerable authority, that section 91

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of the Evidence Act was a bar to the witness' statement being proved *aliunde* as, for example, by the Special Referee or by one of the officers assisting him in the reference. The observations of the learned Judges have had the effect of causing the plaintiff to take out this summons, asking for various directions, and the matter has also been raised by a special report of the Special Referee made at the instance of the plaintiff.

The plaintiff asks for certain directions upon the shorthand writers who have been by consent employed to record the evidence. There is no difficulty as regards this, and the Special Referee is prepared to direct the shorthand writers, if he has not already done so, to sign and initial the depositions in the way which the plaintiff suggests.

The plaintiff also asks that the whole of the evidence given in what is called the "fluid assets" reference and in the main reference should be read over and explained to the witnesses by a sworn interpreter, who, in his turn, should certify that he has correctly interpreted the evidence.

A point of practice has to be decided as to the procedure that Mr. J. M. Ghose ought to adopt in recording the evidence. Mr. Ghose himself takes the view that it is not necessary for the evidence to be read over to the witnesses, and he bases this view on Chapter XIV, rule 1 of the Rules and Orders. I do not agree with Mr. Ghose in this respect, for Chapter XIV deals with proceedings at the hearing of suits, and rule 1 begins "upon the hearing of any "suit or matter in Court or before a Judge". The rule is, therefore, clearly not applicable to proceedings before a Special Referee.

With regard to civil courts generally, the provisions of the law as to the taking of depositions are to be found in Order XVIII, rules 5 and 6 of the

Civil Procedure Code. At first sight, it would appear that these rules have no application to the present case because Order XLIX, rule 3 provides that they shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original jurisdiction. It has been suggested that the procedure, which the Special Referee should follow, is the procedure which is laid down in Chapter XXII of the Rules and Orders, or more particularly the procedure specified in rule 3 of that chapter, which, in many respects, resembles the procedure laid down by Order XVIII, rules 5 and 6 of the Code. I am of opinion that Chapter XXII deals solely with the procedure upon commissions to take evidence, issued by virtue of the powers conferred on civil courts by Order XXVI, rules 1 and 4 of the Code of Civil Procedure. None of these rules are directly applicable to the case in question, because rule 1 deals with the examination of a witness, within the local limits of the jurisdiction, who is exempted from attending court or who is from sickness or infirmity unable to attend it, and rule 4 deals with persons who are resident beyond the local limits, or who are about to leave them or whose official duties prevent them from giving evidence without detriment to the public service. None of these conditions apply to the present case.

It is suggested on behalf of the defendants that a Special Referee is a person whose existence is not recognised by the law, and who is, therefore, not bound to follow any particular procedure, although the evidence given before him, and the conclusions at which he arrives on that evidence may be binding as between the parties. I consider that that is putting the matter too high, at any rate with regard to the present case, because Mr. J. M. Ghose has been appointed not only Special Referee but Commissioner of Partition and he has been directly authorised by the order of his appointment to examine witnesses

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upon oath or solemn affirmation and to take their depositions in writing. That appears to me to contemplate the evidence being taken in accordance with the provisions of the law, whatever the provisions applicable in this particular case may be. As to this question, I think the answer is to be found in the concluding provisions of Order XXVI. Rule 9 deals with commissions for local examination. Rule 11 deals with commissions to examine accounts, and rule 13 deals with commissions to make partitions. Rule 17 provides that the provisions of the Code relating to the summoning, attendance and examination of witnesses shall apply to persons required to give evidence under Order XXVI. In my opinion, the effect of that is to make the provisions of Order XVIII, rules 5 and 6 apply to proceedings conducted by Commissioners of Partition appointed by the Original Side of the High Court, although, as I have pointed out, Order XLIX, rule 3 makes those provisions inapplicable to proceedings conducted by the Court itself. The consequence, therefore, is that I direct that, with regard to all witnesses who have been called and whose examination has not been concluded, and with regard to all witnesses who may hereafter be called at the reference, Mr. J. M. Ghose should see that the provisions of rules 5 and 6 of Order XVIII are carried out, that is to say, that the depositions should be read over and explained to the respective witnesses when each witness' evidence is completed, and that, when necessary, they should be translated into a language which the witness understands. I do not think it necessary to give any directions with regard to the depositions which have already been completed. Both parties have succeeded in part and failed in part because the plaintiff at one time asked that at the close of each day the witness' deposition should be read over to him and he should be required to acknowledge its correctness. This procedure is not

recognised by any of the rules which it has been suggested apply to the proceedings before Mr. Ghose. On the other hand, I have rejected the defendant's contention that the commissioner is at liberty to disregard rules 5 and 6 or Order XVIII. In these circumstances I direct that each party bear his own costs.

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Application allowed in part.

G. K. D.