

## ORIGINAL CIVIL.

*Before McNair J.*

1940

April 4, 5.

SARBA SUNDARI DASÍ

*v.*

NANDA RANI DASÍ.\*

**Costs**—*Commissioner of Partition and attorney of a deceased party, if may apply—Direct order for payment.*

The Commissioner of Partition may apply to the Court which appointed him and in the suit in which he was appointed for an order for payment of the amount due to him for his fees and other expenses of the commission.

The bill of the Commissioner of Partition may be taxed by the taxing officer of the Court.

A preliminary decree by consent in a partition suit provided for payment by the receiver appointed in the suit of the costs of the respective parties to their respective attorneys and the costs and expenses by the Commissioner of Partition. On the application of the attorney of the deceased plaintiff and by the Commissioner of Partition and his clerk for an order for payment of their costs,

*held* : (i) that, although not parties to the suit, they were entitled to apply;

(ii) that the taxed costs of the attorney and the costs incurred by and under the direction of the Commissioner of Partition including the costs of a clerk and surveyors were payable by the receiver appointed in the suit.

*Harnandroy Foolchand v. Gootiram Bhuttar* (1) followed.

The Court may remove a receiver whose accounts are in arrears in spite of an order directing him to file his accounts and who considers his own personal interest to the exclusion of the interest of the parties.

## MOTION.

The facts of the case appear sufficiently from the judgment.

*B. C. Ghose* and *N. C. Chatterjee* for the applicants. The preliminary decree provided for payment of the costs of the attorney and the costs and expenses of the Commissioner of Partition. The applicants are entitled to apply. *Halsbury's Laws of England*, 2nd Ed., Vol. 28, para. 99. *Harnandroy Foolchand v. Gootiram Bhuttar* (1).

\*Application in Original Suit, No. 1319 of 1933.

*J. C. Sett* for the surveyors supported the applicants.

*P. C. Ghose* for the respondent, *Jogendra*. The applicants not being parties to the suit have no right to the reliefs claimed, and cannot apply in this suit.

1940  
 Sarba Sundari  
 Dasi  
 v.  
 Nanda Rani  
 Dasi.

*Brocklebank v. East London Railway Company* (1).

The suit by the plaintiff was not for legal necessity and the costs incurred by her could not be paid out of the estate, as, on her death, her share of the estate has devolved on the defendants who are the reversioners.

*B. C. Ghose*, in reply.

McNAIR J. This is an application by the attorney of a deceased plaintiff, by a Commissioner of Partition and special referee appointed in the suit, and by the commissioner's clerk, for an order for taxation of the commissioner's remuneration and expenses, for an order for taxation of the costs of the deceased plaintiff, for removal of the defendant *Jogendra Nath Laha* as receiver in the suit, for appointment of the Official Receiver, and for payment by him on appointment of the costs of the petitioners.

The plaintiff brought a suit on June 20, 1933, for administration of the estate of *Beni Madhab Laha* deceased, for construction of his will, for partition, and for possession.

The plaintiff was a daughter-in-law of *Beni Madhab*, being the widow of his son *Bhupen*, who died in 1921. *Bhupen* had three brothers, *Jogendra*, *Mahendra* and *Nagendra*. *Jogendra* is the receiver. *Jogendra* and *Mahendra* were two of the defendants in the suit as were the sons of *Nagendra*, who had died, and the other defendant was the widow of *Beni Madhab*.

1940

*Sarba Sundari*  
*Dasi*  
 v.  
*Nanda Rani*  
*Dasi.*  
 McNair J.

On April 6, 1936, there was a consent decree, in which the shares of the parties were declared. The plaintiff Sm. Sarba Sundari Dasi was declared entitled as a Hindu widow to one-fourth share. Jogendra was also entitled to one-fourth share, and he was appointed receiver of the secular property belonging to the deceased Beni Madhab, and empowered to collect the rents, issues and profits of the *debattar* property. One of the present applicants, Hemanta Kumar Mitra, was appointed commissioner and special referee, and there were directions for partition and division of the estate and for the usual enquiries and report. The decree further provided that—

the receiver do out of the estate pay the costs of the respective parties to this suit up to this decree, to be taxed by the taxing officer of this Court as between attorney and client as of a defended suit, to their respective attorneys,

and that—

the costs and expenses of the Commissioner of Partition, namely, of issuing and executing the same and of confirming the commissioner's report of the respective parties be paid by the respective parties in proportion to the value of their respective shares and that the same be paid to the respective attorneys by the receiver and be debited by the latter to the respective shares of the parties; with liberty to apply.

Hemanta Kumar Mitra was duly appointed, and held a number of meetings. With the consent of parties he appointed two surveyors who are now supporting this application, and a clerk.

The commissioner held his last meeting on February 25, 1938, and he states that most of his duties had then been completed except for the actual framing of the scheme and making the allotments and report.

There were several interlocutory applications in which the plaintiff was awarded costs.

On February 26, 1938, the plaintiff died. She left a will and her executors obtained probate and applied for substitution of their names in the place of the deceased plaintiff in the suit. That application has

been adjourned from time to time and is still pending in circumstances which will be related hereafter.

Nanda Rani, Beni Madhub's widow, died in 1939, and the other defendants contend that they are the sole reversioners and that the administration and partition suit which was brought by Sarba Sundari was unnecessary. In December, 1939, they brought a suit for a declaration that all causes of action and all rights to prosecute or further proceed with this suit had ceased on the death of Sarba Sundari and had become vested in Jogendra and Mahendra, and further for a declaration that Sarba Sundari had no right to dispose by her will of the rents, issues and profits, to which she was entitled as a Hindu widow.

1940  
 Sarba Sundari  
 Dasi  
 v.  
 Nanda Rani  
 Dasi.  
 McNair J.

Having filed this suit, Jogendra then applied for an injunction restraining the executors from being substituted in the place of Sarba Sundari in her suit. The result is that nothing further has been done in this suit, and the suit brought by Jogendra and Mahendra is still pending. The application for substitution has been directed to be heard after that suit is concluded.

The applicants point out that Jogendra as receiver was directed to file his accounts half-yearly. He failed to do so, and an order was made at the instance of the plaintiff during her life time ordering those accounts to be filed. In spite of that order which was made nearly three years ago, the accounts are still in arrears.

Apart from the question whether the applicants should receive the payments for which they ask it appears to me quite clear that Jogendra should no longer be retained as receiver. In addition to his failure to file his accounts, his whole attitude is inconsistent with the attitude of a receiver. He has his own personal interests, and it is clear from the attitude which he has adopted on this application, and in fact ever since the death of the plaintiff, that

1940  
*Sarba Sundari*  
*Dasi*  
v.  
*Nanda Rani*  
*Dasi.*  
*McNair J.*

he is considering his own personal interests to the exclusion of the interests of the parties whose representative he is and whose benefit should be his concern.

There will be an order that Jogendra do file his accounts within one month from the date of this order, that he be forthwith removed from acting as receiver, and that the Official Receiver be appointed in his stead. The Registrar will report to this Court within five weeks from the date of this order whether the accounts have or have not been filed. If Jogendra fail to comply with this order, the Court will consider the action that should be taken against him.

The remainder of the application relates to the costs of the attorney and the Commissioner of Partition who was appointed in the partition suit. It is argued on behalf of Jogendra that no costs should be payable on the ground that, on the death of the plaintiff, the suit no longer exists and that the question whether or no any costs or fees are payable will depend upon the result of the suit which he has filed and which is now pending.

It is argued further that the applicants are not parties to the suit, and therefore they have no right to any of the reliefs which they claim. In support of this contention reliance has been placed on the case of *Brocklebank v. East London Railway Company* (1), where it was held that a person, who is not a party to an action, is not entitled to apply by motion for payment of money to him by a receiver appointed in the action. In the course of the argument it was pointed out by the learned Judge (Fry J.) that the considerations might have been very different on that motion had the suit been, as it is here, an administration suit. The decision is a decision on the facts of that particular case, and to my mind it decided no more than that there is no general principle that a

person who is interested in having money paid to him by a receiver has for that reason alone a right to apply to Court for an order on the receiver to pay his costs.

In Halsburys Law of England, 2nd Ed., Vol. 28, para. 99 the general rule is stated :—

On any application by a stranger to enforce his rights, the Court will examine the claim and either give effect to it by an order in the action or, if this is impracticable, allow any necessary proceedings to be taken outside the action.

Clearly a stranger may apply in proper circumstances, and a Commissioner of Partition is amply justified in applying to the Court which appointed him and in the suit in which he was appointed, if he is unable to receive a payment to which he is entitled.

Furthermore, in the present instance there has been a consent decree, so far back as April, 1936, to which the receiver was a party and by which the receiver was ordered to pay the costs of the respective parties and the costs and expenses of the Commissioner of Partition. Those costs were to be paid by the respective parties in proportion to the value of their respective shares and would be paid to the respective attorneys by the receiver.

It has been suggested that the commissioner's bill cannot be taxed. Learned counsel has, however, produced before me several bills of commissioners which have been taxed by the taxing officer of this Court, and where the commissioner has been appointed by this Court. I fail to see what objection there can be to the taxation of this bill. In fact, I should have thought that the receiver would welcome taxation in order that he might be satisfied that the fees and expenses which he as receiver has been ordered to pay were properly incurred.

It is admitted that had the plaintiff been alive there would have been no difficulty in obtaining payment, but Jogendra argues that his share, which

1940

*Sarba Sundari*  
*Dasi*

v.

*Nanda Rani*  
*Dasi.**McNair J.*

1940  
 Sarba Sundari  
 Dasi  
 v.  
 Nanda Rani  
 Dasi.  
 McNair J.

belonged to the plaintiff, has now vested in him and the other defendants in that suit.

With regard to the attorney's costs, this matter was dealt with by this Court in *Harnandroy Foolchand v. Gootiram Bhuttar* (1). That was an application by a solicitor whose client had been awarded costs, and it was held that, in a proper case, the Court, in the exercise of its discretion, could make an order for payment of such costs to the solicitor by the opposite party. The applicant there was the solicitor for the defendant. The defendant died. But, before his death, he had obtained an order against the plaintiff for certain costs, which had been taxed. On the death of the defendant, no steps were taken to re-constitute the action, which was dismissed, and the solicitor for the defendant sought an order against the plaintiff in the action. In deciding that the solicitor was entitled to the relief for which he prayed, Rankin J., in the course of his judgment, said that he considered that it was a matter of settled law that when the Court had jurisdiction in an action, it had jurisdiction not only as between the parties to that action but also as regards those officers of the Court who acted for the parties.

I can see no objection in the present instance to the payment by the receiver to the applicant attorney and to the other applicants of the costs and expenses which have been incurred by them in the course of the partition suit. It may be that the partition suit will be held to have been misconceived, as Jogendra now suggests. The costs, however, have been incurred, and Jogendra himself, as one of the parties to that suit, consented to a decree under which he as receiver was to pay the costs incurred and the costs and expenses of the commission. The surveyors appointed by the commissioner have appeared in support of his application, although they are not parties to it. They were undoubtedly appointed with the consent of the

parties and are also entitled to their fees. Jogendra, having been discharged from acting as receiver, the Official Receiver will be appointed and he will be directed to pay the taxed costs of the attorney for Sarba Sundari, the costs incurred by or under the directions of the Commissioner of Partition, including the cost of a clerk and surveyors.

1940  
 Sarba Sundari  
 Dasi  
 v.  
 Nanda Rani  
 Dasi.  
 McNair J.

There will be an order in terms of clauses 1, 2, 3, 4 and 5 of the notice of motion. Certified for two counsel. The applicants are entitled to their costs certified for two counsel. No costs are allowed either to Jogendra or to the learned counsel appearing for the surveyors.

*Application allowed.*

Attorney for applicant: *B. P. Chunder.*

Attorneys for respondents: *R. K. Bose; K. C. Mullick.*

A. C. S.