

APPELLATE CIVIL.

Before Mr. Justice Abdul Raof and Mr. Justice Harrison.

SAWAN MAL AND TULSI RAM (DEFENDANTS)—

Appellants,

versus

RAUNAQ MAL-CHUNI LAL (PLAINTIFFS)—

Respondents.

1922

Feb. 1.

Civil Appeal No. 1688 of 1917.

Civil Procedure Code, Act V of 1908, section 75, and order XXVI rule 9—issue of commissions—whether Court can delegate to a Commissioner the trial of the material issues in the case—Second appeal:

The plaintiff firm sued the defendants alleging them to be a joint Hindu family and claiming to recover from them, as such, Rs. 1217-10-3. The defence was that the defendants had no sort of dealings with the plaintiff firm, and the Subordinate Judge, finding that this was so, dismissed the suit. On appeal the District Judge first heard the arguments, and then on his own motion referred the case to a Commissioner and directed him to decide every single material issue whether of law or fact. A full report was submitted, and the District Judge pronounced judgment, accepting the findings of the Commissioner throughout.

Held, that section 75 of the Civil Procedure Code, defines clearly the circumstances under which a commission may be issued, and it does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is bound to try.

Sangli v. Mookan (1), followed.

Held also, that a second appeal was competent as there had been grave irregularity in the issuing of a commission at all; that the District Judge had not done his duty, inasmuch as he had not come to an independent finding on the material issues in the case; that the findings, such as they are, were not based on the evidence on the record; and that so far as the District Court was concerned the case had not been tried at all.

Durga Chowdhrami v. Jewahir Singh (2), distinguished.

Second appeal from the decree of Khan Bahadur Maulvi Inam Ali, District Judge, Hissar, dated the 17th April 1917, reversing that of Lala Gulal Chand, Subordinate Judge, 2nd Class, Hissar, dated the 4th March 1915, and decreeing the claim.

(1) (1892) L. L. R. 16 Mad. 350. (2) (1890) L. L. R. 18 Cal. 25 (P. C.)

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MORTON, for Appellants.

N. C. PANDIT and HARGOPAL, for Respondents.

The judgment of the Court was delivered by—

HARRISON J.—In this case the plaintiff firm sued the defendants alleging them to be a Hindu joint family and claiming to recover from them as such Rs. 1,217-10-3. The case was carefully tried by the Subordinate Judge and a lucid and well expressed judgment was written by him, disposing of all the points in dispute and dismissing the suit. On appeal the District Judge first heard the arguments, and then apparently on his own motion referred every question arising in the case, and, in fact, one question which had not arisen at that stage, to *Lala Sheo Narain* and issued a most comprehensive commission to him. This gentleman died before he was able to do anything, and his son, *Lala Joti Parshad*, was appointed in his place. A full report was submitted, but apparently no evidence was taken, though the statements of the parties were recorded. The District Judge then pronounced judgment and accepted the findings of the Commissioner throughout.

On appeal it is urged that the only possible subject on which the District Judge could have been justified in issuing a commission was the examination of accounts, and that in this case he was not justified in doing so, as the correctness of the accounts had not been challenged, the defence having been that the defendants had no sort of dealings with the plaintiff firm and the finding being that this was so. Until, therefore, the District Judge reversed the decision of the lower Court and found that there had been dealings, the question of the amount due on those dealings did not arise, and when it did the usual and natural procedure would have been to remand the case for a decision. Not content with issuing a commission which might be necessary at some later stage, the District Judge directed the Commissioner to decide every single material issue whether of law or fact and, in a word, to do his work for him. Counsel for the respondents urges that even so there are findings of fact and, in the words of *Durga Chowdhurani v. Jewahir Singh* (1)

that there was evidence before the Court. The very form of the judgment shows that the way in which the District Judge approached the case was to accept the opinion of the Commissioner as final and conclusive, unless the plaintiff could show how and where it was wrong. He made no reference to the evidence on the record, nor to the well-expressed judgment of the trial Court, and we are satisfied that in the sense of being considered by him the evidence was not before him, though he had the knowledge that ample evidence had been given.

As to the scope of a commission, counsel for the respondents urges that Order XXVI amplifies and explains section 75, and that the Court is at liberty to issue a commission on any subject whatsoever and not merely on the subjects given in heads (a), (b), (c) and (d) of section 75 and dealt with in the first four branches of Order XXVI, the headings of which repeat the wording of that section. With this contention we cannot agree. Section 75 runs:—"Subject to such conditions and limitations as may be prescribed," those conditions and limitations being contained in the subsequent orders. The words on which counsel relies are to be found in rule 9 of Order XXVI "In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any *matter in dispute*" and these come immediately under the heading "Commissions for local investigations." Here there was no question of a local investigation and no such investigation was made, and all that the Commissioner did, and apparently all that he understood he was required to do, was to give an opinion on the case generally and on each of the issues of law and fact.

Counsel for the respondents further urges that the commission having been accepted by the defendant-appellants they cannot now question it. There is nothing whatever to show that they ever accepted the commission or agreed to having one issued. All that they did was to accept *Lala Joti Parshad* after the death of his father as a suitable person to do the work which the Court had decided to entrust to a Commissioner

The most material point in the case was whether a certain document had been signed by *Sawan Mal*,

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defendant. On this the Commissioner gave an opinion as an expert witness which may be good or bad and this opinion was accepted by the District Judge. The finding as to the amount shown to be due in the accounts is given by the District Judge in the following words:—"The Commissioner's calculation is not shown by the respondents' pleader to be erroneous in any way." We are of opinion that section 75 defines clearly the circumstances under which a commission may be issued, and *Sangili v. Mookan* (1) explains that it does not authorize a Court to delegate to a Commissioner the trial of any material issue which it is bound to try. We find, therefore, that there has been a grave irregularity in the issuing of a commission at all, that the District Judge has not done his duty, inasmuch as he has not come to an independent finding on the material issues in the case, that the findings, such as they are, are not based on the evidence on the record, and that so far as the District Court is concerned the case has not been tried at all.

Counsel for the appellants states that his clients never questioned the correctness of the accounts and do not question them now, and that if their liability be held to be proved a decree should be passed against them for the total amount claimed. The necessity, therefore, for examining the accounts in order to see what amount is due wholly disappears, even if the defendants or any of them be held to be liable, and what is required is a clear finding on the various material issues.

We remand the case to the District Judge for a decision on the merits, wholly independent of the Commissioner's report which should be entirely ignored. It is unnecessary for us to frame any fresh issues as those framed by the trial Court are correct and exhaustive.

A. R.

Appeal accepted : case remanded.

(1) (1892) I. L. R. 16 Mad. 350.