

Before Mr. Justice Phear.

**SRIMATI BAMSUNDARI DASÍ (PLAINTIFF) v. RAMNARAYAN
MITTER AND OTHERS (DEFENDANTS).***

1872
Feb. 22.

*Costs Payment of, by Person not Party to the Suit—Plaintiff's Costs—Vis^o
voce Examination in support of Affidavits on Argument of the Rule—
Adjournment.*

A RULE had been obtained by Mr. Goodeve for the plaintiff in this suit calling on one Binduchandra to show cause why he should not pay the costs of the suit. The petition on which the rule was granted showed:—

That a suit was instituted by the plaintiff on 21st April 1870, against Ramnarayan Mitter, Dayamayi Dasi, his wife, and Lakhinarayan Mitter, his son; that on 26th August 1870, a decree was made in favor of the plaintiff, providing amongst other things that the costs of the suit should be paid by the defendants; that the plaintiff obtained a writ of attachment under which she seized, in execution of the decree, the right, title, and interest of the defendant Dayamayi Dasi in certain immoveable property in Calcutta; that she obtained an order for the sale of such right, title, and interest, and the property was advertized by the sheriff for sale; that plaintiff, having obtained leave to bid at the sale, became the purchaser for Rs. 800; that the sale was confirmed by the Court, and a certificate under section 259, Act VIII of 1859, was granted to the plaintiff; that the plaintiff made an application to the Court for a writ of possession of the property, and an order was made by the Court that the defendants Ramnarayan, Dayamayi, and Lakhinarayan should shew cause why a writ of possession should not be granted; that on 17th April 1871, the defendants showed cause by affidavit; that the affidavit of Lakhinarayan Mitter stated that the property in question had been mortgaged by the defendant Dayamayi Dasi, on 14th May 1870, to one Binduchandra Chunder who, under a power of sale contained in the mortgage-deed, had, on 9th January 1871, caused the said property to be sold, and the defendant Nistarini Dasi had become the purchaser, and had, since 14th January 1871 been in possession of the property, that the defendants Ramnarayan, Dayamayi, and Lakhinarayan had not since that date been in possession, and that this affidavit of Lakhinarayan was supported by the affidavit of Sambhuchandra, the father of Nistarini Dasi; that the Court discharged the order, but without costs, the plaintiff undertaking to institute a suit for possession, which she did on 10th May 1871, against Ramnarayan, Dayamayi Dasi, Lakhinarayan, Nistarini Dasi, and Sambhuchandra; that on 10th July 1871, she obtained a decree declaring her entitled to possession of the property, and ordering Nistarini Dasⁱ to deliver up possession together with the deed of mortgage from Dayamayi Dasi to Binduchandra, and the conveyance from Binduchandra to Nistarini Dasi, for the purpose of being cancelled, and that the defendants should pay the costs of the suit; that at the hearing of that suit,

1872
 SRIMATI
 BAMSUNDARI
 DASI
 v.
 RAMNARAYAN
 MITTER.

the evidence of Nistarini Dasi was not taken; that the costs were taxed at the sum of Rs. 1480-5; that the defendants Nistarini Dasi and Sambhuchandra preferred an appeal from this decree, but, on their failing to furnish security for the costs of the appeal in accordance with an order made ordering them to find security, the appeal was dismissed; that the plaintiff's costs of the appeal amounted to about Rs. 700; that the plaintiff, accompanied by one Dwarkanath Dutt and Rajkisto Mullick, went to the house of the defendant Sambhuchandra and demanded the payment of the plaintiff's costs, and Sambhuchandra, then told her to apply to Binduchandra, who would pay the same, and he stated that neither himself nor his daughter Nistarini were the real parties to the suit, and that the costs paid for the defence of the suit had been paid by Binduchandra; that Binduchandra application to him refused to pay the costs; that, from information she had received, the plaintiff believed that the property in question had been purchased by Binduchandra in the benami name of Nistarini Dasi, with the consent of her husband Shibchandra Das, and that Binduchandra had given the instructions relative to defending the suit, and preferring the appeal, and had paid the expenses of such proceedings; that the plaintiff had been informed that Binduchandra had paid out of his own moneys the costs of the conveyance from himself to the defendant Nistarini Dasi; and that Binduchandra was related to the defendant Sambhuchandra, a son of Sambhuchandra having married a daughter of Binduchandra. The petition prayed that an order might be made that Binduchandra should pay the costs of the suit. The petition was supported by the affidavit of Rajkisto Mullick and Dwarkanath Dutt which contained statements chiefly on information and belief, and not from direct knowledge.

The affidavit of Binduchandra in opposition stated:—That on or about 14th May 1870, the property in question was mortgaged to him by Dayamayi Dasi for Rs. 1,500; that under a power of sale contained in the deed the property was put up to auction and purchased by Nistarini Dasi for Rs. 1,800, which sum was duly paid to him, and he executed a conveyance to Nistarini that the said sale was *bona fide*, and that he, Binduchandra, from thence ceased to have any interest in the property; that he had no interest as alleged in the suit, nor did he pay or agree to pay the costs of the suit, nor did he provide the expenses of the defence of the suit; that the plaintiff had not personally nor otherwise applied to him for payment of the costs; that he had not purchased the property in question in the name of Nistarini, but that the said purchase was made by Nistarini without any privity or collusion by him, and that the sale was *bona fide*, and made without any intention of defeating the claims of the plaintiff; that he had not given instructions relative to defending the suit, or preferring the appeal on behalf of the defendants. He denied generally the statements contained in the affidavit of Rajkisto Mullick and Dwarkanath Dutt.

Mr. Evans now showed case.—This cause is distinguishable from other cases in which it has been decreed that the costs be paid by another person

than the actual parties to the suit. In those cases the application has been made by the defendant against a real plaintiff, and he has succeeded on showing that there was a fictitious plaintiff on the record. The present is an application by the plaintiff to make a third party, not an actual mover in the suit, pay the costs instead of another who actually appeared in the suit. He referred to *Bamasoonderee Dossee v. Anundolall Doss* (1), in which there was held to have been champerty and gross misconduct—and to *Jugessur Coowar v. Prosonno Coomar Ghose* (2), *Hayward v. Giffard* (3), and *Evans v. Reece* (4).

1872
 SRIMATI
 BAMSUNDARI
 DASI
 v.
 RAMNARAYAN
 MITTER.

Mr. *Marindin* (with him Mr. *Goodeve*), *contra*.—In almost every case in England in which a third party has been ordered to pay costs, that party has been a defendant. See *Bamasoonderee Dossee v. Anundolall Doss* (1) within the principle of which this case is, and the cases there cited. See also *Hutchinson v. Greenwood* (5) and *Anstey v. Edwards* (6). The course taken by the plaintiff is the proper course. It was not necessary, if possible, to bring a suit. All the information on which we now proceed has come to us since the trial. If the Court desires, it can now examine witnesses and take further evidence.

Mr. *Evans* objected to any further evidence being taken, and contended that an action would lie.

PREAR, J.—I am of opinion that, if I were satisfied that Binduchandra made a fictitious sale, in order that Nistarini might be sued instead of himself, or that he might come in and defend such a suit under her name, and further that he did in fact so defend the suit brought by Ramasundari, I ought to make the order which is asked for, *viz.*, that Binduchandra should pay the costs which have been incurred by the plaintiff. Now the affidavits which I have before me are unquestionably conflicting; and if there were nothing more than this to be perceived, I should probably give greater weight to the affidavit of Binduchandra which directly denies, as of first hand, facts alleged against him, than I should give to the affidavit filed on behalf of the plaintiff in which the material facts are stated on the hearsay testimony of other witnesses who have not made affidavits themselves. But I think the case, as it now stands, is by no means so simple as to depend solely on the better appearance of the one affidavit as compared with the other. It now appears to me certain that the sale which Binduchandra affected to make in the exercise of his power under the mortgage-deed, a power which, if he exercised it at all, he was bound to exercise most impartially as regards the interest of the mortgagor, and under liability to be called to account by this Court, was a sale to a *parda*.

(1) Bourke, 44, on appeal. *ib.*, 96.

(2) 1 L. J. N. S., 282.

(3) 4 M. & W., 194.

(4) 2 Q. B., 334.

(5) 4 E. & B., 324.

(6) 16 C. B., 212.

1872

SRIMATI
BAMA SUNDARI
DASI
v.
RAMNARAYAN
MITTER.

woman, who, whatever Mr. Evans may argue to the contrary, was a near connexion of his. That sale was made just three days before the plaintiff made her purchase at the Sheriff's sale, which was held in execution of her decree against the alleged mortgagor, and there is no suggestion from first to last in these affidavits, as I remember them, of any cause which would lead a *bonâ fide* mortgagee to take on himself so unusual a risk as the exercise by himself, without the authority of the Court, of a power of sale in his mortgage, and that too just a day or two before and apparently for the purpose of defeating, the Sheriff's sale. On these facts, which I may say are admitted, certainly not contradicted, by Binduchandra, he stands in a very remarkable position relative to the nominal defendant in the present suit, *i.e.*, the defendant Nistarini who has the title-deeds of the property, but who was undoubtedly not the owner of the property whether the owner was Bindu or the Mitters. I think, therefore, on a view of all these circumstances, that I ought to give an opportunity for a further investigation of the true position of Binduchandra relative to the defendant in this suit. I am told by Mr. Marindin that one of the persons mentioned in the plaintiff's affidavit is here, ready to be examined. I think I ought at any rate to take his testimony. I have undoubtedly power in the exercise of my discretion to adjourn the argument on this rule for the purpose of enabling the parties to put in further affidavits. There is nothing either in the practice of the Court, or in the reason of the thing to prevent my taking further evidence in this matter, either in the shape of affidavits or of *vivâ voce* testimony. *Vivâ voce* testimony given in the presence of both parties, subject to cross-examination, is undoubtedly better evidence than that afforded by affidavits; its drawback being the amount of time which it costs. As to the practice of the Court I have several times myself taken *vivâ voce* evidence for or against motions made in this Court. I think it would be better in the present matter, instead of taking the evidence now of the single witness who is ready to be examined, to adjourn the case for the purpose of taking not only his evidence, but that of others who may be produced by either side relative to the issue which I have already specified, *viz.*, whether Binduchandra did or did not make a fictitious sale to Nistarini, in order that she might be the ostensible party to the suit, and whether he did in fact substantially defend that suit under cover of her name.

Attorney for the plaintiff: Mr. Hecht.
