

1872
 DWARAKANATH
 BYSAK
 D.
 MAHENDRA-
 NATH BYSAK.

must be set aside. The texts which exclude a madman from inheritance declare that he is entitled to have maintenance; and this was not questioned in the argument before us. It must therefore be referred to one of the Judges of this Court (unless the parties can agree on it, which they will probably be able to do) to ascertain what is a proper sum to be allowed for Mahendranath Bysak's maintenance from his share of the property. The parties will respectively bear their own costs of this appeal to be taxed as between attorney and client on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. Gray & Sen.

Attorneys for the respondent: Messrs. Swinhoe, Law, & Co.

1872
 Aug 29

Before Mr. Justice Macpherson.

S. M. PRANKUMARI DASI AND ANOTHER v. ABINASH CHANDRA
 MOOKERJEE.

Costs, Payment of Plaintiff's, by Stranger to suit.

The Court will not order a person not on the record to pay the costs decreed against the defendant, when the latter is a real and not a sham defendant and himself did the wrongful act on which the suit was based, and has an interest in the subject-matter of the suit, and when the plaintiff knew before the trial the circumstances under which the afterwards sought to make such third person responsible for the costs, and might have added him as a defendant on the record (1)

On 5th August 1872 the *Advocate-General* (offg.) obtained a rule calling on Krishnalal Gosain to show cause why he should not pay to the plaintiffs their costs of this suit payable to them by the defendant Abinash Chandra Mookerjee under the decree in the suit. The rule was obtained on the decree and on affidavits of the defendant Abinash Chandra Mookerjee and of Mr. Carruthers, one of the attorneys for the plaintiffs. It appeared from these affidavits that the suit had been instituted to obtain possession of a house and premises No. 12, Old Post Office Street,

(1) See *Srimati Bamasundari Dasi v. Bamnarayan Mitter*, 8B.L.R., (App.) 65

Calcutta, of which the defendant, on the 8th January 1872, had forcibly dispossessed the plaintiffs, and for damages. The plaint was admitted on the 27th January 1872. At the time of the dispossession complained of, the defendant and Krishnalal Gosain carried on business in partnership as printers, under the style of the Bengal Printing Company, and after such dispossession, the plant and stock of the Bengal Printing Company were removed into the premises of which the plaintiffs sought to recover possession. On the 19th February Krishnalal Gosain advertized that he was the sole proprietor of the Bengal Printing Company, No. 12 Old Post Office Street, and on the following day the plaintiffs' attorneys, acting under instructions from their clients, gave Krishnalal Gosain notice that, unless he would forthwith deliver up possession of the said premises, they would apply to add him as a defendant to the suit. It appeared, however, that the threat was not carried into execution, and Krishnalal Gosain was never added as a defendant. On the 24th February Abinash Chandra Mookerjee and Krishnalal Gosain sued the plaintiffs for specific performance of an agreement to grant them a lease of the house No. 12, Old Post office Street, alleging in their plaint that, in pursuance of permission granted to them by the plaintiffs' agent, they had, on the 8th January 1872, taken peaceable possession of, and had removed their plant and stock-in-trade into the said premises. The suit for specific performance was dismissed on the 12th June 1872 with costs, the plaintiffs therein not appearing. The plaintiffs in this suit obtained a decree on the 5th June 1872 for possession of the premises, and for Rs. 2,000 damages, together with costs of suit on scale No. 2, which costs were taxed at Rs. 2,235-1. Neither the costs, nor the damages, nor any part thereof, had been paid by the defendant Abinash Chandra Mookerjee; and Mr. Carruthers in his affidavit stated that he had been informed by Mr. C. F. Pittar, the defendant's attorney, that the defendant was a man of very limited means, and wholly unable to pay the costs or the damages awarded, and that he had no interest either in this suit or in the suit against the plaintiffs for specific performance, and that such suits were defended and instituted for the sole benefit

1872

S. M. PRAN-
KUMAR DASI
v.
ABINASH
CHANDRA
MOOKERJEE.

1872
 S. M. PRAN
 KUMAR DAS
 v.
 ABINASH
 CHANDRA
 MOOKERJEE.

of Krishnalal Gosain. The affidavit referred to the deposition of the defendant at the hearing of the suit, in which the defendant stated that the printing-press had been bought with funds supplied by Krishnalal Gosain, who was the monied partner of the firm that he, the defendant, took possession of the premises No. 12, Old Post Office Street, with Krishnalal Gosain's knowledge ; that he had ceased to be a partner in the Bengal Printing Company on the 15th April 1872, from which date he had received no profits therefrom ; that he had no interest in the suit ; and that the costs were being paid by Krishnalal Gosain. The defendant Abinash Chandra Mookerjee supported these statements by an affidavit in which he alleged that Krishnalal Gosain had agreed to pay the costs of this suit and of the suit for specific performance, and that the latter suit was instituted, and both suits were carried on, for Krishnalal Gosain's sole benefit.

In an affidavit filed in answer to those upon which the rule had been obtained, Krishnalal Gosain stated that Abinash Chandra Mookerjee was his managing partner, but that he had never authorized him to take forcible possession of the plaintiffs' premises, nor was he aware that Abinash Chandra Mookerjee had done so until after the institution of the plaintiffs' suit ; that he had merely learnt from Abinash Chandra Mookerjee that there was a house to let in Old Post Office Street, and had given his assent to renting it. He denied that he had ever agreed to pay all the costs incurred in the conduct of this suit, or of the suit for specific performance. or that such suits were for his sole benefit.

Mr. *Kennedy*, on behalf of Krishnalal Gosain, showed cause. Up to the present time there has been no case showing that the Court has power to order a stranger having a substantial interest in a suit to pay the costs due by the defendant, although there is a note by Mr. Bourke in his report of the case of *S. M. Bammasundry Dossee v. Anundololl Doss* (1) to the effect that such a course might, under certain circumstances, be adopted. In order to succeed, the plaintiffs must show something in the nature of barratry and maintenance. See *per* Lord Abinger in

(1) Bourke, 44.

Hayward v. Giffard (1). This was the principle adopted by Phear, J., in *Jugessur Coomar v. Prossono Coomar Ghose* (2) and in *S. M. Bammasundry Dossee v. Anundololl Doss* (3). The plaintiffs ought to have made Krishnalal Gosain a party defendant—*Berkeley v. Dimery* (4) and *Evans v. Rees* (5).

1872

S. M. PRAN-
KUMARI DAS
v.
ABINASH
CHANDRA
MOOKERJEE.

The *Advocate-General* (*offg.*) in support of the rule.—The liability of Krishnalal Gosain depends on whether he consented to the wrongful act, or afterwards so gave his assent to it as to show that he concurred with Abinash Chandra Mookerjee—*Petrie v. Lamont* (6). The technical rule established by the English cases is only a portion of a broad principle; the real point to be looked at is who was substantially the defendant—*Doe d. Marsters v. Gray* (7). In this case it was clearly established that Krishnalal Gosain paid for the defence, and was the real defendant.

Cur. adv. vult.

MACPHERSON, J.—It appears to me that this is not a case in which I ought to order that the damages and costs, or the costs, payable by the defendant Abinash Chandra Mookerjee, should be paid by Krishnalal Gosain. The case is by no means one of those contemplated by Phear, J., in the remarks made by him in his judgment in the case of *S. M. Bammasundry Dossee v. Anundololl Doss* (8); for this is not a case in which, in the course of the trial itself, it for the first time turned out that the party before the Court was a man of straw, and merely the puppet of Krishnalal Gosain, who was actually pulling the strings of litigation. In the first place, the party before the Court is not a man of straw, as far as I can see, whether he is or is not now able to pay the amount decreed. Abinash Chandra Mookerjee was in no sense a sham defendant, he was a real substantial defendant, who had himself done the wrongful act on which the suit was based, and who had a six-anna interest in the whole matter, which was really the subject of the suit.

(1) 4 M. & W, 194

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

(3) Bourke, 44

(4) 10. B & C. 113; in note.

(5) 2 Q. B., 339.

(6) 1 Car. & Marsh., 93.

(7) 10 B. & C., 615.

(8) Bourke, 44, at p. 46.

1872

S. M. PRAN-
KUMARI DAS
v.
ABINASH
CHANDRA
MOOKERJEE.

Then, the plaintiffs did not for the first time, in the course of the trial itself, discover the position of the defendant with relation to Krishnalal Gosain. They, in fact, all along knew of the connection between these persons. The negotiations which had taken place between Abinash Chandra and the plaintiffs were for a lease of the house to him and Krishnalal Gosain for the purposes of the printing business which they were carrying on. At any rate, if the plaintiffs did not know of the partnership at the time they filed their plaint, they certainly knew on the 20th February as much of the connection of Abinash Chandra Mookerjee with Krishnalal Gosain as they now know, and they on that day wrote a letter to Krishnalal Gosain threatening to have him added as a party defendant to the suit, if he did not immediately give up possession of the house. The course indicated in this letter was in fact the course the plaintiffs should have followed: Krishnalal Gosain ought to have been made a defendant, for practically he was just as much liable in this suit as was Abinash Chandra Mookerjee. Krishnalal Gosain had certainly no more interest in defending the suit than Abinash Chandra Mookerjee had, except that he had a larger share in the partnership. It is a case in which the plaintiffs have chosen to sue only one person instead of suing two. The defendant was selected by the plaintiffs themselves, and is in no sense a sham defendant. I, therefore, refuse this application; but, considering all the circumstances, I shall not give any costs.

Rule discharged.

Attorneys for the plaintiffs, Messrs. *Carruthers and Dignam.*

Attorneys for Krishnalal Gosain, Messrs. *Swinhoe, Law & Co.*