

(1889) 08 CAL CK 0003
In the Calcutta High Court

Jagat Kishore Acharjea Chowdhry

APPELLANT

Vs

Dinanath Chuckerbutty Chowdhry and Others

RESPONDENT

Date of Decision : 26-08-1889

Acts Referred:

Court Fees Act, 1870 — Clause 1, 20

Citation : (1890) ILR (Cal) 281

Hon'ble Judges : W. Comer Petheram, C.J.; Gordon, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J. and Gordon, J.—This is an appeal by a judgment-debtor against an order passed by the Subordinate Judge of Dacca directing him to pay to the decree-holders the sum of Rs. 7,417-8 as mesne profits.

2. It appears that a commission was issued by the Court under the provisions of the CPC to the Civil Court Ameen, directing him to bold a local investigation for the purpose of ascertaining the amount of mesne profits payable by the Judgment-debtor, and to report thereon to the Court. The Ameen completed his investigation and submitted his report, which was tiled with the record, without any objection being taken to it by either party. He assessed the mesne profits at Rs. 3,496. Subsequently, when the case came on for hearing, it was found that the decree-holders had failed as ordered by the Court to deposit the excess Court-fees, amounting to Rs. 102, payable on account of the remuneration of the Ameen, and accordingly the Subordinate Judge, relying apparently upon a note appended to Article 3 of Part II of the rules relating to the service and execution of processes framed by this Court under Clause 1, Section 20 of the Court Fees Act of 1870, refused to allow the decree-holders' pleader to make use of the Ameen's report as evidence, and the judgment-debtor not appearing, he proceeded to determine ex parte the amount of mesne profits on other evidence then before him. This evidence consisted of copies of certain road-cess returns which had been tiled in the Collectorate by the father of the judgment-debtor, and on the basis of these papers alone the learned Judge fixed the amount of

mesne profits at Rs. 7,417-3.

3. Mr. Evans, for the judgment-debtor, appellant, contends before us that the Judge has erred in law in not taking into consideration the Ameen's report. He points out that, under the provisions of Section 393 of the Civil Procedure Code, the Subordinate Judge was bound to use the Ameen's report and the evidence taken by him as evidence in the suit, and that no rules framed by the Court under the Court Fees Act can override these provisions. We think that this is a sound contention. The rule apparently referred to, and acted upon, by the Subordinate Judge, is to be found in a note appended to Article 3 of the rules which were framed and promulgated in 1878, and which are the rules at present in force.

4. Article 3 of the rules provides as follows:

5. [After reading Article 3 and the note appended thereto (see ante p. 282) their Lordships continued.]

6. It is the latter portion of this note which the Subordinate Judge apparently thinks is applicable to the present case, and under which he has refused to use the Ameen's report as evidence. In our opinion this note is ultra vires. It is inconsistent with Section 393 of the Civil Procedure Code. That section is as follows:

The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing, signed with his name, to the Court. The report of the Commissioner and the evidence taken by him (but not the evidence without the report), shall be evidence in the suit and shall form part of the record;" and then follows a provision for the personal examination of the Commissioner by the Court, with which we are not now concerned. Now, in the present case, as we have already said, the Ameen completed his enquiry, and submitted his reported the evidence he had taken to the Court, and, therefore, in accordance with the terms of the section just cited, we think the Subordinate Judge was bound to treat such report and evidence as evidence in the suit. We are also of opinion that Article 3 of the rules is itself ultra vires. A commission is not, in our opinion, a, process within the meaning of Section 20 of the Court Fees Act. Process has a well understood meaning within which such a commission cannot be included. As both the rule and the note are ultra vires, they can not be enforced by law, and this appeal must be decreed and the case be remanded for re-trial. The Subordinate Judge will consider the report of the Ameen and the evidence taken by him as evidence in the suit, subject of course to any objections that may be taken to them by either party, along with the other evidence now on the record, and any fresh evidence bearing on the determination of the amount of mesne profits, which we give the parties liberty to adduce. We make no order as to costs.