

(1916) 08 BOM CK 0015
In the Bombay High Court

Laxmibai and Others

APPELLANT

Vs

Hussainbhai and Others

RESPONDENT

Date of Decision : 22-08-1916

Acts Referred:

Citation : (1917) ILR (Bom) 719

Hon'ble Judges : Macleod, J

Bench : Single Bench

Judgement

Macleod, J.—In this suit a decretal order of reference to Commissioner was made on the 7th November 1913 to take the following accounts, viz., an account of what was due by the plaintiffs to the defendant for principal and interest on the mortgage mentioned in the pleadings on the basis of the findings on the issues therein from 23rd October 1880 and it was directed that in such account the defendant should be debited with all the rents and profits accrued from the property mentioned in the pleadings and the sale proceeds of any machinery or building materials sold by him and be given credit for all costs and expenses properly incurred by him in maintaining the said property or working the said mills.

2. The first defendant died after the said order was made and the present 6th and 7th defendants are the Receivers appointed in Suit No. 936 of 1914 for administration of the estate. The Receivers brought in an account of the mortgage debt and filed it before the Commissioner., The account showed a balance of Rs. 16,73,072-2-0 due to the estate. The plaintiffs filed objections which amounted to Rs. 21,90,392-2-1. Out of these objections against the original defendant having paid ground-rent in respect of the mortgage property alone amount to Rs. 3,69,492-8-0. Objections against the payment of insurance premia amount to Rs. 30,467-8-3.

3. The 6th and 7th defendants objected to the Commissioner hearing these objections on the ground that there was no dispute as to the amount paid by the original defendant by way of rent and insurance and the question whether the

original defendant could have credit for the payments was a question wholly of law or of mixed law and fact and should be determined by the Judge who tried the case.

4. The Commissioner, however, expressed the opinion that under the said reference he had power to go into the questions even though they involved questions of law or of mixed law and fact. Whereupon defendants Nos. 6 and 7 moved before me for an order that directions should be given to the Commissioner that it was not open to him to determine the objections of the plaintiffs in the accounts brought in by the 6th and 7th defendants challenging the right of the original defendant to have credit in the account for ground-rent and insurance premia paid by him, and that the decretal order of reference did not give him any power authorising him to decide the said questions and, in the alternative, that, if in the opinion of the Court it was still open to plaintiffs to raise the objections, the same should be tried by the Court.

5. It is admitted that there is no precedent in this Court for such an application. Rule 397 of the High Court Rules provides that "The Commissioner shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient." Rule 399 provides that "The Commissioner, if he thinks fit, shall make a special report concerning any matter or thing arising in or about the matter referred to him, in order that the opinion of the Court may be taken therein." But unless the Commissioner makes a special report under one of these rules, in the ordinary course he proceeds with the reference and makes his final report in the matters referred to him.

6. It cannot be seriously contended that the Commissioner is not entitled to decide questions of law which may arise while taking the accounts. It is impossible for the Court while giving directions for the taking, for instance, of a mortgage account, to decide all questions of law, since many such questions do not arise until the accounts are filed, as in this case, where the mortgagee in possession claims that he is entitled to be given credit for certain costs and expenses as properly incurred by him in maintaining the mortgaged property. It must often happen, as in this case, that the Commissioner cannot arrive at a conclusion without deciding questions of law.

7. Mr. Strangman, however, on behalf of the 6th and 7th defendants, has asked me to adopt the same practice as is prescribed by the Rules of the Supreme Court. Order LV. of those Rules is headed "Chambers in the Chancery Division" and under Rule 69 "Any party may, before the proceedings before the Master are concluded, take the opinion of the Judge upon any matter arising in the course of the proceedings without any fresh summons for the purpose". On page 374 of Vol. XXXVI of the Solicitors' Journal there is a note relating to an unreported case in which an order was made by the Judge expressing an opinion under Rule 69 as to the principle on which a claim against an estate should be dealt with by the Chief Clerk. An appeal having been filed against this order, no order was

made on the appeal, but that was to be without prejudice to the right of the appellants to raise, upon summons to vary the Chief Clerk's certificate after it had been made, the question upon which the Judge had given his opinion. The Lords Justices expressed strongly their opinion that upon an application of this kind under Rule 69 an order ought not to be drawn up, for this highly inconvenient result would follow that the order might be appealed from and the appeal might be carried even to the House of Lords and then after the certificate had been made the matter might be reheard on an application to vary the Chief Clerk's finding and there might be a second appeal to the House of Lords. That would be most inconvenient and oppressive: On such an application the opinion of the Judge was given for the guidance of his Chief Clerk and no formal order ought to be drawn up.

8. Therefore, if I admitted this application and adopting, the practice prescribed by Rule 69 expressed an opinion on the points which are now in dispute regarding the payment of ground-rent and insurance premia, it might be that a party who was dissatisfied with that opinion might appeal against the order and the appeal might even be taken to the Privy Council. For, it would be problematical whether this Court would follow the opinion expressed by the Lords Justices in the case I have just referred to. It would be very undesirable to introduce an entirely new procedure with regard to references to the Commissioner, unless I was of opinion that I was entitled to adopt the procedure prescribed by Order LV, Rule 69 above referred to.

9. But I am decidedly of opinion that as in the High Court Rules there is no rule similar to Rule 69 of Order LV, it is not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of the accounts. From the Notes in the Annual Practice, it appears that applications under that Rule are rarely made. Moreover, it is not, in my opinion, in the interests of justice that parties to a reference should be at liberty to stop the proceedings by moving the Court to give its opinion on a point of law which has arisen which the Commissioner can decide.

10. It is certainly desirable that the Commissioner should deal with such questions, and the parties objecting to his decision then should proceed in the ordinary course by filing exceptions to his report.

11. But I must not be taken as holding that the Court, once a reference has been made to the Commissioner, loses all control over the proceedings until the Commissioner has made his report. There may be cases in which the Court may find it necessary to withdraw the proceedings from the Commissioner and resume the hearing itself, but such cases must necessarily be of rare occurrence. It is a different matter to ask the Court to resume the hearing merely for the purpose of deciding certain questions which come within the powers of the Commissioner.

12. In my opinion, therefore, the application must be dismissed with costs.