

(1971) 02 CAL CK 0014
In the Calcutta High Court
Case No : A.F.O.D. No. 13 of 1958

Mathura Prosad Rajgharia and Others APPELLANT
Vs
State of West Bengal and Another RESPONDENT

Date of Decision : 11-02-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 8 Rule 5, 11
Evidence Act, 1872 — Section 115
Land Acquisition Act, 1894 — Section 18, 30

Citation : AIR 1973 Cal 288

Hon'ble Judges : M.M. Dutt, J;Arun K. Mukherjea, J

Bench : Division Bench

Advocate : Jitendra Kumar Sen Gupta and Amarendra Nath Gupta, for the Appellant; B.P. Chatterjee and S.K. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal arises out of Order No. 250, dated August 2, 1957, of the President Calcutta Improvement Tribunal rejecting the application of the appellants whereby they asked for payment of the whole of the enhanced amount of compensation.

2. The appellants Mathura Prasad Rajgharia and others were lessees of Premises No. 1. Bahir Surah Road, Calcutta, under one Madhusudan Banerjee and Sm. Surabala Devi, for a term of sixty years under a registered lease dated September 20, 1927. Under the terms of the lease, the appellants had the option to purchase the lessors' interest in the demised property at any time within ten years from the date of the, lease. It was further provided in the lease that in the event of acquisition of the demised property, both the lessors and the lessees shall be entitled to the compensation that would be payable to them respectively.

3. The premises was acquired by the Government after the publication of the statutory notification and declaration. The declaration u/s 6 of the Lend Acquisition Act was made on September 4. 1941. The L. A. Collector assessed

the value of the land at Rupees 3,73,941/- which represented both lessors" and lessees" interest in the land. Before the award was passed by the Collector in accordance with Section 11 of the Act Mr. Satyendra Nath Mitra, Advocate accepted the valuation made by the Collector on behalf of the appellants as lessees. The acceptance was made by the learned Advocate in writing on the petition of claim filed before the Collector in the following terms:--

"Under instruction from my client, I accept Rs. 3,73,941/- as the value of the land plus S. A. therein measuring 536 Ka. 2 Chs. 38 sq. ft. of land excluding area occupied by Shitola Temple and the grave with the passage as claimed and Rs. 335/- and S. A. for trees and Rs. 2000/- and S. A. for culvert, road and drainage and Rs. 3120/- and S. A. for two structures in full satisfaction of my client's claim as a lessee and Rs. 350/- plus S. A. for ghat."

4. On August 30, 1943, the Collector made a joint award in favour of the appellants and their lessors for a total sum of Rs. 4,30,788/13/9 pies which included the said sum of Rs. 3,73,941/- on account of the value of the land and other sums for trees etc. Possession of the premises was taken by the Collector on October 20, 1943.

5. The appellants did not make any reference against the award of the Collector presumably because they accepted the valuation made by the Collector through their learned Advocate. On July 6, 1944, the lessors Madhusudan Banerjee and Surabala Devi made a reference u/s 18 of the Land Acquisition Act for valuation and apportionment. The valuation case was numbered as Case No. 66 of 1944 and the Apportionment case was numbered as Case No. 13 of 1947.

6. On January 26, 1945, the appellants instituted a suit at Alipore against their lessors, namely, Madhusudan Banerjee and Surabala Devi for specific performance of contract of sale as embodied in the lease dated September 20, 1927. During the pendency of the suit Surabala Devi transferred her interest in the acquired property to the appellants by a registered kobala dated April 3, 1945. After the said transfer the appellants got themselves substituted in place of Surabala Devi in the valuation case.

7. The valuation case was disposed of by the Tribunal by its order dated February 23, 1948. The Collector's award of compensation in respect of the land was enhanced by Rs. 57,196/6 annas. As to the apportionment of the enhanced amount between the appellants and Madhusudan Banerjee the Tribunal by its order dated March 2, 1948, directed that the question as to the apportionment of the enhanced amount would be decided in a subsequent proceeding to be heard along with the Apportionment Case No. 13 of 1947. The then Province of Bengal made an application for being added as a party in the Apportionment case. The application was allowed and the Province of Bengal was added as a party in the Apportionment case. An additional issue being Issue No. 8 was framed in the Apportionment case to the following effect-

"(8) What was the effect of the acceptance by Mr. Satyendra Nath Mitra,

Advocate on behalf of Mathura Prosad Rajgharia and others? Is it a bar to their claiming the enhanced amount or any portion thereof?"

8. Although it was directed by the Tribunal that the subsequent proceeding would be started and heard along with the Apportionment case, it does not appear that any such subsequent proceeding was started. It is apparent that after the framing of the additional issue it was not necessary to start any subsequent proceeding because the Apportionment case comprised disputes regarding the apportionment of the enhanced amount. The proposed subsequent proceeding on the question as to the apportionment of the enhanced amount was adjourned sine die by order No. 206, dated May 3, 1948, of the Tribunal on the prayer of the parties with liberty to mention about the matter in proper time. The Apportionment case was also stayed till the disposal of the specific performance suit instituted by the appellants.

9. The Government preferred an appeal to this Court being F. A. No. 167 of 1948 against the judgment of the Tribunal in the valuation case. While the appeal in this Court had been pending the specific performance suit which was instituted by the appellants was compromised and a compromise decree was passed on June 16, 1953. According to the terms of compromise, out of the sum of Rs. 4,30,788/13/9, jointly awarded in favour of the appellants and their lessors by the Collector, a sum of Rs. 2,00,000/- was to be awarded to Madhusudan Banerjee and out of the said sum of Rs. 2,00,000/- a sum of Rs. 49,660/- would be awarded to Salil Kumar Mitter, the mortgagee of Madhusudan Banerjee in full satisfaction of the mortgage dues and the balance would be awarded to the appellants out of the compensation money in deposit in C. D. Case No. 73 of 1943.

10. After the disposal of the said specific performance suit, Mathura Prasad Rajgharia as the karta of the joint family of the appellants made an application in this Court in the said F. A. No. 167 of 1948 under Order XXII, Rule 10 of the CPC for being added as a party-respondent in the said appeal inter alia on the ground of the compromise of the said specific performance suit and the devolution of the interest of Madhusudan Banerjee on the appellants. On the said application Mathura Prosad Rajgharia for self and as karta of the joint family of the appellants was added as a party-respondent.

11. At the hearing of the said F. A. No. 167 of 1948, on behalf of the Government an objection was taken as to the right of the said Mathura Prosad Rajgharia to pursue any objection to the Collector's award either on his own behalf or as the karta of the joint Mitakshara family on the ground that he accepted the Collector's award. In support of the said objection on behalf of the Government the attention of this Court was drawn to the written note of the said Satyendra Nath Mitra, the Advocate appearing on behalf of the appellants, accepting the offer of the Collector as to the value of the land. Dasgupta J. who delivered the judgment in the said F. A. No. 167 of 1948 observed as follows-

"There can be no doubt that In view of this acceptance Mathura Prasad Rajgharia and others on whose behalf the acceptance was made would be disentitled from pursuing a claim as in their capacity of lessees. The question, however, is not whether they were entitled to pursue their claim as lessees but whether on having acquired the interest of some of the lessors they were entitled to pursue any objection that had been made by such lessors. As has been indicated earlier, the reference was made on the petition of Madhusudan Banerjee and Surabala Devi who, it does not appear to be disputed, were the lessors. Whatever interest Mathura Prasad and others had in August 1943, was as lessees. I am unable to see any legal basis for the argument that a person who is precluded from proceeding in one capacity must be precluded from proceeding in all other capacities. Clearly, if the interest of the lessors had continued to be in Madhusudan and Surabala, they would be entitled to pursue their objection to the Collector's award in spite of the acceptance by the lessees. It is equally clear that if the interest of Madhusudan and Surabala had passed to some persons other than the lessees, those other persons would be entitled to pursue the objection once they are brought on the record in accordance with the provisions of Order XXII, Rule 10 of the Code of Civil Procedure. In the present case Mathura Prasad Rajgharia was brought on the record in place of Surabala Devi when the case was pending before the Tribunal. When any other transferee from Surabala would have been entitled to pursue objections to the award on the strength of Surabala's petition of objection, I cannot see any reason why the lessee should be so precluded in his new capacity as owning Surabala's interest as lessor. The contention that Mathura Prasad Rajgharia was not entitled to pursue the objection to the Collector's award even in his capacity of lessor on the basis of transfer from Surabala Devi and substitution thereof must therefore be rejected."

12. It has already been stated that the subsequent proceeding for the determination of the question as to the apportionment of the enhanced amount of compensation, was adjourned sine die by the Tribunal with liberty to the parties to mention. It appears that before the disposal of the said appeal pending in this Court, on behalf of the appellants and the said Madhusudan Banerjee the matter was mentioned before the Tribunal in the Apportionment case. The said parties filed the certified copy of the compromise decree passed in the said specific performance suit and the Tribunal disposed of the Apportionment case by Order No. 108, dated June 29, 1953, as follows:--

"I direct in accordance with the said terms of compromise that a sum of Rupees 2,00,000/- be awarded to Madhusudan Banerjee and out of this sum of Rs. 2,00,000/- a sum of Rs. 49,660/- be awarded to his mortgagee Salil Kumar Mitra in full satisfaction of his mortgage dues and the balance be awarded to the applicants Mathura Prasad Rajgharia and others out of the compensation money in deposit in C. D. Case No. 73 of 1943.

* * * *

I further direct that the amounts awarded to Madhusudan Banerjee and his mortgagee Salil Kumar Mitra be paid to them when the sale proceeds are received. Each party will bear his or their own costs. Case disposed of. This order also governs Case No. 73 of 1943 (C. D.)".

13. Long after the passing of the said order dated June 29, 1953, the appellants made an application on April 26, 1957, before the Tribunal praying for an order of payment of the entire enhanced amount of compensation with interest and costs amounting to Rs. 1,02,341/2/9. The application was opposed by the State of West Bengal.

14. The contention of the State of West Bengal was inter alia that the appellants were precluded from claiming the lessees' interest in the enhanced amount of compensation by reason of their acceptance of the Collector's award and also in view of the fact that the appellants did not prefer any objection against the Collector's award by making a reference u/s 18 of the Land Acquisition Act. Further, it was contended that in view of the judgment of this Court in the said F. A. No. 167 of 1948 the claim of the appellants for the lessees' interest in the enhanced amount of compensation was barred by res judicata. On behalf of the appellants it was urged before the Tribunal that after the disposal of the Apportionment case by the said order No. 108, dated June 29, 1953, including the issue as to the apportionment of the enhanced amount of compensation the State of West Bengal was debarred and precluded from questioning the appellants' right to receive the entire amount of compensation consisting of both the lessees' and the lessors' interest. It was further contended on behalf of the appellants that the interest of the lessors having merged in them in view of the said compromise decree passed in the said specific performance suit, the appellants were entitled to withdraw the entire amount.

15. The Tribunal overruled all the contentions of the appellants and by its Order No. 250, dated August 2, 1957, dismissed the application of the appellants for the withdrawal of the enhanced amount of compensation. The Tribunal further directed hearing of the Issues Nos. 7 and 8 framed in the Apportionment Case No. 13 of 1947 as according to the Tribunal these two issues were not disposed of by the said order No. 108, dated June 29, 1953. Hence, this appeal by the appellants against the said order of the Tribunal dated August 2, 1957.

16. On behalf of the appellants the same contentions which were made before the Tribunal were repeated before us by Mr. Sen Gupta, learned Advocate for the appellants. Mr. Sen Gupta submitted that u/s 18 of the Land Acquisition Act only a person who accepted the award of the Collector would be precluded from making a reference u/s 18. It was contended that as the acceptance of the offer of the Collector as to the valuation of the land was made by the appellants through their Advocate Mr. Satyendra Nath Mitra before the Collector passed the award it could not be said that the appellants accepted the award and that accordingly the appellants would not be debarred from claiming the lessees' interest in the enhanced amount of compensation. This argument of Mr. Sen

Gupta is without any substance. The award of the Collector may be accepted either by express terms or impliedly. Section 18 prescribes a time limit within which one has to make an application for reference against the award of the Collector. If no such reference is made by a person within the period prescribed by Section 18, it must be held that the award has been accepted by the said person. In the instant case, if the appellants were aggrieved by the Collector's valuation, the appellants should have made a reference u/s 18. The appellants not having done that, it must be held that the appellants accepted the award of the Collector. We have already stated that before the award was passed the appellants accepted the offer of the Collector regarding the valuation of the land through their Advocate Mr. Satyendra Nath Mitra. That acceptance was made in unequivocal terms in writing under the hand of the Advocate on the petition of claim. The appellants, therefore, are debarred and precluded from claiming lessees' interest in the enhanced amount of compensation. The view which we take finds support from the decision of the Privy Council in AIR 1932 102 (Privy Council) where it has been laid down by their Lordships that when there are two claimants and one of them agrees to accept a certain valuation and his share at a certain ratio in relation to the other claimant and an award is made in respect of both claimants on such basis, the second claimant, if he causes a reference to be made as to the amount alone but not as to the apportionment, cannot, on the amount being increased, claim the whole thereof minus the sum which the first claimant had accepted by agreement on the basis of the lower valuation and that he is only entitled to his share according to the ratio of apportionment by which he is bound and the gain is a gain of the authority which acquired the land. Relying on this principle of law laid down by the Privy Council it was submitted on behalf of the respondent the State of West Bengal that the lessees' interest in the enhanced amount of compensation would go to the acquiring authority which is the State of West Bengal.

17. On this point there are two decisions of this Court, the first one is the decision in the Secy. of State v. Manohar Mukherjee, 23 Cal WN 720 = (AIR 1919 Cal 524 (1)). In that case a Division Bench of this Court has held that where in a proceeding under the Land Acquisition Act the tenants accepted the Collector's valuation but the landlord objected to it and asked for a reference and the Judge allowed an excess amount representing all the interests in the land, the tenants were not entitled to any portion of the excess amount allowed by the Judge. This case is directly on the point under consideration before us. Mr. Sen Gupta sought to distinguish this case by drawing our attention to an observation made by then Lordships as follows-

"The tenants accepted the award of the Collector and did not ask for any reference to the Judge nor taken any exception to the award before the Judge."

It was submitted by Mr. Sen Gupta that in that case the tenants accepted the award but, the appellants before us did not accept the award but accepted the offer of the Collector before the award was made. In our view, this is a

distinction without any difference. We have already stated above that an award will stand accepted for the omission of a claimant to make a reference u/s 18 within the time limit prescribed by that section. The other Bench decision of this Court in the State of West Bengal Vs. Kesson Chand Kocher and Others, followed the principle of law laid down in the above Privy Council case AIR 1932 102 (Privy Council) and in the case of 23 Cal WN 720 = (AIR 1919 Cal 524 (1)). We accordingly overrule the contention of Mr. Sen Gupta and hold that by accepting the award of the Collector regarding the valuation of the land, the appellants precluded themselves from claiming the lessees' interest in the enhanced amount of compensation.

18. Mr. Sen Gupta argued that the Order No. 108, dated June 29, 1953, whereby the Tribunal disposed of the Apportionment case would operate as *res judicata* between the parties and that the respondent State of West Bengal was not entitled to raise any objection to the appellants' claim for the lessees' interest in the enhanced amount of compensation. The learned Advocate for the State of West Bengal submitted before us that the State of West Bengal was not given any notice before the Apportionment case was taken up for hearing at the instance of the appellants. It has already been noticed that the hearing of the proposed subsequent proceeding on the question of the apportionment of the enhanced amount of compensation was adjourned *sine die* by Order No. 206, dated May 3, 1948, and the Apportionment case was also adjourned till the disposal of the specific performance suit instituted by the appellants. As already stated no such subsequent proceeding was initiated on the question of apportionment, but a new issue was raised in the Apportionment case. The effect of the said order No. 206 was that the Apportionment case stood adjourned *sine die*. After the compromise decree passed in the specific performance suit, the appellants and the said Madhusudan Banerjee mentioned the matter before the Tribunal and the Tribunal disposed of the Apportionment Case No. 13 of 1947 on consent by its order No. 108, dated June 29, 1953. It does not appear from the record that before the matter was mentioned by the appellants and the said Madhusudan Banerjee, any notice was served on the respondent State of West Bengal. It was curious that the Tribunal proceeded to dispose of the Apportionment case in accordance with the compromise decree on the prayer of the appellants and their erstwhile lessor Madhusudan Banerjee without service of any notice on the respondent. In the order appealed from the Tribunal has held that by the said order dated June 29, 1953, the question as to the apportionment of the enhanced amount of compensation so far as lessees' interest was concerned, was not disposed of but only the dispute between the appellants and Madhusudan Banerjee in respect of the apportionment of the Collector's valuation of the land was disposed of by the said order by consent of the appellants and the said Madhusudan Banerjee in accordance with the terms of the compromise decree. Mr. Sen Gupta strenuously urged before us that the compromise decree contained terms regarding the apportionment of the enhanced "amount of compensation and that by the said order dated June 29.

1953, the Apportionment case having been disposed of in terms of the compromise decree, it must be held that the question as to the apportionment of the enhanced amount of compensation was also disposed of by the Tribunal by its said order. It may be that the compromise decree also contained terms of settlement of disputes over the apportionment of the enhanced amount of compensation between the appellants and the said Madhusudan Banerjee and the disposal of the Apportionment case in accordance with the terms of the compromise decree is a disposal of the question of apportionment of the enhanced amount of compensation. But, here we are concerned whether without service of any notice on the respondent before the Apportionment case was disposed of by the consent of appellants and Madhusudan Banerjee, the order disposing of the Apportionment case would be binding upon the respondent State of West Bengal. The State of West Bengal was not a party to the compromise decree or to the compromise effected before the Tribunal. It is now well-established principle of law that a compromise decree is not binding upon a person who is not a party to the compromise. Our attention was drawn to the following statements made by the appellants in paragraph 5 of their petition before the Tribunal claiming the entire enhanced amount of compensation:--

"The State of West Bengal though cognizant of the disposal of the said Apportionment case at or about the time of the said disposal, and in any event on or about 6th September, 1956, when the petitioners apprised it of the same by letter dated 6th September, 1956, took no steps to have any apportionment of the compensation money determined between the lessor and the lessee, for which the State applied and had itself joined as party to the said Apportionment case for protecting any possible interest of the State in the matter."

19. It was contended that the allegations made in the aforesaid statements were not denied by the State of West Bengal. In paragraph 28 of its petition of objection the State of West Bengal dealt with the said allegations made in paragraph 5 of the petition of the appellants. In paragraph 28 it was alleged by the State that the subject-matter of the Apportionment Case No. 13 of 1947 was the apportionment of the compensation money as awarded by the Collector and originally remitted to the Tribunal and did not and could not comprise the enhanced amount which had not been determined at that point of time and not remitted to the Tribunal. It is true, that the State of West Bengal did not deny that they were aware of the disposal of the Apportionment case and did not take steps to get the order set aside. The allegations made by the appellants in paragraph 5 are on the face of it vague allegations inasmuch as the appellants did not specify the point of time when the State of West Bengal came to know of the disposal of the Apportionment case. It was merely alleged that the State of West Bengal was cognizant of the disposal of the Apportionment case at or about the time of the said disposal. That is patently a vague allegation and non-traverse of a vague allegation, in our view, is not tantamount to an admission on the part of the State of West Bengal. But, one thing is plainly clear that although the appellants did not serve any notice on the State of West Bengal, the

appellants and Madhusudan Banerjee mentioned the matter before the Tribunal for the disposal of the Apportionment case by consent of the appellants and the said Madhusudan Banerjee in accordance with the compromise decree. To the circumstance, we are unable to hold that the order of the Tribunal dated June 29, 1953, is binding on the State of West Bengal even assuming that it disposed of also the question as to the apportionment of the enhanced amount of compensation.

20. From another point of view also the claim of the appellants for the whole of the enhanced amount of compensation would be barred. The judgment of this Court in the said F. A. No. 167 of 1948 was passed after the disposal of the Apportionment case in the presence of the appellants. This court in considering the question as to the locus standi of the appellants to pursue their objection to the appeal by the State against the enhancement of the valuation, decided that the appellants were disentitled from claiming in their capacity of lessees, the enhanced amount of lessees' interest in the compensation in view of their acceptance of the Collector's offer made by the appellants through their Advocate Mr. Satyendra Nath Mitra. It does not appear that during the hearing of the said appeal the appellants brought to the notice of this Court either the said compromise decree or the said order of the Tribunal disposing of the Apportionment case by consent of the appellants and the said Madhusudan Banerjee in accordance with the said compromise decree. Even assuming that the order of the Tribunal disposed of the question of apportionment of the enhanced amount of compensation, the judgment of this Court being later in point of time will, in our view, prevail and would operate as res judicata between the parties in all subsequent proceedings on the principle that where successive decrees are passed between the same parties over the same subject-matter of dispute, the last of such decrees would prevail and operate as res judicata between the parties in any subsequent suit or proceeding. From the aforesaid view of the matter, the appellants are not entitled to succeed in respect of their claim to the entire enhanced amount of compensation.

21. Lastly, it was contended by Mr. Sen Gupta that on the passing of the decree for specific performance of contract transferring title to the enhanced amount of compensation in favour of the appellants, that title would relate back to the date of the agreement which was embodied in the lease dated September 20, 1927. In the instant case, no title to the property passed under the lease dated September 20, 1927, in respect of the lessors' interest in the property which was leased to the appellants for 60 years with an option of purchase of the lessors' interest. If the proposition of Mr. Sen Gupta is accepted in that case it would come to this that on September 20, 1927, the appellants acquired the title of the lessor in the property by the said document of lease which is absurd on the face of it. So long the conveyance of the lessors' interest in the property is not made there cannot be any question as to the passing of the lessors interest in favour of the appellants. We are unable to accept the contention of Mr. Sen Gupta that on the passing of the decree for specific performance of the contract

as embodied in the document of lease dated September 20, 1927, the lessors' interest in the property stood transferred with effect from September 20, 1927. In support of the said contention Mr. Sen Gupta relied upon a decision of this Court in *Johar Mull Bhutra v. Jatindra Nath Bose*, 34 Cal LJ 79 = (AIR 1922 Cal 412 (2)). In that case it has been held that when a suit for specific performance of a contract for transfer of immovable property is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based. The principle which has been laid down in the aforesaid case is applicable only to the special facts and circumstances of that case. What happened in that case was that in the document of lease whereby permanent lease in respect of several properties was granted it was stipulated that if any other parcel of land was discovered to have been omitted by mistake, a supplementary deed would be executed in respect thereof in favour of the lessee. The contingency contemplated happened and it was discovered that the tenancy in dispute had been left out by mistake from the list of tenancies in the schedule to the lease. The lessees sued for specific performance of the contract contained in the lease and obtained a decree. On the aforesaid facts it was held that the decree for specific performance of the contract transferring title to the lessee would relate back to the date of the agreement. By the lease, in that case, not only the properties mentioned in the schedule thereof were demised but also the properties which were omitted to be included in the schedule through mistake. In that context it was held that on the passing of the decree for specific performance of contract, the title of the lessee to the disputed property would relate back to the date of the agreement. We cannot read the decision as having laid down such a very wide proposition of law as contended by Mr. Sen Gupta. In the instant case, as has already been stated there was no question of transferring of lessors' interest under the lease dated September 20, 1927. The principle of law laid down in the said decision in 34 Cal LJ 79 = (AIR 1922 Cal 412 (2)) has no application to the facts and circumstances of the instant case. The contention of Mr. Sen Gupta about the relation back of title is overruled.

22. It is not disputed before us on behalf of the respondent State of West Bengal that the appellants are entitled to the lessors' interest in the enhanced amount of compensation. That has also been found by the Tribunal by its order appealed from. After careful consideration of the facts and circumstances of the case and the contentions of the parties before us we hold that the appellants are not entitled to the lessees' interest in the enhanced amount of compensation.

23. Before we conclude, we fail to understand that although the Tribunal came to the same conclusion and overruled the claim of the appellants to the lessees' interest in the enhanced amount of compensation, the Tribunal directed hearing of Issue No. 8 along with Issue No. 7 framed in the Apportionment case. We do not feel any necessity for any further hearing on Issue No. 8 or for the determination of that issue inasmuch as Issue No. 8 stands determined by the order of the Tribunal appealed against.

24. In the result, we affirm the order No. 250, dated August 2, 1957, passed by the President, Calcutta Improvement Tribunal subject to this that there is no necessity for any further hearing on Issue No. 8 framed in the Apportionment Case No. 13 of 1947. The appeal is dismissed with costs, hearing fee being assessed at 10 Gold Mohurs only. The alternative application is also dismissed without cost.

Arun K. Mukherjea, J.

25. I agree.