

**(1916) 05 CAL CK 0016**  
**In the Calcutta High Court**

Peari Mohan Kundu

APPELLANT

Vs

Mohini Kanta Saha Choudhury and Others

RESPONDENT

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**Date of Decision :** 15-05-1916

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 15

**Citation :** 34 Ind. Cas. 855

**Hon'ble Judges :** Newbould, J;D. Chatterjee, J

**Bench :** Division Bench

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## Judgement

1. This is a matter which arises out of proceedings in a partition suit.
2. A Commissioner was appointed for making the partition without, however, settling his fees. On the 22nd December 1913, the order of the Subordinate Judge was as follows: "None of the parties turned up. So the Commissioners" remuneration could not be settled. They will begin work at once and the remuneration matter will be put up on the 2nd January 1914." The matter was put up later on the 5th January and it was decided that only one Commissioner, namely Babu Pyari Mohan Kutidu, should be appointed. Then on the 29th May 1914, the Commissioner put in a petition asking for two months" time and he was ordered to submit report within the time allowed. The question of his remuneration was left to be considered when the papers were filed and the quantity and quality of his work judged by Court. On the 19th February 1915, the Commissioner"s bill was considered and Rs. 3,260 was passed as his fees besides travelling and other expenses. There seems to have been an objection; and upon the hearing of the objection on the 6th March 1915, the learned Judge says: "I have heard the Pleaders of the parties and the Commissioner and they all agree that the Commissioner may get Rs. 400 less than what was allowed to him on the 19th February 1915. The Commissioner agreed to reduce his remuneration in consideration of his getting a handsome amount in all". After this, there was an application to the District Judge by some of the defendants complaining against the order of the Subordinate Judge and in this petition, the

petitioners do not say anything about the agreement mentioned by the Subordinate Judge. In paragraph 9 of their petition they said that they expected that in the ordinary course the said bill would be submitted to the District Judge who would settle what was fairly payable to the Commissioner but that they understood that unfortunately the bill had not been sent up as usual. The learned Judge upon this seems to have issued notice to the parties and upon hearing them passed an order making a further reduction in the fees allowed to the Commissioner.

3. In speaking of the agreement, the learned Judge says, "It is said that Rs. 2,860 was fixed by a compromise. The Pleader states that the matter was not properly understood and that there was not any real compromise but only a failure to object by a party who had not the information necessary to enable it to object."

4. In the counter-affidavit which is filed before us, we find that paragraph 4 is to the effect that it is not true that the Pleader of the defendants-opposite parties agreed to the Commissioner's fees being settled at Rs. 2,860 on the 6th March 1915, the said Pleader raised objections but could not press them strongly as he was under the impression that the bill of the Commissioner had been duly submitted to the District Judge and approved by him according to the Circular Orders of the High Court, whereas, as a matter of fact, it had not been submitted to the District Judge at all.

5. If there was no such agreement as stated by the learned Subordinate Judge, we should have expected that the Pleader who was present and who is supposed to have agreed to the proposal, would have made an affidavit to that effect. No such affidavit however, has been filed and only an officer of the defendants says, upon information said to have been received from the Pleader, what is stated in paragraph 4 of the counter-affidavit.

6. We are not satisfied that upon these materials the agreement said to have been made before the learned Subordinate Judge is disproved, and if there was an agreement by the parties and an order was passed upon such agreement, they cannot now be allowed to back out of it without sufficient reason; and we see no sufficient reason in this case. This is one view of the case,

7. It is farther contended that the order of the learned District Judge in this connection is without jurisdiction and ought not to have been made. The Circular Orders of the High Court give the District Judge a certain amount of disciplinary jurisdiction in the matter of the appointment of Commissioners to make inquiries. The learned Vakil for the opposite party has referred to notes 6 and 6 of Rule No. 122, Chapter I, of the Rules relating to Practice and Procedure (High Court General Rules and Circular Orders, Vol. I).

8. Note 6 authorises the District Judge to keep in his office a brief record of the cases entrusted to Pleader Commissioners and note therein all instances of dilatory or unsatisfactory work on their part. Under Note 8, the District Judge

should himself, take action if it appears from a Pleader Commissioner's diary that his work has been either dilatory or insufficient, or if the final report submitted by him in form No. (M) 75 of Volume II appears to require explanation. Note 9 says that it is open to the District Judge to withhold cases from those Commissioners whose work is found to fall below a reasonable standard of punctuality and efficiency.

9. It seems to us that these rules do not interfere with the powers of the Court in which the case is pending in respect of which the commission is being executed. These powers are given to the District Judge for maintaining a particular standard of efficiency among Pleader Commissioners who undertake these commissions, but they do not seem to us to authorise him to set aside any order passed by the Trial Court which is in a position to decide as to the quality of the work done by the Commissioners. In this view of the case also the order of the District Judge appears to us to have been passed without jurisdiction.

10. The whole trouble in this case seems to have arisen from the learned Subordinate Judge not acting in accordance with the obvious intention of the law in Order XXVI, Rule 15, which provides that before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued. If that were done, a question of this kind would hardly arise. As the amount given to the Commissioner was arrived at by agreement, we do not feel called upon to express any opinion on the merits of the order of the District Judge.

11. The Rule is made absolute. We make no order as to costs.