

(1945) 06 CAL CK 0032

In the Calcutta High Court

Case No : (Suit No. 505 of 1938) Appeal from Original Orders Nos. 34 & 35 of 1942

Prokash Krishna Mitter

APPELLANT

Vs

Issur Radha Madan Gopal Jew and Others

RESPONDENT

Date of Decision : 01-06-1945

Acts Referred:

Citation : (1945) 06 CAL CK 0032

Final Decision : Dismissed

Judgement

McNair, J.—These are two consolidated appeals by Prokash and Jiban Mitter respectively from a judgment and decree of this Court in its Ordinary Original Civil Jurisdiction by which Ameer Ali, J., dismissed the suit by the Plaintiff Thakur, and made an order directing the costs to be paid by the Defendant Jiban Mitter, and by Prokash Mitter who was the next friend of the Plaintiff deity until removed by an order of this Court, dated the 22nd May, 1938. The appeals were taken solely on the question of costs and were argued before us for two days in February, 1944, on the question whether an appeal lay, on the ground that the order appealed from was not a judgment within cl. (15) of the Letters Patent. It was then argued that although the suit had been dismissed the costs did not follow the event but had been given against one of the sued Defendants, and against the original next of the Plaintiff who was then no longer a party to the suit. The learned trial Judge in making such an order was bound to express his reasons in writing under sec. 35 (2) of the Code of Civil Procedure. This he had failed to do and the matter was accordingly remanded for that purpose on February 22nd, 1944. The appeals now come before us again with the judgment in which the learned Judge gives the reasons for the order which he has made.

2. To appreciate that order it is necessary to set out the facts at some length. The Plaintiff deity is the family deity of the Mitters descended from Gour Mohan Mitter. The pedigree of the family is as follows:

3. The present suit was brought by Prokash, who is said to be merely the

nominee of his father Jiban, and to have been set up without right or justification to represent the family deity for the sole purpose of threatening to deprive the other members of the family of property which they had enjoyed for over 50 years as secular property, on the plea that it was debutter. Jiban was made a Defendant but neither entered appearance nor contested the suit. The other four Defendants were Jiban's nephews, the sons of his brothers Benoy and Bejoy, who were both dead. Jiban and his nephews were shebaites of certain property admittedly dedicated to the Thakur. On the death of Jiban's father, Jadunath Mitter, a suit was brought in 1911 by the widow of his son Benoy for partition of the family property. A consent decree was passed and an arbitrator was appointed, and a final decree was made in February, 1913, in terms of the arbitrator's award. By that award the property now claimed as debutter was divided among members of the family and a scheme was framed for the worship of the Thakur by the present Defendants as shebaites.

4. In that suit Jiban affirmed an affidavit admitting that Jadunath was the owner of the properties now claimed by the Thakur and the major portion of those properties was by the award allotted to Prokash. Friction arose later between Jiban and the other shebaites, and in 1937 they brought a suit against Jiban and three other persons to restrain them from interfering with the carrying out of the scheme. Jiban and others promptly sued for a declaration that the present Defendants were incompetent to act in the management, and very shortly thereafter Jiban's son brought the present suit against the shebaites claiming, as a person interested in the worship, that the Thakur was entitled to the property which was the subject-matter of the consent decree and which had been allotted to the various members of the Mitter family. The claim is based on an alleged will dated January 12th, 1877, of Sm. Haromony Dassi, the widow of Jadunath's uncle, Harish Chunder Mitter. Haromony died in 1881 and the will has never been proved.

5. The shebaites other than Jiban defended the suit and applied for the removal of Prokash as next friend on the ground that he was a mere-nominee of his father with whom he lives and to whom he looks for support, and that he was unfit to represent the Thakur's interest. On this application an order was made on 24th May, 1938, removing Prokash and appointing Mr. Banerjee, an attorney of this Court, as next friend of the Thakur in his place. On June 9th, 1939, Mr. Banerjee wrote to Prokash pointing out that the Plaintiff's title depended on the proof of Haromony's Will, and the necessity of obtaining probate without delay. No reply was received to this letter nor to a further letter of the 19th January in which Mr. Banerjee pointed out that without Prokash's co-operation he could not prosecute the suit.

6. On the 23rd May, 1939, Mr. Banerjee wrote to Prokash's solicitors, Messrs. C. C. Bose, sending them a copy of Counsel's opinion and asking them to let him have the necessary materials and evidence from Prokash to prove the attestation and execution of the Will. Two reminders were sent, and finally on June 26th.

Messrs. C. C. Bose wrote:

The question of our client obtaining probate will arise at the time of the decree. In the meantime our client is trying to collect the informations. Please therefore proceed with the suit in the meantime and oblige.

7. Three; days later the suit appeared in the Special List and Mr. Banerjee again wrote to Messrs. C. C. Bose for information and assistance in prosecuting the suit. Again there was no reply inspite of a reminder, and it was not until the 19th December, 1939, that Messrs. C. C. Bose said that they would attend a consultation with Counsel and discuss the matter. On May 29th, 1941, the suit was dismissed for want of prosecution.

8. On June 5th, 1941, Messrs. C. C. Bose wrote that they had sent the Will to the Administrator-General with instructions to apply for probate. They must have known, however, that the Administrator-General could not take action unless he was put in funds for the purpose.

9. The letter concludes:--

Our client desires yon to proceed with the suit.

10. Mr. Banerjee accordingly applied and had the suit restored on December 18th, 1941, and he once more tried to get help from Messrs. C. C. Bose and their clients.

11. On January 9th, 1942, he wrote to Jiban and sent him a copy of the letter to "your solicitors. Messrs. C. C. Bose" in which he stated that the trial Judge would take up the suit on the following day and hear the evidence in support of the Plaintiff's claim A copy of this letter was sent to C. C. Bose and they have never denied that Jiban was also their client.

12. On January 16th, Mr. Banerjee again wrote to Messrs. C. C. Bose and sent a copy to Prokash.

I have been directed by his Lordship The Hon''ble Mr. Justice Ameer Ali to inform you and your client Babu Prokash Krishna Mitter that the above suit which was on today's Peremptory List has been adjourned till Tuesday the 20th instant. As your client desires me to proceed with the suit it is of the utmost importance that he should Bee me at once and attend Court on the 20th instant with the original Will and codicil of Sm. Haromony Dassi

* * * * *

13. On February 2nd, the suit was called on and was adjourned till the 4th to enable the Plaintiff to call his evidence.

14. Mr. Banerjee wrote to both Jiban and Prokash that he was informing them of the position under the Judge's directions, and that they may be liable for costs if the suit is again dismissed for want of evidence. A copy of the latter was sent to Messrs. C. C. Bose. Again on February 4th, 6th, 13th and 18th, he informed

them of further adjournments and of the probability in their absence of the suit being dismissed with costs for which he refused to accept responsibility. Copies of these letters were sent to Messrs. C. C. Bose. Finally on February 26th the suit was dismissed. The shebait was ordered to pay in the first instance the general subsequent to Mr. Banerjee's appointment, and the shebait other than Jiban were empowered to recover those costs from Jiban and Prokash. From the above order the costs of the application for restoration of the suit were excepted which Jiban and Prokash, or either, were ordered to pay in any event.

15. A preliminary point was taken when the appeal was first heard that the order as to costs was not a judgment within cl. 15 of the Letters Patent and that no appeal lay. On this point reference was made to Mulla's Civil Procedure Code, 10th Edn. at p. 147, where the learned author discusses the question whether an appeal lie for costs only, and says:

All the High Courts are agreed that such an appeal does lie where the order as to costs involves a matter of principle, as where a formal party to a suit against whom no relief is claimed is made to pay the costs of the suit.

16. In the present instance a successful Defendant and a next friend who has been dismissed from the suit have been ordered to pay the costs and it can hardly be said that no question of principle is involved.

17. The next question is whether the trial court had jurisdiction to make the order.

18. Sec. 35 of the CPC Provides that the costs shall be in the discretion of the Court, and it is well settled that in the exercise of this discretion the Court may take into consideration both the conduct of the parties and the circumstances which induced the litigation, In the case of Jointee Chunder Sein v. An Lull Doss 14. W. R. (A. C. J.) 1 (1865) a father and son had colluded together in putting forward a purdanashin lady to sue for the possession of land on a claim based on a fictitious deed of conveyance. The court Sir Barnes Peacock, C. J. and Norman, J., appeal held that these two persons, who were parties to the suit, but were the real, 11 hidden, plaintiffs, had been rightly ordered to pay the costs since they had been guilty of an abuse of the process of the Court. For the reason certain persons who had set up a lady as their nominee to apply for an adjudication order, and then to apply as a creditor in the insolvency were ordered to pay the costs of the proceedings arising out of their nominee's claim in K. C. Banerjee v. S. C. Debi 21 C. W. N. 826 (1917). It is from the above cases that the Court can, if it considers that the circumstances justify an order, direct even a stranger to a suit to pay the costs.

19. The guiding principle is that the costs are in the discretion of the Court and if the Court has exercised that discretion in a judicial manner the Court of Appeal will not readily reverse the decision. "No doubt," said Lord Halsbury in Civil Service Co-operative Society v. Gen S. N. Co. (1903) 2 K. B. 756 at p. 765.

"where a Judge has exercised his discretion upon certain materials which are

before him, it may Dot be, and I think, is not, within the power of the Court of Appeal to overrule that exercise of discretion But the necessary hypothesis of the existence of materials upon which that discretion can be exercised, most be satisfied.

20. The whole question whether an appeal will lie as to costs alone was exhaustively considered by the House of Lords in Donald Campbell & Co. v. Pollak (1927) A. C. 732 and the majority of the House held that it would entertain an appeal as to costs where it is alleged that the order is founded upon an error of law.

21. In the present case the trial Judge has in his supplementary judgment set out the materials on which his conclusion was based and I can find no ground for any suggestion that he has not come to that conclusion in a proper judicial manner.

22. In my opinion there was ample justification for the order as made. Prokash was the original next friend. He commenced the litigation and, although he was removed from his position as next friend of the Thakur, he encouraged and instructed his successor to continue the suit. Time and again he was told that the suit could not go on without proof of the Will, and he was given every opportunity of producing the evidence the existence of which would alone justify his setting the machinery of the Courts in motion. He deliberately refrained from giving any active assistance and from appearing at the hearing although he had been warned that he might be held liable for costs. With regard to Jiban, he too had been warned that he might be made liable for costs. He was a party to the suit and Messrs. C. C. Bose are admittedly both his and Prokash's solicitors. Prokash lived with him and depended on him, and there is material which justifies the conclusion that the suit was brought by him in the name of his son Prokash in order to embarrass his co-shebaits.

23. The action of father and son was undoubtedly in my opinion a gross abuse of the process of the Court which fully justified the Court in ordering them to pay the costs. The appeals are dismissed with costs as between attorney and client throughout including all reserved costs, the reason being that in our opinion the Respondents should be fully indemnified against all the costs occasioned by this litigation. There will be a certificate for two Counsel on the hearing of this appeal, and on the hearing of the suit on remand to Mr. Justice Ameer Ali, the costs of which are included in this order.

Gentle, J.

24. These are two consolidated appeals against an order for costs made by Ameer Ali, J., who, by his decree, dismissed the suit and, at the same time, adjudged the costs to be borne by Defendant No. 5, Jivan and by his son Prokash, who was not a party. Prokash instituted the suit as the next friend of the Plaintiff Thakur; subsequently and previous to the trial, by an order of the Court, Prokash was removed as next friend and Mr. A.D. Banerjee, an attorney,

was appointed in his place. Jivan and Prokash appeal against the order for costs made against them. Defendants Nos. 1-4 are the nephews of Jivan, (Defendant No. 5) and the cousins of Prokash. (Jivan's son). The Plaintiff in the suit is the deity of the family of which the Defendants and Prokash are members. In the plaint it is alleged that the Defendants were in possession of the immovable properties, set out in Schedule A thereto attached, and certain movable properties, of which the Thakur is the owner and to whom they had been dedicated by a Will dated January 12th, 1877, and a codicil thereto, made by one Sreemati Hurromony Dassi who died in 1881; she is an ancestress of the Defendants. Claims are made for a declaration that the Thakur is entitled to the properties, accounts and other consequential relief. Prokash affirmed the correctness of the statements in the plaint as the next friend of the Plaintiff Thakur.

25. The suit was instituted on March 17th, 1938. In an application by Defendants Nos. 1-4, an order of this Court was made on May 24th, 1938, removing Prokash as next friend of the Plaintiff as it was undesirable he should so act since he is the son of one of the Defendants, Jivan, and with whom he was living at the time. As already stated, Mr. A. D. Banerjee was appointed next friend in place of Prokash.

26. Jivan did not enter appearance or take any step in the suit. In the joint written statement of Defendants Nos. 1-4 they deny the alleged ownership by the Thakur of the properties and other statements in the plaint; do not admit the Will and codicil; allege the properties formerly belonged to one Jadunath (father of Jivan and grand-father of Defendants Nos. 1-4 and Prokash). Jadunath died intestate, by a decree in Suit No. 749 of 1911 (in which Jivan. Defendant No. 1, and others were parties) the immovable properties claimed by the Thakur, except some bustee land, were exclusively allotted to Defendant No. 1 (Plaintiff in that suit). Paragraph 18 of the written statement: alleges that the suit had been instituted falsely and maliciously by Jivan against the other Defendants, in the name of his son Prokash as next friend, to harass them and was not at all for the benefit of the Thakur and, in para. 19, Defendants Nos. 1-4 submit the suit should be dismissed and the costs be specially directed to be paid by Jivan. It does not appear whether Jivan was furnished with a copy of this written statement.

27. On May 29th, 1941, the suit was dismissed for want of prosecution. On December 18th, 1941, the order for dismissal was set aside.

28. Probate of the alleged Will and codicil was never obtained; it is manifest that the establishment of the claims made in the plaint depended upon proof of the Will and codicil and grant of probate being obtained. Mr. Banerjee was a stranger to the suit, he had no knowledge of its subject-matter and had to depend upon those by whom it had been instituted to supply him with all information.

29. It is common ground that Messrs. Charu Chandra Bose were the attorneys

for Prokash. Between January 9th, 1939 and April 29th, 1941, Mr. Banerjee wrote about 12 letters, several were marked "urgent," some addressed to Prokash and others to his attorneys, stating he had been advised by Counsel that success in the depended on the Will and codicil being proved and probate obtained, and requesting that this be done and also that he be supplied with materials and evidence of execution. No reply any sort was sent by Prokash, and many letters addressed to the attorneys remained unanswered. On December 19th, 1939, the attorneys wrote to Mr. Banerjee that Counsel, who drafted the plaint, had advised probate could be taken out at the time of the passing of the decree in the suit. No information was given as to execution of the Will. On June 5th, 1941, the attorneys wrote that the Will and codicil been sent to the Administrator-General of Bengal who had been requested to apply for late. It is known, especially to attorneys-at-law, that the Administrator-General will not and cannot make such an application unless placed in funds for the purpose. No funds furnished, see the Administrator-General's letter, addressed to the attorney for Defendants Nos. 1 to 4, dated February 21st, 1942. No real step was taken by Prokash or the attorneys to obtain a grant of probate and no grant was obtained or even application made for it and Banerjee was not furnished with materials and evidence to make an application for a grant. In January and February, 1942, Mr. Banerjee several letters addressed to Jivan and Pro asking them to attend Court with the Will and necessary evidence, but they failed to comply with these requests and did not reply to the latter letters.

30. On June 26th, 1939, the attorneys wrote their client was trying to collect information concluded "please therefore proceed with suit." On June 5th, 1941, they again wrote to Mr. Banerjee "to proceed with the suit." V respect to the Will and codicil, on April, 1941, Mr. Banerjee wrote to the attorneys "Please ask your clients to get them probated early as possible, as without which the above suit is likely to be dismissed." The word "clients" clearly meant Jivan and Prokash; no reply was made to this letter and the attorneys never wrote to say that Jivan was not their client.

31. In January, 1942, the suit was approaching trial. In his letter dated January 8th, Mr. Banerjee informed the attorneys it would be in the list before Mr. Justice Ameer Ali on the 9th instant and "as your client desired me to proceed with the suit, please ask him to attend Court tomorrow at 11 A.M. with such evidence as he may desire to adduce, failing which the suit is likely to be again dismissed." On January 9th, 1942, Mr. Banerjee wrote to Jivan that the suit would be in the Peremptory List on the 16th instant and added, "As you want me to proceed with the suit, please see me with necessary papers and attend Court punctually at 11 A.M." The letter concludes that a copy of it was being forwarded to "your solicitors, Messrs. Charu Chunder Bose for their information." A copy was sent to the attorneys who made no reply and left unchallenged the statements that Jivan was their client and wanted Mr. Banerjee to proceed with the suit. The suit came before Mr. Justice Ameer Ali on January 16th, when it was adjourned to January 20th. Mr. Banerjee wrote to the attorneys that he had been directed by the Judge

to inform them and their client, Prokash, of the adjourned date; as their client desired him to proceed with the suit it was of the utmost importance he should attend Court on January 20th with the original Will and codicil; unless their client helped and gave evidence it would not be possible to go on with the hearing; the attorneys should ask their client to attend Court with the Will and codicil; and meanwhile to let the writer know what steps had been taken by the client to take out probate. A copy of this letter was forwarded to Prokash. No reply was received.

32. On February 2nd, 1942, Mr. Banerjee wrote a letter to Jivan and Prokash that the suit had been adjourned to February 4th and he had been directed by the Judge to convey this information to the addressees; the letter concludes that if the suit were again dismissed for want of evidence Mr. Banerjee would not be responsible and Jivan and Prokash might be held liable for costs. A copy was sent to the attorneys. The suit was adjourned on several occasions upon each of which similar letters, (except the reference to the responsibility for costs) regarding further adjournments and the same directions by the Judge, were written by Mr. Banerjee to Jivan and Prokash on February 4th, 6th, 13th and 18th : in each instance copies were sent to the attorneys. No replies or communications were received from Jivan, Prokash or the attorneys. None of them appeared in Court and the Will and codicil were not forthcoming upon any of the days to which the trial of the suit was adjourned. On February 24th, 1942, Ameer Ali, J., dismissed the suit and ordered that general costs as between attorney and client since Mr. Banerjee's appointment be paid in equal shares by Defendants Nos. 1-5 (including Jivan); Defendants Nos. 1-4 had a right to proceed and recover from Jivan and Prokash; the costs of Defendant Nos. 1-4 to be paid by Jivan and Prokash; the costs of obtaining restoration of the suit to be paid by the same persons.

33. Sec. 35 (I) of the CPC provides that costs shall be in the discretion of the Court which should have full power to determine by whom they are to be paid but, by sub-sec. (2), where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The order for costs is one which does not follow the event and since Ameer Ali, J., did not give his reasons for it, as required by sub-sec. (2) when the appeals first came before us, we remanded the matter to him to state the reasons for his order.

34. The learned Judge's reasons for his order have now been given; shortly they are: the suit by Prokash, as next friend, is an attack by Jivan and his son in the disguise of the deity against the other part of the family which was never intended to be prosecuted to a final conclusion; the appointment of Mr. Banerjee as next friend in place of Prokash did not disserve Jivan and Prokash from the suit; the next friend could not act without the active support and management of Jivan and Prokash; they had the Will and it was for them to obtain probate of it and to give such evidence as was necessary; the intervention of Mr. Banerjee as next friend of the deity did not prevent the deity being the puppet of Jivan and

Prokash; the correspondence shows, as the fact was, that Jivan and Prokash acting through one firm of attorneys; at least three opportunities were given but neither of these two persons favoured the Court with their appearance; and Jivan was considered to be an unsuccessful party and Prokash the real party Plaintiff.

35. The order for costs is challenged solely with respect to that part by which Jivan and Prokash were directed to pay the costs awarded against Defendants Nos. 1 to 4 and the costs incurred by them.

36. There is no contest or dispute with respect to the several letters written by Mr. Banerjee to Jivan, Prokash and the attorneys and the few letters he received from the attorneys. It is agreed all these letters were written to and received by the persons to whom they are addressed : further, that there were no letters, save those which were produced before Ameer Ali, J., copies of which are printed in the paper-book.

37. The allegation in the written statement, that the immovable properties claimed as being owned by the Plaintiff Thakur formerly belonged to Jadunath, is borne out by the decree, dated February 10th, 1913, in Suit No. 749 of 1911, in which Jivan and most of the members of the family were parties. This decree must have been known to Jivan. At all times Prokash lived in the same house with his father. Mr. Banerjee was ignorant of the facts and matters arising in the suit and in order that he could act in the interests of the Thakur, as the next friend appointed by the Court, he had to depend upon information and help from others. It is convenient to examine separately the respective positions of Jivan and Prokash.

38. Prokash instituted the suit as the Plan Thakur's next friend and affirmed the correct of the statements in the plaint. Messrs Charu Grandier Bose, admittedly, were attorneys. The attorneys informed Mr. Banerjee by letters dated June 26th, 1939 and June 5th, 1941, that Prokash wished him to proceed with the suit. In several letters Mr. Banerjee asked Prokash and his attorneys, to obtain probate of the Will and codicil or to furnish him with materials and evidence to prove execution and attestation so that he could apply for a grant, which was essential in order to establish the claims in the suit, and also to be given help and evidence to prove the various allegations in the plain: See letters dated January, 9th and 19th, May 23rd, June 16th, 23rd and 29th, September 12th, November 22nd and 29th (two letters), 1939, March 4th, April 29th, 1941, January 8th, 9th and 16th, February 2nd, 4th, 6th, 13th and 18th, 1942. The only step taken by the attorneys was to send the Will and codicil to the Administrator-General, on or shortly before June 5th, 1941, requesting him to obtain a grant but they did not put him in funds to make an application although they must have known he would take no action unless this was done. This step was nothing more than a pretence to obtain probate. Prokash replied to no letters and neither he nor his attorneys supplied Mr. Banerjee with any information, materials or evidence to obtain a grant of probate or to establish the allegations in the plaint. As late as June 5th, 1941, the attorneys wrote to Mr. Banerjee that their client desired him

to proceed with the suit. In January and February, 1942. Prokash was asked, in several letters, to go to Court, taking the Will with him, upon the dates to which the trial of the suit was repeatedly adjourned. By letter dated February 2nd, 1942, he was warned that, if the suit was again dismissed for want of evidence he might be held liable for costs. He failed to appear in Court or to reply to any letters.

39. The only inferences which can be drawn from the foregoing is that although Prokash affirmed the correctness of the statements in the plaint he did not have, and did not intend to obtain, evidence to bear out the allegations in the plaint; when the requests were made to Mr. Banerjee to proceed with the suit, Prokash knew it would ultimately be dismissed for want of evidence; he used the Thakur merely as a puppet when he instituted the suit and when he pressed Mr. Banerjee to proceed with it; and it was never intended that the allegations and claims in the plaint would be ventilated in Court. He must have known that the contesting parties were compelled to incur costs to resist the claims made, against them. The only conclusion is that the suit was solely commenced and utilised to cause annoyance, nuisance and expense to Defendants Nos. 1-4. In my view Prokash's conduct amounts to an abuse of the process of, the Court.

40. Now as regards Jivan. At all material times he lived with Prokash; he did not appear in the suit; he must have known of the decree in the Suit No. 749 of 1911, in which he was a party, whereby the immovable properties alleged in the plaint to belong to the Thakur had been allotted to Jadunath, his own father; on April 29th, 1941, Mr. Banerjee wrote to the attorneys who, admittedly, were acting for Prokash, requesting them to ask "your clients" to get probate of the Will as early as possible; "clients" clearly means Jivan and Prokash; the attorneys did not reply to this letter and did not deny that they were acting for Jivan; on January 9th 1942, Mr. Banerjee wrote a letter to Jivan in which he refers to Messrs. Charu Chunder Bose as "your solicitors" and stating that he, Jivan, wanted the writer to proceed with the suit; Jivan did not reply to the letter nor deny the correctness of the statements: five letters were written between February 2nd and February 18th, 1942, by Mr. Banerjee addressed to Jivan and Prokash, to which reference has already been made, in which, in one letter, he warned the addressees that if the suit were again dismissed for want of evidence they might be held liable for costs and, in all the letters, requesting them to go to Court, take the Will with them and produce the evidence and stating that he had been directed by Ameer Ali, J., to ask both to attend the Court. Copies of these letters were sent to the attorneys. No replies or communication were received by Mr. Banerjee with respect to these letters.

41. From the foregoing the conclusions arise that Jivan, as well as Prokash, requested Mr. Banerjee to proceed with the suit and that Jivan was also the client of the attorneys; the attorneys could only act both for Jivan and for Prokash when their interests were not in conflict; Jivan was associated with Prokash in everything done with respect to the suit; and both of them, in substance and in

fact, were the Plaintiff. The observations which I have made with respect to the suit and Prokash's connection with it are applicable in a like measure to Jivan who also is guilty of an abuse of the process of the Court.

42. Before the order for costs was made against Jivan and Prokash, they were informed by letter that, if the suit was again dismissed for want of evidence, they might be held liable for costs and they were fully aware of the consequences. They were also informed of the several dates to which the suit was adjourned and every opportunity was afforded to them to be present at the hearing. No complaint is justified that the order was made without an opportunity being given to them to attend Court to resist the order.

43. Reference can now conveniently be made to the authorities. In *Hayward v. Giffard* 4 M. & W. 194 (1838), Lord Abinger expressed the opinion that an order for costs could not be made against a person, not a party to a suit, in the absence of anything in the nature of barratry, maintenance or contempt of Court. In the *Queen v. Green* 4 Q. B. Report 646 at p. 652 (1843), Sir William Follet said, "where it is clear that a man of straw is purposely put forward, the real party ought to pay costs" and Lord Denman's observations are to the same effect. In *Jointee Chunder Sein v. Anundo Lall Doss* 14 W. R. (A. O. J.) 1 (1865), Peacock, C. J., was of opinion that a person who is not a party but who has been guilty of abuse of the process of the Court can be ordered to pay the costs. Norman, J., after referring to and citing *Green's* case 4 Q. B. Reports 646 (1843), observed at p. 5 "I think that where a person is put forward as Plaintiff--who has no interest of any Sort--who is a mere name--whose very existence, as I may say, is more than doubtful--the party using the name as Plaintiff, is guilty of a contempt and abuse of the process of the Court. The Court can and will compel the party who is really the Plaintiff to pay costs, although he was not named as a party in the original proceedings." The last authority was followed in *Ketnkey Charan Banerjee v. Sin. Sarat Kumari* 21 C. W. N. 826 (1917) a decision of an Appellate Bench of this Court on appeal from the Original Side; an adjudication of insolvency was made upon an application by a woman, alleged to be a creditor, which subsequently was annulled; it was also found that the woman was not a creditor but was put forward merely as a blind for two other persons; it was held that, in the circumstances of that case, the persons behind the applicant were guilty of abuse of the process of the Court and the costs of the debtors were recoverable from those persons.

44. *Hayward's* case 4 M. & W 194 (1838) is not an authority for the proposition that an order for costs cannot be made against a person who is not a party; on the contrary, it suggests, in a proper case, that such an order can be made and *Green's* case 4 Q. B. Reports 646 (1843) supplies an instance when it should be made. The two decisions of this Court, which I have cited, lay down that, when in a suit or proceeding, a person who is not a party but uses the name of a man of straw as a Plaintiff or uses the name of another as a blind for himself, such conduct is an abuse of the process of the Court and that person can be ordered

to pay the costs which, ordinarily, would be awarded against the person whose name has been used as a party.

45. The suit, out of which these appeals arise was in the name of the Thakur as Plaintiff but, in substance and in fact, was a suit by Jivan and Prokash who used the Thakur's name as blind. Their acts and conduct connected the institution and progress of the proceedings, are an abuse of the process of the Court and the order against them in respect of costs was properly made and is justified by authority.

46. Prokash was not a party and the order against him is covered by the decisions to which reference has been made. Jivan was a Defendant and since the suit was dismissed, he was nominally a successful party. It was conceded by learned Counsel on his behalf that, in a proper case, an order for costs can be made against party in whose favour a decree is passed. When such party is one of two persons by whom, in fact, the proceedings were instituted, if the circumstances justify, as in the present case an order for costs being made against both persons, the incident that one of them is a party cannot prevent an order being made against him when, had he not been a party, such order would be made.

47. There is one further aspect in these appeals. The question of costs in every case is a matter for the discretion of the Judge, which discretion must, of course, be properly exercised. An Appellate Court will not interfere with the exercise of this discretion, unless it is shewn that the Judge of first instance was wrong, even when the Appellate Court might have exercised the discretion differently. There is nothing to justify a finding that Ameer Ali, J., was wrong in exercise of his discretion as to costs, which alone is sufficient to entail dismissal of the two consolidated appeals. But, in the present instance, the discretion as to costs was correctly exercised.

48. Since the appeals by Jivan and Prokash upon their merits it is unnecessary to express a finding upon the contention, on behalf of the Respondent, that no appeal lies solely against an order for costs. It is convenient, however, to state shortly an opinion upon this contention.

49. It is now settled law that an appeal against costs only does lie when the costs are awarded by a decree, if the order as to costs involves a question of principle; vide Mulla's Code of Civil Procedure, 11th Edition, at page 153, where the matter is succinctly discussed and the relevant decisions are quoted. In the present appeals there are principles, viz., whether a successful party and a person who is not a party can be ordered to pay the costs of the other successful parties in a suit. I agree that these two consolidated appeals should be dismissed and with the order for costs expressed by my learned brother.