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**(1953) 03 CAL CK 0006**  
**In the Calcutta High Court**  
**Case No : Civil Revn. No. 3151 of 1952**

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| Rebati Ranjan Chakravarty and Others | APPELLANT  |
| Vs                                   |            |
| Umaprasanna Mukherjee and Others     | RESPONDENT |

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**Date of Decision :** 27-03-1953

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 40 Rule 2, Order 43 Rule 1, 115

**Citation :** AIR 1953 Cal 574 : 58 CWN 193 : (1955) 1 ILR (Cal) 237

**Hon'ble Judges :** G.N. Das, J; Debabrata Mookerjee, J

**Bench :** Division Bench

**Advocate :** Sen Gupta and Jatis Chandra Guha, for the Appellant; Sitaram Banerjee and Hari Prasanna Mukherjee, for the Respondent

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## Judgement

G.N. Das, J.—This is a petition, in revision on behalf of defendants nos. 1 and 2 and is directed against an order of Mr. P.M. Lahiri, learned Subordinate Judge, Birbhum, dated the 8-12-1952, directing the payment to the Receiver, who is opposite party No. 1 in this Rule, his salary at the rate of Rs. 5007- per month from 20-1-1951 prospectively till his discharge.

2. The petitioner, opposite parties Nos. 2, 3, and 4 were co-trustees of two trust estates known as Brajabala Trust Estate and Ram Ranjan Trust Estate.

3. As was to be expected, the trustees had their differences with the result that on 13-11-1950, two Title Suits Nos. 110 of 1950 and 111 of 1950 were instituted in the Court of the Subordinate Judge, Birbhum, by the plaintiff opposite party No. 2 against the petitioners as defendants nos. 1 and 2 and opposite parties Nos. 3 and 4 defendants Nos. 3 and 4. In these suits, the plaintiffs prayed for removal of the trustees and appointment of new trustees for the framing of a scheme of management, for the appointment of a Receiver, for the issue of injunction, for accounts and for other incidental reliefs. On the same day, an application was made by the plaintiff for the appointment of a Receiver. On 18-1-1951, Mr. Nishakar Choudhury, learned Subordinate Judge of Birbhum

made an order appointing the opposite party No. 1, Uma Prasanna Mukherjee, B.L., Honorary Magistrate, Suri, as Receiver "for managing the Brajabala Trust Estate and Ram Ranjan Trust Estate during the pendency of the suits Nos. 110 and 111 of 1950." The Receiver was directed to furnish security of Rs. 40,000/- within 25-1-1951. The learned Subordinate Judge further directed that "the Receiver will get Rs. 500/- per month as fixed remuneration with effect from the date on which the security is accepted by the Court and on acceptance of the security, the possession, of the trust property will be vested in him."

The last sentence of the order which is just quoted is somewhat unhappy. It is contrary to the general rule that the Receiver has to take possession and assume charge of the estate in respect of which he is appointed Receiver and that he cannot be deemed to be in possession merely because he furnishes security. On 20-1-1951, the Receiver furnished requisite security which was accepted and a Writ was issued to him on the terms mentioned in the Writ. On 22-1-1951, a petition was filed before the learned Subordinate Judge for stay of proceedings. The learned Subordinate Judge directed the matter to be put up on 25-1-1951. The Receiver was directed to report by the said date if he had exercised any act of possession. On 22-1-1951, the petitioners filed an appeal in this Court against the order of the learned Subordinate Judge appointing the opposite party No. 1 as Receiver. This was registered as First Miscellaneous Appeal No. 36 of 1951.

On 22-1-1951, the Receiver went to Hetampur to take possession but he failed to get possession, either of the "Sherista" of the Trust Estates or of the papers relating thereto. On 24-1-1951 the Receiver made a report to the Court for direction as regards the papers of the trust estates. On the same date, a telegram was received from the petitioners' learned Advocate in this Court, informing the petitioners' Pleader in the Court below that this Court had admitted the appeal filed by the petitioners and that this Court had granted "ad interim" stay of further proceedings. On receipt of the telegram, the learned Subordinate Judge "made a further order on the same date directing that the matter be put up on 25-1-1951.

The order which was made by this Court was an "ad interim" order staying possession of the Receiver if he had not already taken possession. This Court also called for a report from the learned Subordinate Judge. On 27-1-1951, the Receiver appeared before the learned Subordinate Judge through his Pleader, Mr. R.P. Mukherjee. On 29-1-1951, the Receiver filed a statement of the realisations made by him. The statement is dated 25-1-1951. The statement shows that upto 24-1-1951, the Receiver had realised a sum of Rs. 20/87- in respect of the Brajabala Trust Estate and a sum of Rs. 657117- in respect of Ram Ranjan Trust Estate, aggregating a sum of Rs. 86/37-. The statement also shows that before 25-1-1951, the Receiver had realised a further sum of Rs. 1,030-/14/-. The total sum which was realised by the Receiver upto 25-1-1951 aggregated to a sum of Rs. 1117/1/-.

It does not appear, nor has it been suggested that the Receiver has realised any

other sum in respect of the trust estates. The learned Subordinate Judge then proceeded to make an enquiry on the question as to how far the Receiver has been able to taken possession. After enquiry into this matter, by Order No. 48, dated 10-2-1951, Mr. Malli Nath Mukherjee, the learned Subordinate- Judge of Birbhum, reported that the Receiver was not allowed possession by the principal defendants who are in possession, that on 22-1-1951, the Receiver had realised a sum of Rs. 20/8/- and that on 24-1-1951, he had realised a further sum of Rs. 65/11/-. The learned Subordinate Judge further stated that this was all the realisation the Receiver had made before the order for stay was received.

In the result, the learned subordinate Judge was of the opinion that the Receiver had taken possession only of a part of the estate and that he had not taken possession of any of the properties in the "Khas" possession of the trustees. This report was sent by tne learned Subordinate Judge on 18-2-1951. It appears that on 7-7-1951, the Receiver who had filed his accounts of the trust estates made an application before the learned Subordinate Judge for direction in the matter of the passing of accounts, and as regards the salary which he was entitled to. By an order dated 26-7-1951, the learned Subordinate Judge was of the opinion that the Receiver was entitled to a sum of Rs. 693/8/- on account of his salary and costs upto 28-2-1951.

The learned Subordinate Judge also directed that in regard to the salary for the months of March to June, 1951, the plaintiff must deposit a sum of Rs. 2,000/-. There was no clear direction as to whether the Receiver was entitled to the salary for these months. Against this order of the learned Subordinate Judge dated 26-7-1951, the petitioners moved this Court in revision. It appears from the affidavit in support of this petition that the petitioners did not press the petition then filed against the order of the learned Subordinate Judge dated 26-7-1951 and that it was accordingly dismissed. There is no counter-affidavit on this point.

4. Thereafter certain proceedings for contempt were initiated against the petitioners-defendants nos. 1 and 2. This matter came up to this Court giving rise to Criminal Misc. Case No. 250 of 1951.

This Criminal Misc. case was disposed of by a Bench of this Court on 27-11-1951. The Bench observed:

"The proceedings for contempt were misconceived and that the Receiver was in possession merely of a small part of the estate and that the rest of the estate was in the possession of the petitioners."

5. As I have already said, a Rule was issued by this Court, being Civil Rule No. 225 (M) of 1951, calling upon the respondents, that is, the plaintiffs opposite parties and the other co-trustees to show cause why the Receiver should not be restrained from taking possession and that an "ad interim" stay was granted. This Rule came up for hearing on 14-12-1951. This Court directed that pending the hearing of the Misc. Appeal, the "Receiver would not possess any part of the trust estate. On 5-1-1952, by an order No. 118, the learned Subordinate Judge

Suri, Birbhum, passed the Receiver's accounts upto December, 1951. The learned Subordinate Judge also permitted the Receiver to appoint a learned Advocate to appear in the Misc. Appeal on his behalf. The order of the learned Subordinate Judge is signed by Mr. R.P. Mukherjee, the Pleader, acting on behalf of the Receiver.

On 30-5-1952, a joint petition of compromise was filed in Misc. Appeal No. 36 of 1951. In paragraph 2 thereof, as appears from the petition in revision, the parties agreed that a token salary should be paid to the Receiver and the Receiver should be discharged. On 2-6-1952, the Misc. Appeal was disposed of in terms of the joint petition of compromise. This Court granted leave to the guardian of the minor parties to enter into compromise and directed that the Misc. Appeal and the suit should be disposed of in terms of the petition of compromise. As the joint petition was filed in the Misc. Appeal arising out of an order for appointment of Receiver, this Court further directed that the petition of compromise should be sent down to the Court below "with a direction to pass a decree in terms of the petition of compromise." As regards the prayer for discharge and remuneration of the Receiver, this Court observed:

"We do not think it proper to pass any order." The records were received back in the Court of the learned Subordinate Judge, Birbhum on 14-7-1952. In the meantime, on 1-7-1952, the Receiver filed a report praying for directions on certain matters. In this report, the Receiver asked the Court for direction as regards his discharge subject to certain payments and a report to this Court. The order which was passed by the learned Subordinate Judge on the same date does not show that the Receiver really pressed for a discharge although the order shows that he was heard at length. Certain other directions were obtained from the Court. It appears from the order sheet that though learned Advocates of this Court had gone to Suri to have the suit disposed of in terms of the petition of compromise, the learned Subordinate Judge did not find time to comply with their request to dispose of the suit in accordance with the terms of compromise.

The learned Subordinate Judge, however, took up the question of the Receiver's salary and by an order dated 8-12-1952, directed that the Receiver would be entitled to his salary from 20-1-1951 till his discharge. By this order, the learned Subordinate Judge did not allow the Receiver the pay of a clerk which was alleged to have been kept by him. The propriety of this order has been challenged in this revision petition by the petitioners. The petition purports to be one u/s 115, Civil P.C., and under Article 227, Constitution of India.

6. Mr. Purushottam Chatterjee, learned Advocate who has appeared on behalf of the opposite party No. 1, the Receiver appointed in the suit, has raised a preliminary objection that the petition is incompetent because an appeal lay to this Court against an order of the learned Subordinate Judge dated 8-12-1952. His contention is that the order of the learned Subordinate Judge comes within Order 40 Rule 1(d), Civil P.C., and against an order made under that rule, an appeal lies under Order 43, Rule 1(s), Civil P. C. The order which was passed on

this case was an order made in pursuance of a report by the Receiver praying for certain directions, one of the directions being the fixation of his salary. The Court fixed the salary of the Receiver under the provisions of Order 40, Rule 2. If the order is one under that rule, then under Order 43, Rule 1 (s), no appeal lies.

A similar question came up for decision by this Court in the case of -- "Thomas Cunliff Tweedie v. Pokea Khatun" AIR 1915 Cal 74 . In that case the facts were that Mr. Tweedie had been appointed a Manager of Hatooria Estate at a remuneration of 12 1/2 per cent, on the collections of the estate. After Mr. Tweedie had assumed charge and began to collect rents and profits of the estate, his possession was interfered with by a common Manager who made large collections. The result was that Mr. Tweedie failed to make proper collections. Thereafter Mr. Tweedie moved the Court for direction for payment to him of 12 1/2 per cent, of the realisations made by the Common Manager. This matter was considered by the learned Subordinate Judge.

The learned Subordinate Judge was of the opinion that Mr. Tweedie would be entitled to 12 1/2 per cent on his own collection and in addition 6 per cent on the collection made by the Common Manager. Being aggrieved by this order, Mr. Tweedie, the Receiver, moved this Court in revision. On behalf of the opposite party, an objection was taken that the order made by the learned Subordinate Judge was an appealable order because the order came within Order 40, Rule 1(d). The Bench consisting of Sir Herbert Carnduff and Richardson JJ. was of the opinion that the order did not come within Order 40, Rule 1 (d) but came within Order 40, Rule 2 and in that view held that no appeal lies against this order of the learned Subordinate Judge. This case therefore, -supports the view that no appeal lies in this case against the order of the learned Subordinate Judge dated 8-12-1952.

7. I may add that in the case of --"Mohini Mohan v. Baroda Kanta" 14 Cal LJ 445 a Bench of this Court held that no appeal lies against the order giving direction to the Receiver in the matter of passing his accounts.

8. On behalf of the opposite party, reliance was placed on the decision in -- AIR 1942 64 (Nagpur) (C). In that case, a Bench of the Nagpur High Court was of the opinion that an order re-fixing the remuneration of the Receiver was an appealable order. The view taken by the Bench was that if the original order for appointment contained a direction as regards the salary, that original order was appealable as being one made under Order 40, Rule 1. In that appeal, the amount of salary of the Receiver could have been called in question. The Bench was of the opinion that there was no reason why a similar view would not be taken of the supplementary order made varying the salary.

In my opinion, the reason for the decision is not sound. The original order of appointment is clearly appealable under Order 40, Rule 1. In that appeal the whole of the order is liable to review by the Court of Appeal. A similar view cannot be taken where the only question before the Court is one under Order 40,

Rule 2 fixing the remuneration of the Receiver. Order 43, Rule 1(s) distinctly limits the appeal to an order made under Order 40, Rule 1 or under Order 40, Rule 4. An order made under Order 40, Rule 2 has not, however, been made appealable.

9. Our attention was also drawn to the case of -- Ali Ismail Doodha and Others Vs. Momin Bibi and Others, (D). That case, in my; opinion, does not support the opposite party No. 1. That was a case where the question was whether the order was appealable under Clause 15, Letters Patent. In dealing with that question, Harries C.J. was inclined to accept the submission made by Mr. S. C. Mitter, learned Counsel appearing in that case, that if the order comes under Order 40, Rule 2, no appeal lies from that order and an order fixing the remuneration of the Receiver was not "per se" appealable under Order 43, Rule 1(s). In my opinion, the order which was passed in this case was not an appealable order and as such the preliminary objection raised on behalf of the opposite party no. 1 cannot be entertained.

10. As regards the powers of this Court to interfere with the order complained of, I do not feel any hesitation in coming to an affirmative conclusion. This case discloses a misconception on the part Of the Judge as regards the power of the Court to vary an order made by the Court fixing the salary of the Receiver. The learned Subordinate Judge seems to be of the opinion that the Court has no jurisdiction once the salary is fixed under Order 41, Rule 2 to vary the salary so fixed, in any event, the facts of this case pre-eminently call for this Court's interference under Article 227 of the Constitution.

11. The question then is whether on the facts of this case the order of the learned Subordinate Judge is justified or not.

12. The learned Subordinate Judge has given the following reasons in support of his conclusion. He has stated; (i) that this Court refused to discharge the Receiver (ii) that the Receiver took possession of a part of the estate and figured as a party in a certain case and had his accounts checked and passed, (iii) that his salary was fixed and cannot be reduced for no fault of the Receiver (iv) that such salary must be paid till his discharge and (v) that a contrary order would be unfair to the Receiver. I shall deal with these reasonings after I have stated my views as regards the powers of the Court to vary the remuneration of the Receiver, once it is fixed by the Court.

13. In order to decide this question, namely, the power of the Court to vary the order made by it fixing the remuneration of the Receiver, one has to bear in mind the reasons why the Receiver earns his salary, The practice, has been ordinarily to give the Receiver a percentage on the collections made by him. In the case of -- "Day v. Croft" (1840) 2 Beav 438 Lord Langdale, Master of the Rolls made a detailed enquiry; and came to the opinion that the ordinary rule in England was to pay the Receiver a percentage on the collections made by him. The idea obviously is that the Receiver earns his salary out of the collections which he

makes and it is proportionate to those collections.

In America, the position is somewhat different. In America the rule is based on the principle of compensation. In the case of -- "Lichenstein v. Dial" 68 Miss 54 (SO) it was held that instead of compensation at a certain percentage upon receipts, the Receiver is paid compensation according to the circumstance of each case after consideration of the responsibility assumed and the skill and labour employed by the Receiver the controlling circumstance being the fair value of the time and labour required in the performance of his duties as measured by the ordinary business standards, and the degree of activity, integrity and dispatch with which the work has been performed.

14. In this country, we are governed by the provisions of Order 40, Rule 2 Civil P.C., which states that the Court may by general or special order fix the amount to be paid as remuneration for the services of the Receiver. In other words, the Receiver earns his remuneration because of the performance of the services to the estate in respect of which he is appointed a Receiver. Order 40, Rule 2, leaves a discretion for the Court either to pay the Receiver a percentage on the collections or a fixed remuneration for his services. That such fixed remuneration may be paid to the Receiver was decided by this Court in the case of -- "Sripat Singh v. Ram Sarya Prasad" AIR 1923 Cal 516 . It was observed that though generally the Receiver is paid on the commission basis, he may be allowed a fixed salary for his services.

15. The question is whether the salary once fixed can be reduced by the Court under certain contingencies. That the Court had such a power to vary the remuneration fixed by the Court has been decided in the affirmative in American Courts. In -- "Farmer Loan and Trust Co." v. Central Railroad", 8 Fed 60 (H) it was held that although the Receiver's compensation may have been fixed to a salary; yet if his duty proves more arduous and onerous than originally expected either by the Receiver or by the Court, it is proper to grant him an allowance in addition to salary. in --"Potts v. Leighton" (1808) 15 Ves 273 the Court varied the salary in favour of the Receiver when it was discovered that his work was more onerous. In the case of -- AIR 1915 Gal 74 to which I have already referred, the Subordinate Judge had varied the order made by him fixing the remuneration of the Receiver. This Court seemed to be inclined to agree with the view of the learned Subordinate Judge.

16. There is, therefore, power in the Court to vary the salary once fixed by the Court. The question is whether the Court could exercise its powers to the detriment of the Receiver, in my opinion, there is no reason why, if the Receiver can earn a higher salary in case his duty proves more onerous, the Court will have no power to reduce his salary in a case where the Receiver is sitting idle, as in this case, A somewhat similar case came up for adjudication in the case of -- "Kickey iv. Parol S. & C. Co." 32 Mont. 143 where it was observed that a Receiver should not be allowed compensation for work performed by him either after the reversal of the order of appointment and the filing of the mandate in the lower

court, and it was the duty of the Receiver in such a case to immediately present his final accounts and ask for his discharge.

The case cited referred to a case of reversal of the order appointing the Receiver. In such a case, the Court was of the view that it was the duty of the Receiver to pass his final accounts and to get his discharge. In a case like the present, where the Receiver's hands are restrained by an order of this Court directing that the Receiver shall not take possession, the same principles should, in my opinion, apply. In this case, as I have said, the Receiver merely realised rents to the tune of Rs. 86737- upto 24-1-1951, when, according to him, he had knowledge of the order for stay.

It is to be noted that the subsequent realisations made by him should not have been realised. At any rate," he has not made any realisation since 25-1-1951. By an order made by the learned Subordinate Judge, the Receiver was paid Rs. 693/8/-being his total dues on account of salary and costs upto the end of February 1951. Since then the only work he has done is to figure as a defendant in certain suits and to file his accounts and get the same checked and passed. Before us, no complaint has been made that the Receiver has sustained any other pecuniary disadvantage.

17. Mr. Chatterjee learned Advocate appearing on behalf of the Receiver has pressed his case upon what he called his legal right to his salary till his discharge. In my opinion, there is no such right in the Receiver to earn -his salary even though, to his knowledge, his possession and management of the estate are taken away from him. In my opinion, there is no reason why he should be allowed to go on earning his salary till his discharge is made. In my opinion, having regard to the facts of this case, it is sufficient to allow the Receiver a reasonable sum.

18. I may add that the law of master and servant cannot be invoked in the determination of the question, as was suggested by Mr. Chatterjee. Dr. Sen Gupta replied by contending that even so, there has been a frustration, of the contract of service.

19. Dr. Sen Gupta on behalf of the petitioner has submitted that his clients are not disagreeable to the payment of a sum of Rs. 2,000/- as the total sum payable to the Receiver on account of his remuneration and costs. In our opinion, this is a fair estimate of the amount to which the Receiver is entitled on the facts of this case. In my opinion, the reasons given by the learned Subordinate Judge do not support his conclusion. The learned Subordinate Judge was not right when he observed that the High Court had refused to discharge the Receiver. This Court merely stated that it was not proper to pass any order at that stage. The view of the learned Subordinate Judge was that the salary was fixed, and that as the Receiver could not act for no fault of his, it was fair that he should be entitled to his salary till his discharge. In my opinion, the proper course for the Receiver was to have taken proper directions from the Court whose officer he



was, instead of filing accounts from time to time, claiming salary at the rate of Rs. 500/- per month together with his incidental costs and the pay of a clerk who had no duty to perform. The reasons given by the learned Subordinate Judge are, in my opinion, entirely without any foundation. I am, therefore, of the opinion that we should set aside the order made by the learned Subordinate Judge and direct that the Receiver be paid a sum of Rs. 2,000/- for his salary plus incidental expenses. We desire to make it clear that the Receiver win not earn any further salary.

20. Mr. Banerjee learned Advocate appearing on behalf of the plaintiff opposite party has submitted that the learned Subordinate Judge was wrong in directing the plaintiff to pay Rs. 2000/- towards the expenses of the Receiver. In our opinion, the Receiver's remuneration should ordinarily come out of the estate in regard to which he was appointed Receiver. This was the view taken by this Court in -- AIR 1923 Cal. 516. In any event, on the facts of this case, there is no reason why the plaintiff should bear the burden of paying the salary of the Receiver. The remuneration of the Receiver which we have assessed at Rs. 2,000/- and the incident costs should come out of the estate.

21. Before we conclude we desire to point out that this Court by its order dated 2-6-1952 sent down the records to the Court below with a direction to pass a decree in terms of the joint petition of compromise. This Court gave leave to the parties to enter into the compromise of the suit and of the appeal pending before it. The records of this case reached the learned Subordinate Judge on 14-7-1952. It appears from the records that learned Advocates of this Court had been to Suri in order to have the compromise recorded but the learned Subordinate Judge could not find any time to pass what seems to us to be a formal order disposing of the suit in accordance with the direction made by this Court on 2-6-1952. In our opinion, the inaction of the learned Subordinate Judge has resulted in serious loss to the parties and the suit has remained undisposed of in spite of the specific directions by this Court made as far back on 2-6-1951.

To pass an order disposing of the suit in terms of the joint petition of compromise ought not to have taken the learned Subordinate Judge any length of time. We regret that the delay in this matter has resulted in serious prejudice to the parties. We direct the learned Subordinate Judge to comply with the directions of this Court made on 2-6-1951, and in case he is unable to act up to the direction of this Court, he is requested to submit to this Court a report why he is unable to comply with the order made by this Court as far back on 2-6-1952.

22. It remains for us to consider the question of costs in this revision case. In the case of -- 14 Cal L. J. 445 this Court made an order disallowing the Receiver his costs incurred in the Court below and made him personally liable for the costs of proceedings in this Court. In this case, the Receiver has taken up the position that the powers of the Court are not sufficient to disentitle him to any part of the salary which was fixed as his remuneration for the management of the estate. He has failed to get proper direction from the Court when he found that he was

sitting idle. On the other hand, he submitted accounts from time to time claiming salary at the rate of Rs. 500/- per month although all the active work that he did extended for about three days. In our opinion, it was his clear duty to obtain a clear direction from the Court when he found that his services were no longer required.

23. In these circumstances, we are of opinion that this Rule must be made absolute on the terms indicated above and that the petitioners will be entitled to costs of this Rule which we assess at 5 gms. to be paid by the Receiver personally.

24. Let the records be remitted to the Court below as early as possible.

Debabrata Mookerjee, J.

25. I agree.