

(1917) 03 CAL CK 0054
In the Calcutta High Court

Saradendu Mukerjee, Sole Executor to the Estate of his Late Father Harendra Nath Mukerjee under his Will APPELLANT

Vs

Charu Chandra Dutta and Others RESPONDENT

Date of Decision : 09-03-1917

Acts Referred:

Citation : 44 Ind. Cas. 870

Hon'ble Judges : Smither, J;Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal from a decision of the learned Additional District Judge of the Twenty-four Pergannas, dated the 5th February 1914, reversing the decision of the Subordinate Judge of the same place. The appeal before the learned Additional District Judge involved only one question on the merits, namely, as to the manner in which the Judge in the primary Court had dealt with the costs of the defendants Nos. 1 and 2. The learned Judge in the primary Court, considering all the circumstances, in the exercise of his discretion made a partial award to the defendants Nos. 1 and 2 of their costs in the suit. As to the remainder of their costs, he made no order and left them to bear them themselves. Against that decision, an appeal was preferred to the learned Additional District Judge, who reversed the decision of the learned Subordinate Judge and awarded to the defendants Nos. 1 and 2 the whole of their costs. The present appeal is preferred against that decision. The facts are these so far as they are material: One Suresh Chunder Gangully died in February 1907, having by his Will, made a few days before his death, dedicated the whole of his properties to a goddess to be installed at Benares. The form of the bequest which formed the subject of judicial decision has been held to be valid. The defendants Nos. 5 and 6 on the 29th September 1908, alleging that they had a 2/5th share of the properties left by Suresh Chunder, mortgaged it to the predecessor of the present plaintiff. That mortgage was transferred subsequently on the 27th September 1909 to the plaintiff who obtained a mortgage decree against the defendants Nos. 5 and 6. Then the plaintiff brought the present suit and the

Subordinate Judge held that the plaintiff under his mortgage decree was entitled only to the benefit of certain annuities that had been given to the mortgagors and that the rest of the property had been validly dedicated to the deity which was to be installed at Benares; and taking into consideration all the facts, the learned Judge made a partial award of costs to the defendants Nos. 1 and 2. Against that award, the defendants Nos. 1 and 2 appealed to the learned Additional District Judge and the learned Additional District Judge decreed the appeal. The learned District Judge has altogether overlooked the provisions of Section 35 of the Code of Civil Procedure. Section 35, Civil Procedure Code, provides that the costs of and incident to all suits shall be in the discretion of the Court; and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course, to say the least of it, for the Appellate Court to interfere with that discretion of the primary Court. This, I think, is well laid down by Sir Lawrence Jenkins, Chief Justice of Bombay, and Mr. Justice Candy in the case of *Parshram Bhawoo v. Dorabji Pestonji* 2 Bom. L.R. 254 where, having stated the general rule, the learned Chief Justice states that, where costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it and, secondly, that the Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. Those two propositions are amply established by the cases in England and, so far as I know, it is the general rule that has been consistently followed in this country. There are grounds of public convenience which render such a rule as one which ought to be adhered to. In many cases, it is an extremely difficult thing for a Judge to review all the circumstances to say how and in what manner the costs ought to be borne by and between the parties and, if the discretion of the Court in such a matter is interfered with by the Appellate Court, the number of appeals that would be preferred to the Appellate Court would be stupendous. It was never intended that a matter of that nature should form the subject of an appeal. Some question of principle must be involved on which the Judge failed to exercise his discretion. I think in this case that the learned Judge of the lower Appellate Court was not justified in interfering with the discretion of the primary Court in the award of costs.

2. The other question that has been urged as to the suit being barred by limitation is an interesting point. It is not necessary for us to decide that matter in the present appeal. A matter of such importance ought not to be decided unless it is necessary for the decision of the case. I always have a strong objection to decide a point that is not necessary for the purpose of the decision of the case before the Court. It tends to tie the hands of the Court on subsequent occasions when the matter becomes perhaps of more importance and perhaps the only question to be considered. I think the learned Judge was altogether wrong in allowing the appeal from the decision of the learned Subordinate Judge with reference to this question of costs only, which had been fully dealt with by the learned Subordinate Judge in the exercise of his discretion.

In my opinion, therefore, the present appeal should be allowed, the decree of the learned District Judge should be set aside and the decree of the Subordinate Judge restored. The respondent must pay to the appellant his costs in this Court and in the lower Appellate Court.

Smither, J.

3. I agree.