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*Wingfield*[1]; *Hill* v. *Administrator-General of Bengal*[2]; *De Nicols* v. *Curlier*[3]; *De Nicols* v. *Curlier*[4]; *De Nicols* v. *Curlier*[5]; *Winans* v. *Attorney-General*[6]; *Bonnaud* v. *Emile Charriol*[7].

Solicitors for the plaintiff: Mr. *C. P. D'Cunha.*

Solicitors for the defendants: Messrs. *Captain & Vaidya.*

*Suit dismissed.*

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(1) (1887) 36 Ch. D. 400.
(2) (1896) 23 Cal. 506.
(3) [1898] 1 Ch. 403.
(4) [1898] 2 Ch. 60.
(5) [1900] A. C. 21.
(6) [1904] A. C. 287.
(7) (1905) 32 Cal. 631.

## ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

1916.

*August* 22.

LAXMIBAI AND OTHERS (PLAINTIFFS) *v.* HUSSAINBHAI AND OTHERS (DEFENDANTS).*

*Commissioner—Accounts—Power of the Commissioner to decide questions of law in the taking of accounts—High Court Rules (Original Side), Rules 397, 399—Rules of the Supreme Court in England, Order LV, Rule 69—Redemption suit—Motion for directions to the Commissioner.*

The Commissioner to whom a suit is referred by a Judge on the Original Side of the High Court is entitled to decide questions of law which may arise while taking the accounts. It is not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of accounts. The parties objecting to the decision of the Commissioner should proceed in the ordinary course by filing exceptions to his report.

*Per* MACLEOD J.:—I must not be taken as holding that the Court, once a reference has been made to the Commissioner, loses all control over the proceedings until the Commissioner has made his report. There may be cases in which the Court may find it necessary to withdraw the proceedings from

* O. C. J. Suit No. 347 of 1912.

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the Commissioner and resume the hearing itself, but such cases must necessarily be of rare occurrence. It is a different matter to ask the Court to resume the hearing merely for the purpose of deciding certain questions which come within the powers of the Commissioner.

MOTION.

On the 12th December 1881, the Liquidator of the Nicholl Press and Manufacturing Co., Ltd., then in liquidation sold the mill premises to one Kissanram Ramanand. The land was held by the company under three Indentures of lease, and the Liquidator assigned to Kissanram, his heirs, executors, administrators and assigns the interest of the company under the said three Indentures. Ahmedbhoy Habibbhoy, the original defendant in the suit, advanced the money to Kissanram to enable him to effect the purchase from the Liquidator, and as security for the money advanced, the title-deeds of the property were deposited with him by Kissanram; and Ahmedbhoy was also allowed to go into possession of the mill premises. Thereafter Ahmedbhoy having opened an account in his books in the name of Kissanram worked the mill until it was burnt down in 1890. It did not appear that Kissanram took any part in the work or the management of the mill, but on the 25th August 1882 he gave a power of attorney to Ahmedbhoy in which it was recited that Kissanram had borrowed the money, being almost the whole of the consideration for the purchase of the mill from Ahmedbhoy on condition that Ahmedbhoy should have a lien on and the possession of the mill and the right to superintend the working thereof until the time all the money due to them with interest should be fully repaid.

At the time the mill was burnt down in 1890, it was not insured; three or four years afterwards the decayed machinery was sold for what it could fetch, while the

building of the mill was repaired and eventually let for godowns.

In 1896, a considerable portion of the property was again destroyed by fire. At this time it was insured for half the value. Ahmedbhoy recovered about Rs. 26,000 from the Insurance Company and spent that money and sundry other moneys in repairing the property.

Ahmedbhoy further appeared to have paid the ground-rent to the lessor till about 1902 obtaining receipts either in the name of the Nicholl Press or Kissanram. Since then he did not pay any rent for the remaining years on the ground that he was not the lessee himself, but was in possession only as an equitable mortgagee.

Kissanram died in 1887. On the 7th August 1911 the heirs and representatives of Kissanram assigned their rights under the assignment dated 12th December 1881 to the 1st plaintiff.

The plaintiffs as representing the original purchaser Kissanram brought a suit to redeem the property from the defendant Ahmedbhoy on proper accounts being taken. It was admitted by the defendant that he was willing to bring into the account the amount that he had as a matter of fact spent on the property and to account for the rents and profits he had actually received getting credit for the expenses incurred. A number of issues were raised, on which the Court recorded its findings. Issue No. 5 was raised as to the question whether the original defendant was bound to insure the property. Issue No. 6 was whether the defendant was bound to reinstate the property after it was destroyed by fire. On both the said issues the Court held in the negative in favour of the defendant. The suit was ultimately referred to the Commissioner,

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his Lordship Macleod J. making the following order :—

"It must be referred to the Commissioner to take an account of what is due to the defendant for principal and interest from 23rd October 1880 on the basis of the above findings. The defendant to account for all the rents and profits accrued from the property and to be given credit for all costs, charges and expenses properly spent by him in maintaining the property or working the mill."

The original defendant died after the said order was made, and his legal representatives were brought on the record as the defendants Nos. 6 and 7 being the receivers appointed in Suit No. 936 of 1914 brought for the administration of his estate. The defendants Nos. 6 and 7 brought in an account of the mortgage debt and filed it before the Commissioner, showing a balance of Rs. 16,73,072-2-0 due to the estate of the original defendant after giving credit for all the sums received. The plaintiffs filed objections amounting to Rs. 21,90,392-3-1. Objection against the original defendant having paid ground-rent in respect of the mortgage property alone amounted to Rs. 3,69,492-8-0. Objections against the payment of the insurance premia amounted to Rs. 30,467-8-3.

At the first hearing before the Commissioner on the 26th June 1916 the plaintiffs applied that instead of the Commissioner proceeding with the objections *seriatim*, as usual, he should allow the plaintiffs to group the items relating to ground-rent and insurance premia and proceed with the said items first. The 6th and 7th defendants objected to the Commissioner hearing these objections on the ground that they involved questions of law and as such should be determined by the learned Judge who tried the case in its earlier state.

The Commissioner was of opinion that he had power under the order of reference to go into the said objections even though they involved questions of law and adjourned the meeting to enable the 6th and 7th defendants to obtain directions from the Court.

The defendants thereupon moved the Court calling upon the plaintiffs to show cause why the aforesaid objections should not be determined by the learned Judge.

*Desai*, for the plaintiffs:—The defendants' application is misconceived: see *Maddeford* v. *Austwick*[1]. Pending an inquiry before the Master the Court will not interfere with his conduct. Dissatisfied party must wait till the report is made and then except to it. High Court Rules provide for special report: see Rules 397, 399. Directions can be given only if any such special report is made. The procedure laid down in Rule 399 is not followed by the party moving. The Commissioner has power to consider questions of law arising during the reference.

*Strangman*, for the defendants, in support of the motion:—The Court should adopt the same practice as is prescribed by the rules of the Supreme Court in England: see Order LV of those Rules headed "Chambers in the Chancery Division" and Rule 69: see Solicitors' Journal, Vol. XXXVI, p. 374 which shows that a Judge may give his opinion for the guidance of the Chief Clerk: see also *Sanguinetti* v. *Stuckey's Banking Company (No. 2)*[2] as to the necessity of directions to the Master before the usual foreclosure judgment is made.

MACLEOD, J.:—In this suit a decretal order of reference to Commissioner was made on the 7th November 1913 to take the following accounts, viz., an account of what

(1) (1840) 10 L. J. Ch. 105. (2) [1896] 1 Ch. 502.

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was due by the plaintiffs to the defendant for principal and interest on the mortgage mentioned in the pleadings on the basis of the findings on the issues therein from 23rd October 1880 and it was directed that in such account the defendant should be debited with all the rents and profits accrued from the property mentioned in the pleadings and the sale proceeds of any machinery or building materials sold by him and be given credit for all costs and expenses properly incurred by him in maintaining the said property or working the said mills.

The first defendant died after the said order was made and the present 6th and 7th defendants are the Receivers appointed in Suit No. 936 of 1914 for administration of the estate. The Receivers brought in an account of the mortgage debt and filed it before the Commissioner. The account showed a balance of Rs. 16,73,072-2-0 due to the estate. The plaintiffs filed objections which amounted to Rs. 21,90,392-2-1. Out of these objections against the original defendant having paid ground-rent in respect of the mortgage property alone amount to Rs. 3,69,492-8-0. Objections against the payment of insurance premia amount to Rs. 30,467-8-3.

The 6th and 7th defendants objected to the Commissioner hearing these objections on the ground that there was no dispute as to the amount paid by the original defendant by way of rent and insurance and the question whether the original defendant could have credit for the payments was a question wholly of law or of mixed law and fact and should be determined by the Judge who tried the case.

The Commissioner, however, expressed the opinion that under the said reference he had power to go into the questions even though they involved questions of law or of mixed law and fact. Whereupon defendants Nos. 6

and 7 moved before me for an order that directions should be given to the Commissioner that it was not open to him to determine the objections of the plaintiffs in the accounts brought in by the 6th and 7th defendants challenging the right of the original defendant to have credit in the account for ground-rent and insurance premia paid by him, and that the decretal order of reference did not give him any power authorising him to decide the said questions, and, in the alternative, that, if in the opinion of the Court it was still open to plaintiffs to raise the objections, the same should be tried by the Court.

It is admitted that there is no precedent in this Court for such an application. Rule 397 of the High Court Rules provides that "The Commissioner shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient." Rule 399 provides that "The Commissioner, if he thinks fit, shall make a special report concerning any matter or thing arising in or about the matter referred to him, in order that the opinion of the Court may be taken therein." But unless the Commissioner makes a special report under one of these rules, in the ordinary course he proceeds with the reference and makes his final report in the matters referred to him.

It cannot be seriously contended that the Commissioner is not entitled to decide questions of law which may arise while taking the accounts. It is impossible for the Court while giving directions for the taking, for instance, of a mortgage account, to decide all questions of law, since many such questions do not arise until the accounts are filed, as in this case, where the mortgagee in possession claims that he is entitled to be given credit for certain costs and expenses as properly

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incurred by him in maintaining the mortgaged property. It must often happen, as in this case, that the Commissioner cannot arrive at a conclusion without deciding questions of law.

Mr. Strangman, however, on behalf of the 6th and 7th defendants, has asked me to adopt the same practice as is prescribed by the Rules of the Supreme Court. Order LV. of those Rules is headed "Chambers in the Chancery Division" and under Rule 69 "Any party may, before the proceedings before the Master are concluded, take the opinion of the Judge upon any matter arising in the course of the proceedings without any fresh summons for the purpose". On page 374 of Vol. XXXVI of the Solicitors' Journal there is a note relating to an unreported case in which an order was made by the Judge expressing an opinion under Rule 69 as to the principle on which a claim against an estate should be dealt with by the Chief Clerk. An appeal having been filed against this order, no order was made on the appeal, but that was to be without prejudice to the right of the appellants to raise, upon summons to vary the Chief Clerk's certificate after it had been made, the question upon which the Judge had given his opinion. The Lords Justices expressed strongly their opinion that upon an application of this kind under Rule 69 an order ought not to be drawn up, for this highly inconvenient result would follow that the order might be appealed from and the appeal might be carried even to the House of Lords and then after the certificate had been made the matter might be reheard on an application to vary the Chief Clerk's finding and there might be a second appeal to the House of Lords. That would be most inconvenient and oppressive. On such an application the opinion of the Judge was given for the guidance of his Chief Clerk and no formal order ought to be drawn up.

Therefore, if I admitted this application and adopting the practice prescribed by Rule 69 expressed an opinion on the points which are now in dispute regarding the payment of ground-rent and insurance premia, it might be that a party who was dissatisfied with that opinion might appeal against the order and the appeal might even be taken to the Privy Council. For, it would be problematical whether this Court would follow the opinion expressed by the Lords Justices in the case I have just referred to. It would be very undesirable to introduce an entirely new procedure with regard to references to the Commissioner, unless I was of opinion that I was entitled to adopt the procedure prescribed by Order LV, Rule 69 above referred to.

But I am decidedly of opinion that as in the High Court Rules there is no rule similar to Rule 69 of Order LV, it is not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of the accounts. From the Notes in the Annual Practice, it appears that applications under that Rule are rarely made. Moreover, it is not, in my opinion, in the interests of justice that parties to a reference should be at liberty to stop the proceedings by moving the Court to give its opinion on a point of law which has arisen which the Commissioner can decide.

It is certainly desirable that the Commissioner should deal with such questions, and the parties objecting to his decision then should proceed in the ordinary course by filing exceptions to his report.

But I must not be taken as holding that the Court, once a reference has been made to the Commissioner, loses all control over the proceedings until the Commissioner has made his report. There may be cases in which the Court may find it necessary to withdraw the

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proceedings from the Commissioner and resume the hearing itself, but such cases must necessarily be of rare occurrence. It is a different matter to ask the Court to resume the hearing merely for the purpose of deciding certain questions which come within the powers of the Commissioner.

In my opinion, therefore, the application must be dismissed with costs.

Solicitors for plaintiff: Messrs. *Matubhai, Jamietram & Madan.*

Solicitors for defendant: Messrs. *Payne & Co.*

G. G. N.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.*

1917. *April* 13.

CHANBASAPPA BIN DODAPPA DESAI (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* KALIANDAPPA BIN AYAPPA DESAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

*Limitation Act (IX 1908), Article 118—Hindu law—Adoption—Death of adopted son leaving a widow—Adopting mother making a second adoption during widow's life time—Adopted son in possession of the property to the knowledge of the plaintiff—Suit by reversioner of first adopted son to recover property challenging the second adoption brought after six years—Suit barred by limitation.*

One D a holder of Vatan and non-Vatan property having died without leaving a son, M his senior widow adopted a son A. A died a minor in 1895 leaving a widow. In 1901, M adopted defendant No. 1 as son to D and from the date of his adoption defendant No. 1 remained in possession of the whole estate to the knowledge of the plaintiff. In 1904, A's widow died. In 1912, the plaintiff claiming as the reversionary heir of A sued to recover possession of the property challenging the adoption of defendant No. 1. Defendant No. 1 pleaded limitation and adverse possession.

*Held*, that there had been no adverse possession sufficient to bar the plaintiff's suit but it was barred under Article 118 of the Limitation Act, 1908, as it was not brought within six years from plaintiff's knowledge of defendant No. 1's adoption.

* First Appeal No. 230 of 1914.