

M.A. Cunningham Sircar Vs. Fred Stephens

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Court : Kolkata

Decided On : Dec-05-1929

Reported in : AIR1931Cal51

Appellant : M.A. Cunningham Sircar

Respondent : Fred Stephens

Judgement :

Lort-Williams, J.

1. In this matter the petitioner asks that an order made by the learned Judge of the Small Cause Court should be set aside.

2. The point has arisen owing to these facts. There was a decree made in a suit brought by the plaintiff, F. Stephens, against T. and M. Bateman, who were the trustees under a certain deed. His suit was for the return of deposit made on an agreement for sale of the trust property. During the pendency of this suit, proceedings were taken by the present petitioner to have the Batemans removed from their trusteeship, and two or three days before the decree in Stephens' suit was passed, the Batemans expressed their desire and intention to resign from the trusteeship. Three days after the decree in Stephens' suit, the Batemans were removed by the Court in Mrs. Sircar's the present petitioner's suit, and she was appointed trustee. It is true that the Batemans were sued in Stephens' suit as trustees, but the decree was by consent in favour of the plaintiff and it stated:

If personal execution 16 weeks against defendant 1, no personal execution against defendant 2; stay of execution for three months.

3. It was not stated that the decree was 'to be realized out of the trust properties in the hands of the trustees.' Therefore this decree was in the form of a personal decree against the defendants, and the learned Judge of the Small Cause Court seems to have been impressed with this view of the case, because he says that somehow or other the decree was passed without the addition of the words to which I have just referred. And he states that he originally expressed the opinion that without amendment of the decree the plaintiff could not succeed in his application, to substitute the new trustee as defendant, and as a result the application was withdrawn with leave to make a fresh application. A fresh application was made and the learned Judge eventually came to the conclusion that a mistake was made at the time the decree was passed and held that, if such a mistake is discovered later, it is the duty of the Court 'to see to the nature of the relief' and to allow substitution. Consequently, he held that he had power under Order 22, Rule 10, to order that the petitioner's name be substituted as defendant in Stephens' suit.

4. It is clear that no amendment of the decree was possible, because it was a consent decree, and it is not suggested that either the Batemans or Mrs. Sircar consented to any such amendment, and the Court had no power to make it without consent. The decree therefore remains in its original form, and I am satisfied that it is in form a personal decree against the Batemans. I am confirmed in this opinion by the judgment in *In the matter of Shard* [1901] 28 Cal. 574. I am not satisfied that substitution after final decree in a suit can be made under Order 22, Rule 10, even in execution proceedings, but I am quite sure that there is no such power to make a substitution under that rule at a time after a final decree has been made and before any question of execution proceedings has arisen, which is the position in the present case, no application for execution having yet been made.

5. The question whether the trust has ever received the sum of money, for which Stephens brought his suit has never been decided, or whether the trust property is liable for its repayment. There are, in this case, grave allegations of breach of trust

'against the Batemans, as the result of which allegations, they were eventually removed from their position as trustees. In particular, it is argued that they had no power whatever to enter into any agreement for the sale of the trust property. In any case it has not yet been decided that this decree is binding upon the trust, nor has any opportunity been given for the present trustee to raise those points or to take the, point that the Batemans, at the time of the decree were not in a position to represent the trust. This distinguishes the present case from Norendra Nath Pahari v. Bhupendra Narain Roy [1895] 23 Cal. 374. Apart therefore from the question of law, I am satisfied that the procedure followed in this case would lead to most unsatisfactory results, and possibly to a denial of justice. I am satisfied that the Small Cause Court had no power to make this order in the circumstances of this case, and for that reason I must set it aside.

6. The rule is made absolute with costs.

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