

(1910) 01 CAL CK 0007

Calcutta High Court

Case No: None

Abbas Khan and Others

APPELLANT

Vs

Nibarani Dassi and Another

RESPONDENT

Date of Decision: Jan. 11, 1910

Acts Referred:

- Civil Procedure Code, 1882 - Section 551
- Civil Procedure Code, 1908 (CPC) - Section 152

Citation: 5 Ind. Cas. 261

Hon'ble Judges: Teunon, J; Mookerjee, J

Bench: Division Bench

Judgement

1. We are invited in this Rule to set aside an order of the Court of first instance for amendment of the decree in a mortgage suit, made on the 19th January 1906. That decree was confirmed on appeal, to the Subordinate Judge on the 9th May 1907. A second appeal was then preferred to this Court, but was dismissed on the 26th November 1907 u/s 551 of the Code of 1882. In the decree of the Munsif, which was thus ultimately affirmed, the property directed to. be sold was described as the dwelling house of the defendants excepting 10 cottahs of pirotter land. When the decree-holder applied for execution, the judgment-debtors objected that the decree was not in accordance with, the judgment and, ought not to be executed. The decree-holder thereupon applied to the Subordinate Judge on the 21st March 1908 for amendment of the decree. The Subordinate Judge, however, thought that he had no jurisdiction in the matter, and, directed the decree-holder to apply to the Court of first instance. When the matter came to be placed, before that Court, the defendants objected that the only Court which had jurisdiction to deal with the question was the High Court. The Munsif, however, overruled this objection on the ground that u/s 152 of the Code of 1908 he had jurisdiction at any time to correct the decree. He then considered the matter on the merits and directed the decree to be amended. The effect of the amendment was to describe the property to be sold

as the dwelling house of the defendants beyond, the private lane which joins "Dey Lane" with the Grand Trunk Road.

2. The validity of the order of the Munsif has been questioned before us by the learned. Vakil for the defendant on two grounds; namely first, that the Munsif had no jurisdiction to deal with the matter; and secondly, that on the merits, the order cannot be supported. In our opinion it is not necessary to deal with the second point, in as much as the Rule must be made absolute on the first ground.

3. Section 152 of the CPC of 1908 provides that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties." But though it is open to the Court under this section to amend a judgment, decree or order at any time, it is manifest that the judgment, decree or order, when it is amended, must be in full operation, and has not become merged in or cancelled by the decree of a superior Court of Appeal. Now it is well-settled that when an appeal has been preferred from a decree of a Court of first instance and the decree of that Court has been affirmed, reversed or varied by the appellate Court, the first decree is superseded by the decree of the appellate Court, and the only decree which is capable of amendment is the appellate decree: *Mohammad Sulaiman Khan v. Muhammad Yar Khan* 11 A. 267 (F.B.); *Aghora Kumar Ganguli v. Mahomed Musa* 11 C.L.J. 155 : 2 Ind. Cas. 662. It is clear, therefore, that the Munsif had no jurisdiction in the matter. The question now, arises whether the Subordinate Judge had jurisdiction to make the amendment. As already stated, an appeal against the decree of the Subordinate Judge was preferred to this Court and it was dismissed u/s 551 of the Code of 1882. Consequently upon the authority of the decision of this Court in *Uma Sundari Devi v. Bindu Bashini Chowdhurani* 24 C. 759 which accords with the cases of *Munisami Naidu v. Munisami Reddi* 22 M. 293, and *Asm Bibi v. Ahmad Hussain* 30 A. 290 : A.W.N. (1908) 109 : 5 A.L.J. 584, it is this Court which has jurisdiction to make the amendment. A contrary view, no doubt, was taken by the High Court of Bombay in *Bapu v. Vajir* 21 B. 548, but that decision has never been followed in this Court.

4. The result, therefore, is that this Rule must be made absolute and the order of the Munsif discharged.

5. We may add that the opposite party will be at liberty to make an application to this Court for amendment of the decree, which has been affirmed by the Subordinate Judge and upheld by this Court; if such an application is presented to us appropriate orders will be passed thereupon. The record will be retained in this Court for the present.

6. Under the circumstances of the case, we make no order as to costs.