

(1866) 08 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 473 of 1866

Sundar Bibi and Others

APPELLANT

Vs

Gridhari Lal Roy

RESPONDENT

Date of Decision: Aug. 21, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

Speaking for myself, I have no doubt that an appeal will lie upon a question of costs, though any interference with the order of the lower Court upon that subject ought to be exercised with discretion. S. 187 of the CPC says: "The judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion, and the Court shall have full power to sward and apportion costs in any manner it may deem proper." The power given to the Court to award and apportion costs in such manner as it may deem proper is a power to be exercised according to law, and not according to mere caprice; it is a power to be exercised subject to all the provisions of this Code and a decree, so far as it relates to costs, is subject to an appeal in the same manner as any other part of the decree. Words similar to the words "in any manner it may deem proper" in s. 137 are also used in s. 193. There it is said, "the Court may order interest at such rate as the Court may think proper to be paid, &c." That does not mean any sum that the Court may think proper without any appeal, otherwise the Court may award 100 per cent, instead of the ordinary rate of 12 per cent, or the rate, if any, expressly agreed to be paid by the contract under which the principal became due. Similar words are used with regard to interest in s. 196. It appears to me that the discretion vested in the Court in all these sections is subject to the controlling power of appeal, whether regular or special, according to the nature of the case. The decree must specify the amount of costs and by what parties they are to be paid (s. 189), and the section which gives an appeal against a decree makes no exception as regards the award or no award of costs. Whether a special appeal will lie or not, must depend upon circumstances. If the lower Court should award costs to the losing party, it might be an improper exercise of discretion

against which a regular appeal would lie, but it would not be a matter of special appeal, unless it should be held contrary to law to award costs under any circumstances to the losing party. If costs should be allowed contrary to law, it would be subject of special appeal. For instance, if the Court should allow costs for three pleaders for one plaintiff where the law allows costs for only one pleader, or should allow costs for a pleader calculated according to a higher percentage than the law allows, it would be an error of law and a matter for special appeal. Many other circumstances might be cited in which the Court might exercise its discretion in awarding costs contrary to the law laid down in same Act or Regulation. In such a case a special appeal would lie, but where there has been merely an unsound exercise of discretion, a special appeal will not lie. The first case referred to by the learned Judges--*The Collector of Dacca v. Kumalakant Mookerjee* 2 W.R., 33--appears to be a case of the latter sort. In that case the discretion exercised was not contrary to law. The first Court gave the plaintiff a decree, but released the Collector, and in so doing, refused to award any costs to him, thinking that it was necessary to join the Collector as co-defendant. The Collector appealed to the Principal Sudder Ameen for his costs. The Principal Sudder Ameen dismissed the appeal, and from that decision the Collector appealed to the High Court. The Court said that "as the awarding of costs is a matter left to the discretion of the Court, we are of opinion that no appeal lies," i.e., that a special appeal having reference to a mere matter of discretion would not lie in a case in which the Court was competent by law to refuse costs. In that case, it was not contrary to law to refuse to award costs to the Collector. The case of *Hureehur Mookerjee v. Abdool Huq Kazee* 1 W.R., 97 was one in which it was held that the award of costs was contrary to law, and therefore a special appeal did lie. In the latter case the decree of the Judge, reversing the decree of the lower Court as to costs, was reversed on special appeal for not stating the reasons for his judgment.

2. In all cases it will be for the Appellate Court to determine whether an error in the award of costs is a matter of special or regular appeal. The question referred in this case is not whether a special appeal will lie under the circumstances. The Judge was wrong in holding that he had no power to interfere with the question of the award of costs. The case was before him in regular appeal; the case upon which he relied was a decision in special appeal.

3. The case must go back to the Division Bench which referred it, in order that the Court may determine the appeal with reference to this expression of the opinion of a Full Bench.

Loch, J.

Jackson, J.

4. I am of the same opinion. I would only add that it seems to me that the direction of the Court of first instance as to costs being, by s. 189, a part of the decree, must,

in my opinion, be open at least to regular appeal. S. 189 says, that the decree "shall state the amount of costs incurred in the suit, and by what parties, and in what proportions, they are to be paid, and shall be signed by the Judge and sealed with the seal of the Court." It appears to me that, in many cases, not only in a matter of costs, but also in some small matters, being a part of what is ordered by the decree, the plaintiff or defendant might be dissatisfied with the decision, and come up to the Appellate Court in appeal, although he might acquiesce in the principal part of the decree. Then, under s. 187, "the Court shall have full power to award and apportion costs in any manner it may deem proper." Now, the words just cited must be taken in connection with the words in s. 189. It does not appear to me that the words "shall have full power" mean anything more than the words "may order interest at such rate as the Court may think proper," in s. 193, or than the words "may provide for the payment, &c. * * * * * with interest thereon at such rate, as the Court may think proper" in s. 196. In short, the award of costs appears to me to be, like the award of damages, in the discretion of the Court, but subject, as in the latter case, to any enquiry as to the mode in which that discretion has been exercised in all cases by regular appeal, and in certain cases also, as pointed out by the Chief Justice in special appeal.

Campbell, J.

5. I also entirely concur with the Chief Justice. It seems clear that the discretion vested by law in the first Court with regard to costs is a discretion subject to regular appeal, and that the Appellate Court may exercise its discretion. The ground of special appeal is very much narrowed by the law which gives entire discretion to the lower Courts, and nothing within the limit of that discretion can be the subject of special appeal. But when in the matter of costs, the order is absolutely illegal, a special appeal also will lie.

Macpherson, J.

I have, in more than one case, held there is no appeal on a mere question of costs. I considered that such appeals were undesirable in principle, and the words of s. 187 of Act VIII of 1859, namely "the Court shall have full power to award and apportion costs in any manner it may deem proper" were so wide as to give a discretion to the Courts which it was not intended should be the subject of appeal when no other ground of dissatisfaction with the decree of the lower Court was alleged. The matter, however, has always appeared to me to be open to doubt, and as the majority of the Court are unanimously of opinion that an appeal will lie on a mere question of costs, I do not desire expressly to dissent from that opinion.