

(1880) 06 CAL CK 0008

Calcutta High Court

Case No: None

Ataoor Rohoman

APPELLANT

Vs

Joykishen Mookerjee
and Another

RESPONDENT

Date of Decision: June 15, 1880

Citation: (1881) ILR (Cal) 22

Hon'ble Judges: White, J; Maclean, J

Bench: Division Bench

Judgement

White, J.

This is a second appeal against a decree of the lower Appellate Court, which rejected the appellants' appeal as being out of time.

2. It is not disputed that the first appeal was barred, unless a certain order which was made by the Subordinate Judge of the 3rd of February 1879 ought to be treated as the final decree in the suit. On the other hand, if it ought to be so treated, the Full Bench case of *Soudaminee Dossee v. Dheraj Mahtab Chahd B. L. R. Sup. 585: S.C. 6 W. R. Mis Rule 102*) shows that limitation runs from the date of the order, in which case the appellants would not be barred.

3. This order was made under the following circumstances:

4. The Subordinate Judge, on the 28th July 1878, pronounced a decree in favour of the respondent (who was the plaintiff in the first Court) in respect of a portion of his claim. The appellants, who are two of the defendants in the first Court, applied to the Subordinate Judge by petition for a review of judgment on several grounds, amongst others on the ground that they were entitled to their costs in proportion to the amount of the claim of the plaintiff, which was disallowed. Notice of the application issued to the respondent. After hearing argument, the Subordinate Judge delivered a judgment, in which he allowed the petition, but only on the last ground, as to which he says: "The last ground as to the proportionate costs seems

to be valid. It was a clerical mistake. No reason was given to disallow the costs, nor was there an order disallowing the costs. I allow this ground." He then made the following order:-- "That the decree be corrected. Defendants' proportionate costs to be paid by plaintiff. Costs to bear interest at 6 per cent, per annum from the date of the original decree. Both parties shall bear their costs respectively, as I allow this petition partly and disallow the other part."

5. The District Judge treats the order as one rejecting the application for a review, and therefore as giving to the appellants no fresh point of departure as regards the period of limitation. His judgment runs thus:

6. The Subordinate Judge does not say Very clearly what his proceeding of the 3rd of February 1879 was intended to be; but I think it impossible, upon reading it in the light of the provisions of the Code, to regard it as anything else than an order substantially rejecting the application for a review, but allowing what he considered a clerical mistake to be amended."

7. In passing this decision the Judge appears to have overlooked the fact that the Subordinate Judge expressly states that he allows the appellants' petition in part, and also that, by the order itself made upon the petition, he corrected the decree. The allowance of the petition was indeed on a minor ground and there was no formal rehearing of the case after the allowance of the ground, but neither of these things affect the construction of the order. The application, which was one for a review, was not the less the grant of the review, because it was allowed on one ground only, and that a comparatively insignificant one. It is clear also that the decree was corrected in consequence of the petition. As the Subordinate Judge had both the parties before him, and there was nothing further to be said respecting the matter as to which correction was sought, a rehearing would have been a mere formality, and might well be dispensed with as unnecessary.

8. It was for this reason probably that the allowance of the petition and the amendment of the decree were embodied in the one order. It perhaps would have been more regular to have made two orders instead of one, but the omission to do so would not affect the right of the appellants to treat the order as one which amended the decree upon the grant of an application for a review.

9. It has been argued before us that the mistake in the original decree was such as the Subordinate Judge might have amended under s. 206 of the Code without granting a review of his judgment, and that the order of the 3rd February should, therefore, be construed as made under that section. Assuming that the decree might have been amended under that section, and I am inclined to think that it might, the answer to the argument is, that the Subordinate Judge, in making his order of the 3rd of February, was not in point of fact proceeding under that section, but was dealing with an application for a review of judgment; in other words, was proceeding under the review sections of the Code.

10. It may be that the Subordinate Judge might, instead of granting the appellants' petition at all, have dismissed it and directed them to move u/s 206; but the Subordinate Judge did not adopt that course, but chose to make the amendment in the way and manner I have mentioned. Under these circumstances, the appellants are, in my opinion, entitled to have the benefit which the procedure adopted by the Subordinate Judge has given them, and to treat the order as made upon review of judgment, and therefore as the final decree in the suit.

11. The appeal will be allowed, the suit remanded to the lower Appellate Court with a direction to hear the appeal and decide it upon the merits.