

**(1869) 02 CAL CK 0017**

**Calcutta High Court**

**Case No:** Motion No. 124 of 1868

Mirhabib Sobhan

APPELLANT

Vs

Mahendra Nath Roy

RESPONDENT

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**Date of Decision:** Feb. 16, 1869

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### **Judgement**

Hobhouse, J.

We think this rule must be made absolute. Mahendra Nath has now shown cause, but, we think, ineffectually. His pleader contends that, although the order of the Deputy Collector of the 23rd April 1866 was an order which the Deputy Collector had jurisdiction to pass, yet that it was expressly an order passed under the provisions of section 54, Act X of 1859; and that being an order passed under that section, either he had liberty, with reference to the provisions of that section, to bring a fresh suit, or, at the least, it was an order which, by its terms, misled him, and that, therefore, we ought not to exercise our extraordinary jurisdiction by setting aside the judgment which necessarily, in his opinion, followed on that order. We remark that the terms of sections 55 and 58 of Act X of 1859 are absolute and unmistakable. Section 55 says, that "if, on the day fixed for the appearance of the defendant, the defendant only appears, then the Collector shall pass judgment against the plaintiff by default." Section 58 declares that no appeal lies against a judgment passed against a plaintiff by default; but in such a case, if the party against whom judgment may be given shall appear, within 15 days from the Collector's order, and if the plaintiff show good and sufficient cause for his previous non-appearance, then the Collector may revive the suit.

2. It is quite clear, therefore, that, although the Deputy Collector may have misquoted the law (in fact, he did so), and may have fancied that he was proceeding u/s 54 of the Act, yet, as a matter of fact and law, he could only have proceeded under the provisions of section 55 of that Act; and when he had so proceeded, no appeal lay to the Judge, nor could any fresh suit be instituted, but the plaintiff's only remedy was to apply for the revival of the case, within 15 days from the date of the Deputy Collector's order, that is to say, within 15 days from the 23rd April 1866; and

upon the admitted facts of the case, it is clear that the plaintiff did not appear at all within the 15 days referred to. This being so, it is clear that when, on the 6th May 1867, the Deputy Collector rejected the plaintiff's application to revive the case, he was quite right in so rejecting it, and the Judge's order of the 3rd August 1868 directing the revival of the case was passed without jurisdiction. But the pleader for Mahendra Nath Roy contends that, although we ought probably to set this decision aside, yet we ought, in justice, because the Deputy Collector misled his client, in the first instance, to restore the parties to their original position.

3. We do not think that we can do this; because if we do so, that would be in effect to say that although, by reason of the plaintiff not appearing to revive the case within 15 days of the 25th April 1866, the Deputy Collector had no jurisdiction to revive it, yet we ought to say now he might revive it. This clearly we cannot say. We can only say that the Judge's decision of the 3rd August 1868 was passed without jurisdiction, and must be set aside. We think that the petitioner must get his costs of this application.