

**(1914) 03 CAL CK 0021**

**Calcutta High Court**

**Case No:** None

Troilukhyanath Mandal

APPELLANT

Vs

Abanish Chandra Roy

RESPONDENT

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**Date of Decision:** March 27, 1914

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 98

**Citation:** AIR 1915 Cal 118 : 24 Ind. Cas. 18

**Hon'ble Judges:** Richardson, J; Fletcher, J

**Bench:** Division Bench

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### **Judgement**

Fletcher, J.

This is an appeal from the judgment of the District Judge of Birbhum, dated 27th Juno 1911, affirming the decision of the Subordinate Judge. The plaintiff brought his suit for the purpose of obtaining an account of what was due to him by the defendant on the footing of a certain document, namely, a registered kabuliat, and also for the purpose of bringing to sale the properties hypothecated in "favour of the plaintiff's father under the terms of that kabuliat. The kabuliat appointed the plaintiff what is known as gomasta, or rather agent, of certain properties that belonged to the plaintiff's father and these properties were hypothecated to the plaintiff's father to secure the due performance by the defendant of the duties that ho had undertaken. The plaintiff, having instituted this suit, obtained a preliminary decree. The preliminary decree was obtained on 16th March 1908. No appeal was presented against that preliminary decree : and the learned Subordinate Judge appointed a Commissioner to take an account of what was due to the plaintiff on the footing of the document of hypothecation : and a final decree was passed on the 21st December 1909. Thereupon the defendant appealed to the District Judge and raised not only questions on the final decree, but also on the footing of the preliminary decree, and he claims that he is entitled to do so under the terms of the old Civil Procedure Code, which was in force at the date of the 24 C. 699 (F.B.) : 1

C.W.S.T. 437.5 Ind. Cas. 186 : 11 C.L.J. 43. institution of the suit. In support of that reliance is placed on the decision of the Full Bench of this Court in the case of Khadem Hossain v. Emdad Hossain 29 C. 758 (F.B.) : 5 C.W.N. 617. That would seem to justify the defendant raising, on appeal, these matters relating to the preliminary decree, provided that the old CPC does, in fact, apply to this appeal : which, for the purposes of the present judgment, I will assume.

2. Then comes the only point of substance which the appellant wishes now to argue, namely, that the suit was barred by limitation, and, therefore, the taking of the account by the Commissioner and the final decree were all abortive and unnecessary proceedings. In support of this view the learned Vakil, for the appellant, relies upon the decision in the case of Jogesh Chandra v. Benode Lal Roy Chaudhuri 5 Ind. Cas. 59 : 14 C.W.N. 122. That was a decision of Chitty and Vincent, JJ., and is, no doubt, in point. But, on the other hand, we have the decision of the late Chief Justice and Mr. Justice Coxe in the case of Hafezuddin Mandal v. Jadu Nath Saha 35 C 298 : 7 C.L.J. 279 : 12 C.W.N. 820,. Now, in the case before Chitty and Vincent, JJ., the case of Hafezuddin Mandal v. Jadu Nath Saha 35 c 298 : 7 C.L.J. 279 : 12 C.W.N. 820 was not cited in the course of the argument, because it is quite clear that those learned Judges were bound by the decision in the case of Hafezuddin Mandal v. Jadu Nath Saha 35 C 298 : 7 C.L.J. 279 : 12 C.W.N. 820 . The case is not distinguishable from the present case, nor from the case that was before Chitty and Vincent, JJ That being so I prefer to follow the decision in the case of Hafezuddin Mandal v. Jadu Nath Saha 35 C 298 : 7 C.L.J. 279 : 12 C.W.N. 820 which, in my opinion, appears to be more correct than the decision of Jogesh Chandra v. Benode Lal Roy Chaudhuri 5 Ind. Cas. 59 : 14 C.W.N. 122., and, further, on the ground that this decision, which was binding on the learned Judges who pronounced the other decision, was not cited to them in the case reported as Jogesh Chandra v. Benode Lal Roy Chaudhuri 5 Ind. Cas. 59 : 14 C.W.N. 122. : In my opinion it would be lamentable in a case like the present, which has gone on for years, to have to rip up the whole of the proceedings which have lasted for a period of something over eight years since the institution of the suit, on the ground that the suit was barred by limitation.

3. In my opinion there is no substance in the present appeal and it should be dismissed with costs.

Richardson, J.

4. I agree that in view of the decision in Hafezuddin"s case 35 C 298 : 7 C.L.J. 279 : 12 C.W.N. 820,, which : was not referred to" in the later case, the appeal should be dismissed.

5. Per Curiam.--As we are unable to agree in this case, u/s 98, Civil Procedure Code, the decree of the lower Court is -confirmed and the present appeal dismissed, each party bearing his own costs.