
(1873) 05 CAL CK 0007

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 97 of 1873

Chowdhry Goluck
Chunder and Others

APPELLANT

Vs

Chowdhry Gunga
Narain and Others

RESPONDENT

Date of Decision: May 30, 1873

Final Decision: Dismissed

Judgement

Markby, J.

In this case it appears that a decree was passed on the 13th July 1868; that decree was brought up to this Court upon appeal, and was confirmed by this Court on the 18th June 1869. The present respondents were defendants in the suit, and it is said that it appears from the judgment that it was the intention of the Court to dismiss the suit as against them, and to give them their costs. The respondents, however, took no proceedings in execution until the 13th December 1871, and when they applied for execution, it was discovered that the decree did not contain any direction by whom those costs were to be paid; it was consequently held by this Court that the respondents could have no execution upon the decree. Thereupon, acting upon a suggestion contained in the judgment of this Court, the respondents on the 21st August 1872 obtained from the Judge of the Court in which the original decree was passed an order amending the decree by inserting the names of the parties from whom they were to obtain their costs. That amendment, as we are informed, was made in accordance with the judgment which had been passed. Then proceedings in execution were again commenced, and an order for issuing execution was made on the 21st December 1872, which is now before us on appeal. An objection has been taken to that order that it has wrongly disposed of the question of limitation which was then raised before the Court. Upon that point we see no reason whatever to differ from the decision of the Court below.

2. The main question which has been argued is that the present execution-proceedings cannot be sustained, because the Court had no power to amend the decree on the 21st

August 1872. Now, on looking into the record, it appears that that order of the 21st August 1872 was not an order passed in review under ch. XI of the Code of Civil Procedure, but was what is called a miscellaneous proceeding such as was suggested by a decision of this Court in Oomanund Roy v. Maharajah Suttish Chunder Roy 9 W.R., 471, and whatever might have been our opinion independently of any authority as to the power of a Judge in the mofussil under the Code to amend a decree which has been confirmed in the presence of the parties by this Court on appeal, I think it is too late now, after that decision which I have just referred to, and the other decision in Zuhoor Hossein v. Mussamut Syedun⁽¹⁾ and also the expression of opinion of Kemp and Glover, JJ. in this very case, Chowdhry Goluck Chunder v. Chowdhry Gunga Narain, ⁽¹⁾ for a Division Bench to hold that such an order cannot be made. It appears that several Judges have expressed an opinion that such an order can be made, and it also appears from the decision in Zuhoor Hossein v. Mussamut Syedun Ante, p. 367 that such an order is open to appeal. And the order of amendment in this case having been made on the 21st August 1872, it is too late now to question it by way of appeal; and therefore being an order which the Court had power to make, and not having been appealed against, it must be taken as final. At the same time we think it right to add that, had this order been now open to question, we should have hesitated very much before confirming it. It is the duty of the parties or rather of their pleaders, when they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered by a Circular Order of this Court of the 19th July 1867, 8 W.R., Civ. Cir., 2 that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties choose to allow so long a time as that allowed in this case to elapse before they take any steps upon the decree without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly presumed that they acquiesced in the decree, and that no alteration ought to be made subsequently. As however we have no power to interfere, the appeal must be dismissed with costs.

(1) Before Mr. Justice Norman and Mr. Justice E. Jackson.

The 19th February 1869.

Zuhoor Hossein and others (Judgment-deetors) v. Mussamut Syedun (Decree-Holder).*

Decree, Amendment of--Power of correcting Error in.

Mr. R.E. Twiddle for the appellants.

Mr. C. Gregory and Moonshee Mahomed Yusuf for the respondent.

The judgment of the Court was delivered by

Norman, J.--In this case the decree was originally passed on the 9th of December 1865. By that decree it was declared that the defendants should pay Rs. 3,265 in respect of

wasilat of the year 1267 (1860) with interest, to the Hindu plaintiffs, and that the defendants should pay certain other plaintiffs" wasilat at Rs. 1,575 annually, after deducting the Government revenue, from the year 1268 (1861) to the date of possession. The decree did not proceed to give to the Mahomedan plaintiffs interest on the amount of wasilat awarded from the date of the decree. The defendants appealed to the High Court against the decision of the Principal Sudder Ameen, and that appeal was dismissed. They have since presented an appeal to Her Majesty in Council, which bears date the 12th of March 1867, but the papers have not been transmitted to England. On the 15th of June 1865, the Mahomedan plaintiffs presented a petition to the Principal Sudder Ameen, applying for an amendment of the judgment on the ground that interest on the wasilat awarded to them had not been included in the decree, and that this was a mistake. The defendants objected to the rectification of the mistake. The Subordinate Judge, after hearing the defendant's objection, considered that it was perfectly legal and proper that the plaintiffs should be entitled to interest on the wasilat awarded to them from the date of the decree.

It is objected in special appeal that this decision was erroneous, inasmuch as the application to the Principal Sudder Ameen was not presented within the period of 90 days from the date of the original decree, and was therefore out of time under s. 377, Act VIII of 1859. We think, however, that merely adding to the decree an order that the decree was to bear interest from its date, was not an act done by way of review of judgment, because it does not appear that the Principal Sadder Ameen was altering, or called upon to alter, anything upon which the decree was passed: it was merely correcting a mistake by adding that to the decree which was already an incident to the then present right to recover the amount of the decree, being that, in respect of any forbearance to enforce the decree, pending the appeal or on default of immediate payment, the amount decreed shall bear interest. We think the Principal Sudder Ameen was right in treating it as a mistake which it was within his power to correct. If the proceedings had gone home, and we had found ourselves in any difficulty in securing to the defendant the power of objecting to the decree in the amended form because the application was too late that the Privy Council might have heard the appeal, we should have felt the difficulty in saying that the amendment could be allowed. In the present case the appellant has failed to show that any injustice was done him by the allowance of the amendment which, as appears to us, was simply in furtherance of the decree. The appeal is dismissed with costs.

(1) Before Mr. Justice Kemp and Mr. Justice Glover.

The 23rd May 1872.

Chowdhry Goluck Chunder and others (Judgment-debtors) v. Chowdhry Gunga Narain and others (Decree-Holders).*

Decree, Amendment of--Power to amend.

Baboo Doorga Mohun Does for the appellants.

Baboo Aushootosh Dhur for the respondents.

The judgment of the Court was delivered by

Glover, J.--The judgment-debtor is the appellant in this case. He sued a certain number of defendants amongst whom are the present judgment-creditors. The case was decided in favor of the plaintiff against certain defendants, and as against Gunga Narain Masunt and Urdubub Narain, the judgment was that they had been improperly made defendants, and that the plaintiff should pay their costs. The case was appealed to the High Court, and the judgment of the Court below was affirmed. The former defendants thus become judgment-creditors applied to take out execution, and to get their costs when it was objected that they were barred by limitation, more than three years having elapsed from the date of the decree. The Judge considered that the time should count from the date of the decree of the High Court, and that therefore their application for execution was in time. Without going into the question whether or not the Judge was right on that point, although as a matter of fact, we sure inclined to think that he was right, we think there is a prima facie objection to the judgment-creditors' claim. They say that the judgment of the Court below awarded their costs as against the party who brought the suits. Now as a matter of fact, although there is a remark in the judgment to the effect that these two persons have been improperly made defendants, and that they ought to have their costs from the plaintiff, still in the decree there is no such recital; it merely gives the plaintiff costs as against all the defendants.

It is contended by Baboo Anshootosh Dhur for these defendants that we ought to read the judgment and decree together, and if we can be reasonably certain that it was the intention of the Judge to award costs to the respondents, that we ought to give them such costs.

In the first place it is an extremely dangerous principle to allow any interpolation to be made in the wording of a decree, or to attach any meaning to the words of a decree which cannot be fairly and plainly attached to them, and in this case there can be no doubt that no costs are mentioned as being due to the present judgment-creditors. It was the easiest thing in the world for them on seeing the mistake or omission of the Judge on the decretal order to have applied to have that omission rectified. It is said that, in the schedule at the foot of the decree, there is a mention of Gunga Narain's costs, but it is not said in that schedule that they are to be paid by the plaintiff, and they are merely entered in the general list of the costs of the defendants without saying by whom they are to be borne. It is clear at all events that the schedule proves nothing, and the decretal order itself as already observed is silent. On the general principle therefore of the inadvisability of incorporating anything into a decree, or of attaching to it a meaning which the words of the decretal order do not properly and clearly express, we think that we ought not to allow this execution for costs to issue. The creditors are still within time, and they can, if so

advised, apply to the Judge to amend his original decree, and to give these defendants the costs which he considers due to them. We may observe that the Judge who passed the decree of 1868 is the same Judge who now presides in the Midnapore Civil Court, and therefore presumably well acquainted with the circumstances of the case.

We reverse the order of the lower Court, and decree this appeal with costs.

* Miscellaneous Regular Appeal, No. 517 of 1868, from an order of the Subordinate Judge of Bhaugulpore, dated the 29th August 1868.

* Miscellaneous Regular Appeal, No. 116 of 1872, from an order of the Judge of Midnapore, dated the 9th February 1872.