

(1909) 08 CAL CK 0026
In the Calcutta High Court

Chhoto Rakhal Das Majumdar

APPELLANT

Vs

Jogendra Narain Mozumdar and Others

RESPONDENT

Date of Decision : 31-08-1909

Acts Referred:

Limitation Act, 1963 — Article 179(4)

Citation : 3 Ind. Cas. 391

Hon'ble Judges : Vincent, J; Mookerjee, J

Bench : Division Bench

Judgement

1. The substantial question of law which, calls for decision in this appeal is, "whether an application presented on the 21st December, 1907, for execution of a decree made on the 6th December, 1904, is, barred by limitation.

2. The Court below has held that the application is not barred, because the decree was amended on the 4th January 1905. This view has been assailed on behalf of the judgment-debtor on the ground that time runs against the decree-holder from the date of the judgment, and that as the amendment related merely to costs and did not effect the substantial portion of the decree, the decree-holder is not entitled to apply within three years from the date of the amendment for execution of the decree in so far as it relates to possession of the properties. On behalf of the decree-holder, it has been contended that although the application was described as one for amendment, it was really in the nature of one for review of judgment and that time runs consequently from the date when the application was granted. To determine which of these contentions should prevail, it is necessary to refer for a moment to the proceedings in the suit.

3. It appears that in the course of the suit, the parties filed a petition of compromise in which they settled some of the matters in dispute and agreed to refer others to arbitrators who were expressly authorised to determine the question of costs. The arbitrators submitted their award on the 23rd November 1904, in which they directed, among other things, that each party should bear

his own costs of the suit. On the 6th December the Subordinate Judge delivered judgment in substantial accordance with the award which had, meanwhile, been amended upon minor points by the consent of parties. Up to this stage, it appears to have been overlooked that costs would be incurred after the judgment in the preparation of the decree, inasmuch as under article 45 of schedule I of the Stamp Act, the decree which effected a partition, would have to be stamped according to the value of the separated share of the property. On the 8th December, the plaintiff was called upon by the Court to deposit the necessary stamp. He carried out this order, and the decree was drawn up and signed on the 3rd January 1905. On the 4th January, the plaintiff applied that directions might be given for the realisation of the stamp duty from the defendants according to their respective shares. As there was no opposition, the Court allowed the application, and a clause was added to the decree, on the same day, under which the plaintiff was authorised to recover a proportionate share of the stamp duty from the defendants. We are informed that one of the defendants now appellant before this Court, paid his share amicably and on the 14th January, 1905, the decree-holder applied to the Court u/s 258 of the CPC to enter satisfaction of the decree pro-tanto this was done and the amount was certified to have been duly paid. The question now arises, whether in the events which have happened, the present application for execution is barred by limitation.

4. In the first place, it is clear that for purposes of execution, the date of the decree must be taken to be the date of the judgment *Afzul Hossain v. Umda Bibi* 1 C.W.N. 93; *Golam Gaffar Mandal v. Goljan Bibi* 25 C. 109 and *Yamaji v. Antaji* 23 B 442. The decree-holder, therefore, cannot in this case derive any benefit from the circumstance that the decree was not, as a matter of fact, drawn up and signed till the 3rd January, 1905. He consequently places reliance upon the amendment made on the 4th January, 1905, and seeks the benefit of article 179 Clause 3 of the Limitation Act, which provides that where there has been a review of judgment, the time is to run from, the date of the decision passed on review. In support of this view reliance is placed upon the case of *Kali Prosunno Basu Boy v. Lal Mohun Guha Boy* 25 C. 258 : 2 C.W.N. 219 where in order for amendment of a decree u/s 206 of the Code of 1832 was treated as equivalent to an order for review of judgment for the purposes of article 179 Clause 3 of the Limitation Act. We observe, however, that this decision has been dissented from in *Ahsanullah v. Dukkhini* 27 A. 575 where it was pointed out that the earlier decision in *Kishen Sahai v. Collector of Allahabad* 4 A. 137 had been misunderstood as already explained in *Kallu Rai v. Fahiman* 13 A. 124 and *Daya Kishan v. Nanbi Begam* 20 A 304. If under these circumstances, the decree-holder found it necessary to rely upon the case of *Kali Prosunna v. Lal Mohun* 25 C. 258 : 2 C.W.N. 219 we should have to consider whether the matter might not require re-examination, and perhaps render necessary reference to a Full Bench. It is manifest, however, in the present case that the application of the 4th January, 1905, by whatever name it might then have been caused, was in its

essence, an application for review of judgment. It was not an application for amendment of the decree, u/s 206, so as to bring it into conformity with the judgment. In the first place, it was made on the assumption that up to that time the decree had not been drawn up and signed. In the second place the judgment which confirmed the award, did not contain any direction for payment of costs to be incurred subsequent to the judgment, in the preparation of the decree. It was a clear case of omission and the plaintiff could obtain relief only by way of review of judgment. Unless was first determined that the cost for the preparation of the decree were to be paid by the parties in proportion to their shares, a direction to this effect could not possibly be inserted in the decree. *Bai Shri Vakhihn v. Agar Sangji Raisungyi* 31 R. 447 : 9 Bom. L.R. 547. This was clearly, therefore, a matter for review of judgment, as the direction for payment of costs required to be supplemented. The view we take is supported by the case of *Venkata Jogayya v. Venkata Simhadri Jagapatirazu* 24 M. 25. But it is suggested that the application was not properly stamped as an application for review of judgment. This circumstance, however, is immaterial: it cannot, in any event, alter the essence of the proceeding. Besides, after the decree has been modified, the Court of execution cannot consider whether it was erroneously or irregularly modified *Menat Ali v. Amdar* All 9 C.W.N. 605. It is plain, therefore, that the application for execution is not barred by limitation.

5. We may add that there is another substantial difficulty in the way of the appellant. As previously stated, the decree-holder appears to have certified payment to the Court by an application on the 14th January, 1905. According to the view taken in the cases of *Tarini Das Bandhopadhya v. Bishtoo Lal Muhhopada* 12 C. 608; *Sujan Singh v. Hira Singh* 12 A. 399 (F.B.) and *Wad Imam v. Punit Singh* 20 C. 600 an application to certify payment where the payment asserted has been actually made, is sufficient to bring the case within the scope of Clause 4, article 179, of the Limitation Act. In this view also, the appellant must fail in his contention.

6. The result, therefore, is that the order made by the Court below must be affirmed and this appeal dismissed with costs. We assess the hearing fee at 5 gold mohurs.