

(1971) 06 CAL CK 0003
In the Calcutta High Court
Case No : Civil Revn. No. 3902 (S) of 1969

Janaki Nath Roy, Narendra Nath Roy and Co. Ltd. (in liquidation)

APPELLANT

Vs

Sambhu Nath Mullick and Others

RESPONDENT

Date of Decision : 17-06-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152, 35(3)

Citation : AIR 1971 Cal 504

Hon'ble Judges : Salil Kumar Datta, J

Bench : Single Bench

Advocate : B.C. Banerjee and Gaganendra Narayan Deb, for the Appellant;
Chandra Narayan Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Salil Kumar Datta, J.—This Rule was obtained by the successor-in-interest of Raja Janaki Nath Roy, Narendra Nath Roy & Co. (P) Ltd., the plaintiff-respondent in S. A. 638 of 1952. The appeal was heard and disposed of by a Division Bench of this Court consisting of Guha Roy and S. K. Sen, JJ. on 26-8-1955 whereby the appeal was allowed and the plaintiff's suit was dismissed and costs throughout were awarded to the defendants. It appears that on 5-2-1958 the above company went into liquidation and the opposite parties in this rule, the heirs and legal representatives of the defendant started execution for realisation of the decretal dues without mentioning that the said company was in liquidation. The proceeding culminated in S. M. A. 57 of 1961 and it was ordered by this Court on 6-2-1963 that the executing Court would allow the amendment of the execution petition showing that the said company was in liquidation represented by its liquidators. It appears that an amendment was made as stated above and on 17-6-1963 the joint liquidators filed an objection u/s 47 on the ground that the decree was not in conformity with the judgment and Misc. Case No, 39 of 1963 was started thereon. The executing Court by an order dated 19-4-1969

held that the mistake or error in the decree could be corrected only by the High Court which passed the decree. Pursuant to the same an application was filed in this Court on 16-9-1969 for modification and correction of the decree in accordance with the judgment in the connected second appeal deleting the provision of interest on decretal costs and on the said application the present Rule was issued on 20-11-1969. The Rule has been opposed by the opposite parties who filed an affidavit-in-opposition in support. It was stated that the decree was in conformity with the judgment as also with the provisions of the Civil P. C. and the then extant Appellate Side Rules. It was further contended that the application was not maintainable and was filed after a lapse of 15 years which showed that the petitioners were guilty of gross and inexcusable delay and, accordingly in any event, were not entitled to any relief.

2. Before proceeding further it will be convenient to look into the judgment and decree of the connected second appeal. The material provisions in the judgment dated 26-8-1955 are as follows:

"The appeal is therefore allowed with costs throughout and the decree of the learned Additional District Judge is set aside. The suit will stand dismissed with costs."

The decree as drawn up provides as follows:

"It is ordered and decreed that the decree of the lower appellate Court be and the same is hereby set aside, that of the Court of the first instance restored and the plaintiff's suit dismissed. And it is further ordered and decreed that the plaintiff-respondent do pay to the defendant-appellant the sum of Rupees 428-2-0 annas only (as per details on foot) being the amount of costs incurred by the latter in this Court with interest thereon at the rate of six per cent, per annum from this date until realisation. And it is further ordered and decreed that the said plaintiff do pay to the said defendant the costs incurred by the latter in the lower Courts with interest thereon at the rate aforesaid from the date of the decrees of the said lower Courts until realisation."

3. This decree was signed by the Hon"ble Judges on 7-9-1955. The decree was drawn in the customary printed form wherein in the portion for costs the blanks in the form were filled up inserting appropriate" words which are underlined in the above extract quoted.

4. I shall now consider the relevant provisions of law. Section 35(3) of the CPC which governs the present proceedings provides as follows:

"The Court may give interest on costs at any rate not exceeding six per cent, per annum, and such interest shall be added to the costs and shall be recoverable as such."

This Clause was omitted by the Code of Civil Procedure. (Amendment) Act, 1956 which came into force on 2-12-1956. The next provision for consideration is of Order 20, Rule 6 of the CPC which provides as follows: Order 20, Rule 6.

"Contents of the decree: (1) The decree shall agree with the judgment and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid."

Section 152 provides as follows:

"Amendment of the judgments, decrees or orders--Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties."

5. Mr. Bankim Chandra Banerjee, the learned Advocate for the petitioner, has contended that the decree providing for interest on costs was not in accordance with the judgment which did not provide for any interest on costs and accordingly the court has jurisdiction and duty to correct it suo motu, when the attention of the Court was drawn to it. It was contended by Mr. Chandra Nath Mukherjee, the learned Advocate for the opposite parties, that the decree was in conformity with the judgment. Further in view of Rules 61 to 63 of Part II of Chapter V of the Appellate Side Rules the decree must be deemed to have been signed by following the procedure laid down therein and it was not open to the parties to turn round and contend that the decree was not in accordance with the judgment. Further it was the practice with the High Court always to award interest on costs and in any event it would be inequitable to allow amendment of the decree after a lapse of 15 years in absence of any reasonable explanation.

6. I shall now consider the cases which have been cited by the learned advocates of the parties in support of their respective contentions. Mr. Banerjee has placed reliance on the decision in *Forester v. Secy. of State for India in Council* reported in (1877) ILR Cal 161 in which the opinion of the Chief Court of the Punjab in its conclusion that "where the order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of these costs with interest" was upheld as correct. This decision does not apply to the facts of the present case, as, as we have seen, in the present case the decree itself incorporates rightly or wrongly interest and that decree was signed by the Judges who delivered the judgment.

7. Mr. Banerjee next relied on the decision in *Chandra Kumar v. Sudhansu* reported in 28 CWN 873 (875): (AIR 1924 Cal 895 (897)) in which it was observed that it was obligatory for the Court when a mistake is discovered to correct a decree for making it in accordance with the judgment and the amendment would be refused when it offends against the principle of equity, as when the interest of a third party was jeopardised. In this case reference was made to the decision in *Henry William Hatton v. Hugh Harries*, (1892) AC 547 (558) in which an amendment was allowed 40 years after the passing of the decree. In *Nagendra Nath v. Ambica Charon*, reported in AIR 1929 Cal 676 (679)

it was observed by Rankin, C. J. that the Court should refuse to entertain an application for amendment of a decree after 18 months unless there is sufficient cause justifying the delay. In *K. C. Mukherjee v. Ainaddin* reported in 36 C WN 97 : (AIR 1932 Cal 503) Suhrawardy, J. was of opinion that it is the duty of the Court to bring the decree in conformity with the judgment and unless it is inequitable to do. the Court must amend the decree and mere delay cannot defeat a statutory requirement with approval. The case of *Kishori Mohan Vs. Chhanga Lal*, was referred to in which it was held that where the amount decreed was incorrect but the decretal dues were paid off, the chapter was closed and an application for amendment thereafter could not be entertained as by satisfaction there was no decree in existence. In the case of *K.C. Mukerjee Vs. Ainaddin and Others*, cited above, Graham, J. held a different view holding that if there was inexcusable delay for amendment, it was always discretionary on the part of the Court to allow amendment In the facts of a particular case and there was the possibility of the interest of a third party intervening. The case was referred to C. C, Ghose, J. who observed that as far as the law was concerned there was nothing in the judgment of Suhrawardy. J. with which he was not in agreement but in the fact of the case it was observed that no sufficient explanation for the delay was made out for allowing the application for amendment. Mr. Mukherjee also referred to the decision in *Pandit Kishori Lal Vs. Seth Badri Das and Others*, where it was held that actual amount of costs was not determined at the time of judgment but subsequently on assessment and inserting costs for the first time in the decree was within jurisdiction particularly when the decree was signed after the pleaders of the applicants had gone through the same and raised no objection. The last case cited is the decision in *Monohar Chandra v. Kali Priya Roy*, reported in (1937) 41 CWN 1330 in which B. K. Mukherjee, J. (as he then was) speaking for the Division Bench held that there is no time limit prescribed by law within which an application for amendment has to be made. It was further observed that when there were undue laches on the part of the petitioners or the interest of third parties had intervened, the Court should be reluctant in allowing amendments of this description. In this case the amendments by two applications made beyond three years, related to the correction of the name of one of the decree-holders and also insertion of the list of properties in the final mortgage decree and the orders of the Subordinate Judge allowing amendment were upheld.

8. Coming to the facts of our case, I must say that I am unable to accept Mr. Mukherjee's contention that the decree was in conformity with the judgment. u/ s 35(3), the Court may allow interest on costs not exceeding six per cent, per annum and it is thus obvious that not only the judgment has to provide interest on costs but it has also to provide rate of such interest. There is no provision at all, as pointed out by Mr, Banerjee, in, the instant judgment about the interest on cost which would clearly indicate that the Court did not intend to award any interest on costs.

9. The next contention of Mr. Mukherjee is that there was the practice in this

Court at the time to incorporate interest on costs in the decree as will appear from the printed form of the decrees which invariably follow judgment passed at about the period when the present judgment was passed even though no mention about interest on costs was made in the judgment. I have examined for my satisfaction three decrees of the relevant period in second appeals with which we are concerned and I have found that the statement made by Mr. Mukherjee, that even though the judgment did not contain any provision for interest on costs, interest was awarded in the decree that was subsequently drawn up, is correct. But even if practice was invariably followed in this Court, It cannot be said that such practice, in absence of any statutory provision as basis of such practice, will have the sanctity of law and this is not a case of stare decisis the sanctity whereof was again reiterated in *Gajnan and Others Vs. Seth Brindaban*, . Incorporation of interest, on costs accordingly cannot be awarded for the first time in the decree when there is no provision therefore in the judgment itself and mere practice will not validate such award of interest on costs in the decree though the connected judgment does not provide for such interest.

10. As to Appellate Side Rules there is nothing to indicate that the decree before the signature of the Judges was seen by the parties' lawyers as the decree bears no signature of any lawyer The provision of the Appellate Side Rules referred to above which provides that the decree is to be drawn up by office and then notices are to be issued to the advocate of the respective parties who will peruse the decree and either sign it or state his objection and if no objection be filed, the decree is to be put up for signature of the Court, was not followed in the present case. Even so it is really a ministerial lapse in not striking out the appropriate words in the printed form of the decree and in incorporating something which was not in the judgment itself.

11. The most formidable objection that has been raised by Mr. Mukherjee is that there is undue delay in making the application and it would be inequitable to allow such amendment at this stage. Mr. Banerjee on the other hand states that there is sufficient ground for delay in making the application and there would be no inequity if the application is allowed. It will appear that though the decree was passed and signed in 1955, the execution proceeding started in 1958. On 5-2-1958 the judgment-debtor company went into liquidation and the execution proceeding filed in 1958 was objected to by the liquidators which culminated in a second miscellaneous appeal being No. 57 of 1961. That was disposed of on 6-2-1963 directing the executing Court to allow amendment describing the company as being in liquidation. It appears that again on June 17, 1963 objection was taken by the said liquidators that the decree was not in conformity with the judgment in so far as interest on costs concerned and the miscellaneous case started thereon was disposed of on 19-4-1969 with the observation, as already stated, that the judgment being of the High Court, the said Court should be moved for making correction if any. Further it was also to be remembered that the present petitioners, the liquidators, were not the original judgment debtors. There is also no question of any inequity on the materials on record as

the opposite parties themselves put the decree in execution and no interest of any third party has intervened. In these circumstances, even though by all these processes there has been lapse of 15 years, the delay is not really of the said period and also it cannot be said that there has been an un- explainable or unreasonable delay in the matter for making the application for amendment of the decree taking into account the various proceedings referred to above.

12. For all these reasons I allow this application and make this Rule absolute. I direct that the decree in second appeal No. 638 of 1952 passed on 26-8-1955 and signed on 7-9-1955 be corrected by deleting there from the provision for interest on costs of this Court as also of the courts below incurred by the defendant-respondent. There will be no order for costs in this Rule.

13. Mr. Mukherjee, the learned Advocate for the opposite parties prays leave to appeal under Clause 15 of the Letters Patent which is being opposed on behalf of the plaintiff-petitioner. Let this matter come up for orders on Wednesday following.