## CIVIL REVISION.

*Before Nasim Ali and Henderson JJ.*

HEMENTAKUMAR GHOSH

*v.*

RAJENDRA MANDAL.*

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*June 26, 27.*

*Decree, Amendment of—Appeal, if necessary—Decree for costs not according to rules, Amendment of.*

Where the executing court and the court which passed the decree are one and the same, the court can amend the decree in the course of the execution.

*Midnapur Zemindari Company Limited* v. *Abdul Jalil Miya* (1) relied on.

Where the judgment awards costs to a party it implies costs allowed by the rules, and if it includes costs which are not permissible under the rules, it is the duty of the court to correct the decree so as to make it in conformity with the judgment.

Where the court can amend the decree, the proper course is to apply for amendment and not to appeal. Omission to appeal does not bar an application for amendment.

*Mirza Akbur Ali* v. *Mukhdoom Buksh* (2) and *Sara Bi* v. *Hamid Cassim* (3) relied on.

*Per* HENDERSON J. In a case where the executing court wrongly assessed costs awarded by the High Court, there was nothing which would give any party a right of appeal to the High Court, and the only remedy open to the parties is by way of revision.

CIVIL REVISION on behalf of the plaintiffs.

The petitioners obtained a decree, against 400 defendants, declaring their title to certain lands, as purchasers at a *patni* sale. The suit was valued at Rs. 5,100; of which Rs. 100 was claimed as *mesne* profits.

Twelve of the defendants appealed to the High Court. Of these, one withdrew and nine succeeded in the appeal. As against the successful appellants the suit was dismissed with costs.

In drawing up a decree for costs, the lower court allowed six sets of pleaders' fees, amounting to Rs. 250 each to these defendants, as they appeared in six different groups. On the 19th September, 1930, the

*Civil Revision, No. 1559 of 1934, against the order of Jaminikishore Ray, Subordinate Judge of Khulna, dated Oct. 5, 1934.

(1) (1933) I. L. R. 60 Cal. 753. (2) (1875) 25 W. R. (C. R.) 63.
(3) (1926) I. L. R. 4 Ran. 347.

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original decree was amended accordingly. On the 16th November, 1933, the minor plaintiffs had notice of the *ex parte* order for amendment of the decree and applied for setting aside of the said order on the 19th December, 1933.

The Subordinate Judge dismissed the application on the ground of delay and on the ground that the executing court had no jurisdiction to amend the decree. He, however, expressed the opinion that according to the rules a total sum of Rs. 250 was payable by the plaintiffs.

*Bijankumar Mukherji* and *Rajendranath Das* for the petitioners. The court, having held that the order of amendment of the decree was contrary to the Circular Order of the Court, should have exercised its discretion in favour of the petitioners and corrected the decree for costs.

The decree was amended without notice to the plaintiffs and so delay is immaterial so long as the rights of third parties are not affected. Vide *K. C. Mukherjee* v. *Ainaddin* (1).

Also, the court was not really the executing court, as the suit had been decided by it. There is ample jurisdiction under section 152 of the Civil Procedure Code to make such corrections in a decree.

The original amendment of the decree was without jurisdiction, as the original court had no jurisdiction to amend after the appellate order of the High Court. That order was also irregular in the absence of opportunity being given to the plaintiffs to oppose it.

*Mukundabihari Mallik* for the opposite party. The proper course for the petitioners was by way of an appeal against the amended decree. The Subordinate Judge had no jurisdiction to set aside or amend the order for costs, once it had been made. Therefore, the High Court cannot entertain this case in revision.

(1) (1931) 36 C. W. N. 97.

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On the other hand, the Subordinate Judge had ample jurisdiction to amend the decree by rectifying the accidental omission in the decree of the court, namely, that the pleaders' fees were not included. Further, under section 33 of the Code of Civil Procedure, he could determine the amount of costs.

Lastly, the amendment having been made on the 19th September, 1930, the application to revise the order for amendment is out of time.

*Mukherji*, in reply. I do not complain against the original decree. Being aggrieved by the order amending the decree, the proper remedy is by way of revision.

*Nalinakshya Ghosal* v. *Mafakshar Hossain* (1) and *Surta* v. *Ganga* (2).

In any event, as the amendment only varies the order for costs, it is doubtful whether an appeal is competent.

NASIM ALI J. This Rule raises a question of procedure. The facts which give rise to this Rule, and do not admit of any dispute, are these :—

The petitioners instituted a suit in the court of the Subordinate Judge of Khulna against the opposite parties and other persons for establishment of their title and recovery of possession of a large quantity of land in the year 1920. The contesting defendants divided themselves into ten groups and ten sets of appearances were entered in the trial court. The learned Subordinate Judge decreed the suit in full with costs. In the decree that was prepared the costs allowed to the plaintiffs were shown but the costs incurred by the defendants for pleaders' fees were not entered therein as required by Order XX, rule 2, clause (2) of the Code of Civil Procedure. Against the said decree only twelve of the defendants preferred an appeal to this Court, out of whom ultimately nine appellants succeeded with the result that the suit stood dismissed as against them with

(1) (1900) I. L. R. 28 Cal. 177. (2) (1885) I. L. R. 7 All. 875.

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costs. On the 15th September, 1930, the successful appellants, who are the opposite parties to this Rule, made an application to the trial court for amending the decree by inserting pleaders' fees therein. No notice of this application was served upon the petitioners or their pleader and an *ex parte* order was made by the court on the 19th September, 1930, allowing the amendment prayed for and directing that six sets of pleaders' fees amounting to Rs. 1,500 should be paid by the petitioners to the opposite parties. On the 16th November, 1933, a notice was served upon some of the petitioners calling upon them to show cause why the said decree for costs should not be executed against them. On the 19th December, 1933, the petitioners made an application before the learned Subordinate Judge under sections 151 and 152 of the Code praying *inter alia* that the order directing the amendment should be set aside. The learned Subordinate Judge, by his order dated the 5th October, 1934, held that the amount of pleaders' fees entered in the decree was contrary to the rules regarding costs. He, however, dismissed the petitioners' application on the ground that the executing court had no jurisdiction to go behind the decree and that the proper remedy of the petitioners was by way of appeal or review. The petitioners, thereupon, obtained the present Rule.

Now it has been stated above that the decree was amended by the learned Subordinate Judge without giving any notice to the petitioners. It is true that under the present Code no notice is necessary but it would be unfair to allow a decree to be amended without an opportunity being given to the party who will be affected by the amendment. In the case of *Bibi Tasliman* v. *Harihar Mahto* (1), Maclean C. J. observed :—

> I think the court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper case being substantiated.

(1) (1904) I. L. R. 32 Cal. 253, 256.

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The learned Subordinate Judge, therefore, on his own findings had power to set aside the *ex parte* order. It is, however, contended by the learned advocate for the opposite parties that as this order has now been incorporated in the decree, the only remedy open to the petitioners was to appeal against that decree. The obvious answer to this contention is that where the court can amend the decree, the proper course is to apply for amendment and not to appeal. Omission to appeal does not bar an application for amendment. See *Mirza Akbur Ali* v. *Mukhdoom Buksh* (1) and *Sara Bi* v. *Hamid Cassim* (2). Now the only cases in which the decree can be amended by the court which passed it are as follows :— (*i*) Where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission (section 152, Code of Civil Procedure). (*ii*) Where the court itself finds its decree as drawn up does not correctly state what the court actually decided and intended to decide, provided the amendment can be made without injustice or in terms which preclude injustice [See the observations of Romer J. in the case of *Ainsworth* v. *Wilding* (3) of Cotton L. J., Lindley L.J. and Bowen L.J. in In re *Swire* (4), quoted with approval in *Somasundaram Chetty* v. *Subramaniam Chetty* (5) and *Midnapur Zemindari Company Limited* v. *Abdul Jalil Miya* (6)]. It is true that an executing court cannot go behind the decree but where the executing court and the court which passed the decree are one and the same, the court can amend the decree in the course of the execution. See the observations of Mitter J. in the case of *Midnapur Zemindari Company* (6) referred to above. But where the decree of the first court is confirmed or reversed, it is superseded by the decree of the appellate court and the only court that can amend the decree thereafter is the appellate court. See *Brij Narain* v. *Tejbal Bikram Bahadur* (7).

(1) (1875) 25 W. R. (C. R.) 63, 64.
(2) (1926) I. L. R. 4 Ran. 347.
(3) [1896] 1 Ch. 673.
(4) (1885) 30 Ch. D. 239.
(5) [1926] A. I. R. (P. C.) 136.
(6) (1933) I. L .R. 60 Cal. 753.
(7) (1910) I. L. R. 32 All. 295; L. R. 37 I. A. 70.

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Now the order of this Court in the appeal preferred by the opposite parties was that they were to get their costs from the petitioners. Where the judgment awards costs to a party it implies costs allowed by the rules. If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the court intended. It is, therefore, the duty of the court to correct it so as to make it in conformity with the judgment. The learned advocate for the opposite parties did not dispute the contention of the petitioners that the pleaders' fees included in the decree by the amendment were not in accordance with the rules. It is therefore clear that the amended decree does not correctly state what the court actually decided or intended.

For the reasons stated above, I make the Rule absolute, set aside the orders of the learned judge dated the 19th September, 1930, and 5th October, 1934. I also set aside that portion of the decree in question which embodies the order of the Subordinate Judge dated the 19th September, 1930, and which has been put into execution by the opposite parties. This will not, however, preclude the opposite parties from taking such steps according to law as are open to them for getting the decree amended in accordance with the judgment. The petitioners are entitled to get their costs from the opposite parties—hearing fee is assessed at five gold mohurs.

HENDERSON J. The main point of controversy before us was whether we have power to interfere with this matter in revision or whether the petitioners ought to have appealed. Dr. Mukherji did not contend that a party aggrieved by an amended decree cannot appeal against it. He, however, argued that in this case there was nothing done which would entitle either party to appeal. The original decree was entirely in favour of the plaintiffs. No doubt if the Subordinate Judge had amended it and substituted for it some order against the plaintiffs in

favour of the defendants, it would have been open to the plaintiffs to appeal. But in the present case nothing of the kind was done and it is only by using language in the loosest possible way that the order of the learned Subordinate Judge, which is the subject-matter of this Rule, can be described as an amendment of the decree. In fact, the decree of the Subordinate Judge had vanished altogether and there was nothing to amend when it had been displaced by a decree of this Court passed on appeal. All that the Subordinate Judge was asked to do was to put into his original decree certain figures which would assist the office to assess the costs which had been awarded to the opposite party by the decree of this Court. In my judgment, it cannot be disputed that there was nothing which would give anybody a right of appeal.

In the second place, I am unable to see how any question of principle was involved before the learned judge. In their petition the opposite parties never claimed Rs. 1,500. They simply wanted to assess the amount to which they were entitled under the rules. In these circumstances, I cannot understand why the opposite parties have seen fit to attempt to uphold the order on a mere technicality. It was obviously to the interest of both sides to have a proper order passed by consent, as the only thing that had to be done was a matter of calculation and no question of principle was involved at all.

In the third place, supposing that there is any question of principle involved or any difficulty in interpreting the rules, that is a matter which has to be decided by this Court and the Subordinate Judge has no jurisdiction to decide it one way or the other. I am far from being satisfied that it was even necessary to enter any figures in the decree of the lower court which has now been superseded. All that was necessary was for the opposite party to collect such materials as are required to enable the decree of this Court to be executed.

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For these reasons, I am clearly of opinion that the petitioners have no right of appeal and their only remedy was by way of revision. On the merits, I am entirely in agreement with my learned brother that the Rule should be made absolute in the terms indicated by him.

*Rule absolute.*

S. M.