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object of driving Fuckeer Buksh and his party off the land, supposing they knew that Tareboolah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tareboolah. And it seems to me upon the finding of the Sessions Judge that it was so, because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that, if nothing more had occurred than driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder, and as I said in regard to the first part of the question, we are bound where there is a reasonable doubt to give the accused the benefit of it.

I concur with the other members of the Court in thinking that the accused ought not to have been convicted under s. 149, but that they may properly be convicted under s. 148. The conviction will be altered accordingly, and the sentence will be one of three years' rigorous imprisonment.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

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May 30.

CHOWDHRY GOLUCK CHUNDER AND OTHERS (JUDGMENT-DEBTORS) v. CHOWDHRY GUNGA NARAIN AND OTHERS (DECREE-HOLDERS).*

Decree, Error in—Power to amend Decree—Mistake—Appeal—Review.

A obtained a decree for costs in a suit brought by *B* against *A*, and the decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, *A* applied for execution of the decree, but it was found that the decree omitted to specify from whom *A* was to obtain his costs, and it

* Miscellaneous Regular Appeal, No. 97 of 1873, from an order of the Judge of Midnapore, dated the 21st December 1872.

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was held that no execution could be taken out under the decree. *A* therefore, applied to the Judge who passed the original decree to amend the decree, and the decree was amended on 21st August 1872, by inserting *B* as the party who was to pay *A*'s costs. *A* then made a fresh application for execution, which was allowed. *Held* that the Judge had power to amend the decree notwithstanding it had been appealed from and confirmed by the High Court, and such order was appealable.

IN this suit the present appellants were the original plaintiffs. They made the present respondents defendants, and it was held that they had been wrongly made defendants, and were therefore entitled to their costs. The decree was made on 13th July 1868. In the drawing-up of the decree, there was an omission, it not being stated from whom the defendants were to obtain their costs. The decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, the respondents made an application for execution of their decree for costs. The omission in the decree was then discovered, and though the Judge allowed execution to issue, it was held on appeal to the High Court on 23rd May 1872 (1) that they could have no execution upon the decree as it stood, Thereupon, they applied to the Judge who passed the original decree to amend the decree, and the omission was on 21st August 1872 rectified by inserting the names of the appellants as the parties from whom the defendants were to obtain their costs. A fresh application for execution was then made, which was opposed by the appellants on the ground that it was barred by the law of limitation. The Judge held on 21st December 1872 that it was not barred ; that the proceedings of 18th June 1869 kept the decree alive ; and that the application for execution on 13th December 1871 was *bonâ fide,* notwithstanding it had been held that execution could not be taken out under the decree.

From that decision the plaintiffs appealed to the High Court.

Baboo *Doorga Mohun Doss* for the appellants.—The Judge had no power to amend the decree on 21st August 1872. The application was made more than three months from the date of the decree. The decree too, having been confirmed by the High Court, had become a decree of that Court. It was practically

(1) See *post*, p. 368.

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an aplication for a review of judgment, and where an appea has been preferred to the High Court, and admitted, a reviw will not be granted by the lower Court—*Lucas* v. *Stephen* (1), [MARKBY, J.—Was it an application for review ?] Yes the Judge so treats it. The omission was not a mere clerical error. No sufficient cause was shown for the delay in making the application. As to limitation it is submitted that the application for execution on 13th December 1871 was not *boná fide* and therefore the execution was barred.

Baboo *Bhowanee Churn Dutt* for the respondents.—The appellants might have appealed from the order amending the decree; but they did not do so; such an order is appealable—*Shama Churn Chuckerbutty* v. *Bindabun Chunder Roy* (2) The Judge had power to amend this decree notwithstanding the appeal to the High Court— *Oomanund Roy* v. *Maharaja Suttish Chunder Roy* (3). The application was not an application for review under s. 376, Act VIII of 1859, but to correct a clerical error; the decree did not agree with the judgment, and the application was to amend that ommission. The Court had power to correct such an ommission—*Zuhoor Hossein* v. *Mussamut Syedun* (4), *Haradhun Mookerjee* v. *Chunder Mohun Roy* (5), and *Bunkoo Lal Singh* v. *Basoomunissa Bibee* (6).

Baboo *Doorga Mohun Doss* in reply:—*Shama Churn Chuckerbutty* v. *Bindabun Chunder Roy* (2) only shows that, where a review has not been applied for within three months, the High Court has power to look into the sufficiency of the cause for admitting it. The order of 21st August 1872 was not appealable; under s. 378, Act VIII of 1859, an order admitting a review is final: this was such an order. [BIRCH, J —It was not entered on the record as application for review.]

The judgment of the Court was delivered by

MARKBY, J.—In this case it appears that a decree was passed on the 13th July 1868; that decree was brought up to this

(1) 9 W. R., 301.

(2) Case No. 1395 of 1866, 30 January 1868.

(3) *Id.*, 471.

(4) *Post*. p. 367.

(5) W. R., Sp. No., 66.

(6) 7 W. R., 166.

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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 as informed, was made in accordance with the judgment which had been passed. Then proceedings in execution were agaiust 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.

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* (1), 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 ameed 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

(1) 9 W. R., 471.

referred to, and the other decision in *Zuhoor Hossein* v. *Mussamut Syedun* (1), and also the expression of opinion of Kemp

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

The 19*th February* 1869.

ZUHOOR HOSSEIN AND OTHERS (JUDGMENT-DEBTORS) *v.* MUSSAMUT SYEDUN (DECREE-HOLDER).*

Decree, Amendment of—Power of correcting Error in,

Mr. *R. E. Twidale* for the appellants.

Mr. *C. Gregory* and Munshee *Mahomed Yusuff* 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 Sudder 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

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