

course and filed an appeal when no appeal is allowed by law, to turn round and say that the Court is bound to exercise its extraordinary jurisdiction. Upon this application, as to whether there may be grounds for interference under s. 15 or not, I pronounce no opinion. All that I say is that I decline to treat this petition of appeal as an application to us to exercise our extraordinary powers under s. 15.

1876

IN THE
MATTER OF
THE PETITION
OF SOORJA
KANT ACHARJ
CHOWDRY.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Mitter.

FUTEEK PAROOEE (ONE OF THE DEFENDANTS) v. MOHENDER
NATH MOZOOMDAR (PLAINTIFF).*

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April 10.

Costs—Special Appeal—Order in Discretion of Lower Court.

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held* that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from such order: the rule as laid down in *Gridhari Lal Roy v. Sundar Bibi* (1) being that an order as to costs cannot be interfered with in special appeal unless it is illegal.

Semble—When the Court is of opinion that the plaintiff is not entitled to any substantial damages, it is not bound to award him nominal damages.

SUIT for Rs. 100 as damages for defamation. The plaintiff had previously instituted proceedings for criminal trespass in respect of the same matter in the Criminal Court against the defendants, which led to their being convicted and fined Rs. 5 each. The Munsif found that, under the circumstances, the plaintiff was entitled to damages, and assessed the amount at Rs. 15. He gave the plaintiff a decree for this amount with costs. On appeal by the defendants the Judge was of opinion that "as the plaintiff had already prosecuted the defendants criminally, and they had been fined to such an extent as the Magistrate thought proper, the present suit, although not contrary to law, was clearly a vexatious one, and the plaintiff ought not to

* Appeal under s. 15 of the Letters Patent of 1875, against decree of Birch, J., dated the 20th of August 1875, in Special Appeal No. 2756 of 1874.

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recover more than nominal damages." He, therefore, modified the decree of the Munsif by giving the plaintiff a decree for four annas as damages, and ordered him to pay all the costs both in the lower Court and on appeal.

The plaintiff preferred a special appeal to the High Court from this decision, on the grounds that it was erroneous in law in holding him entitled to only nominal damages; that the defendants ought to have been ordered to pay the costs of the suit; or that at any rate the plaintiff ought not to have been ordered to pay the defendants' costs.

It appeared that the costs would amount to about Rs. 21.

The appeal came before Birch, J., who held that as it was a special appeal he could not go into the evidence to see whether or not the Judge came to an erroneous finding on the facts, but being of opinion that the costs had been awarded on an erroneous principle, he modified the decree appealed from by giving the plaintiff the costs in both the lower Courts, and ordered the defendants to pay the costs of the special appeal.

The defendant Futek Parooe appealed under s. 15 of the Letters Patent on the ground that the special appeal having failed in every other respect, the order of the District Judge in respect of costs ought not to have been set aside, and that such order having been in the discretion of the District Judge it could not have been set aside in special appeal unless it was an illegal order.

Baboo *Aushootosh Mookerjee* for the appellant.

Baboo *Hemchunder Banerjee* and *Umakally Mookerjee* for the respondent.

The contentions and the cases cited appear in the judgment of the Court, which was delivered by

MARKBY, J.—This was a suit to recover damages for defamation. The matter had already been the subject of criminal proceedings. The Subordinate Judge gave the plaintiff a decree for nominal damages; but being of opinion that the suit was a vexatious one, directed the plaintiff to pay the costs of the litigation.

The case having come up to this Court on special appeal, Mr. Justice Birch was of opinion that there was no ground upon which he could interfere with the decree for nominal damages, but being of opinion that the plaintiff ought not to have been made to pay the costs of the suit set aside the order of the Subordinate Judge as to costs, and directed that the plaintiff should recover the costs of the litigation.

It is contended before us that, in special appeal, this Court cannot interfere with the discretion of the Courts below as to costs: and that in this case the award of costs to the defendant notwithstanding that the plaintiff obtained a decree for nominal damages, was within the discretion of the Court below.

Upon the first point we are of opinion that the question is concluded by the decision of the Full Bench in *Gridhari Lal Roy v. Sundar Bibi* (1). It was there laid down that this Court could, in regular appeal, review the exercise of the discretion of the lower Court as to award of costs; but that in special appeal this Court could not interfere unless the order made as to costs was illegal. We have no reason to doubt that this rule, which has also been approved in Bombay in *Amirsabeb Hafizulla v. Jamshedji Rustam* (2), has been since generally acted on in this Court. The only instances in which there is any apparent departure from it are in the cases of *Mussamut Bibee Moseehun v. Mussamut Bibee Munoorun* (3) and *Ooma Churn v. Grish Chunder Banerjee* (4), but the Full Bench decision does not seem to have been there referred to, and we have no reason to suppose that the learned Judges intended to question a rule thus authoritatively laid down. We may also observe that the attention of Mr. Justice Birch was not called to the Full Bench decision when the present case was before him. On the other hand, quite recently, a Judge of this Court, acting on the Full Bench decision refused to review in special appeal the discretion of the Court below as to costs.

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(1) B. L. R., Sup. Vol., 496.

(2) 4 Bom. H. C., A. C., 41, followed in *Desaji Lakhmaji v. Bhavanidas Narotamdas*, 8 Bom., H. C., A. C., 100; but the opposite view was taken

by the Madras High Court in *Sri Dantuluri Narayana Gajapati Razu Garis v. Surappa Razu*, 3 Mad. H. C., 113.

(3) 24 W. R., 69.

(4) 25 W. R., 22.

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We think that we ought to follow the Full Bench decision, and to hold that a special appeal will not lie against any order as to costs, which it was within the discretion of the lower Courts to make. It, therefore, remains to consider whether, when a decree had been given for nominal damages, the Court had a discretion to award costs to the defendant. We are of opinion that it had. The Court below thought that though the words complained of had been spoken, the plaintiff was not entitled to any damages, and that to bring this suit after criminal proceedings had been taken in the same matter was vexatious. In substance, therefore, the defendant succeeded in the Court below. Perhaps it would have been better under these circumstances to have dismissed the suit altogether, the Court in such a case not being bound to award nominal damages. But we are not aware of any law which prevents the Court, if it thinks that the suit is a vexatious one, and that no damage has really been sustained, from giving nominal damages to the plaintiff, and awarding costs to the defendant. The words of s. 187 leave the discretion of the Courts as to costs wholly unlimited, and it would be impossible to say that such an award of costs was illegal.

We, therefore, reverse the order of Mr. Justice Birch, and dismiss the special appeal.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

SUTTYA GHOSAL v. SUTTYANUND GHOSAL AND OTHERS.

1876
July 7.

Majority Act (IX of 1875), s. 3—Minor—Guardian ad litem.

The appointment of a guardian *ad litem* is sufficient to make the minor party subject to s. 3, Act IX of 1875 and to constitute his period of majority at 21, at any rate so far as relates to the property in suit, notwithstanding that such minor would but for such appointment have attained majority at 18.

By the decree in this suit, which was brought in 1871 for partition of the estate of Raja Kallysunkur Ghosal, deceased,