

CALCUTTA HIGH COURT

Banku Chandra Bose

Vs.

Marium Begum

(Lancelot Sanderson, C.J., Woodroffe and A Mookerjee, JJ.)

10.02.1916

JUDGMENT

Lancelot Sanderson, C.J.

1. I am of opinion that the preliminary point which Mr. Sarkar took on behalf of the respondents, the plaintiffs, is a good one.

2. The order is set out at pages 25 and 26 of the paper-book, and the material part of it is in these terms:- "it is ordered that upon the said Syed Ashrufuddin Ahmed within three weeks from the date hereof paying to the defendants' attorney Babu Virendra Nath Mitra the sum of L 250 towards the defendants' costs of and incidental to this application on the Said Babu Birendra Nath Mitra undertaking to refund any surplus that may be found to have been paid in excess upon taxation of the said costs and within one month from the date hereof giving security for 2,500 to the satisfaction of the Registrar the said order in so far as it dismissed this suit for want of prosecution be set aside and this suit be restored to its file." Then, "it is further ordered that the said Syed Ashrufuddin Ahmed do pay to the defendants their costs of and incidental to this application to be taxed by the Taxing Officer of this Court." In pursuance of that order the L 250 was paid by Ahmed to the defendants' Solicitor, and was accepted by him. It is said by the learned Counsel for the appellant that his client could not help himself, as under the order Ahmed was bound to pay the L 250, and the defendants' Solicitor was bound to accept it. Well that may be; but personally, I cannot help thinking that the defendants would have been in a much better position if, upon that transaction, they had said, "we intend appealing against this order and we only accept this sum of L 250, under protest, because the order contains a direction that it shall be paid, but we place on record our intention to appeal and we accept the money under protest." But I do not base my judgment upon that ground only, because I think that when the defendants took advantage of the order which directed the payment to the defendants of their costs of and incidental to the application, they precluded themselves from appealing against that order. The principle upon which cases such as this must be dealt with was laid down quite clearly by my learned brother Mr. Justice Mookerjee in the case which has been cited and which is reported as

*Mani Lal Guzrati v. Harendra Lal Roy*¹ and the passage which I am about to read begins at the bottom of page 558*: "That principle is that a party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another." In my judgment, when the

¹8 Ind. Cas. 79 : 12 O. L.J. 556

defendants adopted the order for taxation and payment of the costs, they did take a benefit under it, because they having obtained the allocatur, as far as I understand at present, there was nothing to prevent them from issuing execution, upon that allocatur, against Ahmed : and, for this reason I am of opinion that they did adopt the order of the Court, and more than that, they acted under it and enjoyed the benefit of it. That being so, upon the principle laid down in the case cited, which is the principle which has been in existence for many years since the case of *Tinkler v. Hilder*² the defendants cannot adopt the order for one purpose and their claim to have it set aside for another purpose.

3. For this reason I think this appeal should be dismissed with costs; such costs may be set off against any costs which are recoverable against Ahmed. Woodroffe, J.- I agree. Mookerjee, J.-I agree. Appeal dismissed.

²(1849) 4 Exch. 187 at p. 191 : 7 D. & L. 61 : 18 L.J. Ex 420 : 13 Jur. 684