

APPELLATE CIVIL.

Before B. B. Ghose and N. K. Bose JJ.

SARAT CHANDRA RAKSHIT

v.

SUBASHINI DEBI.*

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Aug. 17.

Restitution—Sale set aside by agreement on terms—Whether judgment-debtors can claim mesne profits for the ad interim period—Appeal, maintainability of—Civil Procedure Code (Act V of 1908), ss. 144, 151.

During the pendency of an appeal to the High Court against an order refusing to set aside a sale under Order XXI, rule 90, the decree-holder auction-purchaser took delivery of possession of the property on the 22nd January, 1923. On the 2nd March, 1925, the appeal was compromised and a consent order was passed, whereby the judgment-debtor would get back possession of the property on payment of the first instalment on the 14th April, 1925. In an application by the judgment-debtors for possession and mesne profits,—

Held that it must be presumed that the whole contract as regards the liability of the parties *inter se* was contained in the agreement on which the consent order was based. On a proper reading of the consent order, it cannot possibly be supposed that, up to the date of the payment of the first instalment, the possession of the decree-holder was that of a trespasser, and that the judgment-debtors were not entitled to any mesne profits from the date of the decree-holder's taking possession to the date fixed by the consent order for possession to be given over to them.

Beni Madho Singh v. Pran Singh (1) distinguished.

An order directing the decree-holder to pay mesne profits to the judgment-debtors by way of restitution is appealable even though the sum has not been worked out and the only thing that remains to be done is to work out the amount. It falls within the definition of a decree under section 2 of Act V of 1908.

Rahimbhoy Habibhoy v. Turner (2) and *Saiyid Muzhar Hossein v. Bodha Bibi* (3) referred to.

APPEAL by Sarat Chandra Rakshit, the decree-holder.

This was an application by the judgment-debtor asking for possession of the property in question and mesne profits for the interval between the decree-holder taking possession thereof and the restoration

*Appeal from Original Order, No. 8 of 1927, against the order of Kamini Kumar Dutt, Subordinate Judge of Khulna, dated Sep. 11, 1926.

(1) (1911) 15 C. L. J. 187.

(3) (1894) I. L. R. 17 All. 112;

(2) (1890) I. L. R. 15 Bom. 155;

L. R. 22 I. A. 1.

L. R. 18 I. A. 6.

of possession to the judgment-debtors by virtue of a consent order. The Subordinate Judge held the decree-holder liable for mesne profits for the period by way of restitution. The material facts and dates are set out in the judgment of Mr. Justice B. B. Ghose.

Mr. Sarat Chandra Ray Chaudhuri (with him *Mr. Gourmohan Datta*), for the appellants.

Dr. Naresh Chandra Sen Gupta (with him *Mr. Jatindra Mohan Chaudhuri*), for the respondents.

GHOSE J. This is an appeal, on behalf of the decree-holder, against the order of the Subordinate Judge, declaring that he is liable for mesne profits for a certain period commencing from the 22nd January, 1923, to the date of the application, which was 25th March, 1926. The question arises in this way: The decree-holder obtained a decree for arrears of rent with regard to the property in question in the year 1920. The decree was put into execution for the whole amount, which was something like nine thousand rupees and the tenure was purchased by the decree-holder at the execution sale on the 7th November, 1921. The judgment-debtors applied for setting aside the sale and that application was dismissed on the 27th May, 1922, by the trial court. The sale was subsequently confirmed and symbolical possession is alleged to have been taken by the decree-holder on the 22nd January, 1923. From the order of the trial court, dismissing the application for setting aside the sale, an appeal was taken to this Court by the judgment-debtors and that appeal was settled by compromise between the parties. The terms of the compromise were that the sale should be set aside on condition that the judgment-debtors deposit in court the sum of two thousand rupees in April, 1925, and the balance of the decretal amount be paid by them in four equal monthly instalments on the first day of every ensuing month, and in default of the first payment being made on the 14th April, 1925, or of any of the four equal ensuing monthly instalments, the

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sale was to stand. On payment of the first instalment, possession was to be given to the judgment-debtors and the judgment-debtors were prevented from making any permanent settlement without the consent of the decree-holder. In March, 1926, the judgment-debtors made an application purporting to have been made under sections 144 and 151 of the Code of Civil Procedure asking for restitution with the mesne profits, which they said they were entitled to get from the decree-holder for his not having delivered possession to the judgment-debtors. The decree-holder took his stand upon the fact that the judgment-debtors were not entitled to any mesne profits, and he further alleged that he had never been in actual possession of the land in question. The Subordinate Judge has held that the decree-holder is liable for mesne profits by way of restitution consequent to the setting aside of the sale under the provisions of section 144 of the Code. The judgment-debtors claimed about seventy-five thousand rupees per year by way of mesne profits. On the face of it, it seems to be an extraordinarily inflated claim, having regard to the fact that the rent reserved for the tenure is only 1,800 rupees, which these judgment-debtors had not been able to pay, and for which default the decree was obtained by the decree-holder. From the decision of the Subordinate Judge, the decree-holder has preferred this appeal.

It is contended on behalf of the judgment-debtors respondents that the appeal is incompetent. If it is an order under section 144 of the Code, it is a decree and from that order there would be an appeal. But it is contended by the respondents that it is not a final order, as the amount of the mesne profits due has not been assessed and, therefore, there would be no appeal. The appellant, however, contends that when the order has been made, the decree-holder is liable for mesne profits, that is a decree, although the sum has not been worked out, and the only thing that remains to be done is to work out the amount. In my judgment, there is an appeal from

the order made by the Subordinate Judge, because it determines the rights of the parties finally with regard to the matter in question, and it falls within the definition of a decree under section 2 of the Code. It may further be stated that according to the principles enunciated by the Privy Council in the cases of *Rahimbhoy Habibhoy v. Turner* (1) and *Saiyid Muzhar Hossein v. Bodha Bibi* (2), this is a final order, from which an appeal is maintainable. The preliminary objection, therefore, fails.

The next question is whether the judgment-debtors are entitled to mesne profits by way of restitution. The first question is with regard to the nature of the consent order. If, upon the payment of the first instalment, the decree-holder had not delivered possession to the judgment-debtors, there is no question that the judgment-debtors would be entitled to possession by execution. The important question is, and that is the only question which has been argued on behalf of the appellant, as to whether the decree-holder would be liable for mesne profits between the date of 22nd January, 1923, to the 14th April, 1925, when the first payment of the instalments was made by the judgment-debtors. It is contended on behalf of the respondents judgment-debtors that they come within the spirit of the provisions of section 144 of the Code, where it is stated that when a decree is varied or reversed the party entitled to any benefit by way of restitution or otherwise should get restitution from the first court. Section 144 does not apply in terms to this case, because it is not a reversal of the decree on which restitution is claimed. But it is said that the judgment-debtors are entitled to recover mesne profits under section 151 of the Code, and reliance has been placed in support of this contention on the case of *Beni Madho Singh v. Pran Singh* (3). There it was laid down, following a series of cases, that the court has inherent power to

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give relief to a party who has suffered any loss on account of the court's erroneous order. That proposition certainly is not applicable to the present case. Here the order confirming the sale was set aside by an agreement between the parties, and nothing can be said against the court confirming the sale that the order was made erroneously and, therefore, the court should exercise its inherent power to place the parties in the position in which they were before the erroneous order was made. A consent order was made upon certain conditions and it was agreed between the parties that only upon the payment of the first instalment, possession was to be delivered to the judgment-debtors. If it was the intention of the parties that up to that date the decree-holder would be liable for mesne profits for having been in possession of the property, the parties would have distinctly set that forth in that agreement on which the order was made. If it was the intention of the judgment-debtors that they would hold the decree-holder liable for mesne profits up to the payment of the first instalment, the decree-holder might very well have said "I am willing to deliver possession this very day if you pay me the money immediately." It is impossible to conjecture what the attitude of the decree-holder would have been if the judgment-debtors had expressed any such intention. It must, therefore, be presumed that the whole contract as regards the liability of the decree-holder to pay anything to the judgment-debtors and the liability of the judgment-debtors for the payment of the decretal amount was contained in the agreement on which the order was passed. On a proper reading of the consent order, one cannot possibly suppose that up to the date of the payment of the first instalment the possession of the decree-holder was that of a trespasser, and unless one holds that a person is in possession of another's property without any right to do so, he cannot in any view be made liable to pay mesne profits. The contention therefore on behalf of the judgment-debtors that they

are bound to be restored to the same position in which they were before the sale was confirmed and they are entitled to recover mesne profits from the decree-holder is without any substance whatsoever. The case is quite different when the decree or order of a trial court is reversed, because in that case the possession taken between the date of the decree of the trial court and the reversal of that decree becomes wrongful on account of the reversal of the decree of the trial court.

I am, therefore, unable to agree with the view of the Subordinate Judge that the judgment-debtors are entitled to any mesne profits from the decree-holder up to the date of the payment of the first instalment on the 14th April, 1925. If the decree-holder has not delivered possession to the judgment-debtors, as provided in the consent order, the judgment-debtors, as I have already said, are entitled to be put into possession and to other consequential reliefs, but they have no right to claim anything by way of mesne profits prior to the 14th April, 1925.

The order, therefore, of the Subordinate Judge making the decree-holder liable for mesne profits up to that date, that is the 14th April, 1925, must be set aside, and the judgment-debtors' application for mesne profits for that period is dismissed.

The appellant is entitled to his costs of this appeal. The hearing-fee is assessed at ten gold mohurs.

BOSE J. I agree.

Appeal allowed.

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