

that, at that time, the defendant's possession is considered at an end, and the transfer to the plaintiff becomes complete.

We think, therefore, that the judgment of the lower Appellate Court, upon the question of limitation, must be reversed, and that the case should be remanded to that Court to be tried upon its merits.

The costs in this Court will abide the result.

*Case remanded.*

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## APPELLATE CIVIL.

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*Before Mr. Justice Morris and Mr. Justice Priusep.*

MOHAMED ELAHEE BUKSH AND OTHERS (DEFENDANTS) v. KALLY  
MOHUN MOOKHOPADHYA AND ANOTHER (PLAINTIFFS).\*

1879  
*Dec. 4.*

*Money paid under conditional Decree—Application to recover, on failure of Contingency—Superseded Decree.*

A obtained against B a decree for arrears of rent at enhanced rates for the year 1871. Pending an appeal from this decree, A obtained a second decree against B for arrears of rent at enhanced rates for the succeeding year. This decree, however, made the payment of so much of the rent calculated at enhanced rates contingent on the event of the Appellate Court affirming the decree in the former suit. A executed this last decree, and obtained payment of the rent at enhanced rates. On the reversal of the decision in the former case by the Appellate Court, B applied for a refund of so much of the money paid A as represented the rent calculated at enhanced rates.

*Held*, that the portion of the second decree, relating to enhanced rent, being merely conditional, was virtually superseded by the order made by the Appellate Court in the previous suit, and that such moneys were, therefore, recoverable.

PREVIOUS to this application, the present plaintiffs sued the defendants for the recovery of arrears of rent at enhanced rates for the year 1278 (1871); this suit was dismissed by the Court of first instance as being barred by limitation. This decision was in turn reversed by the lower Appellate Court, and the defendants thereupon appealed to the High Court. Pending the

\* Appeal from Orders, Nos. 102 and 101 of 1879, against the order of F. H. McLaughlin, Esq., Officiating Judge of Zilla Noakhali, dated the 8th February 1879.

1879

मोहनबद  
बलान्ति  
बुक्सि

v.

काल्य मोहन  
मोहनबद  
दिया.

hearing of this appeal, the plaintiffs brought the present suit to recover arrears of rent at enhanced rates from the defendants for the year 1279 (1872), and obtained a decree. This decree, however, contained a condition, that the rent claimed in excess of the ordinary rate should be allowed, contingent on the event of the High Court affirming the decree in the previous case. The plaintiffs proceeded to execute their second decree, and the defendants, in compliance with the order of the Court executing the decree, paid the plaintiffs, in addition to the sum decreed for arrears of rent, the sum of Rs. 540, representing the money alleged to be due as rent calculated on the enhanced rate mentioned in the decree. On the reversal of the decision of the lower Appellate Court in the first suit by the High Court, the defendants, on the ground that the condition upon which the payment of the sum of Rs. 450 had been enforced having failed, applied for a refund of this money.

The Court below was of opinion that a portion of the second decree being in form conditional, was "unusual and *prima facie* illegal," yet, as the defendants had taken no steps to set aside the order of the Court executing the decree enforcing the payment of the enhanced rent, they were debarred through their own laches from now seeking for a refund of the money.

Against this order the defendants appealed to the High Court.

Baboo *Rajendro Nath Bose* for the appellants.

Baboo *Kashi Kant Sen* for the respondents.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—This appeal raises a question as to the proper reading of the decree which is sought to be executed, and the still more important question, whether the lower Court was right in refusing to allow certain moneys that had been paid in execution of the decree to the judgment-creditor, to be recovered back and refunded to the judgment-debtor.

The lower Court, as we think, read the decree aright, namely, as a decree containing the condition that the rent claimed for 1279 in excess of the ordinary rate, shall be allowed only in the

event of the Appellate Court affirming a previous decree allowing a similar sum in excess as enhanced rent for the year 1278.

The decree was positive only in regard to the amount claimed at the old rate of rent. And it seems singular that, in spite of the condition relative to the sum claimed as enhanced rent, the Court, in the execution department, should, before the appeal referred to in the decree was decided, have allowed the judgment-creditor to take out execution and compel the judgment-debtors to pay a portion of the excess demand.

When the appeal was decided in favor of the judgment-debtors, and the sum claimed as enhanced rent of 1278 was disallowed by the dismissal of the suit, the judgment-debtors sought a refund of the money that had been paid by them in excess, and referred to the conditional terms of the decree in support of their claim. The Judge has refused their application, on the ground that it ought to have been made when the conditional part of the decree came to be executed, and that, as the decree continues in force, having been neither appealed against nor sought to be altered in review, the order of the execution department cannot be altered. He also adds, that there is no procedure which can be found for remedying the error in the way now sought by the petitioners.

The Judge, when he passed this order, could not apparently have had his attention drawn to the opinion expressed by the Privy Council in the case of *Shama Parshad Roy Chowdhry v. Hurro Parshad Roy Chowdhry* (1), or to the case, somewhat similar to the present, of *Jogesh Chunder Dutt v. Kally Churn Dutt* (2). The ruling laid down by the Privy Council is clear, namely, that "money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it was recovered remains in force. And this rule of law rests upon this ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding."

In the present case, admitting that the execution department allowed the judgment-creditors to realize under their decree a

(1) 10 Moore's I. A., 203; S. C., 3 W. R., P. C., 11. (2) L. L. R., 3 Cal., 30.

1879

MOHAMMED  
 БЛАХИН  
 БУКШ  
 v.  
 KALLY MOHUN  
 МОКХОПА-  
 ДРИА.

1879  
 MOHAMMED  
 ELAHEE  
 BUKSH  
 of  
 KALLY MOHUN  
 MOOKHOPA-  
 DHYA.

portion of the amount claimed as enhanced rent, there can be no question that, in accordance with its express terms, that part of the decree was "superseded" by the proceeding in appeal relative to the enhanced rent of 1278. And again, under the authority of the Full Bench above quoted, the decree, if it be a decree for enhanced rent of 1279, must be treated as subordinate to, and dependent upon, the decree which disallowed the enhanced rent claimed for 1278.

The order of the Judge is, therefore, set aside, and the judgment-debtors, appellants, are declared entitled to recover back from the judgment-creditors with interest at 6 per cent. per annum such amounts as were realized by them as enhanced rent under the decree. The Judge will, upon this application of the judgment-debtors, take necessary steps for the recovery of the money.

*Appeal allowed.*

*Before Mr. Justice Morris and Mr. Justice Prinsep.*

GYAMONEE (DECREE-HOLDER) v. RADHA ROMON (OBJECTOR).\*

1879  
 Dec. 4.

*Execution of Decree—Order on questions arising between Co-Decree-holders not appealable—Civil Procedure Code (Act X of 1877), ss. 244, art. (c) 588.*

A decree-holder, having assigned a share of her decree, applied several times jointly with such assignee for execution. On a subsequent application made by the original decree-holder alone, the Court, while granting the application, directed that the proceeds arising from such execution should only be paid over to the co-decree-holders jointly. *Held*, that the question in dispute being one between co-decree-holders, and not between parties to the suit or their representatives as contemplated by art. (c), s. 244 of the Civil Procedure Code, no appeal would lie from such order.

In this case, one Gyamonee, having assigned one-third share of her decree, applied several times jointly with Radha Romon, her assignee, for execution. Subsequently, Gyamonee alone made a further application for execution of the decree, and the

\* Appeal from Order, No. 130 of 1879, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Zilla Mymensing, dated the 24th March 1879.