APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and
Mr. Justice Wilkinson.

ARUNACHELLAM (PETITIONER AND PURCHASER), APPELLANT,

v.

ARUNACHELLAM AND OTHERS (COUNTER-PETITIONERS AND DEFENDANTS NOS. 8 AND 10, AND SURETIES NOS. 1 TO 9), RESPONDENTS.*

1891. September 16, 17, 29.

Civil Procedure Code, ss. 211, 253, 318, 610—*Construction of order giving effect to judgment of Privy Council—Mesne profits—Cost of management—Interest— Sureties for execution of decree.*

Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land; and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant's claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest:

Held, (1) the order must be taken to have been made under Civil Procedure Code, s. 610 and an appeal lay therefrom.

(2) although the appeals to the High Court and the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequential upon it. *Rodger* v. *The Comptoir D'Escompte de Paris* (L.R., 3 P.C., 465) followed.

(3) the application was rightly dismissed against the sureties.

(4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management.

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* Appeal against Order No. 20 of 1889.

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(5) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment.

APPEAL against the order of S. Gopalachariar, Subordinate Judge of Madura (East), made on execution-petition No. 72 of 1888, in original suit No. 44 of 1879.

In original suit No. 44 of 1879, on the file of the Subordinate Court of Madura (East), the plaintiff therein obtained a money decree in execution of which certain land was attached and brought to sale as the property of defendants Nos. 8 and 9, of whom the latter was the father of defendant No. 10.

The present petitioner was the purchaser at the Court sale, who had paid into Court Rs. 20,500 as the purchase money; the first and second respondents to his petition were the eighth and tenth defendants above referred to, the remaining respondents were persons who had given security for the delivery of the land in question, together with mesne profits thereon to the purchaser under the circumstances mentioned below. The purchaser had already obtained possession of the property; by his present petition he sought to recover Rs. 25,782-15-10 for the mesne profits accrued on the land during the period (from 26th February 1885 to 30th June 1888), while he was out of possession, by attaching the sale-proceeds which remained in Court and also the property which was the security furnished by respondents Nos. 3—11 as above.

The petitioner's purchase took place on 28th July 1882; and he obtained possession in the first instance on 15th October 1882; but, on 16th October 1883, the High Court made an order setting aside the sale to him. On 3rd December 1883, he applied for leave to appeal against this order to Her Majesty in Council and also made an application under Civil Procedure Code, s. 608 (*d*) that he should be permitted to remain in possession, the purchase money paid into Court being treated as security for the mesne profits. Pending the disposal of these applications, viz., on 26th February 1885, respondents Nos. 1 and 2 were placed in possession, but, on 13th April 1885, the High Court admitted the petitioner's appeal to Her Majesty in Council, and, with reference to his other application, ordered that respondents Nos. 1 and 2 (by their guardians) should furnish security for the payment of the mesne profits and the redelivery of the land in case that appeal should be successful. In pursuance of the last-mentioned order, after a prolonged inquiry, a surety bond was executed in Feb-

ruary 1886, charging the property to which the second part of the present petition related. In the interval, viz., in October 1885 the land, which had been sold to the petitioner, was placed in the possession of a receiver appointed by the Court on the motion of other persons who held decrees against respondents Nos. 1 and 2.

The Privy Council delivered judgment in the above appeal in favour of the petitioner and the order in Council upon this judgment was received on 14th August 1888, in pursuance of which he was put into possession on 25th August 1888.

To the present petition various objections were raised, upon which and upon the petition the following questions arose for determination, which were summarized by the Subordinate Judge, in paragraph 25 of his order (referred to in the judgment of the High Court) as follows:—

(1) "Whether the application is not sustainable against defendant No. 8.

(2) "Whether the tenth defendant's interest also passed by "the sale or not, and, if not, should any and what share be "excluded on his account?

(3) "What is the amount of net income due to the petitioner "for each of the faslis in question?

(4) "Whether the sureties can be proceeded against by this "application.

(5) "To what extent and for what amount are the several "sureties or their properties liable?

(6) "Whether the deposit money should be first proceeded "against by petitioner or other properties of the minors exhausted, "before the sureties' properties are pursued."

The Subordinate Judge held as to the first and second questions that the contentions of respondents Nos. 1 and 2 were clearly unsustainable. On the 3rd question, he held that the total sum payable, in respect of the net income for the four faslis 1294—1297, was Rs. 17,965. In arriving at this sum, he allowed to the petitioner no interest, observing that there was no provision for such allowance in the decree and referring to *Hurro Doorga Chowdhrani* v. *Maharani Surut Soondari Debi*(1), but he did allow to respondents Nos. 1 and 2 the full collection charges incurred during the receiver's management. As to the remaining questions,

(1) L.R., 9 I.A., 1.

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he pointed out that, in his view, the security had not been given for the performance of any order in Council, but merely for the payment of mesne profits during the period of the defendant's possession before such order was made, and held that respondents Nos. 3—11 could not be made liable in the present proceedings, their obligation being an independent one and not comprised in the decree and not coming within the purview of Civil Procedure Code, s. 253.

The petitioner preferred this appeal on the following grounds:—

(1) "The Subordinate Judge is wrong in holding that the "appellant cannot obtain restitution by proceeding against the "sureties in execution proceedings, but must resort to a regular "suit against them.

(2) "The Subordinate Judge overlooked the definition of "mesne profits in disallowing interest on the amount of net income "of each fasli on the ground that interest is not allowed on such "amounts in the decree.

(3) "In ascertaining the amount of mesne profits, the Subor-"dinate Judge is wrong in deducting from the income the salary "of, and the charges incidental to the appointment of a receiver.

(4) "The Subordinate Judge ought to have awarded the "actual amount of mesne profit for fasli 1297, though it was in "excess of the probable amount estimated by the appellant."

Respondent No. 1 preferred a memorandum of objections on the following ground, *inter alia*, that "the purchaser is not entitled "to recover mesne profits in execution proceedings. His remedy, "if any, is by regular suit."

Bashyam Ayyangar for appellant.

Subramanya Ayyar, *Krishnasami Ayyar*, *Seshagiri Ayyar*, and *Sundara Ayyar* for respondents.

JUDGMENT.—This is an appeal from an order made by the Subordinate Judge of Madura with reference to the order of Her Majesty in Council, dated the 29th June 1888. The appellant is the purchaser at the Court sale held in execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court and respondents Nos. 1 and 2 are the eighth and tenth minor defendants in that suit. The properties, which the appellant purchased, were put up to sale as belonging to the first respondent and to the ninth defendant, the father of the second respondent,

and knocked down to the appellant, as the highest bidder, on 28th July 1882. An application was afterwards made, on behalf of the respondents, under section 311 of the Code of Civil Procedure, to set aside the sale on account of certain irregularities, but the Subordinate Judge disallowed their objection. He then passed an order confirming the sale under section 312, granted a certificate to the appellant under section 316, and placed him in possession of the properties purchased under section 318 on the 15th October 1882. From the order confirming the sale, respondents Nos. 1 and 2 appealed to the High Court under section 588, and, on the 16th October 1883, the High Court considered that the sale was irregular and reversing the order of the Subordinate Judge, made under section 312, set aside the sale. The representatives of the first and second respondents applied to be put back in possession, and, on the 26th February 1885, the Subordinate Judge replaced the properties sold in their possession. Meanwhile, the appellant applied for leave to appeal to the Privy Council, and, on the 13th April 1885, the High Court admitted his appeal and ordered that respondents Nos. 1 and 2, by their guardians, should furnish security for redelivery without waste of the properties sold to the appellant and for mesne profits if its order, setting aside the sale should be reversed by the Privy Council. Pursuant to that order, security was furnished for Rs. 10,000 and Rs. 5,000 on 2nd November 1885 and 20th February 1886. Meanwhile, several creditors, who had obtained decrees against respondents Nos. 1 and 2, attached the villages, which were put up to sale in July 1882, and, on their application, the Subordinate Judge appointed a receiver. From October 1885 the receiver held the villages on behalf of the decree-holders, and the collections, which he remitted to the Subordinate Court from time to time, were applied in satisfaction of their decrees. On the 27th June 1888, the Judicial Committee heard the appeal from the order of the High Court, and held that that order should be reversed, that the order of the Subordinate Judge should be affirmed, and that the respondents should pay the appellant's costs throughout.

On the 29th June 1888, Her Majesty in Council passed an order in accordance with the judgment of the Judicial Committee, and, on the 14th August 1888, the High Court transmitted that order to the Subordinate Court for execution. The appellant then applied to be put back in possession of the villages purchased by

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him on the ground that he was entitled to restitution and the Subordinate Judge restored possession to him on the 25th August 1888. The appellant then claimed mesne profits from the 26th February 1885, when respondents Nos. 1 and 2 were put back in possession with reference to the order of the High Court to the end of fasli 1297 or 30th June 1888. He sought to recover them in execution proceedings not only from respondents Nos. 1 and 2 by attachment of the sale amount deposited in Court, but also from their sureties by attachment of properties offered as security. The respondents resisted the application and the several questions raised by them for decision are set forth by the Subordinate Judge in paragraph 25 of his order. The Subordinate Judge held that the appellant was entitled to recover mesne profits from respondents Nos. 1 and 2 by application for restitution and found that the amount payable for such mesne profits was Rs. 17,965. But he was of opinion that the appellant was not entitled to proceed against the sureties, respondents Nos. 3 to 11, summarily or by way of execution and that his remedy against them was by a regular suit. Accordingly, he permitted execution against respondents Nos. 1 and 2 for the amount mentioned above, and dismissed the appellant's application so far as it related to enforcement of liability of the sureties, respondents Nos. 3 to 11. In the view which the Subordinate Judge took of the case, as against the sureties, he did not consider it necessary to determine the fifth and sixth questions mentioned in paragraph 25 as arising upon their contention. To this order, both the appellant and respondents Nos. 1 and 2 object and six questions are argued before us, two for the latter and four for the former, the other questions not being pressed upon us.

It is urged for respondents Nos. 1 and 2 that no appeal lies from the order made by the Subordinate Judge. The order in question was made in enforcement of the order of Her Majesty in Council and it can only be made under section 610 of the Code of Civil Procedure, which renders the rules applicable to execution of original decrees also applicable to enforcement of that order. Any party aggrieved by an order made in execution of a decree of the Subordinate Judge is entitled to appeal, and the objection is, therefore, one which cannot be supported.

The next contention is that the Subordinate Judge has misconstrued the order of Her Majesty in Council, that it did not

direct payment of mesne profits, and that such payment was not within its purview. It is also urged that the Subordinate Judge placed the appellant in possession under section 318 and that there was no appeal to the Privy Council from the order made under that section. The formal order of Her Majesty in Council declares that the appeal was allowed, that the order of the High Court was reversed, and that the order of the Subordinate Judge was confirmed, and directs the several Courts and all parties concerned to conform to it. The true construction is not simply that the relief awarded in terms by the order restored should be continued to the appellant from the date of it, but also that every benefit fairly and reasonably consequential upon it should likewise be continued to him. That was the construction put by the Judicial Committee upon a similar order in *Rodger* v. *The Comptoir D'Escompte de Paris*(1). It is true that the order, which the High Court set aside on appeal, and which the Privy Council restored, was the one made by the Subordinate Judge, confirming the sale to the appellant under section 314 and that it said nothing further than that the sale was confirmed. But sections 316 and 318 which are peremptory directed what relief or benefit should be conferred upon him when an order confirming the sale was made; and the former ordered the issue of a certificate as a title-deed and the latter, the delivery of the property purchased. The three sections 314, 316 and 318 are, when read together, related to each other, the first as declaring that the purchaser has a valid title, the second as directing that statutory evidence of such title be furnished to him, and the third as giving effect to the sale by transfer of possession without the intervention of a regular suit. The declaration, therefore, that the order of the Subordinate Judge is restored includes a direction necessary to continue to the appellant the consequential benefit which the appellant had secured under section 318 when the High Court set aside the order of the Subordinate Judge. This is also apparent from the respondent's action when the High Court set aside the sale under section 314, and he claimed under that order to dispossess the appellant who had been placed in possession under section 318, and to be put back in possession though there had been no appeal to the High Court from the order made under that section. We are of

(1) L.R., 3 P.C., 465.

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opinion that a benefit by way of restitution is clearly within the purview of the direction embodied in Her Mejesty's order in Council. It does not appear that this objection was taken when the High Court transmitted Her Majesty's order for execution to the Subordinate Court.

No other objection contained in the memorandum of objections is pressed and we dismiss it with costs.

Passing on to the objections taken by the appellant, the first and the main contention is that the Subordinate Judge erred in holding that the sureties could not be proceeded against except by a regular suit in respect of mesne profits to which he is entitled by way of restitution. The sureties being no parties to the order made by Her Majesty in Council, their liability could only be enforced on general principles by a regular suit in the absence of a special statutory direction on the subject. This is conceded, but our attention is drawn to section 253 of the Code of Civil Procedure and to the words in section 610, "in the manner and according to the rules applicable to the execution of its original decrees," and it is argued that section 253 ought to be read as part of section 610. It might be so if there was no special provision inconsistent with such contention in section 610 as amended by Act VII of 1888, section 58. That section provides that "in so far as the order awards costs to the respondent, it may be executed against a surety therefor to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant." On comparing it with section 253, it is apparent that the words, "in so far as the order awards costs to the respondent" are substituted for the words in section 253, "the decree may be executed." The intention it suggests is to make the rule contained in section 253 part of section 610 only so far as the order of Privy Council awards costs to the respondent. On the view that the rule embodied in section 253 was intended to be included by the words, "according to the rules, applicable to the execution of its original decrees" there is no necessity for the amendment; nor is it sensible. It is suggested that we may treat it as surplusage or as introduced by way of illustration, but we cannot accede to this suggestion without departing from the recognised rules of interpretation. There is reason to think that the amendment was made with reference to a conflict of opinion on the subject between the different High

Courts. In *Bans Bahadur Singh* v. *Mughla Begam*(1) which was decided in January 1880, the question whether the general words in section 610 "according to the rules applicable to execution of its original decrees" include the rule contained in section 253, was considered by the Full Bench of the Allahabad High Court. The majority of the Court held that it did, but two of the learned Judges dissented from that opinion. In that case there were two references and one of them related to a surety-bond which secured the costs of the Privy Council, whilst the other covered the whole decree appealed against including the decretal amount and the costs. The learned Chief Justice, who delivered the judgment of the majority of the Court, observed that the legal question was the same in both and must be answered in the same way. The answer was that all the rules applicable to execution of original decrees including section 253 were made part of section 610, the ground of decision being that sureties were intended to be placed on the same footing with defendants, and that there was no reason why a distinction should be made between persons who became sureties in the Original Court before decree and those who became such in the Appellate Court before the appellate decree. The dissenting Judges, however, held that the liability of a surety rested on his bond and not on the decree, and that section 253, which introduced a rule of substantive law among the rules of procedure, was limited to the class of sureties mentioned therein, and could not be extended to sureties who became such when an appeal was preferred to the Privy Council, and that the general words in section 610, "rules applicable to execution of original decrees," referred only to rules of procedure and did not include a rule of substantive law embodied in section 253. In *Radha Pershad Singh* v. *Phuljuri Koer*(2), the same question was considered by a Divisional Bench of the High Court at Calcutta with reference to an application for execution against a surety in respect of costs awarded by the Privy Council, and the learned Judges, who decided that case, concurred in the opinion of the dissenting Judges in the Allahabad case. The effect of similar words used in section 583 was considered by Divisional Benches of the High Courts at Bombay and at Madras in *Venkapa Naik* v. *Baslingapa*(3) and *Thirumalai* v. *Ramayyar*(4) and the Judges who decided those cases agreed

(1) I.L.R., 2 All., 604.
(2) I.L.R., 12 Cal., 404.
(3) I.L.R., 12 Bom., 411.
(4) I.L.R., 13 Mad., 1.

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with the majority of the Allahabad High Court. All these decisions had been passed except *Thirumalai* v. *Ramayyar*(1) before the amendment was introduced, and, though section 610 was amended, section 583 was not similarly amended. The amendment was apparently made with reference to the conflict of opinion between the High Courts at Allahabad and Calcutta, and the insertion of the words, "in so far as the order awards costs," to the respondent becomes significant when it is remembered that the majority of the Judges of the High Court at Allahabad held that the whole order, whether it related to costs or the decretal amount, might be enforced against the surety in execution. It is clear, therefore, that the amendment contemplated a distinction between the order as to costs and the other orders and declared that the surety might be proceeded against in respect of the former, implying thereby that but for the amendment, section 253 should not be treated as incorporated with section 610 by the general words, "according to the rules applicable to the execution of original decrees." Having regard to the circumstances in which the amendment was made and to the principles on which the use of a special phrase may be held to evidence no special intention on the part of the Legislature as laid down in *Hough* v. *Windus*(2), we are of opinion that the order of the Subordinate Judge is right so far as it refused the appellant's application to proceed against the sureties in execution in respect of their liability for mesne profits.

The second question argued in support of this appeal relates to interest claimed on mesne profits from the end of the fasli on which they became due to the date of payment. The expression "mesne profits" is explained in section 211 as including interest on such profits and the respondents Nos. 1 and 2 are ordered to pay mesne profits to the appellant, on the ground that such payment is consequential on the order of the Privy Council. Again, whenever money paid on account of a decree since reversed on appeal is ordered to be refunded, the refund is ordinarily directed to be made with interest. *Jaswant Singh* v. *Dip Singh*(3), *Ram Sahai* v. *The Bank of Bengal*(4), and *Rodger* v. *The Comptoir D'Escompte de Paris*(5). The case of *Hurro Doorga Chowdhrani* v.

(1) I.L.R., 13 Mad., 1. (2) L.R., 12 Q.B.D., 228. (3) I.L.R., 7 All., 432.
(4) I.L.R., 8 All., 262. (5) L.R., 3 P.C., 465.

Maharani Surut Soondari Debi(1) on which the Subordinate Judge relies is not in point, the ground of decision being that interest was disallowed by the decree and that in execution the Court is not at liberty to amend it. Nor is *Chaku Modan Isana* v. *Dullabh Dwarka*(2) in point, for it is only an authority for the proposition that the cases contemplated in section 211 form an exception to the common law rule about interest and it was decided with reference to section 196, Act VIII of 1859, which did not define mesne profits as including interest. We think that interest at 6 per cent. per annum should be awarded on the mesne profits for each fasli from the end of that fasli to the date of payment and that the order of the Subordinate Judge should be varied accordingly.

The third objection argued relates to the order of the Subordinate Judge so far as it debits against the appellant the salary of the receiver and his establishment. The receiver was appointed certainly not for the appellant's benefit, or at his request, but at the instance of the first and second respondents' creditors and for their benefit. The Subordinate Judge considered that, under section 211, the defendants should not be charged with anything more than what they had actually received. But for the intervention of the first and second respondents, judgment-creditors, it is clear that the appointment of a receiver would have been unnecessary, and it does not appear just that the appellant, who was dispossessed by the respondents Nos. 1 and 2, should bear a charge consequent on their act and not shown to be necessary in the ordinary course of prudent management. This objection must, we think, also be allowed and the order appealed against amended.

The only other objection taken on appeal relates to the difference between the average income for fasli 1297 and the amount claimed by the appellant. The Subordinate Judge disallowed the difference, because it was in excess of the amount actually claimed by the appellant. We must take the agreement on which the Subordinate Judge acted to have been made subject to the rule that no more than what the appellant himself claimed was to be awarded to him. We disallow this objection.

The order of the Subordinate Judge will be amended to the

(1) L.R., 9 I.A., 1. (2) 9 Bom. H.C.R., 7.

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extent indicated above and confirmed in other respects. Costs will be paid proportionately by appellant and first and second respondents, but the other respondents are entitled to their costs, as many sets as there are separate pleaders.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1892. Feb. 3, 4, 9.

THIAGARAYA AND OTHERS (PETITIONERS),

v.

KRISHNASAMI (COMPLAINANT).*

Penal Code, s. 499, exc. X—Defamation—Privilege—"Mala fides"—Privilege exceeded.

The complainant, a Brahman who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a "doshi" or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice:

Held, that the accused had not acted in good faith, and that the publication was not under the circumstances privileged and protected by Penal Code, s. 499, exc. X, and that the accused were accordingly guilty of defamation.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Sultan Mohideen Saheb, a Presidency Magistrate, Black Town, Madras, in calendar case No. 16872 of 1891.

The facts of the case, as stated by the Magistrate, are as follow:—

"One Akilandayya, a Smarta Telugu Brahman of the Valva-"nad sect, went to England with his wife and two minor children "(daughter and son aged five and two years respectively). Having "stayed there for some time, he returned to India with his family. "He and his wife were, of course, expelled from caste under the

* Criminal Revision Case No. 600 of 1891.