Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1882
May 11.

GAURI PROSAD KOONDOO (DECREE-HOLDER) *v.* REILY (JUDGMENT-DEBTOR).*

Execution of Decree—Mesne Profits how estimated—Amount stated in Plaint—Estoppel.

When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant.

Baboojan Jha v. *Byjnath Dutt Jha* (1) explained.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:

"The first point raised by this appeal is, whether the appellant can recover mesne profits to an amount exceeding that claimed in his plaint and decreed to him. In the plaint mesne profits are claimed for the period from Baisakh 1281 (April—May 1874) to the 6th of Choitro 1282 (18th March 1876), and their amount is declared to be Rs. 41-11-11, at the rate of Rs. 21-8-18 per annum. The Munsif decreed the plaintiff's (appellant's) claim to possession of 117 out of the 121 plots in suit, and that "the plaintiff do get wasilat from 1281 to this day (the 15th of September 1876 = 31st of Bhadro 1283), and the amount of wasilat is to be ascertained in execution of this decree." The decree of the Munsif was affirmed successively by the Judge and the High Court. In execution, the decree-holder seeks to recover mesne profits at the rate of Rs. 347 a year. The Munsif, on the authority of *Gooroo Doss Roy* v. *Bungshee Dhur Sein* (2), which, as he observes, was a case precisely similar to the present, has refused to allow mesne profits at a rate in excess of that claimed in the plaint, and for the period subsequent to the 31st of Bhadro 1283 (15th of September 1876), and assessed the mesne profits payable under the decree at Rs. 52-8-0, with interest at 6 per cent. from the 16th of September 1876 until the 14th of August 1880, the date of such assessment. The aggregate thus awarded is Rs. 76-7-0. Unquestionably the cases of *Gooroo Doss Roy* v.

* Appeal from Appellate Order, No. 306 of 1881, against the order of J. F. Bradbury, Esq., Officiating Judge of Furreedpore, dated the 18th August 1881, affirming the order of Baboo Kishna Nath Roy, Sudder Munsif of that district, dated the 14th August 1880.

(1) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.

(2) 15 W. R., 61.

Bungshee Dhur Sein (1) and *Baboojan Jha* v. *Byjnath Dutt Jha* (2) do lay down that the plaintiff, in the absence of special circumstances, cannot recover damages in the nature of mesne profits in excess of the sum claimed in the plaint; but the Munsif has awarded a sum in excess of that claimed by his decree. The claim was for a period terminating on the 6th of Choitro 1282) 18th of March 1876), whereas the Munsif decreed mesne profits up to and inclusive of the 31st of Bhadro 1283 (18th of September 1876). By a cross appeal, the respondent denies the appellant's right to mesne profits *in toto;* but that question is concluded by the affirmation of the Munsif's decree on a first and second appeal. That decree distinctly awards mesne profits up to the date of the decree. It is now settled that if the decree is silent on the subject of mesne profits subsequent to the date of the institution of the suit, the Court executing the decree cannot assess or give execution for such mesne profits: *Sadasiva Pillai* v. *Ramalinga Pillai* (3). The same principle of the inability of the Court executing a decree to add to it precludes it from assessing or giving execution for mesne profits accruing due subsequently to the date of the decree, where the decree is silent on the point. The plaintiff, appellant, is, therefore, debarred from recovering, in execution, mesne profits for the period beginning with the 1st Ashar 1283. His remedy is a separate suit.

"With regard to the period anterior to that date I conceive that he is bound by his own assessment of the mesne profits; as the Munsif has pointed out he has ample means of knowing or ascertaining their amount before action brought, and he estimated the amount at Rs. 21 odd annually. No special circumstances exempting him from the operation of the rule enumerated in *Gooroo Doss Roy* v. *Bungshee Dhur Sein* (1) and *Baboojan Jha* v. *Byjnath Dutt Jha* (2) are suggested, much less proved; and I therefore uphold the Munsif's decision on the question of the annual rate at which the mesne profits are to be assessed. The respondent, in cross appeal, takes exception to the aggregate mesne profits awarded, on the ground that, having dismissed the appellant's claim to four of the plots in dispute, the annual amount of mesne profits should be proportionately reduced; but I do not understand the High Court rulings I have quoted to go so far as to lay down that, in no instance, can the plaintiff recover in excess of the rate

(1) 15 W. R., 61.
(2) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.
(3) 15 B. L. R., P. C., 383.

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claimed. In each of those cases the plaintiff recovered the full amount claimed, and in this instance the Munsif does not decide that the claim made in execution is groundless and exorbitant, but merely that, exceeding the amount laid down in the plaint, it cannot be awarded. The appellant is clearly entitled to recover at least the amount awarded to him. Had the amount been specified in the decree, nothing in excess of the sum decreed could be recovered; but the Munsif having reserved the assessment of mesne profits for the execution of the decree, was, I conceive, competent to assess and award any sum not exceeding the aggregate of the annual rate declared in the plaint for the period for which the decree gave mesne profits.

"The respondent further contends that the Munsif ought not to have given interest on the mesne profits. The Munsif seems to have considered s. 211, Civil Procedure Code, as sanctioning the award of interest. At least he quotes that section and the explanation thereof, but its application is clearly confined to cases where the Court has provided in its decree for the payment of interest, which this decree did not do. I consider however that the appellant is entitled to interest independently of the express provisions of any Act, on the principle expounded in *Luckhy Narain* v. *Kally Puddo Banerjee* (1) and the authorities there cited, and that, whether the decree provides for such interest or not. In *Luckhy Narain* v. *Kally Puddo Banerjee* (1) the decree appears to have been silent on the subject of interest, which was nevertheless awarded. Finally, both the appellant and respondent appealed regarding costs. The Munsif disallowed the costs of both. I do not, however, comprehend why the plaintiff is not to get proportional costs. I am not prepared to say, and I do not understand the Munsif to say, that he has been guilty of fraud. He may yet succeed in recovering mesne profits at the higher rate for the period posterior to the 31st Bhadro 1283. I accordingly direct that the appellant do recover the costs of the enquiry into and ascertainment of the amount of mesne profits in the Court below. Such costs to bear the same proportion to the whole of the costs incurred by him as the amount of mesne profits awarded to him bears to that claimed. In the result I dismiss the cross-appeal of the respondent with costs."

The decree-holder appealed to the High Court.

Baboo *Girija Sunker Mozoomdar* for the appellant.

Baboo *Kashi Kant Sen* for the respondent.

(1) I. L. R., 4 Calc., 882.

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The judgment of the Court (PRINSEP and O'KINEALY, J.J.) was delivered by

PRINSEP, J.—The point we are called upon to decide in this appeal is, whether the plaint having stated the amount of mesne profits claimed at a certain sum of money, and the decree having directed the amount to be ascertained in execution, the plaintiff, decree-holder, is estopped from claiming any excess of the amount stated in his plaint.

As an authority for the affirmative of this proposition the case of *Baboojan Jha* v. *Byjnath Jha* (1) has been cited. We have consulted the learned Judges who passed that judgment, and we are authorized by them to state that they did not then intend to enunciate any general rule for adoption in such cases. We are therefore at liberty to deal with this case on its own merits.

It appears to us that—as stated by Dwarkanath Mitter, J., in the case of *Pearee Soonduree Dossee* v. *Eshan Chunder Bose* (2)—the decision in the original suit having declared the amount of mesne profits should be determined in execution, the Courts are not precluded from varying or altering the decree in that suit. This was the conclusion arrived at by a Full Bench of this Court—*Mosoodun Lall* v. *Bheekaree Singh* (3), and affirmed by their Lordships of the Privy Council in numerous cases; see *Pillai* v. *Pillai* (4), *Forester* v. *Secretary of State for India* (5), *Gokuldass* v. *Murli* (6). We are therefore of opinion that, in executing such a decree as that now before us, the plaintiff is not estopped from proving that he is entitled to a larger sum as mesne profits than that claimed in his plaint. This is in accordance with s. 11 of the Court Fees Act, which declared that, in suits for mesne profits, or for immoveable property and for mesne profits, if the profits or the amount decreed are or is in excess of the profits claimed, the decree shall not be executed until the difference of fee has been paid. It also appears to be the view adopted by their Lordships of the Privy Council in the case of

(1) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.
(2) 16 W. R., 302.
(3) 6 W. R., Mis., 109.
(4) L. R., 2 I. A., 219.
(5) L. R., 4 I. A., 137.
(6) L. R, 5 I. A., 78.

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Fakharuddin Mahomed Ahsan Chowdhry v. *Official Trustee of Bengal* (1), for we find from an inspection of the record that the successful party obtained a larger sum as *wasilat* than he had claimed in his plaint. At the same time we would observe, that if it should appear that, in making his original claim for mesne profits, a plaintiff has special means of knowledge for determining the amount due, the judgment-debtor can fairly use as evidence against him his own statements embodied in his plaint. Applying this principle to the present case, we think that it must be remanded for reconsideration by the lower Appellate Court. Costs to abide the result.

Case remanded.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882
April 24.

LUKHYNARAIN CHUTTOPADHYA (PLAINTIFF) *v.* GORACHAND GOSSAMY (DEFENDANT).*

Special Appeal—Revenue Sale Law—Evidence—Registration—Common Registry—Act XI of 1859, *s.* 39.

The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *primâ facie* evidence that such a tenure exists.

In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:—

"The circumstances in connection with the suit out of which this appeal has arisen are these. Asura Madhanpore and other mauzas formed a revenue-paying estate, and they were registered in the Collector's towji under two numbers, *viz.*, 61 and 325, each of them representing a moiety of the estate. When the estate was advertised for sale on account of arrears of revenue, the plaintiff informed the Collector that he held the property in mokurari and was in possession, and prayed to have the sale stopped by offering to pay the arrears due.

* Appeal from Appellate Decree, No. 495 of 1881, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 30th December 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 15th October 1879.

(1) L. R., 8 I. A., 197.