

## FULL BENCH.

1871  
November

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

PARTAB SINGH (DECREE-HOLDER) v. BENI RAM (JUDGMENT-DEBTOR).\*

*Execution of Decree—Separate Suit—Act X of 1877 (Civil Procedure Code), s. 244.*

Moneys realised as due under a decree if unduly realised, are recoverable by application to the Court executing the decree and not by separate suit. The opinion of STUART, C. J., in *The Agra Savings Bank v. Sri Ram Mitter* (1) differed from *Haromohini Chowdhraïn v. Dhanmani Chowdhraïn* (2) and *Ehowri Singh v. Bijaynath Chattapadhyā* (3) distinguished.

ONE Beni Ram, against whom a decree for the possession only of certain land had been made in favour of one Partab Singh, applied to the Subordinate Judge of Bareilly, the Court executing the decree, for an order directing the decree-holder to refund a certain amount of the mesne profits of such land, which the decree-holder had realised in execution of the decree, on the ground that such amount had been unduly realised. The Subordinate Judge, finding that the decree-holder had unduly realised under the decree the amount claimed by the judgment-debtor, made an order directing the decree-holder to refund such amount.

The decree-holder appealed to the High Court against the order of the Subordinate Judge, contending that moneys unduly realised under a decree were not recoverable by application to the Court executing the decree but by separate suit.

The Court (PEARSON, J. and OLDFIELD, J.) referred to the Full Bench the question "whether moneys realised as due under a decree can be recovered, as having been unduly realised, in the execution department."

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), Mir Akbar Husain, Pandit Bishambhar Nath, and Munshi Hanuman Prasad, for the appellant.

Munshi Sukh Ram, for the respondent.

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First Appeal, No. 18 of 1878, from an order of Maulvi Maksud Ali Khan, Subordinate Judge of Bareilly, dated the 9th March, 1878.

(1) I. L. R. 1 All. 388.

(2) 1 B. L. R. A. C. 138.

(3) 4 B. L. R. A. C. 111.

1878

ARTAB  
SINGH  
v.  
SRI RAM

The judgment of the Full Bench was delivered by

TURNER, OFFG. C.J.—We are asked whether moneys realised as due under a decree can be recovered if unduly realised by application to the Court in the execution of decree. The language of the Codes, both the repealed and the existing Code, appears to us express on this point. The question whether moneys have been duly or unduly levied under a decree is clearly a question relating to the execution of the decree, and, if it arises between the parties to the suit or their representatives, the Code expressly declares it shall be determined by order of the Court executing the decree and not by separate suit. It has frequently happened that orders for the restitution of moneys unduly levied under a decree have come before this Court in appeal, and with the exception of one instance in no case has it been held that such orders could not properly be passed. We refer to the numerous cases heard by this Court on appeal from the Judge of Bareilly known as Husaini Begam's cases. In these cases the decree-holder, by executing the decree of an Original Court instead of the modified decree of the Appellate Court, had recovered sums largely in excess of the sums she was entitled to recover and was compelled to make restitution by orders passed in the execution of the decree. In *The Agra Savings Bank v. Sri Ram Mitter* (1) the learned Chief Justice advanced in support of the opinion pronounced by him two cases decided by the Calcutta High Court. In *Haromohini Chowdhraïn v. Dhanmani Chowdhraïn* (2) no more was decided than this, that mesne profits which were neither decreed nor claimed in a suit for possession after the date of the institution of the suit could be claimed in a separate suit. In *Ekowri Singh v. Bijaynath Chattapadhya* (3) it was held that mesne profits which were not awarded by the decree could not be obtained by an order of the Court executing the decree. It appears to us that these cases, of which the authority is not impugned in this Court, and indeed there are decisions of this Court in accordance with them, do not bear on the question before us. In the cases cited there was no question whether the amount claimed was or was not decreed, for the decrees had admittedly awarded no mesne profits for the period for which they were claimed by separate suit.

(1) L. L. R. 1 All. 388.

(2) 1 B. L. R. A. C. 138.

(3) 4 B. L. R. A. C. 111.

In the case before us the applicant complains that he has been compelled to pay what he was not bound to pay under the decree. We are of opinion that he adopted not only the proper course, but the only course open to him, in presenting his application to the Court executing the decree.

1878

PART A  
SINGH  
v  
BENI RA

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## APPELLATE CIVIL.

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1878  
November

*Before Mr. Justice Spankie and Mr. Justice Oldfield.*

GULZARI MAL (DEFENDANT) v. JADAUN RAI (PLAINTIFF).\*

*Suit for a Declaration of Right—Suit to set aside an Order under s. 246 of Act VIII of 1859 disallowing a claim to property under attachment—Act VII of 1870 (Court Fees Act), s. 7. (iii), and sch. ii, 17—Consequential relief.*

*Held* that a suit for a declaration of the plaintiff's proprietary right to certain moveable property attached in the execution of a decree while in the possession of the plaintiff, and for the cancelment of the order of the Court executing the decree, made under s. 246 of Act VIII of 1859, disallowing his claim to the property, could be brought on a stamp of Rs. 20, and need not be valued according to the value of the property under attachment.

*Chunnia v. Ram Dial* (1) followed. *Mufti Jalaluddin Mahomed v. Shohorullah* (2) dissented from. *Motichand Jaichand v. Dadabhai Pestanji* (3) and *Chakalinga-peshana Naicker v. Achiyar* (4) distinguished (5).

THIS was a suit in which the plaintiff claimed a declaration of his proprietary right to certain grain, valued at Rs. 1,200, and the cancelment of an order made by the Munsif of the city of Moradabad on the 17th May, 1876, disallowing his claim to the same. The grain was attached by the defendant, when in the possession of the plaintiff, in the execution of a decree for money held by the defendant, as the property of the defendant's judgment-debtor. The plaintiff paid on his plaint an aggregate amount of court-fees, *viz.*, a fee of Rs. 10 in respect of his claim for a declaration of his proprietary right to the property in suit and a similar fee in respect of his claim for the cancelment of the Munsif's order. The defendant contended, amongst other things, that the plaint was not suffi-

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\* Second Appeal, No. 593 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 25th September, 1877, reversing a decree of Moulvi Muhammad Wajih ul-la Khan, Subordinate Judge of Moradabad, dated the 11th April, 1877.

(1) I. L. R., 1 All. 360.

(2) 15 B. L. R., Ap. 1: S. C., 22 W. R. 422.

(3) 11 Bom. H. C. Rep. A. C. J. 186.

(4) I. L. R., 1 Mad. 40.

(5) In *Motichand Jaichand v. Dadabhai Pestanji*, however, it was held that a suit, having for its object the relief of property from attachment, seeks consequential relief.