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of Arjun Singh, that if he within a specified time paid the Rs. 1,308-9 in respect of the 3 annas share, he would be entitled, on default made by Sarfaraz Singh, to obtain Sarfaraz Singh's share on payment within the further period of fifteen days of the Rs. 1,090-7-0. I am of opinion that the judgment of my brother Mahmood is a right judgment in law, and that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

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January 31.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MATADIN AND OTHERS (JUDGMENT-DEBTORS) *v.* CHANDI DIN AND OTHERS (DECREE-HOLDERS). *

Execution of decree—Civil Procedure Code, ss. 246, 247—Cross-decrees—Set-off—Limitation.

Under two decrees of the Sadr Diwani Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January 1867 *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by *A*.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit, of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity.

Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off

* First Appeal No. 103 of 1887 from a decree of Pandit Ratan Lal, Subordinate Judge of Bánda, dated the 30th April, 1887.

was therefore not barred by limitation; that the order of January, 1867 was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A*, that decision also would be a decree, and that s. 246 of the Code could then be applied.

The facts of this case are fully stated in the judgment of Straight, J.

Munshi *Hanuman Prasad*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

STRAIGHT, J.—This is a first appeal on the execution side from an order of the Subordinate Judge of Bánda refusing an application of the judgment-debtors, appellants, the nature of which I will presently explain. Before doing so it is necessary to state the facts connected with the litigation out of which it arose. In the year 1863 Raghunath and others, the ancestors of the now decree-holders, respondents, brought a suit in the Court of the Judge of Fatehpur against Hatti Dubai and others, now represented by the judgment-debtors, appellants, for a declaration of their right to and possession of certain immoveable property and mesne profits valued at Rs. 76,099-12-1¾, and on the 28th July of that year the Judge gave the plaintiffs a decree in full for their claim. The defendants appealed to the Sadr Diwani Adalat, and that Court, on the 26th November, 1864, so far modified the Judge's decree as to hold the defendants entitled to retain one-third of the property with proportional mesne profits, but maintained it as to two-thirds. Hatti Dubai then appealed from this decision to their Lordships of the Privy Council in regard to the two-thirds as to which the Judge's decree had been sustained, while the plaintiffs rested content; and in the result their Lordships, on the 24th March, 1873, affirmed the decree of the Sadr Diwani. For convenience I will call this decree A.

In 1861 Hatti Dubai, ancestor of the judgment-debtors, appellants before us, had also brought a suit against the ancestors of the decree-holders, respondents, for immoveable property and mesne profits valued at Rs. 49,583-10-6½, which was dismissed by the Principal Sadr Amin of Bánda on the 27th of June, 1861. He then preferred an appeal to the Sadr Diwani Adalat, and on the 15th of August, 1863 that Court modified the decree of the first

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Court by giving the then plaintiff one-third of the property claimed. This decree was also appealed by the plaintiff Hatti Dubai to their Lordships of the Privy Council with regard to the two-thirds dismissed, and this appeal was consolidated with that mentioned as preferred from decree A and was disposed of by their Lordships in the manner I have already indicated. Under the decrees affirmed Hatti Dubai had been declared entitled to mesne profits for the years 1860 (1267 fasli) and thenceforward to date of possession, which were left to be determined on execution. This decree I will call decree B.

Now as to the execution proceedings in regard to decree A. The first application was made in September, 1863, and this was struck off on the 28th March, 1864. A second application was made in July, 1864, which was also struck off in March, 1865. In September, 1865 the decree-holders were awarded possession of the villages decreed, but an application then pending as to mesne profits was stayed. On the 17th of April, 1866 the decree-holder filed a petition, praying that an account might be taken of the mesne profits due to them under their decree B, and "after setting off the amount due to the other on whichever side whatever surplus is found may be realized by the party entitled to it." It would appear from the petition that the amount of *mesne* profits claimed by the decree-holders was Rs. 55,066-9-1½, and as the appeals were pending to the Privy Council, they were called upon to file security for that amount as a condition to their application being allowed, so as to provide for restitution in the event of the appeals succeeding, but according to an order of the 12th September, 1866, this they failed to do and their application was struck off.

As to the execution proceedings with regard to decree B, that was first executed on the 31st March, 1864, and the decree-holders were put in possession of the one-third of the property decreed to them. There were also certain proceedings taken under that decree with regard to mesne profits, and from them it seems that the decree-holders had applied to execute their decree for Rs. 24,159-15-9½ mesne profits, but that this had been objected to by the judgment-debtors, decree-holders of decree A, on the ground that the mesne profits recoverable by them under their

decree were much larger. Upon this application the Court granted a stay of execution. By a subsequent proceeding of the 26th January, 1867, in regard to decree B, the Court found that Rs. 18,165-12-9½ was the amount to which the decree-holders of decree B were entitled in respect of mesne profits. This closed the execution proceedings of that stage of the matter. As I have already stated, their Lordships of the Privy Council determined the consolidated appeals in regard to both decrees on the 24th March, 1873. On the 25th February, 1885, the decree-holders of decree A applied for execution of the order of their Lordships to this Court, and in the ordinary course it was sent to the Subordinate Judge for execution. The decree-holders of decree B then filed before the Subordinate Judge an application praying to have the amount of the mesne profits to which they were entitled under the decree applied by way of set-off. The Subordinate Judge refused to do so, and his order was appealed to this Court, which, on the 17th of December, 1886, allowed the appeal in a judgment the terms whereof are set out in the decision of the Subordinate Judge which is now before us in appeal. The Subordinate Judge has now in effect found that as only the two-thirds of the property decreed by decree A and dismissed by decree B was made the subject of the appeals to their Lordships of the Privy Council, while as to the one-third decreed to the appellants and never questioned by the respondents in appeal or by cross-objections the decree of the Sadar Diwani Adalat was left untouched, nothing was due to the appellants under the order of their Lordships, and further, that "inasmuch as there is no decree in existence regarding which the provisions of ss. 246 and 247 may be carried out, the Court cannot grant set-off. If both parties had produced their respective decrees as provided by s. 246, then proceedings would have been taken under ss. 246 and 247. As this has not been done, the Court is helpless and can only execute the decree produced before it."

The matter, therefore, seems to stand thus: in 1867, when the appeals by the appellants were pending in the Privy Council, the appellants had obtained possession of the one-third of the villages decreed them and the respondents of their two-thirds, which latter property alone was the subject of the appeal. As to the one-third that had passed beyond the region of controversy, and in any event

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the appellant was entitled to mesne profits in regard to it, up to the 26th of January, 1867, to the amount of Rs. 18,165-12-9½. But as to this sum it seems clear to me from what appears in the last sentence of the Sadr Amin's decision of that date that he held over granting execution in respect of it pending the decision of the Privy Council appeals. In other words, the Court decreed the decree-holders of decree B execution of their decree for mesne profits until it had been determined by their Lordships whether the decree-holders of decree A were entitled to the two-thirds of the property as to which they claimed their mesne profits, and indeed this was in accordance with the prayer of the petition put in by them asking for such a stay of execution, which was granted by the order of the 11th July, 1866. It seems to me, therefore, that if there was error in the proceedings, which I am not now determining, that was an error of the Court in which both parties acquiesced and indeed by their own action brought about, and of which neither should be allowed to take advantage to the detriment of the other. As admittedly both parties had obtained possession of their shares in the properties at the time of the Privy Council appeals being preferred, in the proportions which by their Lordships' order affirming the decrees of the Sadr Diwani Adalat were found to be the extent of their legal rights, each of them was entitled to an amount of mesne profits against the other up to the date of such possession being given, and as to the appellants that had found to be Rs. 18,165-12-9½, while in regard to the respondents it was alleged to be Rs. 56,066-9-1½, but the accuracy of this sum was not determined and still remains to be decided. In my opinion this latter question ought to be re-opened at the point at which it was left in 1866, and that when it has been ascertained what the respondents are entitled to if it exceeds the Rs. 18,165-12-9½ declared by the order of the 26th of January, 1867, to be the amount of mesne profits due from the respondents to the appellants, satisfaction of the claim of the respondents to that extent should be entered up and the balance be recoverable from the appellants. This is what it appears to me my brothers Oldfield and Brodhurst contemplated being done when they made their order of the 17th of December, 1886, and even if it is a course not strictly in accordance with the letter of s. 246 or 247 of the

Civil Procedure Code, which I am far from conceding, it is certainly within their spirit and under any circumstances, on principles of natural equity, ought to be sanctioned. One point only remains. It is said that the set-off the appellants now claim is barred by limitation, as it was not put forward until more than twelve years from the date of the order of their Lordships had elapsed. It is clear that the respondents were the parties who under the order of their Lordships were released from the stay that had been put upon their proceeding, with execution for mesne profits, by the order of the 11th of July, 1866, and that they took this view of the matter is shown by their application of the 25th of February, 1885. It was well known to the appellants that the unascertained amount of the claim of the respondents against them was in any event sure to be considerably in excess of the amount to which they had been declared entitled by the order of the 26th of January, 1867, and until steps were taken by the respondents to have it ascertained, it was useless for them to claim a set-off—indeed the order of the 26th of January, 1867 seemed to contemplate their adopting that course. The respondents are now seeking to open up the question of mesne profits which was hung up by the Sadr Amín in 1866 and 1867, and in regard to which they themselves had recognised the right of the appellants to maintain a set-off for the counter mesne profits due to them upon the basis of the order of their Lordships of the Privy Council of March, 1873. Their application for execution, though delayed till almost the last moment, is within time; but until the execution department has ascertained definitely whether the whole of the Rs. 55,066-9-1½ claimed by them in 1866 or what part of it was due, the right of the appellants to maintain their set-off, the amount of which had been ascertained, did not in my opinion arise, and I, therefore, cannot hold that any bar of limitation stands in their way. The order of the 26th January, 1867, which they hold, declaring their right to Rs. 18,165-12-9½, is equivalent to a decree for that sum, and in my opinion, when the execution department has in the proceedings out of which this appeal has arisen determined the sum to which the respondents are entitled, that will also be a decree, and thus the provisions of s. 246 of the Civil Procedure Code can be applied.

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Such being the view I hold, I decree the appeal with costs, and, setting aside the order of the Subordinate Judge, direct him to dispose of the execution proceeding now pending in his Court with advertence to what I have said in the course of this judgment.

BRODHURST, J.—I concur.

Appeal allowed.

1888
February 2.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ABDUL RAHMAN AND ANOTHER (PLAINTIFF) *v.* BEHARI PURI (DEFENDANT)*

Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule not to make suit unmaintainable.

A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code.

Held that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable.

THE facts of this case were as follows:—On the 12th March, 1886, one Mata Ghulam obtained against Ram Din and Gulab Kuar a decree upon a hypothecation bond by which two palki-garis were hypothecated. The decree contained an order that the two garis were to be sold in satisfaction of the hypothecation. After this, one Goshain Behari Puri, in execution of a money decree against Ram Din, attached the same two garis and caused them to be advertized for sale, the notification announcing the lien upon the garis under Mata Ghulam's decree. He then purchased Mata Ghulam's decree. At the sale in execution of Behari Puri's original decree, one Nahori purchased one of the garis and afterwards sold it to Abdul Rahman. The other was purchased by Sukun. Behari Puri then proceeded to put in force the decree which he had purchased from Mata Ghulam by attachment of the

*First Appeal No. 126 of 1887 from an order of Pandit Bansi Dhar, Subordinate Judge of Allahabad, dated the 25th June, 1887.