

THE
INDIAN LAW REPORTS,
Allahabad Series.

APPELLATE CIVIL.

1898
August, 8.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Burkitt.

HARDAT (DECREE-HOLDER) v. IZZAT-UN-NISSA (JUDGMENT-DEBTOR).*

Civil Procedure Code, section 583—Restoration of benefit obtained under a decree which has been subsequently reversed in appeal—Interest—Mesne profits.

Held, that a person who is entitled under section 583 of the Code of Civil Procedure to the restoration of a benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or, if the thing to be restored is land, to mesne profits for the time during which he has been kept out of possession. *Phul Chand v. Shankar Sarup* (1) approved.

IN this case Musammât Izzat-un-nissa Begam sued one Dwarka Das for the purpose of having a lease which had been granted to him set aside. She obtained a decree in the Court of the Subordinate Judge on the 8th of March 1895. That decree cancelled the lease and directed Dwarka Das to give up possession of the land and to pay to Izzat-un-nissa the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court that decree was set aside and Izzat-un-nissa's suit was dismissed with costs. Meanwhile, however, Izzat-un-nissa had executed the decree of the Subordinate Judge and had obtained possession, and she had realized also the amount of her mesne profits and her costs. Dwarka Das assigned the decree

* First Appeal No. 136 of 1898 from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th March 1898.

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of the High Court in his favour to Hardat, and Hardat applied under section 583 of the Code of Civil Procedure, asking in the first place for restitution of the amount which Izzat-un-nissa had realized in execution of her decree as mesne profits and costs, with interest thereon, and, secondly, for mesne profits from the date when his assignor was ejected in execution of Izzat-un-nissa's decree up to the date of the expiration of the lease.

The Court of first instance (Subordinate Judge of Bareilly) allowed the claim for the mesne profits and costs realized by Izzat-un-nissa, but disallowed the claim for interest and for future mesne profits.

The applicant thereupon appealed to the High Court.

Mr. *D. N. Banerji* for the appellant.

The respondent was not represented.

KERSHAW, C. J., and BURKITT, J.—This is an appeal against an order made by the Subordinate Judge of Bareilly on an application made to him under section 583 of the Code of Civil Procedure.

The only facts which need be cited are that the respondent, Musammat Izzat-un-nissa Begam, sued the appellant's assignor for the purpose of having a lease which had been granted to the latter set aside. She obtained a decree on the 8th March 1895. That decree cancelled the lease and directed appellant's assignor to give up possession of the land and pay to Musammat Izzat-un-nissa Begam the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court the decree in that case was set aside, and Musammat Izzat-un-nissa Begam's suit was dismissed with costs.

But meanwhile Musammat Izzat-un-nissa Begam had executed her decree obtained in the lower Court: she had obtained possession, and she had realised the amount of her mesne profits and her costs. The present applicant asks for the restitution of these amounts with interest. The Subordinate Judge has ordered the mesne profits and costs to be refunded, but has refused interest. That is the first matter raised in appeal.

It is contended that the order of the Subordinate Judge refusing interest is wrong, and we have been referred to the recent case of *Phul Chand v. Shankar Surup* (1). In that case, on the strength of the decision of their Lordships of the Privy Council, it was held that in a case like the present, interest should be allowed. In our opinion that decision, to which one of us was a party, is correct and should be followed. We therefore set aside that part of the judgment of the Subordinate Judge which refused interest, and we direct him in execution to allow interest at 6 per cent. on all amounts which the appellant is entitled to recover from the opposite party.

The other matter asked for is, that appellant should be allowed mesne profits from the date when he was ejected under the execution of Musammât Izzat-un-nisa Begam's decree up to the date of the expiration of his lease, that is, up to the 6th of July 1897. It is a matter of regret to us that no counsel has appeared to argue this case before us, but we think that the principle underlying the ruling of their Lordships mentioned above is that we must put the appellant in the same position that he would have occupied if the plaintiff's decree had never been passed. Had that decree never been executed this appellant would have held possession of the leased property up to the date on which the lease expired, and would as lessee have been entitled to the rents and profits and the other advantages of possession as lessee. We think that we ought now to put him in that position, and we therefore direct that the Subordinate Judge on this application under section 583, allow to the appellant the mesne profits which he would have received between the date when he was ejected in execution of the decree and the 6th of July 1897, the date on which the lease expired. Interest will be allowed on the mesne profits at 6 per cent.

We also give appellant the costs of this appeal.

Decree modified.

(1) I. L. R., 20 All., 430.

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