

1887  
 LUTCHMIPUT  
 SINGH  
 BAHADUR  
 v.  
 THE LAND  
 MORTGAGE  
 BANK OF  
 INDIA,  
 LIMITED.

Court will have to make will, therefore, be as to the respective values of the several properties now in the hands of the Bank and of the plaintiff and his donees with a view to the apportionment of the money now due to the Bank, and the Court will direct that, upon payment of the sum thus found due as chargeable against the six annas share of the properties in the possession of the Bank, the plaintiff should be entitled to redeem.

We therefore remit the case to the Court below with the direction that the Court do complete the necessary enquiries and make the final decree in the cause.

Under the circumstances, each party will bear his own costs in both this Court and the lower Court.

H. T. H.

*Appeal allowed and case remanded.*

1877  
 April 15.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.*

MOOKOOND LAL PAL CHOWDHRY AND ANOTHER (JUDGMENT-DEBTORS)  
 v. MAHOMED SAMI MEAH (DECREE-HOLDER).\*

*Execution of decree—Possession under decree—Reversal of decree—Restitution of property after reversal of decree—Mesne profits—Civil Procedure Code, 1882, s. 244.*

A Court, reversing a decree under which possession of property has been taken, has power to order restitution of the property taken possession of, and with it any mesne profits which may have accrued during such possession.

In the Court of first instance the plaintiff obtained a decree for possession, which decree was on appeal reversed. In the interval between these decrees the plaintiff took possession of the land in suit; the defendant after obtaining his decree in the Appellate Court applied in the execution proceedings for restitution of the property and for *wasilat* for the period during which the plaintiff had been in possession.

The plaintiff (judgment-debtor) contended that, there being in the decree no order for *wasilat*, the decree-holder could not

\* Appeal from Order No. 37 of 1887, against the order of F. Rees, Esq., Judge of Tipperah, dated the 20th of September, 1886, affirming the order of Baboo Dwarka Nath Bhattacharji, Subordinate Judge of that district, dated the 1st of July, 1886.

apply in execution, but should bring a fresh suit for any *wasilat* there may have become due. 1887

The Subordinate Judge overruled this contention, deciding on the authority of the cases of *Lati Kooer v. Sobadra Kooer* (1) and *Rachapa v. Amingovda* (2) that the decree-holder was entitled to have the lands in suit restored to him and mesne profits refunded.

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On appeal to the District Judge the judgment of the lower Court was affirmed.

The judgment-debtor appealed to the High Court.

Baboo *Alhai Coomar Banerji* for the appellant contended that a fresh suit must be brought for mesne profits, citing *Ram Roop Singh v. Sheo Golam Singh* (3); *Ram Ghulam v. Dwarka Rai* (4).

Baboo *Durga Mohun Das* and *Munshi Serajal Islam* for the respondent.

Judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J. (GHOSE, J., concurring).—I think that this appeal must be dismissed.

The question which arises here is whether a Court, which has given a wrong decree, which has been afterwards reversed, for the possession of land, has power to order the restitution of the thing which had been improperly taken under its decree with the mesne profits which have been derived from that thing whilst it was in the possession of the party who was not entitled to it.

A decision of the Allahabad Court in which I took part has been cited, in which it was held that the section of the Code does not prevent the person who has been wrongfully deprived of his property by this proceeding from bringing an action to recover the profits during the time he has been wrongfully kept out of possession; and speaking for myself I still adhere to the opinion which I then expressed that such an action may be maintained; but, if such an action can be maintained, it by no means follows that the Court which has given possession under the wrong decree,

(1) I. L. R., 3 Calc., 720.

(3) 25 W. R., 327.

(2) I. L. R., 5 Bom., 233.

(4) I. L. R., 7 All., 170.

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which has afterwards been cancelled, cannot order restitution of the property which has been wrongfully taken and any mesne profits which may have been derived from it in the meantime.

Speaking for myself I do not think that this restitution is a proceeding which comes within the meaning of s. 244 of the Code of Civil Procedure, but I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to any one, and therefore it seems to me that that inherent right does exist, and that the Court has a power under that inherent right to order restitution of the thing which has been improperly taken, and as a part of that power it must have the right and the power to order restitution of everything which has been improperly taken. If they have that power they have the power not only to order restitution of the property itself but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received are the mesne profits of the property; and, therefore, it seems to me, it being admitted that there is a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits, and therefore the order of the Court below, directing the restitution of the property and the return of the mesne profits, was perfectly correct. The appeal must, therefore, be dismissed with costs.

T. A. P.

*Appeal dismissed.*

### PRIVY COUNCIL.

KRISHNA KISHORI CHAUDHRANI AND ANOTHER (DEFENDANTS) v.  
 KISHORI LAL ROY (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

P. C.\*  
 1887  
 February 15  
 and 16.

*Evidence Act (I of 1872), ss. 65 and 74—Secondary evidence of contents of document.*

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in

\* *Present*: LORD WATSON, LORD FITZGERALD, SIR B. PEACOCK and SIR R. COUCH.