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is a final order in the sense of section 595(*a*) as modified by section 594 of the Code of Civil Procedure. The mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit cannot make appealable an order which does not fulfil the statutory conditions. Now it does not in their Lordships' judgment admit of doubt that, assuming the order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order, directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the appeal. Precluded as they would therefore be from proceeding to examine the merits of the order, their Lordships do not regret that in the course of ascertaining its true construction they have necessarily had to consider the law applicable to the case and to pronounce that no other order would have been appropriate save that which they find to have been made. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the respondent:—The *Solicitor, India Office.*

P. C.
J. C.
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November 21.
December 8.

BANARSI PRASAD *v.* KASHI KRISHNA NARAIN AND ANOTHER.

On Appeal from the High Court for the North-Western Provinces.

Civil Procedure Code, sections 596, 600—*Appeal to Her Majesty in Council—Procedure.*

In order that an appeal may lie according to section 596, of the Code of Civil Procedure, besides involving directly or indirectly the value of at least Rs 10,000, the appeal must raise a substantial question of law in those cases where the decree of the final appellate Court affirms the decree of the Court below it.

The assent of the respondent to the issue of a certificate under section 600 cannot give effect to it in the absence of the conditions required to give the right of appeal. Nor does the existence of a question of law of itself give rise to a right of appeal in the ordinary course of procedure under section 596, being in such a case a necessary condition when the higher Court affirms the decision of the lower.

Present:—LORDS HOBHOUSE, DAVEY, and ROBERTSON and SIR RICHARD COUCH.

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But, should a question of law be raised in a case where the value is less than the above sum, it is within the judicial discretion, to be exercised by the Court under sections 595 and 600, to specially certify the case as "otherwise" "fit for appeal."

APPEAL from a decree (16th December, 1895) of the High Court (1), varying a decree (6th February, 1894) of the Subordinate Judge of Bareilly.

The question which the plaintiff-appellant sought to raise was whether the law in sections 43 and 44 of the Code of Civil Procedure which had been applied to his claim for mesne profits by the High Court, was applicable under the following circumstances. It was contended on his behalf that the judgment below had erroneously decided that part of the time during which, according to his claim, mesne profits had accrued, to which he was entitled, was a period in respect of which his present claim might have been, and ought to have been, if it was to succeed, included in a prior suit brought by him against the defendant on the same cause of action in 1899. However, it appearing that the appeal involved a value less than that for which a right of appeal was given by the Code of Civil Procedure in ordinary course of procedure, and that the appeal had not been certified as otherwise a fit one, the case was disposed of on this ground.

This suit was brought on the 30th June 1892 by Banarsi Prasad, the appellant, son of Gobind Prasad, deceased in that year, for mesne profits of two villages with interest. The defendant, Musammat Mewa Kunwar, representative in estate of Jaichand Rai, who died on the 17th January 1888, also died pending this appeal, and was succeeded on this record by Kashi Krishn Narain and Gobind Krishn Narain, as representing her.

On the 5th February, 1883, by deed of usufructuary mortgage, Jaichand Rai had mortgaged the two villages to the said Gobind Prasad for a term of seven years, agreeing that the mortgagor should pay to the mortgagee in every year Rs. 2,182 for interest, and that if any should fall into arrear for two years, the mortgagee should be entitled to possession. Jaichand Rai remained in possession till he died in January 1888, leaving his son Aftab Kuar his heir, who, in respect of these two villages,

(1) (1895) I. L. R., 17 All., 533, *Mewa Kuar* v. *Banarsi Prasad*.

caused the name of Mewa Kunwar, his wife, to be entered in the Collectorate record. The two years' arrears then became due, and on the forfeiture under the contract of 1883, Gobind Prasad obtained against Mewa Kunwar, on the 1st December, 1890, in a suit commenced on the 23rd December, 1889, a decree for possession, and payment of Rs. 5,625, the interest due for 1887 and 1888, with a further sum of Rs. 1,675, in all Rs. 7,300.

Mewa Kunwar, however, continued to hold possession of the two villages, receiving the profits to which the appellant Banarsi Prasad was entitled.

Hence the present suit by the latter, claiming Rs. 12,053 on account of the profits received by her from the instalment of February 1889 till the end of June 1892 at 1 per cent. a month, total Rs. 14,332. This part of the period for which profits were claimed was from 31st January 1889 to 23rd December 1889, the latter date being that of the institution of the prior suit for possession.

On the answer of the defendant an issue was framed as to whether there was a bar to the claim under section 43 of the Code of Civil Procedure on the ground that the prior claim filed on the 23rd December, 1889, should have included what was due in respect of the period from 31st January, 1889, to 23rd December, 1889, if it was to be recoverable.

The Subordinate Judge decided this point in favour of the plaintiff, decreeing Rs. 13,975 against Mewa Kunwar.

The judgment of the High Court (EDGE, C.J. and BANERJI, J.) is reported in I. L. R., 17 All., 533. They referred to *Lalessor Babui* v. *Janki Bibi* (1), *Lalji Mal* v. *Hulasi* (2), *Venkoba* v. *Subbanna* (3). They held that by the operation of section 43 of the Code of Civil Procedure, and the effect of the previous suit, the plaintiff was disentitled to claim mesne profits for the period between the 31st January, 1889, and the 23rd December, 1889, in the suit before them. They, therefore, remanded the case to the Court below to find what were the mesne profits to which the plaintiff was entitled after excluding those in respect of the above period.

(1) (1891) I. L. R., 19 Calc., 615. (2) (1881) I. L. R., 3 All., 660.
(3) (1887) I. L. R., 11 Mad., 151.

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After the return of the findings, after this order of remand, the High Court decided and decreed on the 16th December, 1895, that the decree of the lower Court, so far as it awarded to the plaintiff mesne profits for the period above specified, should be reversed. They held that the claim in respect of that period was barred by section 43 of the Code of Civil Procedure. By this decision the amount awarded was reduced to Rs. 10,066. The amount that remained in dispute as being calculated in reference to the time so withdrawn was Rs. 3,929. On the 14th July 1896 the High Court certified that the case fulfilled the requirements of section 596 of the Code of Civil Procedure, and on the 12th November following this appeal was admitted.

Mr. *G. E. A. Ross*, for the appellant, argued that he was entitled in this suit to claim mesne profits for the period between 31st January, 1889, and 23rd December, 1889. The judgment of the first Court was right. The appellant had not been obliged to include them in the suit of the latter date, which was not brought upon a cause of suit identical with that which was the ground of the present claim; for the right to sue for mesne profits was separate from the right to claim proprietary possession. The latter was the ground of the suit decreed on the 1st December 1890, and although it was true that in suits for land the Court might decree payment of mesne profits, with interest, by section 211 of the Code of Civil Procedure, and might determine the amount thereof prior to suit, or might reserve inquiry by section 212, still that power was consistent with power to decree in a separate suit mesne profits and interest. Section 43 contemplates identical causes of action, and no such identity was found in the two suits that presented the question now raised. The expression "cause of action" included every material fact which the plaintiff had to prove in order to obtain a decree. In a suit for mesne profits he had to prove more propositions than that he had a right to possess the property in question. A decree for the land did not involve the right for the recovery of mesne profits. He referred to the judgment in *Jibunti Nath Khan* v. *Shib Nath Chakerbati* (1).

[SIR R. COUCH referred to the certificate of the High Court under which this appeal had been admitted, adding that the case

(1) (1882) I. L. R., 8 Calc., 819.

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did not appear to have been certified for appeal except as one preferred in the ordinary course under section 596, of the Code of Civil Procedure.] It was no doubt the certificate in the ordinary course that had been issued. However, the admission of the appeal having taken place, it could be understood to have been in the exercise of the High Court's power within sections 595 and 600 of the Code of Civil Procedure.

The irregularity in the certificate could be remedied by special leave being granted here. The admission of the appeal having ensued, such admission being within the discretion of the Court to grant or withhold on the ground of the existence of a point of law, it was now too late for the appeal to be stayed as if no such proceedings had taken place.

The respondent did not appear. On the 8th December their Lordships' judgment was delivered by Lord HOBHOUSE.

It will be remembered that the argument on the merits of the case was broken off because the property at stake is not such as to give a right of appeal. The amount in question is little more than Rs. 4,000. When this was called to Mr. *Ross*' attention, he relied on the allegation that a substantial point of law is involved. Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of appeal in the ordinary course of procedure under the Code. That is a mistake. Section 596 of the Code requires that in order to give such a right there must be in dispute either directly or indirectly an amount of Rs. 10,000. If the decree affirms the Court below, another condition is affixed, *viz.* that the appeal must involve some substantial question of law. The presence of such a question does not give a right when the value is below the mark; the requirement of it restricts the right when the higher decree affirms the lower.

It is true that by sections 595 and 600 an appeal may be granted if the High Court certifies that the case is fit for appeal "otherwise," *i.e.* when not meeting the conditions of section 596. That is clearly intended to meet special cases; such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the

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discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate.

No such certificate has been given in this case. The certificate runs, "That as regards the nature of the case, it fulfils the requirements of section 596 of Act No. XIV of 1882." But it does not fulfil them on account of its small value.

Mr. *Ross* says that the defendant was served with notice, and, not appearing, must be taken to have assented. It is quite possible that owing to the defendant's non-appearance the defect in value was overlooked; but even if non-appearance could be taken to signify assent, it cannot give to the plaintiff a right of appeal which the Code does not allow, or sustain a certificate which from some oversight or other is obviously erroneous. Whether, if the learned Judges had been asked to say that notwithstanding its small value the case was a fit one for appeal to the Queen in Council, they would have said so, may well be doubted, seeing that Mr. *Ross*, whose argument had advanced to some length before the point of value was observed, had not succeeded in impressing their Lordships with the importance of his legal objection to the decree. What is certain is that the learned Judges were not asked by the plaintiff to do, and have not done, anything of the kind. And as it is of great importance not to allow litigants who have succeeded in the High Courts to be harassed by further appeals, when there is nothing at stake but amounts of money which the Indian Legislature has decided to be too small to give a right of appeal, their Lordships will humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers* and *Nevill.*