

1900

HODGES  
v.  
THE  
DELHI  
AND  
LONDON  
BANK,  
LIMITED.

of Robert Hodges has failed on the most material points. Their Lordships think that the modification now made ought not to affect the costs; especially considering that no attempt was made in the Court below to review the judgment on this point. The appellants must pay the costs.

*Appeal dismissed. Decree affirmed  
with amendment.*

Solicitors for the appellants:—Messrs. *Young, Jackson, Beard and King.*

Solicitors for the respondent Bank:—Messrs. *Lyne and Holman.*

BHUP INDAR BAHADUR SINGH (APPELLANT) v. BIJAI  
BAHADUR SINGH (RESPONDENT).

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

P. C.  
J. C.  
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July 10, 21.

*Civil Procedure Code, section 211—Decree for future mesne profits—Order in execution fixing the period over which they were to extend—Such order appealable—Civil Procedure Code, sections 2, 5, 40—Date of decree affirmed by Order in Council.*

A decree, dated the 12th November 1887, made by a District Court for the possession of land, awarded to the plaintiff future mesne profits. This decree after having been reversed by the High Court was restored and affirmed by the Order of the Queen in Council, dated the 11th May 1895. In execution of the decree relating to mesne profits the Court ordered on the 22nd July, 1896, that they should be recovered from the 12th November 1887 to the 12th November 1890,—that being for three years from the date of the decree.

*Held*, that the order of the 22nd July was essentially final in its nature and within the meaning of section 2 of the Code of Civil Procedure, so that it was appealable under section 540 of the Code, though not one of those enumerated in section 588 as appealable.

*Held also*, that the Queen's order of the 11th May 1895 was the only operative decree, and that mesne profits were in effect decreed by the order with reference to its own date, and not to that of the original decree of the 12th November 1887:—the period for which mesne profits were due was from the institution of the suit on the 23rd September 1886 down to the 30th November 1895, when possession was delivered.

APPEAL from a decree (11th February 1897) of the High Court (1) reversing an order (22nd July 1895) of the Judge of the Mirzapur district.

*Present*:—Lords HOBHOUSE, MACNAGHTEN and LINDEY, SIR RICHARD COUCH and SIR HENRY STRONG.

(1) I. L. R., 19 All., 296.

This appeal arose out of an order made in execution of a decree dated the 12th November 1887. The present appellant and respondent were plaintiff and defendant in the suit which resulted in the above decree against the Raja for possession of the estate claimed "with future mesne profits." The order of the District Court executing that decree was made on the 22nd July 1896. To this they were parties as petitioner and objector, and afterwards, on this appeal, the former was represented by Lal Raghu Saran Singh.

On the 19th July 1889 the decree of the District Judge, dated the 12th November 1887, was reversed on appeal to the High Court. This decree, however, was affirmed and restored by an Order of the Queen in Council, dated the 11th May 1895, and possession of the land was delivered to the decree-holder on the 30th November 1895. His petition then filed for execution of the decree for future mesne profits claimed them from the 23rd September 1886, the date of the filing of the suit, down to the day of possession. To this the counter-petitioner objected on the ground that mesne profits were restricted to the period of three years from the date of the decree by section 211, Civil Procedure Code, and that this date was the 12th November 1887. The Court executing the decree originally of that date, but affirmed by the Queen's order eight years later, held on the 22nd July 1896 that the proper date for fixing the commencement of the three years was that on which the decree was originally made, the 12th November 1887, as that decree had been affirmed in every particular by the Order of the Queen in Council on the 11th May 1895.

On an appeal to the High Court (KNOX and BURKITT, JJ.) a preliminary objection was taken that the order made in execution on the 22nd July 1896 was not appealable under the Code of Civil Procedure. This objection was disallowed by order of the 8th February 1897, the Judges being of opinion that the order in question was in the nature of a final order, practically dismissing the claim of the decree-holder to mesne profits for a period of between five and six years.

Having, accordingly, heard the appeal the High Court set aside the order. Their judgment is reported at length in *Bijai*

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*Bahadur v. Raja Bhup Indar Bahadur Singh* (1). The result was that in their opinion the decision of the Court below as to the date which was to be accepted as that of the decree awarding future mesne profits was wrong. They stated in their judgment that it was admitted before them that the decree to be enforced was the Order in Council of the 11th May 1895. But they gave as their reason that the decree as embodied in that order and taking its date from it, was the only enforceable decree; and they applied section 211, Civil Procedure Code. They found that the plaintiff was entitled to recover mesne profits from 23rd September 1886, the date on which the suit was instituted, down to 11th May 1895, the date of the Order in Council, and thereafter from 11th May 1895 down to the 30th November 1895, the date on which the appellant obtained possession in execution of the Order in Council.

The counter-petitioner having appealed against this order.

Mr. G. E. A. Ross, for the appellant, argued that there was error in the judgment of the High Court on the question whether the order of the High Court of the 22nd July 1896 was appealable or not. That order fixed the period for mesne profits, but was a preliminary and interlocutory order, and would be followed by an order after the necessary inquiry. It was not one of the orders enumerated as appealable in section 538 of the Code of Civil Procedure.<sup>7</sup>

On the main question decided by the High Court relating to the date from which the three years in section 211 of the Code of Civil Procedure were to commence, it was argued that the order in Council of the 11th May 1895, by restoring the order of the 12th November 1887 in its entirety, with no alteration of the date from which mesne profits were to be calculated had left the date of the original decree, for the purpose of fixing that date, as remaining the only one authorized. By the right application of the provision in section 211 of the Code of Civil Procedure the period would be as the Court executing the decree for future mesne profits had decided it to be; that was from the 12th November 1887 to 12th November 1890. The course open to the respondent for the recovery of mesne profits for any period in addition to that would

(1) I. L. R., 19 All., 296.

be, according to the Civil Procedure Code, by bringing a suit for them. He referred, in connection with the question raised, to *Fakharuddin Mahomed Ahsan Chowdhry v. Official Trustee of Bengal* (1); *Puranchand v. Roy Radhakishan* (2); *Anundokishore Das Bukshi v. Anundokishore Bose* (3); *Govind Chunder Lahiri v. Shikhareswar Roy* (4).

Mr. W. A. Rakes, for the respondent, was not heard.

Afterwards, on the 21st July, their Lordships' judgment was delivered by LORD HOBHOUSE :

This appeal is presented against an order made in the course of execution proceedings. The plaintiff in the suit, who was the original respondent in the appeal, claimed possession of land. On the 12th November 1887 the District Judge passed a decree in his favour, ordering possession, and adding "the plaintiff is also entitled to future mesne profits." The defendant now appellant appealed to the High Court, who on the 19th July 1889 reversed the decree and dismissed the suit. The plaintiff then appealed to the Queen in Council, who, on the 11th May 1895, ordered that the decree of the High Court should be reversed and the District Judge's decree of the 12th November be affirmed.

After that the plaintiff prosecuted his claims in execution of the decree so affirmed by the Queen in Council. He recovered possession on the 30th November 1895. Then he proceeded to recover mesne profits. He claimed them from the 23rd September 1886, on which day his suit was brought, down to the recovery of possession by him. The defendant objected that no decree remained to be executed except that of the Queen in Council which made no mention of mesne profits; but the District Judge held that the Queen's Order had come down for execution and "its effect causes reference to be made to the original decree of this Court as a final decree in all applications for execution."

Having thus settled that the Queen's Order gave mesne profits by reference to the original decree the District Judge went on to frame issues. The second of such issues was, "For what period are mesne profits recoverable?" It was arranged that this issue should be treated as preliminary to taking

(1) (1881) L. R., 8 I. A., 107; I. L. R., 8 Calc., 178.

(2) (1891) I. L. R., 10 Calc., 182.

(3) (1889) I. L. R., 14 Calc., 52.

(4) (1900) L. R., 27 I. A., 110; I. L. R., 27 Calc., 951.

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accounts, and should be argued separately: That was done, and the District Judge decided that mesne profits were due for the three years next after the date of the original decree, *i. e.*, from the 12th November 1887 to the 12th November 1890.

From this decree the plaintiff appealed to the High Court, who in the first instance addressed themselves to a preliminary objection made by the defendant that no appeal is given by the Procedure Code in such a matter. The High Court overruled that objection. As it has been renewed here, and earnestly pressed upon their Lordships by Mr. Ross, it may be convenient to dispose of it in the first instance.

The High Court felt considerable difficulty on the point. They allowed the appeal on the ground that the District Judge had tried the question separately, and had embodied his finding in a formal order. They remark it practically dismisses the claim of the decree holder for some five or six years' profits; and that in a way which in the Court of the District Judge is final. Therefore they hold it be an appealable order.

Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions, their Lordships think not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable; though it is also in another way interlocutory and may result in the exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect and as such equally open to appeal.

But then Mr. Ross urges that we are not testing the question by general principles, but by the expressions of the Code which

relate to appeals. That is true, and their Lordships turn to the Code to see what it says.

Section 540 gives a right to appeal to the proper Court from the decrees or from any part of the decrees of Courts exercising original jurisdiction. By section 2 a decree is thus defined, "The formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication so far as regards the Court expressing it decides the suit. . . . An order . . . determining any question mentioned or referred to in section 244, but not specified in section 588, is within this definition." Section 244 is that which gives to the Court engaged in executing a decree jurisdiction to determine questions arising between the parties relating to the execution of the decree. Section 588 specifies a large number of orders from which appeals lie, including many made in execution proceedings but not including such an order as the one under discussion. It appears to their Lordships that the plain meaning of section 2 is to make this order a decree appealable under section 540. Mr. Ross has not shown any reason why the words of the Code should not be construed in their plain and obvious sense. On the contrary, the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice.

Turning from this purely technical question to the substance of the appeal, the High Court found the issue before them to be very simple. The District Judge held that it turned on the construction of sections 211 and 244 of the Code. Section 244 prescribes that questions arising in execution including this question should be decided in the execution and not by separate suit. Section 211 enacts that in suits for possession of immovable property "the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs)."

The effect of the District Judge's application of these sections is somewhat startling; because, though executing the Queen's Order, he holds himself to be limited in point of time as though he was executing his predecessor's decree made in his own Court, and he

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counts the three years for which alone he thinks he has the jurisdiction to estimate mesne profits, not from the date of the Queen's Order, but from the date of the decree of his own Court.

Now the plaintiff, it must be held, was entitled to possession throughout. In 1887 he got a decree for it, and had that been executed he would have had the profits. But there was an appeal, and in 1889 the High Court took a view adverse to him and passed a decree in the face of which he could claim nothing. Five years afterwards he succeeded in displacing that decree and in re-establishing his original right to possession. Then he is told that from the 12th November 1890 down to the 30th November 1895 the law debars him from recovering the income of his property, and allows his opponent to keep it.

The District Judge expresses an opinion that the plaintiff might have brought a separate suit for this income and that if he has lost some years' profits it is by his own laches. How he could be charged with laches for not instituting a suit which with the decree of the High Court standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit, or if he had done so in 1895 after reversal of the adverse decree, a substantial part of his just claim would be barred by Article 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing, not the District Judge's decree of 1887, but the Queen's Order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May 1895 and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits." That signifies profits future to the 12th November 1887. The order of 1895 speaking with the language of the decree of 1887 clearly carries all profits up to its own date. If there had been delay for three years after the 11th May 1895, section 211 would be called into operation with reference to the order of that date. But to call it into operation with

reference to the decree of the 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits because they are not expressly mentioned ; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court their Lordships will humbly advise Her Majesty to dismiss the appeal and the appellant must pay the costs.

*Appeal dismissed.*

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

Solicitors for the respondent :—*Mr. T. C. Summerhays.*

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## REVISIONAL CRIMINAL.

1901

January 3.

*Before Mr. Justice Blair and Mr. Justice Aikman.*

QUEEN-EMPRESS v. KEDAR NATH.\*

*Criminal Procedure Code, section 133—Nuisance—Encroachment upon unmetalled portion of a Government road.*

*Held* that any obstruction upon a public road is a nuisance within the meaning of section 133 of the Code of Criminal Procedure, whether in point of fact it causes practical inconvenience or not.

This was a reference made by the Additional Sessions Judge of Agra under section 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the order of the Court.

The *Government Pleader* (Maulvi Ghulam Mujtaba) in support of the order of the Magistrate.

BLAIR and AIKMAN, JJ.—This matter has been referred to us by the Additional Sessions Judge of Agra with a recommendation that all proceedings held in a certain case to be hereafter described should be set aside. It appears that one Kedar Nath made an application to the District Magistrate of Muttra on the 30th of January, 1900, asking for leave to erect a watering trough for cattle on land described by him in his petition as *nazul land*, and forming part of, or adjacent to, the public road between

\* Criminal Reference No. 625 of 1900.