

Before Mr. Justice Banerji and Mr. Justice Richards.
COLLECTOR OF MEERUT (OBJECTOR) v. KALKA PRASAD

1906
May 16.

(APPLICANT).*

Civil Procedure Code, sections 244, 583—Execution of decree—Review—Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit—Application in execution.

Where M. D., defendant in a partition suit, was deprived by the High Court of a house allotted to him by the first Court and subsequently the High Court acting under Chapter XLVII of the Code of Civil Procedure set aside its decree and M. D., having recovered possession of the house, applied under section 583 of the Code for mesne profits, *held* that section 583 had no application, the order entitling M. D. to restitution having been passed under Chapter XLVII, and not in appeal under Chapter XLI. *Held* further that it was not necessary for M. D. to bring a separate suit, that one of his remedies was by "summary process," *i.e.* by an application under section 244, and that the present application might be deemed to be one under that section. *Shamu Purshad Roy Chowdhery v. Hurro Purshad Roy Chowdhery* (1) referred to. *Hurro Chunder Roy Chowdhery v. Shoorodhones Debia* (2), *Saran v. Bhagwan* (3) and *Harnam Chandar v. Muhammad Yar Khan* (4) followed.

Seemle that the lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken. *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (5) and *Raja Singh v. Kooldee Singh* (6) referred to.

Held also that the applicant having been guilty of gross laches in not applying for review for many years should get mesne profits only from the date of the High Court's decree in review.

KALKA PRASAD, son of Mathura Das, deceased, applied to the Subordinate Judge of Meerut under section 583 of the Code of Civil Procedure to recover mesne profits under the following circumstances.

In a suit for partition brought by Nanak Chand, the present appellant, whose estate is now under the Court of Wards, a house was allotted to Mathura Das. In appeal by Nanak Chand in regard to compensation, which he had also been ordered to pay, the High Court allotted to him the house, though he had accepted the decision of the first Court in regard thereto. In pursuance of this decree Nanak Chand obtained possession of the house in 1892. Ten years later Mathura Das applied to the High Court for a review and obtained a decree in August, 1902. Having

* First Appeal No. 93 of 1905, from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 7th January, 1905.

(1) (1865) 10 Moo. I. A., 203.

(2) (1868) 9 W. R., 402.

(3) (1903) I. L. R., 25 All., 441.

(4) (1905) I. L. R., 27 All., 485.

(5) (1887) I. L. R., 14 Calc., 484.

(6) (1894) I. L. R., 21 Calc., 989.

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obtained possession of the house, he made an application to the Subordinate Judge of Meerut under section 583 of the Code of Civil Procedure for mesne profits for the period of his dis-possession. The Collector, on behalf of Nanak Chand, objected. The lower Court disallowed the objection, but refused interest.

The Collector, on behalf of Nanak Chand, appealed.

Messrs. *A. E. Ryves* and *W. Wallach*, for the appellant.

Munshi Jang Bahadur Lal, for the respondent.

BANERJI, J.—The circumstances which have given rise to this appeal are these:—One Nanak Chand, whose estate is now in charge of the Court of Wards, brought a suit against Mathura Das and others for partition of certain family property. The Court of first instance made a decree for partition under which a certain house, described as No. 6, was allotted to the share of Mathura Das to whom some compensation was also awarded. Nanak Chand appealed to this Court in respect of the award of compensation only, upon the ground that the Court had wrongly refused to amend a clerical error in the plaint and had thereby awarded to Mathura Das as compensation a larger amount than that to which he was entitled. This Court, however, by its decree, dated the 7th of January, 1890, allotted to Nanak Chand's share the house No. 6, although he had submitted to the decision of the Court below as to the assignment of that house to the share of Mathura Das. In execution of this decree Nanak Chand took possession of the house in 1892, and remained in possession till 1904. In 1902 an application was made to this Court for a review of its judgment of the 7th of January, 1890, on the ground that there was in it an error apparent on the face of the record. The application was granted and on the 14th of August, 1902, this Court set aside its original decree and dismissed the appeal of Nanak Chand, the result being that the decree of the Court of first instance allotting house No. 6 to the share of Mathura Das was restored. Mathura Das having died, his son, the respondent, Kalka Prasad, recovered possession of the house in June, 1904. He now claims mesne profits for the period of his dis-possession, that is, from August, 1892 to June, 1904, and he also claims the value of some fencing and a gate. The Court

below having awarded to him the mesne profits claimed this appeal has been preferred on behalf of the Court of Wards.

Mr. Ryves for the appellant has raised three contentions before us: first, that the application of the respondent is not maintainable under section 583 of the Code of Civil Procedure, the section under which it purports to have been made; secondly, that his remedy is a suit and not an application; and, thirdly, that in any case he is not entitled to mesne profits for more than three years.

The first contention is in my judgment well founded. Section 583 provides for the case of a benefit, including restitution, to which a party is entitled under a decree passed in an appeal under Chapter XLI. The benefit which the respondent claims in this case was not granted to him in an appeal under that chapter, but, as he urges, he is entitled to it because the decree of the appellate Court was set aside by that Court upon review of judgment. This was done under Chapter XLVII. The respondent was not deprived of possession in execution of the decree of the lower Court which was set aside subsequently on appeal, but he was dispossessed in execution of the decree of the appellate Court itself. Section 583 applies to a case of the former description. This not being a case of that description, the Court below was wrong in holding that the respondent was entitled to restitution under that section.

Upon the second question, I am of opinion that it was not necessary for the respondent to bring a fresh suit, that it was the duty of the Courts to restore to him that of which he had been deprived by reason of the enforcement of the erroneous decree subsequently set aside, and that his remedy was by application. In the case of *Shama Purshad Roy Chowdery v. Hurro Purshad Chowdery*, (1) their Lordships of the Privy Council held as follows:—
 “There is no doubt that according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting

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and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action." According to this ruling, when a judgment has been reversed or superseded, one of the remedies open to the successful party is restitution by "summary process," that is, by an application to the Court executing the decree. The matter is, in my opinion, one which may be dealt with under the provisions of section 244 of the Code of Civil Procedure, being a question relating to the execution of the decree. It was observed by Sir Barnes Peacock, C.J., in *Hurro Chunder Roy Chowdhry v. Shoorodhoney Debia*, (1) that "the decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed, and I should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been forced had been deprived by reason of its having been enforced." With this view I am in full accord, and in my opinion the subsequent decree by which the original decree was reversed or superseded contained by necessary implication a direction for restitution. An application for restitution is therefore an application for execution of the later decree, and comes within the purview of clause (c) of section 244. In *Suran v. Bhagwan* (2) it was held by this Court that restitution of money realized under an *ex parte* decree which was subsequently set aside could be sought by an application for execution, and in *Harnam Chandar v. Muhammad Yar Khan* (3), it was held that an application for refund of money realized in execution of a decree subsequently amended under section 206 of the Code was an application under section 244. The principle of these rulings, I think, applies to the present case and the application of the respondent may be deemed to be one under that section. The original decree of this Court having been superseded by the judgment passed on review, the respondent

(1) (1868) 9 W. R., 402, *at* p. 407. (2) (1903) I. L. R., 25 All., 441.

(3) (1905) I. L. R., 27 All., 435.

is entitled to restitution of what was lost by him in consequence of the execution of the superseded decree and his remedy in my opinion is an application to the Court. By such application he may ask not only for restoration of possession, but also for the rents and profits of which he has been deprived. In *Mookond Lal Pal Chowdhry v. Mahomed Sami Meah* (1), Petheram, C.J., observed :— “I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to anyone, and therefore it seems to me that that inherent right does exist, and that the Court has 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 and of any proceeds which have been improperly taken.” See also *Raja Singh v. Koolliap Singh* (2). Holding the view that I do as to the applicability of section 244, I deem it unnecessary to express any opinion upon this point. In my judgment the Court was competent to award mesne profits to the respondent upon an application being made to it, whether it could do so under section 244 or in the exercise of its inherent powers, and that it was not necessary for the respondent to bring a separate suit.

As for the amount of mesne profits, I am of opinion that the respondent should not be allowed profits for any period anterior to the date on which the judgment upon review was passed by this Court. This is not on the ground of limitation, but because the respondent or his predecessor in title was guilty of gross laches, and clearly slept over his rights. He not only submitted to the original decree of this Court, but made no application for review of judgment until nearly ten years after the date of the decree. He has offered no satisfactory explanation of this long delay though an error was apparent on the face of the decree. I would therefore award him mesne profits from 14th August, 1902, the date of this Court's decree upon review, to June, 1904, when he was restored to possession, that is to say, for a period of 23 months. During this period the appellant had no right to continue in possession and he ought to have relinquished

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possession as soon as this Court decided against him on review. The lower Court has awarded profits at the rate of Rs. 7 a month and this rate is not disputed. The profits for 23 months at the above rate amount to Rs. 161, and this is the sum to which I think the respondent is entitled. He should also be awarded interest on the said amount at the rate of 6 per cent. per annum from June, 1904, when it became due, to the date of payment, interest being by the very definition of mesne profits a part thereof. I would accordingly vary the decree and order of the Court below and award to the respondent Rs. 161 with interest thereon at 6 per cent. per annum from June, 1904, to the date of payment. Having regard to the circumstances of the case, I think the parties should abide their own costs in both Courts.

RICHARDS, J.—I concur. In the absence of the authorities referred to, I would have had some difficulty in coming to the conclusion that this application could be made under the provisions of section 244 of the Code of Civil Procedure. I entirely concur with my learned colleague on the question of the amount of mesne profits and interest to be awarded.

BY THE COURT—

The appeal is allowed in part, the decree and order of the Court below are varied to this extent that the respondent is awarded Rs. 161 (one hundred and sixty-one rupees) with interest thereon at 6 per cent. per annum from June, 1904, to the date of payment. The parties will abide their own costs in this Court and in the Court below.

Decree modified.