

grant this application it may well be that the litigation will be prolonged over a series of years. On every ground therefore we dismiss this application with costs.

Application rejected.

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PRIVY COUNCIL.

PRAG NARAIN (DECREE-HOLDER) v. KAMAKHIA SINGH AND OTHERS
(JUDGMENT-DEBTORS).*

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]

Sale in execution of decree—Possession given to purchaser who was the decree-holder—Setting aside sale for irregularity—Satisfaction of decree and restoration of property to mortgagor—Remedy for recovery of mesne profits and interest—Application in execution proceedings—Separate suit—Civil Procedure Code (Act XIV of 1882), sections 244, 583—Right of purchaser to interest on purchase money.

Under a mortgage decree obtained by the appellant against the respondents the mortgaged property was in February 1901 put up for sale in default of payment and purchased by the decree-holder who had obtained leave to bid. The purchase money was not paid but was set off by the appellant against the amount due under the decree, which gave no future interest. Possession was given to the appellant in December 1901. In September 1903 the sale was set aside for irregularity, and in March 1904 the respondents paid to the appellant the amount due under the decree and possession of the property was restored to them.

Held (affirming the decisions of the Courts in India) that the respondents were entitled by sections 583 and 244 of the Code of Civil Procedure to recover mesne profits and interest thereon in the execution proceedings, and were not obliged to have recourse to a separate suit for the purpose, the delay and expense of which their Lordships would not at this stage of the proceedings have been disposed to permit.

Held also that the appellant was not entitled to interest on his purchase money which had not been actually paid, but was set off against what was due on the decree. The sale was set aside for his fault and it was out of the question that he should be allowed to make a profit at the expense of the respondents out of his own error, and so in effect recover interest not allowed him by the decree.

APPEAL from a decree (22nd May 1906) of the court of the Judicial Commissioner of Oudh, which affirmed an order (12th February 1906) of the court of the Subordinate Judge of Bara-Banki.

Present:—Lord MACNAGHTEN, Lord DUNEDIN, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

P. C.
June 30,
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The main question for decision on this appeal was whether the respondents were entitled to recover from the appellant the profits of certain property received by him during the time he held possession of it under a sale in execution of a decree which was set aside; and if so whether interest should be allowed on the said profits.

On 13th June 1890 one Bholai Singh, a predecessor in title of the respondents, hypothecated a village called Ferozpur and other immoveable property to Newal Kishore the father of the appellant for Rs. 54,000 bearing interest at Re. 1-4 per cent. per mensem. On 1st November 1897, a decree was made in favour of the mortgagee for Rs. 85,866-15-6, and in default of payment thereof it was ordered that the mortgaged property should be sold. This decree which was made absolute on 23rd August 1898 contained no provision for future interest on the amount decreed.

On 21st February 1901 the village of Ferozpur was sold by auction in execution of the decree and was purchased by the appellant for Rs. 82,000. This sum however was not paid in cash but was credited in part satisfaction of the money due under the decree. An application by the respondents to set the sale aside was dismissed on 16th October 1901. On 15th December 1901 the appellant obtained possession of the village as purchaser at the auction sale.

On 18th September 1903 the auction sale was set aside by the Judicial Commissioner who reversed the order of 16th October 1901. On 14th March 1904 the respondents paid to the appellant all the money due under the decree, and on 18th March 1904 possession of the village was restored to the respondents.

The application out of which this appeal arose was made by the respondents on 23rd May 1904, under section 583 of the Civil Procedure Code to recover from the appellant mesne profits realized by him from the village during the period of his possession from 15th December 1901 to 18th March 1904 together with interest on such mesne profits.

In answer to that claim the appellant contended that the mesne profits, if recoverable at all, could only be recovered by suit and not by application under section 583 of the Code of Civil Procedure; that interest was not payable on the mesne

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profits; and that the appellant was entitled to a refund of his purchase money with interest.

On 7th March 1905 the Subordinate Judge decided that section 583 was not applicable, and that the only remedy open to the respondents was by a separate suit; and he dismissed the application. On 9th June 1905, on appeal by the respondents, the court of the Judicial Commissioner (Mr. W. F. Wells, officiating Judicial Commissioner and Mr. A. E. Ryves, Additional Judicial Commissioner) holding that section 583 was applicable to the proceedings, set aside the order of the Subordinate Judge, and remanded the case under section 562 of the Code of Civil Procedure for the determination of the amount of mesne profits which the judgment-debtors, the present respondents were entitled to receive. In making the order they said,

"Section 244 is extremely wide. There can be no doubt that as between the parties to this suit the question of whether the sale was a valid one or not was a question relating to the execution of a decree and is covered by sections 244(c). It may no doubt, also be an order under section 312. It has been argued before us that sections 244 and 312 cannot be overlapping questions, but I do not see why they should not be considered so.....There is no doubt whatever that the applicants are *prima facie* entitled to mesne profits for the period during which they were out of possession. If the order under section 312, being between the parties to the decree, can by any means be deemed to come also within section 244, I think it should be so deemed, and the applicants should be allowed the advantage of section 583, and not be driven to a separate suit."

On the case coming again before him the Subordinate Judge made a final order on 12th February 1906 that the judgment-debtors should get from the decree-holder Rs. 10,804-15 as mesne profits with interest at the rate of 6 per cent. per annum, and disallowed the decree-holder's claim for interest on his purchase money.

On appeal by the decree-holder the Court of the Judicial Commissioner (Mr. E. Chamier, officiating Judicial Commissioner, and Mr. H. D. Griffin, officiating Additional Judicial Commissioner) affirmed the decision of the Subordinate Judge. The Judicial Commissioner (the Additional Judicial Commissioner concurring) said,

"The sale having been set aside by an order which has now become final it must be held that it was an invalid sale and that the appellant had no right to take possession of the property, and had no right to the profits thereof.

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"The respondents have paid to the appellant the whole amount due under his decree so that the appellant cannot possibly claim to retain any part of the profits on account of that decree. It was argued that the appellant should be allowed to retain the profits because the decree carried no interest and that the appellant lost the use of the purchase money for a certain time. The circumstance that the decree carried no interest is in my opinion altogether irrelevant and I cannot see that the appellant lost the use of the purchase-money for any time owing to anything that took place in execution. As a matter of fact the purchase-money was set off against the amount due under the decree.

"The decision of their Lordships of the Privy Council in *Rodger v. The Comptoir D'Escompte de Paris*, (1) shows that the respondents are entitled to interest on the profits,"

On this appeal.

De Gruyther, K. C. and *B. Dube* for the appellant contended that the remedy, if any, to recover the mesne profits claimed by the respondents was by separate suit, and not by application under section 583 of the Code of Civil Procedure. Section 583 related to restitution under a decree, and applied only to decrees under Chapter XLI of the Code. In this case the order of the Subordinate Judge, dated 16th October 1901, refusing the respondents' application to set aside the sale was one under section 312 of the Civil Procedure Code; that order was appealable under section 588, clause (16) of the Code, which was a section in Chapter XLIII; and section 2 of the Code which gives the definition of "decree," provides that an order specified in section 588, was not a "decree." The order, therefore, of 18th September 1903 by which the sale was set aside, was it, was submitted, not a "decree," and section 583 was not applicable. This application, moreover, was not in accordance with the provisions of section 235 of the Code. It was also contended that the appellant was entitled to interest on the purchase money during the time he lost the use of it; but that the respondents were not entitled to interest on their mesne profits. *Rodger v. Comptoir D'Escompte de Paris* (1) was referred to.

Ross for the respondents contended that the application was properly made, and was maintainable, under section 583. The appellant was both auction purchaser and decree-holder, and the order of the court of the Judicial Commissioners setting aside the sale was an order under section 244 of the Code, and was therefore a decree, and section 583 was consequently applicable.

(1) (1871) L. R. 3 P. C., 465 at p. 475.

Reference was made to *Prosonno Kumar Sanyal v. Kali Das Sanyal* (1). The respondents were entitled to mesne profits and interest thereon. As to the claim of the appellant to interest on his purchase money, it was not paid in cash, but was set off against the debt due under the decree: he could not therefore, it was submitted, claim interest under section 315 of Civil Procedure Code on money which he never actually paid.

De Gruyther, K. C., replied.

1909, July 20th :—The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

This is a very idle appeal.

In November 1897, the appellant obtained a decree against the predecessor in title of the respondents declaring that on the 1st of May 1898, Rs. 85,866-15-6 would be due to him on the footing of a certain mortgage bond, and ordering a sale in default of payment.

In February 1901, the property was put up to sale by auction in execution of the decree. It was knocked down for Rs. 82,000 to the appellant, the decree-holder, who had leave to bid.

On the 15th of December 1901, the appellant as purchaser, obtained possession of the property. In September 1903, the sale was set aside for irregularity. In March 1904, the respondents paid to the appellant the sum found due to him by the decree and possession of the property was restored to them.

Then the respondents applied in the execution proceedings for mesne profits and interest. The application was dismissed on the ground that it ought to have been made by separate suit. The Court of the Judicial Commissioner on appeal reversed that order. Thereupon the lower Court made an order allowing mesne profits with interest and dismissing a claim on the part of the appellant to interest in respect of his purchase money for the period during which he was held accountable for profits received. On appeal the Court affirmed this order.

The present appeal has been brought from the last mentioned order. In effect it involves both orders of the Court of the Judicial Commissioner.

It is not disputed that the respondents are entitled to recover mesne profits with interest. But it was argued that, having

(1) (1892) I. L. R., 19 Calc., 683 (689); L. R., 19 I. A., 166 (169).

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regard to certain provisions in the Code of Civil Procedure taken in connection with the definition of a "decree" in section 2 of the Code, a separate suit was required, although it was admitted that precisely the same relief would be obtained whether the application were made in a separate suit or in the execution proceedings. It was also argued that the appellant was entitled to interest in respect of his purchase money.

In their Lordships' opinion there is no substance in either of these contentions. The claim of the respondents to have the questions in dispute determined in the execution proceedings is justified by sections 533 and 244 of the Code of Civil Procedure. Even if the point were doubtful, their Lordships would not be disposed, at this stage of the proceedings, to permit the expense and delay of a separate suit.

The claim of the appellant to be allowed interest is absurd. The purchase money was not actually paid. It was set off against the amount due under the decree. The miscarriage at the sale in February 1901, was the fault of the appellant. It is out of the question that he should be allowed to make a profit at the expense of the respondents out of his own error, and so in effect recover interest not allowed to him by the decree.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the cost of the appeal.

Appeal dismissed.

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

Solicitors for the respondents :—*T. L. Wilson & Co.*

J. V. W.