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December 18.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

HULASI (JUDGMENT-DEBTOR) v. MAIKU AND OTHERS (DECREE-HOLDERS). \*

*Execution of decree—Appellate order in execution—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (3).*

The holder of a decree for possession and partition of a share of certain immoveable property, dated the 19th January 1873, applied for execution on the 2nd February 1878. An order was made by the Court of first instance, from which the decree-holder appealed. The appellate Court, on the 18th September 1878, reversed the order of the first Court and directed that the partition of the property should be effected by lots, and remanded the case for that purpose. The first Court proceeded to carry out the order of the appellate Court, but eventually struck off the case, on the 15th February 1879, as the decree-holder failed to appear personally when ordered to do so. On the 13th September 1881, the legal representative of the deceased decree-holder, who had meantime died, applied, with reference to the order of the appellate Court dated the 18th September 1878, to have lots drawn in accordance with that order.

*Held*, on the question whether this application was barred by limitation, that, if it were regarded as nothing more than an application for execution of the original decree, it might be barred, inasmuch as it had been made more than three years after the date of the last application, and it was doubtful whether the 2nd clause in the 3rd column of No. 179, sch. ii of Act XV of 1877 would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the 1st clause of that article, and not an appeal in course of execution of that decree or order; that, however, the order of the appellate Court dated the 18th September 1878 was itself of the nature of a decree and capable of execution, and for the execution of which an application could be made to which that article would apply; that the application in question should be regarded as one for execution of that order; and that therefore, so regarding it, it was within time.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD, J., and TYRRELL, J.,) delivered the following judgment:

OLDFIELD, J.—The facts of this case are that the decree-holder obtained his decree on the 19th January, 1878, for possession and

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\* Second Appeal No. 35 of 1882, from an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 25th March, 1882, affirming an order of Maulvi Muhammad Abdul Basit, Munsif of Chibramau, dated the 23rd January, 1882.

partition of a third part of an enclosure. The first application for execution was made on the 2nd February, 1878, and the partition was effected by the amín of the Court and possession given on the 15th August, 1878, and the case struck off as completely executed on the 13th September, 1878. The decree-holder appealed to the Judge's Court, and the Judge, on the 18th September, 1878, reversed the Munsif's order and remanded the case to the Munsif, and directed that the distribution of the shares into which the property was to be divided should be made by lots to be drawn by the parties. The case was restored to the file and on the 31st October, 1878, the amín was directed to carry out the Judge's directions; and on the 30th November he reported that he had prepared the lots, but the decree-holder insisted on their being drawn in the Munsif's Court. The Munsif, on the 2nd December, 1878, ordered the decree-holder to attend, and as he failed to appear the case was struck off on the 15th February, 1879. The representative of the decree-holder, the latter having died, filed the application which is the subject of this appeal on the 13th September, 1881, and in this he refers to the former proceedings and the order of the appellate Court dated the 18th September, 1878, and asks that the lots be drawn in accordance with it, alleging the illness resulting in the death of the decree-holder as the cause of his failing to appear on the former occasion. The question before us is whether this application is barred by limitation; and if it is to be regarded as nothing more than an application for execution of the original decree of the 19th January, 1878, under article 179, it would probably be barred; for it has been filed more than three years from the date of the last application of the 2nd February, 1878, and it is doubtful if the 2nd clause in the 3rd column of article 179 would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the first clause of the article, and not an appeal in course of execution of that decree or order. But the order of the appellate Court in execution of the decree is itself of the nature of a decree and capable of being executed, and for the execution of which an application can be made to which article 179 will apply; and we regard the application dated the 13th September, 1881, as an application to execute the appellate Court's order dated the 18th September, 1878, and in consequence not barred by

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limitation. No doubt the execution of the original decree will be the result of allowing the application, but it is none the less an application for execution of the order of the appellate Court, that being its essential object and intention, and it should be so treated. We therefore dismiss the appeal with costs.

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December 15.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.*

NAIT RAM (PLAINTIFF) v. SHIB DAT AND OTHERS (DEFENDANTS).\*

*Breach of contract—Liquidated damages—Penalty—Measure of damages—Act IX of 1872 (Contract Act), s. 74.*

Under s. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred.

*Held*, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract.

ON the 5th January, 1878, the defendant Shib Dat and one Chedi Lal, represented in this suit by his heirs, gave the plaintiff a bond in which they agreed, as the consideration for an advance of Rs. 200, to deliver to the plaintiff on a certain day 1,334 maunds of indigo plant. They further agreed that, if they failed to deliver the indigo plant, they should pay as damages twice the amount of the sum advanced. They hypothecated as colla-

\* Second Appeal No 309 of 1882, from a decree of Munsif Zain-ul-Abidin, Subordinate Judge of Shahjahanpur, dated the 15th December, 1881, modifying a decree of Lala Ganga Prasad, Munsif of Bijnoli, dated the 25th August, 1881.