

is obtained on such a trial, the Court should stay the inquiry into or trial of the other charges which will have the effect of an acquittal of the accused on those charges subject to the event of the conviction being set aside by higher authorities. If the conviction is set aside the Magistrate may proceed with the trial or inquiry of the other charges

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PRIVY COUNCIL.

KEDARNATH GOENKA

v.

ANANT PRASAD SINGH AND OTHERS

1925.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rules 3, 12—Abatement—Enquiry as to Mense Profits—Execution Proceedings—Suit under Code of 1882.

 Feb., 9.

A Subordinate Judge in 1905 made a decree for possession and mense profits. Appeals to the High Court and to the Privy Council were dismissed, the latter in 1913. An inquiry as to the mense profits recoverable was held subsequently, and during it two of the plaintiffs died. Their representatives not having been substituted within six months, the defendant contended that there had been an abatement under Order XXII, rule 3, of the Code of Civil Procedure, 1908.

Held, that under the Code of Civil Procedure 1882, the proceedings to determine the mense profits under the decree of 1905 were "proceedings in execution," and consequently they were excluded by Order XXII, rule 12, of the Code of 1908 from the operation of rule 3 of that Order as to abatement.

Judgment of the High Court in *Kedarnath Goenka v. Tarini Prasad Singh* (1), affirmed.

Appeal (no. 101 of 1923) from a decree of the High Court (March 10th, 1921) rejecting an application for the revision of an order of the Subordinate Judge of Monghyr (April 9th, 1920).

* PRESENT: Lord Shaw, Lord Carson, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

(1) (1921) 61 Ind. Cas. 4; 2 Pat. L. T. 245; (1921) Cal. W. N. (Pat.) 158.

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In 1905 the Subordinate Judge made a decree against the father of the present appellant for possession of immovable property and for mesne profits. That decree was affirmed by the High Court in 1908, and by the Privy Council in 1913 [*Baijnath Ram Goenka v. Nand Kumar Singh*(¹)] Possession was given in 1914.

In proceedings to ascertain the amount of the mesne profits the Subordinate Judge held in 1915 that they should run from the date of the Privy Council decision, but the High Court on appeal, held that the plaintiffs were entitled to them from the date of the original decree of 1905

In 1920 the appellant, who had been substituted for his father, deceased, applied to the Subordinate Judge for an order that the proceedings had abated, since two of the plaintiffs died in 1918 and no steps had been taken to substitute their representatives.

The Subordinate Judge dismissed the application, holding that the inquiry as to mesne profits was a proceeding in execution of a decree within the meaning of Order XXII, rule 12, of the Code of Civil Procedure, 1908, and that therefore rule 3 of that Order providing for abatement did not apply.

The appellant applied to the High Court for revision but the application was dismissed.

DAS, J., with whose judgment ROSS, J., agreed, held that the Code of 1882 applied in considering whether the inquiry was a proceeding in execution, and under section 244 it was so. *Ram Kishore Ghose v. Kanta Shaha*(²) was a direct authority for that. *Puran Chand v. Roy Radha Kishen*(³), decided nothing to the contrary, but merely that for purposes of limitation such proceedings were proceedings in execution of a decree for a fixed amount. That being so under Order XXII, rule 12, of the Code of 1908, which applied on the question whether there had been an abatement, no substitution was necessary.

(1) (1913) I. L. R. 40 Cal. 552; L. R. 40 I. A. 54.

(2) (1900) I. L. R. 23 Cal. 242. (3) (1891) I. L. R. 19 Cal. 182.

1925, February 3.—*Dunne, K. C.* and *E. B. Raikes* for the appellants. The decree of 1905 having been affirmed by the Privy Council in 1913, the whole question depends upon the Code of 1908. Although under the Code of 1882 mesne profits could be ascertained in execution proceedings that is not so under section 47 of the Code of 1908. The proceedings were therefore not "proceedings in execution of a decree" within Order XXII, rule 12; consequently there was an abatement under rule 3 of that Order. The plaintiffs could have applied under rule 9 to set aside the abatement. Reference was made to *Radha Pershad Singh v. Lal Sahab Rai* (1), *Bhup Indar v. Bijai* (2), and the two decisions referred to by the High Court. The respondents did not appear.

The judgment of their Lordships was delivered by—

LORD SHAW.—The question raised on this appeal is one of procedure. The judgments of the Courts below are concurrent; they are gathered together in the final paragraph of the judgment of the High Court, in which Das, J., says:

"I hold that, under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in the suit. That being so, Order XXII, rule 12, applies, and it must follow that substitution was not necessary."

Their Lordships have heard a persistent argument criticising the entire authorities cited in the case; they have considered that argument and the authorities; and they now declare that nothing has been urged which would induce them upon this point of procedure to express disagreement with the result arrived at in the Courts below.

In their Lordships' opinion, the appeal accordingly ought to be dismissed, and advice will be humbly tendered to His Majesty in that sense.

Solicitors for appellants: *Watkins and Hunter.*

(1) (1890) I. L. R. 18 All. 53; L. R. 17 I. A. 150.

(2) (1900) I. L. R. 28 All. 152; L. R. 27 I. A. 209.

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