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for executing the risk note under which the goods were despatched. In this view of the case it is unnecessary to deal with the further argument advanced on behalf of the appellant that the plaintiff had ratified the act of Narsing by taking delivery of one bale of goods under this risk note.

With regard to the second point, it is clear that this is a case of loss. The plaintiff in his plaint alleged that only one bale was delivered and that there was shortage. The railway company in their defence pleaded that there was no wilful negligence by reason of which the company was liable for any loss sustained by the plaintiff. The case was clearly a case of loss on the pleadings; and, in view of the terms of risk note in Form B, it was for the plaintiff to prove that the loss of one complete package was due to negligence on the part of the company's servants. No such proof was offered and the plaintiff's claim must therefore fail.

The appeal is allowed and the suit of the plaintiff is dismissed with costs in both the Courts below, but in the circumstances of the case there will be no costs of the appeal in this Court.

DAS, J.—I agree.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Das and Adami, J.J.*

BHATU RAM MODI

*v.*

FOGAL RAM.*

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*May, 5; Nov., 3.*

*Mesne profits, application for ascertainment of, whether can be dismissed—decree-holder, right of, to apply to Court to ascertain mesne profits—limitation.*

* Appeal from Original Decree no. 98 of 1922, from a decision of B. Pramatha Nath Bhattacharji, Subordinate Judge of Hazaribagh, dated the 21st January, 1922.

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Where a decree for mesne profits has been passed and an application has been made for ascertainment of the mesne profits it is not competent to a Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed.

It is always open to the decree-holder to ask the Court to ascertain the mesne profits inasmuch as an application for mesne profits is an application in the suit itself and the law of limitation has no application to it so long as the suit is a pending suit.

*Lachmi Narain Marwari* v. *Balmukund Marwari* (1), relied on.

Appeal by the judgment-debtor.

On the 25th August, 1915, the Ramgarh Raj obtained a decree for possession of certain properties and for mesne profits up to the date of the decree

" at the rate of the rent fixed in the lease with interest thereon at the rate specified in the said lease."

and for subsequent mesne profits

" at the full rate recoverable under the law."

The Ramgarh Raj obtained possession of the properties on the 22nd February, 1916, and it therefore became entitled to mesne profits at the rate of rent up to the 25th August, 1915, and at the full rate from the 25th August 1915 to the 22nd February 1916.

On the 23rd December, 1915, the Raj presented an application for execution claiming Rs. 2,866-14-0 as mesne profits for eleven years up to the date of the decree and Rs. 1,069-11-9 as mesne profits from the date of the decree up to the 23rd December, 1915. The application was presented as a simple application for execution of the decree. Certain proceedings were taken and certain properties of the judgment-debtors were sold in this execution, but an objection having been taken the sale was set aside on the 8th December,

(1) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.

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1917, and the decree-holder was directed to file a fresh execution. On the 13th August, 1919, another execution case was started by the Raj. On the 11th November, 1919, this was rejected as infructuous because certain substitutions had not been effected. On the 7th March, 1920, the third execution case was started. The judgment-debtor now for the first time raised the objection that mesne profits could not be ascertained in execution and that there was no application for ascertainment of mesne profits and that the application for execution could not be converted into an application for ascertainment of mesne profits. On the 17th April, 1920, the Court dismissed this application as barred by limitation. The Court also held that the proceedings could not continue as mesne profits had not been ascertained which must be ascertained in a proceeding in the suit itself. The decision of the Court on the question of limitation was subsequently set aside by that Court on review and that decision was upheld by the High Court. Having regard to this decision Fogal Ram who, meanwhile, had purchased the decree from the Raj, instituted the present proceedings on the 29th April, 1920, for the ascertainment of mesne profits. His application succeeded and the judgment-debtors appealed to the High Court, and they contended that having regard to the previous orders, namely, those passed on the 8th December, 1917, 11th November, 1919, and the 17th April, 1920, the present application was not maintainable. The matter was heard before Das and Adami, J.J., on the 5th May, 1925, when their Lordships delivered judgment agreeing with the contention of the appellants. Mr. B. C. De thereafter appeared before their Lordships before they had signed the judgment and he asked for permission to argue the matter again before them. Their Lordships acceded to the request.

*Susil Madhab Mullick* (with him *Bankim Chandra De*), for the respondent: The previous application for mesne profits does not debar the decree-holder from filing another application for

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realisation of the mesne profits. A decree for mesne profits having been passed, it is not competent to a court to dismiss a suit which is deemed to be still pending. The principle embodied in *Upendra Chandra Singh* v. *Sakhi Chand* (1) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (2) is no more good law. It has been practically overruled by the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (3) where it was held that a default on the part of the decree-holder in taking further steps after the passing of the preliminary decree in a partition suit does not entail the dismissal of the suit. There is no distinction in principle between a suit for partition and a suit for recovery of possession and mesne profits. Order XX, rule 12, does not require an application to be made for ascertainment of mesne profits as is required in the case of a mortgage suit under Order XXIV, rule 5. I also rely on *Ranjit Sahi* v. *Maulavi Qasim* (4) and *Lachmi Narain Tiwari* v. *Ramsaran Tiwari* (5).

*Sultan Ahmed* (with him *S. N. Dutt*), for the appellant: The court had jurisdiction to dismiss the application for ascertainment of mesne profits. The dismissal of the claim for mesne profits does not operate as the dismissal of the entire suit, nor can it affect the decree passed in the suit. Under the new code an application for ascertainment of mesne profits is a proceeding or a " sub-suit " in the original suit. It follows, therefore, that an order made in respect of the application will not necessarily affect the rights of the decree-holder acquired under the decree passed in the original suit. The point is concluded by *Upendra Chandra Singh* v. *Sakhi Chand* (1) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (2).

(1) (1912) 16 Cal. L. J. 3.

(2) (1919) 29 Cal. L. J. 470.

(3) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.

(4) (1924) 4 Pat. L. T. 257.

(5) (1925) 6 Pat. L. T. 152.

In *Lachmi Narain Marwari* v. *Balmakund Marwari* (1), which related to a partition suit, the court dismissed the entire partition suit although a preliminary decree had been passed. In the present case the court only dismissed the claim of the plaintiffs with respect to mesne profits but did not dismiss the whole suit. *Upendra Chandra Singh* v. *Sakhi Chand* (2) and *Purna Chandra Roy Chowdhuri* v. *Jogendra Nath Chowdhuri* (3), have not been touched by the Privy Council, and I submit they are still good law.

S. A. K.

DAS, J. (after stating the facts set out above, proceeded as follows): In my opinion, having regard to the arguments which have been advanced before us to-day, we must affirm the decision of the lower court and dismiss this appeal.

The short point which falls to be considered is whether there is any power in a court to dismiss an application for ascertainment of mesne profits. It is contended before us by Mr. Susil Madhab Mullick that a decree having been passed for ascertainment of mesne profits it was not competent to the Court at any stage to dismiss those proceedings it being beyond the power of a Court to dismiss a claim which had already been decreed; and it was contended that if the previous applications be regarded as applications for the ascertainment of mesne profits, then the dismissal of those applications were from one point of view illegal and that in any case they could not prevent the decree-holder from inviting the Court to carry into effect the decree of the High Court, dated the 25th August, 1915 This view is supported by the decision of the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (1). That decision was pronounced in a suit for partition. A preliminary decree for partition

(1) (1925) I. L. R. 4 Pat. 61; L. R. 51 I. A. 321.

(2) (1912) 16 Cal. L. J. 3.

(3) (1919) 29 Cal. L. J. 470.

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was made and all that remained to be done was to carry the partition into effect. The Subordinate Judge accordingly fixed a date for hearing the parties as to how the partition was to be effected and gave them notice but the plaintiff did not appear on the date fixed and thereupon the Subordinate Judge dismissed the suit for want of further proceedings. With reference to what was done by the Subordinate Judge, their Lordships said as follows: "After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced"; and then their Lordships said this, "If, for instance, the Subordinate Judge had made an order adjourning the proceedings sine die, with liberty to the plaintiff to restore the suit to the list on payment of all costs and court fees thrown away, it would have been a perfectly proper order".

Now it seems to me that this case decides the present controversy between the parties. The decree of the 25th August, 1915, in terms gave a decree to the plaintiff for mesne profits. There was, therefore, a valid decree which was operative and which the Court had to carry into effect. That decree was not set aside and it seems to me that the proceedings for the ascertainment of mesne profits could not be dismissed for the dismissal of those proceedings would operate as a dismissal of the suit which had already been decreed by the Calcutta High Court.

The question only arises as it is contended before us that although in form the previous applications may have been applications for execution of the decree, in substance they were applications for the ascertainment of mesne profits. I hold that if they were applications for the ascertainment of mesne profits, their dismissal was ultra vires and that it was open to the plaintiff to ask the Court to ascertain the mesne

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profits. It is well established that an application for mesne profits is an application in the suit itself and that the law of limitation has no application to it so long as the suit is a pending suit.

Mr. Sultan Ahmed ingeniously argued before us that a distinction should be drawn between a suit and a claim which may be involved in the suit. He admits that the suit having been decreed it was not in the power of the learned Subordinate Judge to dismiss the suit; but he contended before us that the claim for mesne profits stood on a different footing. I am unable to agree with this contention. The only part of the suit that remained was that dealing with the question of mesne profits payable to the plaintiff and in any view the claim for mesne profits had in distinct terms been decreed by the Calcutta High Court and that being so that claim could not be dismissed by the learned Subordinate Judge.

I would accordingly dismiss this appeal. There will be no order as to costs.

It was brought to our notice that the lease does not provide for the payment of any interest. That being so, the plaintiffs will be only entitled to mesne profits at the rate of rent fixed in the lease up to the date of the decree.

ADAMI, J.—I agree.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mullick and Kulwant Sahay, J.J.*

MUHAMMAD SHARIF

*v.*

RAI HARI PRASAD LAL.*

1925.

NOV., 3.

*Code of Criminal Procedure, 1898 (Act V of 1898), section 526(8) and section 528(4)—"enquiry" meaning of—omission to record reasons for transferring a case, whether vitiates the order—jurisdiction.*

* *In re.* an application, from an order of J. C. Dutt, Esq., Officiating District Magistrate of Gaya, dated the 15th October, 1925.