above. The ordinary karta's account will be taken of the joint family property and the debts binding on the joint family property as they stood at the date of the institution of the suit. Each party will bear its own costs throughout.

Learned Counsel for the respondents contended that the costs of the trial Court so far as they related to the impartible estate should be allowed to the defendants. But in all the circumstances of this litigation we see no reason to depart from the usual order made in partition suits.

FAZL ALI, J.—I agree.

Appeal allowed in part.

APPELLATE CIVIL.

Before Macpherson and Khwaja Muhammad Noor, JJ.

TEJ NARAYAN SINGH

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Court-fees Act, 1870 (*Act VII of* 1870), *section* 15, *scope of—review admitted on the ground of mistake in fact—previous decision modified—applicant, whether entitled to certificate—delay of six months, whether a bar.*

Section 15, Court-fees Act, 1870, provides:

"Where an application for a review of judgment is admitted, and where, on the rehearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee payable on any other application to such Court under the Second Schedule to this Act, no. 1, clause (*b*) or clause (*d*).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing."

* First Appeal no. 83 of 1925, in the matter of.

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Held, that the requirements of the section are (*1*) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission and (*2*) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing.

Where, therefore, the applicant who had not appeared at the original hearing applied for review which was admitted on the ground of mistake in fact as a result of which the former decision was modified substantially in favour of the applicant.

Held, that the applicant was entitled to a certificate under section 15.

Held, further, that a delay of six months from the date when the application might first have been made was no bar to the granting of the certificate.

Jadubansi Sahay v. *Barhamdeo Narayan Singh*(1), distinguished.

Application by the defendants, 1st party.

The facts of the case material to this report are stated in the judgment of the Court.

B. P. Sinha, for the petitioners.

S. Dayal, *Government Pleader*, for the Crown.

MACPHERSON and KHWAJA MUHAMMAD NOOR, JJ. —This is an application under section 15 of the Court-fees Act for a certificate authorizing the petitioners to receive back from the Collector the sum of Rs. 577-8-0 paid as court-fee on an application for review of an appellate judgment in this Court less a sum of Rs. 3 which would be the fee payable on an ordinary application to this Court under the Second Schedule to the Court-fees Act.

The circumstances are as follows. Basarh and Zorowarganj are contiguous villages in the Kosi area of Bhagalpur. The north-east portion of Basarh and some adjoining villages became *dahanal* on account of the Kosi floods and remained so for many years and

(1) (1930) 11 P. L. T. 476.

finally became fit for cultivation in 1316 F. The proprietors of Basarh sued for recovery of possession of certain lands as being part of Basarh with mesne profits and made the applicants defendants first party. The petitioners are tenure-holders of eight-annas of Zorowarganj. The defendant second party, the proprietor of the Darbhanga Raj, is the proprietor of Zorowarganj and holds eight-annas khas. The third party defendants are the raiyats holding the disputed land.

The suit was decreed by the trial Court with mesne profits from 1326 F. till recovery of possession and the extent of mesne profits was left to be ascertained later.

The defendant second party appealed making the plaintiffs and his co-defendants respondents to his appeal. At the hearing the defendants-respondents did not appear. The appellant abandoned his claim to the lands and only contested the decree so far as it granted mesne profits. This Court held that the appellant was protected from liability to mesne profits by virtue of an agreement between him and the plaintiffs that upon demarcation according to the Revenue Survey and recovery of possession up to the boundary so demarcated no mesne profits should be payable by either party. This Court decreed the appeal and specifically directed that the appellate order should not affect in any way the decree which the learned Subordinate Judge had passed as against the defendants other than the defendant-appellant.

The petitioners then filed an application for review and were made to pay court-fee in accordance with the valuation of the appeal, their protest that they should pay only upon the valuation of the mesne profits being rejected. Das, J. allowed the review on the ground of an error apparent on the face of the record.

The appeal came on for rehearing before a different Bench which dismissed it in toto holding that

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the agreement was not relevant since dispossession took place subsequent to it.

The applicants for review now apply under section 15 of the Court-fees Act for refund of court-fee paid on the application.

The office of the Court doubted whether section 15 was available to the applicants on the view that the adverse order first passed against them in the appeal was due to their own laches in not appearing and presenting their case at the original hearing and considered that the principle underlying the proviso to section 15 should be applied in this case. The office also referred to the decision in *Jadubansi Sahay* v. *Barhamdeo Narayan Singh*(1) in connection with the delay in applying for refund.

Section 15 reads as follows:

"Where an application for review of judgment is admitted, and where, on the rehearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee payable on any other application to such Court under the Second Schedule to this Act, no. 1, clause (*b*) or clause (*d*).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing."

The Government Pleader who was asked to appear contends, first, that in the circumstances of the case refund of court-fee is not available under section 15. He urges that the application for review was admitted under the misapprehension of fact that the present petitioners had had no opportunity of being heard, and further that on the rehearing the former decision was not reversed or modified on the ground of mistake in law or in fact but rather in view of fresh contentions which could have been raised if the applicants had only taken the trouble to appear and that in any

(1) (1930) 11 Pat. L. T. 476.

case the modification was not in favour of the applicants. Mr. B. P. Sinha urges that so far as section 15 is concerned if an application for review has in fact been admitted it is enough and the adequacy of the ground of admission is irrelevant, and further that at the rehearing the Court did substantially modify its former decision on the ground of mistake in law or in fact. In our opinion the contention on behalf of the applicants cannot be gainsaid. The requirements of section 15 are perfectly definite: (1) the admission of the application for review of judgment irrespective of the correctness of the grounds for the admission; (2) a reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. It cannot be contended that the application for review was not admitted. As to the result of the rehearing, the learned Government Pleader contends that so far as the applicants were concerned, there was no difference between the first and the second decisions since under both they only became liable for half of the mesne profits, the extent of their interest being set out in the plaint. But a perusal of the decision of the first Court and of the decisions in this Court does not appear to bear out the contention. In the judgment of the trial Court all the defendants are made liable both for the mesne profits and for the costs of the suit. The first decision in appeal left the decree against the applicants intact. The result was that they were liable both for the whole of the mesne profits and of the costs. That view cannot be contested so far as the costs are concerned and the modification in respect of the costs being made on a ground of mistake in law or in fact would alone be sufficient to bring the application within section 15. The learned Government Pleader would indeed contend that at the ascertainment of mesne profits the applicants would only be held responsible to the extent of their interest in the village or to the extent

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of the trespass actually made by them and accordingly the decision at the rehearing does not benefit them. This is, however, not by any means clear and on the whole one is inclined to think that an executing Court would regard the decree of the trial Court as making all the defendants responsible for the whole of the mesne profits so that the restoration at the rehearing of the appeal of the liability of the appellant was a modification to the benefit of the applicants who are co-judgment-debtors with him. It is not contended that the fresh arguments presented to the Court constituted "fresh evidence" within the meaning of the proviso to section 15. In our view there has not only been at the rehearing a modification of the former decision but it is one substantially in favour of the applicants, and it is made on the ground of a mistake of fact.

The point taken by the office as to delay in applying for refund is without substance. The decision cited is under section 151 of the Code of Civil Procedure and relates to a different matter in which it was discretionary with the Court to accord relief. Moreover the delay is only six months from the date when the application might first have been made and not eighteen months as supposed by the office.

On this view section 15 is available to the applicants and they are entitled to a certificate, and it is directed under section 15 that they receive a certificate, from this Court authorizing them to receive back from the Collector the sum of Rs. 574-8-0.

Application allowed.

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March, 26.

PRIVY COUNCIL*.

PARSOTIM THAKUR

v.

LAL MOHAR THAKUR.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 107 (*1*) (*d*) *and Order XLI, rules* 27 *and* 29—*Appeal to High*

* *Present*: Lord Blanesburgh, Lord Macmillan and Sir George Lowndes.