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RADHA NATH SINGH *v.* CHANDI CHARAN SINGH.* [13th Feb., 1903.]

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"Decree," meaning of—Civil Procedure Code (Act XIV of 1882) ss. 2, 211—Mesne profits—Future mesne profits.

Held, by the Full Bench (Prinsep, J. dissenting) that an order dismissing, for default, an appeal from a decree is a 'decree' within the meaning of section 2 of the Code of Civil Procedure.

Jagarnath Singh v. *Budhan* (1) and *Anwar Ali* v. *Jaffer Ali* (2) overruled.

Ramchandra Pandurang Naik v. *Madhav Purushottam Naik* (3) referred to.

[Foll. 10 Bom. L. R. 160, Note; 39 C. 341; 8 C. W. N. 313; 16 C. P. L. R. 151; 34 C. 403 (F. B.)=5 C. L. J. 247=11 C. W. N. 329=2 M. L. T. 123; Dist. 17 C. P. L. R. 1; 121 P. R. 1907=51 P. W. R. 1907, F. B.; Diss. 4 L. B. R 17; 31 M. 157=3 M. L. T. 336; Ref. 13 C. L. J. 153=14 C. W. N. 57=5 I. C 493; 39 Cal. 341.]

REFERENCE to Full Bench in appeal by the judgment-debtor, Radha Nath Singh.

The decree-holder, Chandi Charan Singh, obtained a decree for recovery of possession of certain properties on declaration of title. The decree awarded mesne profits up to the date of the suit, and further directed that "the amount of *wasilat* will be determined at the stage of execution," referring evidently to future mesne profits. This decree was passed on the 31st March 1895, and there was an appeal to the High Court, which was dismissed for default on the 24th November 1897.

[661] On the 3rd October 1899, the decree-holder applied for ascertainment of mesne profits, on taking accounts, for the years 1301 to 1307 B. S. On the 17th February 1900, the judgment-debtor put in a petition of objection, contending, amongst other things, that the decree-holder could not get any mesne profits, specially as there was no prayer in the plaint for mesne profits from the date of the suit to the date of the recovery of possession, and there was no order passed by the Court with reference to the same.

The Subordinate Judge held that the decree had provided for future mesne profits. With reference to other objections by the judgment-debtor, he held that the decree-holder was entitled to mesne profits for a period ending with three years from the date of the High Court decree, although the appeal to the High Court had been dismissed for default, distinguishing the case of *Anwar Ali* v. *Jaffer Ali* (2) on the ground that the meaning of the word 'decree' with reference to s. 211 of the Civil Procedure Code was not considered in that case. He accordingly disallowed the objections of the judgment-debtor.

The appeal originally came on for hearing before a Division Bench (MACLEAN, C. J. and BANERJEE, J.). Their Lordships being unable to agree with the view expressed in *Jagarnath Singh* v. *Budhan* (1) and *Anwar Ali* v. *Jaffer Ali* (2) referred the case to a Full Bench, on the 11th December 1901, with the following opinions:—

MACLEAN, C.J. Three points are raised before us upon this appeal. The first was that, inasmuch as there was no provision in the decree for the payment of

* Full Bench Reference in appeal from order No. 282 of 1900.

Full Bench: Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens, and Mr. Justice Geidt.

(1) (1895) I. L. R. 23 Cal. 115.
(2) (1896) I. L. R. 23 Cal. 827.
(3) (1891) I. L. R. 16 Bom. 23.

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mesne profits from the date of the institution of the suit until the delivery of possession, the party in whose favour the decree was made—the respondent in the present appeal—was not entitled to such mesne profits. That depends upon whether, having regard to the provisions of section 211 of the Code of Civil Procedure, there was any provision in the decree for the payment of subsequent mesne profits. Now that we have seen the preliminary decree, it has been conceded by the pleader for the appellant that there is such a provision, and consequently it is unnecessary for us to say anything further upon that point.

The second question is that the respondent is only entitled to mesne profits for a period of three years from the date of the first decree passed on the 31st of March 1895, and not from the date of the decree on the appeal to this Court, dated the 24th of November 1897.

[662] The latter decree is one of this Court, and is in these terms:—"Upon this appeal being called on in a Division Court before the Hon'ble James O'Kinealy and the Hon'ble Robert Fulton Rampini, two of the Judges of this Court, on the twenty fourth day of November 1897, and the pleader for the appellant not being prepared to go on with the appeal.—It is ordered and decreed that this appeal be, and the same is hereby, dismissed; and it is further ordered and decreed that the appellant do pay to the respondent, who appeared, the sum of Rupees three hundred and one, Annas six and Pies six, being the amount of costs incurred by him in this Court with interest thereon at the rate of six per cent. per annum from this date to the date of realisation."

The respondent contends that upon the principle enunciated in the Privy Council case of *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1) the three years run, not from the date of the decree in the Lower Court, but from the date of the decree of this Court, and, subject to the point I am about to mention in a moment, that has been conceded by the learned Vakil for the appellant. I think it is difficult upon principle to differentiate that case from the case now before us.

The last point is that that which I have previously spoken of as the decree of the 24th November 1897 is not a decree within the meaning of section 2 of the Code of Civil Procedure, upon the ground that it was not passed after argument and after a judgment, but merely upon a default, *viz.*, the non-appearance of the appellant. It is urged that a decree made under the circumstances is not a "formal expression of an adjudication upon any right claimed," within the meaning of section 2 of the Code, and in support of that proposition reliance is placed upon two cases decided by two Division Benches of this Court, *viz*, *Jagarnath Singh* v. *Budhan* (2) and *Anwar Ali* v. *Jaffer Ali* (3). There is no question but that the adjudication here did decide the appeal. These cases undoubtedly support the contention of the appellant, but I may point out that that view is not shared by the Bombay High Court, as appears from the case of *Ramchandra Pandurang Naik* v *Madhav Purushottam Naik* (4).

Speaking with every respect, I am unable to share the view of the learned Judges who decided the cases I have referred to in this Court. Looking at the terms of the decree in the present case, I find it difficult to say that there was no formal expression of an adjudication of the right claimed or that such adjudication did not decide the appeal. It does not seem to me to be any the less a "formal expression of an adjudication upon the right claimed," because it was not preceded by an argument or by a judgment, written or otherwise. The decree speaks for itself; it is surely the expression of an adjudication, and it certainly is formal, and it decided the appeal.

On these short grounds, being unable, as I have said, to agree with the decisions of this Court, the case must be referred to a Full Bench upon this point, it being now conceded that there are no other points in the case.

BANERJEE, J. I concur.

[663] On this reference:—

Babu *Tarak Chandra Chakravarti* for the appellant. The order of the High Court does not come within the definition of a decree in section 2 of the Civil Procedure Code. The word "decree" has the same meaning in ss. 2 and 211 of the Code. It is an order. I rely on

(1) (1900) I. L. R. 23 All. 152; L. R. 27 I. A. 209.
(2) (1895) I. L. R. 23 Cal. 115.
(3) (1896) I. L. R. 23 Cal. 827.
(4) (1891) I. L. R. 16 Bom. 28.

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Jagarnath Singh v. *Bubhan* (1) and *Anwar Ali* v. *Jaffer Ali* (2). The dismissal of a suit under s. 102 of the Code is analogous, and the following cases relating thereto should be considered: *Amrito Lal Mukherjee* v. *Ram Chandra Roy* (3), *Mansab Ali* v. *Nihal Chand* (4), *Chand Kour* v. *Partab Singh* (5), and *Gilkinson* v. *Subramania Ayyar* (6). I refer also to *Lucky Churn Chowdhry* v. *Budurunnissa* (7) and *Abdul Hossein* v. *Kasi Sahu* (8). The opinion of a single Judge in *Ramchandra Pandurang Naik* v. *Madhav Purushottam Naik* (9) is, I respectfully submit, incorrect.

[MACLEAN, C. J. Why should we put a narrow construction upon the language of section 2? What is an *expression of adjudication*?]

There was no adjudication of any substantive right claimed. The Appellate Court could not have affirmed the judgment of the first Court, which was not before it. Section 2 also relates to a *defence*. When orders in such cases have been held to be not *res judicata*, it cannot be said that there is an adjudication.

[STEVENS, J. Dismissal of a suit under section 136 of the Code has been held to be a decree, as also dismissal of a suit for insufficient court-fees.]

I beg also to refer to the Full Bench case of *Fatimunnissa* v. *Deoki Pershad* (10).

Babu *Lal Mohan Das* (Dr. *Ashutosh Mukherjee* and Babu *Joygopal Ghosh* with him), for the respondent, was not called upon.

[664] MACLEAN, C. J. In my opinion the view taken by the referring Court upon the point which has been referred is the right one. I have listened with attention to the argument which has been submitted to us by the appellant, but that argument has not satisfied me that that view is incorrect. I was a party to the reference, and I have given my reasons for the conclusion at which I arrived. Other reasons might also be given. So far as I am personally concerned, I only desire to add that I still think that the definition of a decree in section 2 is sufficiently wide to embrace the conclusion of the Court of the 24th November 1897. We ought to be chary in putting such a construction upon that definition as would lead to an injustice, and this would be the result in the present case if we accepted the contention of the appellant.

I notice a slight error in my observations when the matter was previously before the Court. I said that the point was decided "by the Bombay High Court," but, to be more accurate, I should have said "by one of the Judges of the Bombay High Court," in the case (9) to which I referred.

PRINSEP, J. In my opinion the order of an Appellate Court dismissing an appeal for default of the appellant is not a decree within the definition of that term as given in the Code of Civil Procedure. I hold that the cases of *Jagarnath Singh* v. *Budhan* (1) and *Anwar Ali* v. *Jaffer Ali* (2) were correctly decided. But I think that the present appeal should be dismissed on another ground. Section 211, Code of Civil Procedure, declares that the decree-holder shall be entitled to mesne profits from the institution of the suit until the expiration of

(1) (1895) I. L. R. 23 Cal. 115.
(2) (1896) I. L. R. 23 Cal. 827.
(3) (1901) I. L. R. 29 Cal. 60.
(4) (1893) I. L. R. 15 All. 359.
(5) (1888) I. L. R. 16 Cal. 98.
(6) (1898) I. L. R. 22 Mad. 221.
(7) (1882) I. L. R. 9 Cal. 627.
(8) (1899) I. L. R. 27 Cal. 362.
(9) (1891) I. L. R. 16 Bom. 23.
(10) (1896) I. L. R. 24 Cal. 350.

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three years from the date of the decree. It has been contended that, under the circumstances of the present case, that means the decree of the first Court. It seems to me that, as the case was taken in appeal to a higher tribunal, the judgment of the first Court could not be regarded as final in 'the formal expression of an adjudication upon the right claimed.' The order passed by the Court of first instance was no doubt a decree, but it was open to consideration by the appeal preferred against it, and until the order of the Appellate Court, which might [665] modify or reverse it, it was not the actual decree in the proceedings. It became the final decree by the order of the Appellate Court on the appeal; and although that order may not itself be a decree within the terms of the definition of a decree in the Code of Civil Procedure, in its effect it declared that the decree of the first Court was the final decree for the purpose of limitation as expressed in section 211. The date of the order of the Lower Appellate Court can therefore, in my opinion, be regarded as the date of the decree from which limitation would run. If we were to hold in the strict terms of the law that the date of the decree of the first Court was, under the circumstances, the time from which limitation would run, it might so happen that the judgment-debtor would, by taking his case up in appeal, deter the decree-holder from executing his decree for mesne profits, for it is not likely that the decree-holder would proceed with the execution of such decree when possibly it might be modified, or even set aside, by the Court of Appeal. The appellant having thus deterred the decree-holder from executing his decree might then, as he has done in the present case, choose not to proceed with his appeal, and allow it to be dismissed for default, and if the calculation of limitation be from the date of the decree of the first Court, it would so happen that the decree-holder would be wrongfully deprived of mesne profits to which he would otherwise be entitled if the appeal were heard.

SALE, J. I agree in the view of the referring Court that the order or decree of this Court dismissing for default an appeal from a decree is a 'decree' within the meaning of section 2 of the Codeof Civil Procedure. I think that view is not only a possible but a reasonable one, having regard to the language of section 2, and I see no reason whatever for adopting a narrow construction.

STEVENS, J. I am also of opinion that the order of the dismissal of the appeal for default amounts to a 'decree' within the definition.

GEIDT, J. I agree in the view expressed by My Lord the Chief Justice.

[666] MACLEAN, C. J. The result is that this case will be sent back to the Division Bench which made this reference with the expression of this our opinion.

The respondent is entitled to the costs of this reference.

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30 C. 666 (=7. C. W. N. 916.)

APPELLATE CIVIL.

FAZLUR RAHIM ABU AHMUD *v.* MAHOMED OBEDUL AZIM ABU AHSAN.* [22nd April, 1903.]

Mahomedan Law—Wakf, validity of—Family settlement in perpetuity—Illusory gifts for charitable purposes.

* Appeal from Original Decree No. 148 of 1899, against the decree of Bipra Das Chatterjee, Subordinate Judge of Murshidabad, dated Dec. 19, 1898.