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share of the plaintiff in that property. There is the testimony of some of the occupying ryots as to the rent which they pay. And this evidence alone, in default of better, would be sufficient to enable the Court assessing damages to arrive at a very approximately accurate measure of them. We have not enquired whether starting from these data, and pursuing the calculations to the end, the result would be that or nearly that which the lower appellate Court has arrived at in this case. But, on the other hand, it has not been suggested to us for a moment that it would not be so, neither has it been alleged, even in argument, that if another investigation were held solely for the purpose of assessing damages, the result would probably be less than the amount which the lower Courts have decreed. Under all these circumstances we think, that this last objection made by the special appellant must fail as well as the others, and we therefore dismiss the special appeal with costs.

Before Mr. Justice Bayley and Mr. Justice Glover.

SHIB NARAYAN POHRAJ v KISHOR NARAYAN POHRAJ.*

Decree for Possession—Mesne Profits—Act XXIII. of 1861, s. 11.

A., in execution of a decree of the lower Court against B., obtained possession of certain land therein mentioned. On appeal by B., the High Court reversed the decree of the lower Court, and ordered restitution of the property to B.; but no mention of mesne profits was made in the decree. B. then sued for recovery of mesne profits for the period during which A. had been in possession.

Held, that such a suit would not lie. The question of mesne profits ought to have been decided in execution under section 11 of Act XXIII of 1861.

On the 19th December 1860, the defendants in this case obtained a decree against the plaintiff herein, in the Judge's Court of Cuttack, for possession of several talooks. In execution of this decree, they, on the 30th April 1861, obtained possession of some of the talooks. On the 30th June 1863, the High Court reversed the decree of the Court below, and ordered that the appellant (plaintiff in the present suit) do recover from the defendants possession of the talooks of which he had been dispossessed in

*Application Nos. 151 and 152, for a review of judgment passed by Bayley and Glover, J. J., on the 24th March 1868, in Regular Appeal, No. 54 of 1867.

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passed. The effect of the decree of the appellate Court was, that the lower Court was ordered to undo what it had done. It was not a substantive decree for possession. Even if it were, still it could not include mesne profits, unless expressly mentioned. The lower Court could not have instituted a judicial enquiry as to the damages done, in such a suit, as it was uncertain whether such damages would exceed the valuation of the original suit.

If the suit were for possession only, the proper decree in that case would be a decree for possession only, and not for possession and mesne profits. The plaintiff would still have power to sue for mesne profits afterwards. A Court, in the Execution Department, cannot amend a decree, and therefore cannot allow interest when the decree itself is silent. See the Full Bench Ruling in *Masudan Lal v. Bhikari Sing* (1). Much less can it award mesne profits, when not mentioned in the decree. *Hara Chandra Chowdry v. Suradhani Debi* (2). A claim for damages in respect of injury sustained by goods, while under attachment in execution of a decree, which was afterwards set aside, was held not a matter to be disposed of under section 11 of Act XXIII. of 1861, but one that must be made the subject of a separate suit. *Kashikishor Roy Chowdry v. Nurkhan* (3). *Joykaran Lal v. Rani Asmudh Kooer* (4).

Baboo *Abhay Charan Bose* (with him Baboos *Chandra Madhab Ghose* and *Ramesh Chandra Mitter*), in support of the judgment.—The plaintiff was restored not only to possession, but to mesne profits also. The effect of the reversal of the decree of the lower Court is, that the defendant was to be put in the same position as he was in, before the original decree had been passed. The case of *Hara Chandra Chowdry v. Suradhani Debi* (2) has been overruled by the Full Bench (5). The case of *Masudan Lal v. Bhikari Sing* (1) does not apply to this case, as it involved only a question of interest, a matter entirely in the discretion of the Court to allow or not, and when the decree was silent, it is to be presumed that the

(1) Case No. 249 of 1865, 15th September (3) 7 W. R. 45.

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(2) 1 W. R., (M. R.), 5,

(4) 5 W. R. 125.

(5) Case No. 792 of 1866, 31st March, 1868.

Court did not allow it. The case of *Kashibihar Roy Chowdry v. Nur Khan* (1) was not for possession of land, and consequently cannot apply. *Joykaran Lal v. Rani Asmudh Kooer* (2) was in execution of a decree of the Privy Council, and does not apply to the present case. The cases in point are: *Rajkrishna Sing v. Barala Debi* (3); *Gobindakumar Chowdry v. Krishnakumar Chowdry* (4); *Narsing Charan Sen v. Bidyadhari Dasi* (5).

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Baboo Kali Prasanna Dutt in reply.—What interest is to money, mesne profits are to land. If by silence in the decree, interest cannot be recovered in the Execution Department, much less can mesne profits be recovered, when not mentioned in the decree. The sentence in the judgment of the Chief Justice relied upon in *Hara Chandra Roy Chowdry v. Suradhani Debi* (6), is an *obiter dictum*. The point did not arise in the case. The only question before the Full Bench was a question of limitation. In *Narsing Charan Sen v. Bidyadhari* (5) more money was taken out than actually decreed. It was properly a matter to be enquired into in the execution of decree. The other cases cited are not in point.

BAYLEY, J.—The defendants in this case originally sued for possession, and got a decree for possession against the plaintiff, and took possession in execution on 30th April 1861. On Appeal, this decree was reversed by the High Court, on the 30th April 1864, and plaintiff was restored to possession on the 11th November 1864. Plaintiff next sued separately for mesne profits, for the interval of 3 years, 9 months, and 19 days. Defendants objected that plaintiff had collected rents for a portion of 1270 (1863), and the whole of 1271 (1864), and put in other pleas against plaintiff's claim. The Principal Sudder Ameen gave a decree for a modified amount of mesne profits to plaintiff. The defendants and plaintiff both preferred regular appeals to this Court, and we held that a regular suit would not

(1) 7 W. R. 45.

(4) Case No. 530 of 1866, 31st May 1867.

(2) 5 W. R. 125.

(5) 2 W. R. 275.

(3) Full Bench Ruling of the 15th September 1866,

(6) Case No. 792 of 1866, 31st March 1868.

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lie, but that the question of mesne profits must be decided in execution under section 11 of Act XXIII. of 1861. An application for review is now made, and it is contended that section 11 of Act XXIII. of 1861 does not apply to the defendants, who, it was stated by the pleader for the applicant, merely got the decision of the first Court against him reversed by the superior Court, and that the decree being for possession only, nothing but a decree in a separate suit could award mesne profits. The question now is, whether the decree of this Court, which technically is for possession only, which, however, reinstated the party in the position he was when ousted, also gives a right to mesne profits on ascertainment in execution. To put the question in another way, will the decree, which is in fact for restitution to possession, enable the Zillah Court, in execution, under section 11 of Act XXIII. of 1861, to include in restitution of possession restitution of mesne profits, which would have reached the ousted party had he not been ousted?

Of the cases cited by the respective parties, *Hara Chandra Chowdry v. Suradhani Debi* (1) may be said to be overruled by *Hara Chandra Roy Chowdry v. Suradhani Debi* (2). *Joykaran Lal v. Rani Asmudh Kooer* (3) refers only to the execution of the decree of Her Majesty's Privy Council. *Musudan Lal v. Bhikari Sing* (4) refers to interest. *Kashikishor Roy Chowdry v. Nur Khan* (5) is not a suit for possession. Of the cases on the other side, *Narsing Charan Sen v. Bidyadhari Dasi* (6) referred to the restoration of money taken from the Collectorate in execution, on the reversal of the decree of a lower Court, where, though the money was not actually decreed, its restoration in execution was held to be proper. *Rajkrishna Sing v. Barada Debi* (7) rather supports the pleas of the opposite party who uses it. *Gobindkumar Chowdry v. Krishnakumar Chowdry* (8) refers to restitution of a sum of money according to the terms of a modified decree. *Hara*

(1) 1 W. R. (M R). 5.

(2) Case No. 792 of 1866, 31st Mar, 1868.

(3) 5 W. R., 125.

(4) Case No. 249 of 1865, 15th Sept. 1866,

(5) 7 W. R. 45,

(6) 2 W. R. 275.

(7) Full Bench Ruling of the 15th Sept, 1866,

(8) Case No. 530 of 1866, 31st May 1867,

Chandra Roy Chowdry v. Suradhani Debi (1) has the following passage: "But for the decision of the Division Bench of the 6th September 1864 (2), I should have thought it clear that, as a matter of law, when the decree under which the plaintiff was turned out of possession, was reversed by the Sudder Court, and it was ordered that the property should remain with the plaintiff, she had a right to be restored to the possession which she had lost, not only of the land, but also of the rents or profits which had been received by the defendant whilst he was in possession of the land, by force of the erroneous decree, which was reversed. When a decree orders a sum of money to be paid to a plaintiff, he is entitled to have that decree executed, although the decree is silent upon the subject of execution. It is the legal effect of a decree of reversal, that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question, whether a decree which is about to reverse has been executed or not. The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorized the Lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced, had been deprived of by reason of its having been enforced."

Reviewing all the cases cited, and referring to the particular facts of this case, which is one of an order for restitution of possession by this Court, as it was before the decree of the lower Court held otherwise, I think *Hara Chandra Roy Chowdry v. Suradhani Debi* (1) governs this case; and that, accordingly, our order was correct. It is urged that the passage cited is an *obiter dictum* of the learned Chief Justice, and not a legal precedent. But I see no dissentient judgment upon that point (though there is on other points in that Full Bench Ruling), and I think the passage forms part of the judgment, as it contains

(1) Case No. 792 of 1864, 31st Mar. 1868. (2) 1 W. R., (M. R.), 5.

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directly the reasoning by which the conclusion was come to by the Chief Justice in that case. Under this view of the case, I would reject the application for review, with costs.

GLOVER, J.—I also think that the application should be rejected. No new argument has been advanced nor any thing shewn to us, which induces me to think the original order wrong. That order turned on a point of law solely, which was fully argued and considered at the first hearing.

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 July 13.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

BRAJARAJ KIFORI DASI *v.* MOHAMMED SALEM.*

Mortgagor and Mortgagee—Covenant not to Alienate—Purchaser at Auction-Sale.

See also
 14 B. L. R.
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A. gave a mortgage to B. of certain property as a security for money lent, and covenanted not to alienate the property by gift, ijara, putni, or otherwise, by which loss might be caused to the existing actual assets of the property. A. subsequently granted a putni to C. B. obtained a decree against A. for the amount of the loan, and the property was sold in default of payment. D. was the purchaser at the Auction-sale. *Held*, that D. could maintain his suit against C. to set aside the putni and for possession.

By a Bengali instrument dated 14th Aswin 1271 (29th September 1865), Bhairab Chandra mortgaged the property in dispute to Giridharilal, and thereby stipulated that he "shall have no power in any way to alienate the property by sale, gift, ijara, putni, or otherwise, by which loss may be caused to the existing actual assets of the property."

Subsequent to the execution of the mortgage, Bhairab Chandra granted a putni (perpetual lease) of the property to the defendant.

Giridharilal sued Bhairab Chandra, and obtained a decree for the amount due and for sale of mortgaged premises, in case of default. The property was sold accordingly. The fact of the existence of the putni lease was made known at the sale.

*Special Appeal, No. 327 of 1868, from a decree of the Judge of Rungpore, affirming a decree of the Principal Sudder Ameen of that district.