For these reasons, we think, we must affirm the judgment of the Court below, but each party must bear their own costs.

The purchase-money must be repaid with interest at 12 per cent. per annum, that being the rate of interest allowed in the decree; and the plaintiff may satisfy the decree for rent before the estate is released from attachment.

The 4th January 1871.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Review—Limitation.

Poresh Nath Roy, *Petitioner,*

versus

Gopal Kristo Deb and others, *Opposite Party.*

Baboo Woomesh Chunder Banerjee for Petitioner.

Baboos Romanath Bose and *Grish Chunder Ghose* for Opposite Party.

The time during which an application for review is pending is not to be taken into account within the 90 days allowed for appeal.

Jackson, J.—We think the decision of the Judge of Sylhet on the appeal of Poresh Nath Roy, refusing to admit the appeal, is contrary to law, and must be set aside. The decision against which Poresh Nath Roy appealed is dated the 28th December 1869. For a review of that decision, Poresh Nath Roy filed an application on the 6th January 1870. An order was passed rejecting that application on the 4th April 1870. Poresh Nath Roy thereupon appealed to the Judge on the 21st April 1870. The ground upon which the Judge has rejected the application is not clearly stated in his order He states that, if the application had been made on the 14th, he might have admitted it; but as it was made on the 21st. he rejected it.

We do not understand in what way the petitioner would have been benefited by making an application on the 14th instead of on the 21st. In either case, if the time during which the application for review was pending be deducted, Poresh Nath Roy was within time. If, on the other hand, that time is to be taken into account, Poresh Nath Roy is beyond time.

It has been decided by a Full Bench of 14 Judges (to be found in II. Weekly Reporter, page 36), and which was afterwards followed by another Full Bench of this Court* (to be found at page 23 of the Revenue, Civil, and Criminal Reporter of the 31st May 1867), that the time during which the application for a review is pending is not to be taken into account within the 90 days allowed for appeal. Following these decisions, Poresh Nath Roy was within time in presenting his appeal to the Judge. The Judge must, therefore, admit the appeal, and pass orders upon it. The order rejecting it is set aside.

The 10th January 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble G. Loch and W. Ainslie, *Judges.*

Mesne-profits—Valuation of claim—Execution.

Case No. 227 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 4th June 1870.

Gooroo Doss Roy and another (Judgment-debtors), *Appellants,*

versus

Bungshee Dhur Sein and others (Decree-holders), *Respondents.*

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* 7 W. R., *Civil*, p. 529.

Baboos Ashootosh Dhur and *Hem Chunder Banerjee* for Appellants.

Mr. J. W. B. Money and *Baboo Sreenath Doss* for Respondents.

Where a plaintiff includes a suit for mesne-profits in a suit for possession, he is bound to value his claim at what he knows to be its real amount, and cannot be allowed, in the course of a mere inquiry into the amount of damages after decree, to depart from the claim made by his plaint, and set up what is substantially a new and distinct claim.

Norman, C. J.— * * * * * * * * * * *

Now, the claim in the plaint, Rupees 8,000 for the mesne-profits of ten years and eight months, is at the rate of Rupees 750 a year. The Subordinate Judge allows to the plaintiff for wassilat for 10 years Rupees 44,684, or, in other words, wassilat at the rate of Rupees 4,450 a year.

The disproportion is the more striking when we find that the whole difference is in respect of the profits of a part only of the land, *viz.*, 240 beegahs out of 415, for which an estimate has been made and allowed by the Subordinate Judge at the rate of Rupees 4,000 a year, or nearly 17 rupees a beegah.

We have no doubt but that *the general rule* is that a plaintiff is not entitled to greater damages than he has claimed in his plaint. To that an exception has been allowed in the case of suits for possession with mesne-profits, where the plaintiff has sometimes no means of knowing accurately what has been realized by the defendant during the period of his dispossession and prior to the suit. Instances of this will be found in VI. Weekly Reporter, Miscellaneous, page 28; IX. Weekly Reporter 218; XIV. Weekly Reporter 82. Again, a plaintiff has no means of judging how long the suit may be protracted, or what will be realized by the plaintiff while the suit is so pending. The 11th Section of the Court Fees Act, VII. of 1870, provides for such cases. But Mr. Money contended that, where a plaintiff includes a claim for mesne-profits in his suit for possession, he is not bound to value his claim at what he knows to be its real amount, but may fix it as low as he pleases—say at ten or fifty rupees; and at the trial or in execution of the decree, if the mesne-profits are shown to amount to a very much larger sum, even to lakhs of rupees, he would be entitled to claim a decree for that large amount on paying the stamp-duty as provided by that Section.

It appears to us that Mr. Money's argument is not tenable. The plaintiff's claim, which the defendants were called on to answer in the suit, with respect to which the issues were fixed, and the contest took place, is that set forth in his plaint. By the 7th Section of the Court Fees Act, Clause 1, he is bound to pay a stamp-fee on the amount claimed by him.

We think that a plaintiff cannot be allowed, in that which is a mere inquiry into the amount of damages after decree, to depart from the claim made by his plaint, and set up what is substantially a new and distinct claim.

In the present case, it is in evidence that the ten khadas were used by the plaintiffs as khâmâr land at the period of their dispossession. The plaintiffs must have known very well what were the profits of the land at that time. The plaintiffs, for some reason or other, in their plaint chose to state the mesne-profits of the whole land at Rupees 8,002 for ten years, and in making that claim they knew very well what they were about. The claim now made of Rupees 22,511 for rather more than half of the land for seven years before the suit, to say the least, savours of extravagance. No explanation has been given of the reasons which induced the plaintiffs to fix the estimate of mesne-profits at 750 rupees a year in their plaint. No suggestion is made that the plaintiffs have discovered any facts not previously known to them, or acquired any additional knowledge of the value of the property after the filing of their plaint, which should have induced them to put forward the larger claim at a late stage of the case. It has been suggested that the plaintiffs' object probably was to prevent an appeal to the Privy Council. If that be so, if with that object they deliberately put forward their claim as a claim for Rupees 8,002 only, we think they ought not to be allowed to enlarge their claim after they have gained their object, as they have done by procuring the High Court to refuse to admit an appeal.

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