The 7th June 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application for execution—Copy of decree—Section 212 Act VIII. 1859—Section 15 Act XXIII of 1861.

Case No. 66 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 26th November 1870, *affirming an order of the Subordinate Judge of that District, dated the 9th August* 1870.

Modhoo Dossia (Decree-holder) *Appellant,*

versus

Nobin Chunder Roy (Judgment-debtor) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Oopendro Chunder Bose and *Rajendro Narain Bose* for Respondent.

It is not required by Section 212 of Act VIII of 1859 and Section 15 Act XXIII of 1861 that a copy of the decree should be filed when an application is made for execution.

Kemp, J.—THE decree in this case was passed on the 16th of December 1865. It appears that the decree-holder in May 1866 realized a portion of the amount due to him under the decree. Again in July 1866, he attached certain properties belonging to the judgment-debtor; in short, between 1865 and 1866 he was proceeding to enforce his decree by every means in his power. Again in 1867 he applied to execute his decree, but his application was rejected on the ground that the decree-holder had not filed a copy of the decree.

Both Courts have gone upon this ground that it is the duty of the decree-holder to file a copy of the decree of which execution is sought, and he not having done so they held that his claim was barred.

We think that under Section 212 of Act VIII of 1859 and Section 15 Act XXIII of 1861 the Courts below are wrong. The Sections referred to do not enact that the decree-holder must file copy of his decree. He is to file an application drawn up in a certain form, and he is to state the mode in which the assistance of the Court is required. Under Section 15 Act XXIII of 1861, if it be shewn to the Court that the particulars stated in the application which is required to be filed under Section 212 of Act VIII do not correspond with the original decree, the Court may either return the application for correction or cause the necessary alteration to be made after comparing the application with the original decree. The Judge has taken a wrong view of this case. We, therefore, reverse his order and decree the appeal with costs.

The decree-holder will be entitled to take out execution of his decree.

The 7th June 1871.

Present:

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

Decree—Construction—Mesne profits—Sections 196 and 197, Act VIII of 1859.

Case No. 105 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 5th January 1871, *reversing an order of the Subordinate Judge of that District, dated the 31st August* 1870.

Raesoonissa Begum (Decree-holder) *Appellant,*

versus

Sharoda Soonduree Chowdhrain and others (Judgment-debtors) *Respondents.*

Baboos Sreenath Dass and *Grish Chunder Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee, Kally Mohun Dass and *Grija Sunkur Moojoomdar* for Respondents.

A decree of a Court should, under Sections 196 and 197, Act VIII of 1859, state whether mesne profits are awarded or not, and it should distinctly state when it reserves any points for subsequent enquiries in execution of the decree, what those points are.

A decree for possession was construed to include mesne profits where the High Court was satisfied that it was the intention of the Court which passed the decree to award mesne profits, even though the words "mesne profits" were not distinctly expressed.

Jackson, J.—THIS is an appeal from an order of the Judge of Dacca passed in execution of decree. The suit was to recover possession of certain lands and for mesne profits for those lands during the time of dispossession. The suit appears to have been originally decreed so far back as the 3rd September 1862. But it was remanded on three occasions by the Judge, and was only finally decided on appeal to the High Court on the 4th January 1869. The result of this final appeal to the High Court was that the decision of the Principal Sudder Ameen dated the 8th March 1866 was confirmed, and that decree is now in process of execution.

The question which arose before both the Courts on the objection of the defendant, was whether the decree-holder had in his decree obtained the mesne profits which he had claimed. The first Court interpreted the decree in favor of the decree-holder. It held that the decree did virtually, though it did not do so in direct words, decree to him a sum of rupees 590 for mesne profits up to the date of suit, and left the question as to what would be the amount of mesne profits subsequent to the suit open to subsequent enquiries. The first Court decided this point upon that view of the decree.

The Judge, on appeal, does not very clearly give his opinion. But he thinks that by the terms of the decree nothing was decreed for wassilat. This does not very clearly show whether he means that wassilat was altogether omitted from the decree, or he means that only the amount of wassilat was omitted.

The special appeal to this Court is that there has been a misconstruction of the decree, and that the decree-holder is, under the terms of the decree, entitled to wassilat, if not to the exact amount for which he sued, at least to have the proper amount ascertained in execution.

The decree has been read to us, and we find that it is in these terms :—In the first place, the claim of the plaintiff is decreed with the exception of a particular portion of the land claimed. The decree then goes on to mention the particular pieces of land of which the plaintiff is to obtain possession and on which his possession is confirmed ; and without making any direct allusion to mesne profits, it goes on to decree the question of costs.

The question, then, for our decision is whether the words "the claim of the plaintiff be decreed with certain exceptions," are sufficient to carry the question of mesne profits ; and if they do, to what extent they carry the decree for mesne profits. There is no doubt that there is great looseness in the manner in which decrees for mesne profits are drawn up in the Courts of this country. Reference has been made to a decision to be found in XV Weekly Reporter, page 293, (which is a case very similar to this) in which also the decree did not distinctly declare that mesne profits ought to be given, but in which it was held by the Division Bench that in fact the mesne profits were decreed. On the other hand, we have been referred to another decision to be found in XI Weekly Reporter, page 200, in which the Chief Justice Sir Barnes Peacock rejected the application for execution for mesne profits when the decree did not distinctly declare that the decree-holder should obtain mesne profits.

I have no doubt, looking to the provision of Sections 196 and 197, that the Court should distinctly in its decree state whether it decrees mesne profits or not ; and it should equally distinctly state when it reserves any points for subsequent enquiries in execution of the decree what those points are. But in consequence of the loose manner in which decrees of our Courts are sometimes worded, if we are to carry out these provisions of law strictly, extreme injustice will be done in many cases. I think, therefore, that we should follow the Judges who passed the judgment in the case in XV Weekly Reporter, and interpret the decree as including mesne profits, if we can be satisfied that there was an intention on the part of the Court which passed the decree to award mesne profits even though the words mesne profits are not distinctly expressed therein.

The words in this case are undoubtedly sufficient. The claim of the plaintiff being decreed and mesne profits being a portion of that claim, mesne profits may be said to have been decreed. To satisfy ourselves of the intention of the Court, we have looked to the allegations of the parties to the suit to ascertain whether there was really any dispute upon the question. This is a case in which there could have been no doubt whatever upon the point. It was an ordinary case in which the plaintiff brought a suit, alleging that he had been dispossessed

in consequence of an erroneous demarcation by the survey authorities, to rectify that demarcation and to recover possession of the land. The defendant declared that he was entitled to these lands and that he was in possession of them. Upon these issues, if the plaintiff obtained a decree he would have been clearly entitled to the mesne profits of the disputed land during dispossession. At the same time, it does not appear that any evidence was heard upon the question of the amount of mesne profits, and therefore it is very clear that no direct determination was come to us to their amount. We think that the proper mode of interpreting this decree is to consider that mesne profits were awarded to the decree-holder as against the parties who had dispossessed him from those lands, and that the question of the amount of mesne profits was left to be ascertained in execution of the decree.

However, the parties themselves or their legal agents seem to us very much to blame in not having it recorded distinctly that mesne profits were given; and this litigation both before the Judge and also before this Court seems to have been caused so far by the neglect of the decree-holder. We think, therefore, that we ought not to give costs in this Court or in the Lower Appellate Court.

The case must be remanded to the first Court in order that that Court may ascertain the amount of mesne profits to which the decree-holder is entitled from the date of dispossession to the date of the recovery of possession.

Mookerjee, J.—I am also of opinion that the decree awarded mesne profits to the plaintiff. The suit was for possession of land with mesne profits. The decree declared that with the exception of the lands of Sagurberiah, "*the rest of the claim* is decreed" in favor of plaintiff. Among that claim was undoubtedly the claim for wassilat, and I think therefore that that claim was also decreed. It is contended by the respondents' pleader that when costs have been separately awarded, and wassilat is not distinctly decreed, wassilat cannot come under the words "*the rest of the claim.*" But the plaint claimed mesne profits and not costs. Costs are not generally matters of claim, but are awarded by a Court in its discretion for the purpose of indemnifying parties to an action for expenses incurred by them in the conduct of the suit. In this case, the Court which passed the decree of the 8th March 1866 construed its own decree and held that the decree was for possession as well as mesne profits. The decree, however, does not declare or specify the amount of profits awarded, therefore that must be ascertained in execution.

The 8th June 1871.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Possession (confirmation or recovery) —Title—Issues.

Case No. 1 of 1871.

*Appeal preferred under Section 15 of the Letters Patent of the High Court of 28th December 1865, against a judgment of the Hon'ble E. Jackson and the Hon'ble Onoocool Chunder Mookerjee, two of the Judges of this Court, dated the 20th March 1871, in Special Appeal No. 1735 of 1870. the said Judges having been equally divided in opinion.**

Moulvie Abdoollah (Defendant) *Appellant,*

versus

Shaha Mujeesooddeen *alias* Peeroo Meeah (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellant.

Baboos Sreenath Doss and *Kalee Mohun Doss* for Respondent.

Where a plaintiff in form seeks for *confirmation* of possession treating himself as being in possession, yet sets out and states circumstances which are in themselves a dispossession, namely, that a suit in which he intervened under Section 77 Act X of 1859 had been decided against him and the rent adjudged to defendant, the suit should be treated as one really for *recovery* of possession.

A suit for confirmation of possession on adjudication of a particular and specific title distinctly alleged, where defendant also puts forward a pedigree, supported by evidence, at variance with pedigrees put forward by plaintiff, is not sufficiently disposed of by the trial of the mere question of possession for 12 or 20 years before the suit.

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* 15 W. R., p. 286.