

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

S. E. COFFIN (ONE OF THE DEFENDANTS) v. KARBARI RAWAT AND
ANOTHER (PLAINTIFFS).^c

1895
February 20.

Right of Suit—Question relating to execution, &c., of decree—Decree for costs—Sale of immoveable property—Reversal of decree on appeal—Suit for recovery of mesne profits—Civil Procedure Code (Act XIV of 1882), sections 244, 583.

A brought a suit against B for compensation, but it was struck off, and B obtained a decree for costs. A appealed, but pending the appeal B executed his decree, and, in execution thereof, purchased a certain immoveable property of A, and took delivery of possession. The Appellate Court remanded the case for retrial on the merits, and a decree was passed by the Court of first instance in A's favour, which was confirmed on appeal, and he got back his property. A then brought a suit for the value of crops wrongfully appropriated by B during the period he was in possession. It was contended on second appeal that such a suit was barred by the provisions of section 244 of the Civil Procedure Code.

Held, that the question to be decided in this suit did not relate to the execution, discharge, or satisfaction of the original decree within the meaning of section 244, because it did not arise at all until that decree had ceased to exist, and such a suit was not barred by the provisions of that section.

Lati Koer v. Sobhavra Kooer (1), *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (2), *Hameeda v. Bhulhun* (3), *Bumsoonduree Dabee v. Tarinee Kant Lahooree* (4), *Duljeet Gorain v. Rewal Gorain* (5), *Ram Roop Singh v. Sheo Golam Singh* (6), *Ram Ghulam v. Dwarika Rai* (7) referred to, *Mothoora Pershad Singh v. Shumbhoo Geer* (8) distinguished.

THE plaintiffs brought a suit for compensation against the defendant No. 1, but it was struck off by the Court of first instance, and the defendant got a decree for costs. The plaintiffs then appealed, but pending the appeal the defendant executed his decree and caused certain property belonging to the plaintiffs to be sold.

^cAppeal from Appellate Decree No. 1276 of 1893, against the decree of Babu Anantaram Ghose, Second Subordinate Judge of Sarun, dated the 9th of March 1893, affirming the decree of Babu Gunnessyam Gupta, Munsif of Motihari, dated the 31st of March 1892.

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| (1) I. L. R., 3 Calc., 720. | (2) I. L. R., 14 Calc., 484. |
| (3) 20 W. R., 238. | (4) 20 W. R., 415. |
| (5) 22 W. R., 435. | (6) 25 W. R., 327. |
| (7) I. L. R., 7 All., 170. | (8) 19 W. R., 413. |

1895
 COFFIN
 v.
 KARBARI
 AWAT.

He purchased it himself on the 7th January 1889, and then took delivery of possession. On the 14th June 1889 the Appellate Court set aside the decision of the Court of first instance, and remanded the case for retrial. The case being retried, a decree was passed in favour of the plaintiffs, and it was upheld on appeal on the 13th March 1890. The plaintiffs then brought this suit for the value of crops taken away by the defendant during the period they were kept out of possession. The defence raised in this case was that no separate suit for *wasilat* would lie, and that the plaintiffs ought to have taken proceedings in the execution department. The Munsif, disallowing this objection of the defendant, decreed the suit of the plaintiffs. On appeal the Subordinate Judge, relying upon the case of *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (1) confirmed the decree of the Munsif.

Against this judgment the defendant No. 1 appealed to the High Court.

Babu *Satis Chandra Ghose*, for the appellants, contended that in *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (1) this point was not decided at all; the learned Chief Justice simply expressed an opinion. Section 244, Civil Procedure Code, is a bar to the suit of the plaintiffs:—See *Mothoora Pershad Singh v. Sumbhoo Geer* (2), *Bamasoonduree Dabee v. Tarinee Kant Lahoree* (3). Section 244 of the Civil Procedure Code (Act XIV of 1882) has a wider scope than section 11 of Act XXIII of 1861, referred to in *Mothoora Pershad Singh v. Sumbhoo Geer* (2). Under section 533, Civil Procedure Code, when a party is entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal, he should apply for execution to the Court which passed the decree against which the appeal was prepared, and such Court should proceed to give effect to the decree of the Appellate Court, giving the successful party the full benefit thereof, and restoring him to the position in which he was before the decree of the first Court was executed.

The Appellate Court, in setting aside a decree, is bound to

(1) I L. R., 14 Cal., 484.

(2) 19 W. R., 413.

(3) 20 W. R., 415.

make complete restitution. See *Lati Koer v. Sobhadra Kooer* (1),
Hameeda v. Bhudhun (2), and *Duljeet Gorain v. Rewal*
 **Gorain* (3).

1895

 GOFFIN
 v.
 KARBARI
 AWAT.

Mr. *Mahmudul Huq* and Moulvie *Mahomed Isfag*, for the respondents, contended that such a suit would lie. See *Shama Pershad Roy Chowdhury v. Hurro Pershad Roy Chowdhury* (4) and *Jogesh Chunder Dutt v. Kali Churn Dutt* (5).

Babu *Satis Chandra Ghose*, in reply, said that the cases cited by the other side had no application to this case.

The judgment of the High Court (MACPHERSON and AMBER ALI, JJ.) was as follows :—

The facts as stated are these : Some of the plaintiff's land was sold in execution of a decree which had been made against him for costs, and was purchased by the defendant, the decree-holder. The decree was afterwards reversed and the plaintiff, who had got back his land, brought this suit to recover from the defendant the value of the crops which the defendant took while the land was in his possession. The defendant, in addition to denying that the plaintiff has any case on the merits, has contended from the first that section 244 is a bar to the suit, and that a claim such as this can only be made to, and dealt with, by the Court executing the decree as a part of the execution proceedings.

Both the Courts have overruled this contention, and on the merits have given the plaintiff a decree, although not to the full extent of the claim. It is now contended, and this is the only contention in the appeal, that section 244 is a positive bar to a separate suit, and that the Courts were wrong in holding that a separate suit would lie.

The cases seem clear on this point, that a Court executing a decree, which is afterwards reversed on appeal, has full power to restore to the judgment-debtor what was taken from him in the execution, and that it should, as far as possible, restore the parties to the position they were in before the decree was executed. Su.

(1) I. L. R., 3 Calc. 720.

(2) 20 W. R., 238.

(3) 22 W. R., 435.

(4) 10 Moore's I. A., 203.

(5) I. L. R., 3 Calc., 30;

1895

COFFIN
v.
KARBARI
AWAT.

also it has been held that, when possession of land is given in execution of a decree which is afterwards reversed, the Court which executed the decree can, in addition to the restoration of the land, give mesne profits or compensation in respect of the time during which the person against whom the decree was executed was out of possession. See the cases of *Mothoora Pershad Singh v. Sumbhoo Geer* (1), *Lati Koer v. Sobhadra Kooer* (2) and *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (3).

It is not so clear, however, whether the power is inherent in the Court, or whether it is exercised under section 244 of the Code, or by way of execution of the Appellate Court's decree.

The case most strongly in appellant's favour is *Mothoora Pershad Singh v. Sumbhoo Geer* (1) : there certain property of the judgment-debtor was sold in execution of a decree for money which was afterwards modified in appeal ; the sale proceeds did not amount to the full judgment-debt, as originally decreed, but exceeded the amount recoverable under the decree as modified in appeal. The judgment-debtor brought a suit against the judgment-creditor to recover the excess money, and it was held that the suit was not maintainable, and that his only remedy was under section 11, Act XXIII of 1861, which was then in force. This case may, perhaps, be distinguished on the grounds that the whole decree was not, as here, set aside ; that the language of section 11, Act XXIII of 1861, which was relied on, was somewhat different from the language of section 244 ; and that the suit was to get back what had been actually made over by the Court and not something incidental to that. The other cases cited, *Hameeda v. Budhun* (4), *Bama Soonduree Dabee v. Tarinee Kant Lahooree* (5), *Duljeet Gorain v. Rewal Gorain* (6), and *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (3), are also distinguished either on the facts, or on the ground that, although it is held that relief, such as is claimed in this suit, could be given by the Court executing the decree, it is not held that a separate suit for it could not be maintained. In the cases of *Bama Soonduree Dabee v. Tarinee*

(1) 19 W. R., 413.

(3) I. L. R., 14 Calc., 484.

(5) 20 W. R., 415.

(2) I. L. R., 3 Calc., 720.

(4) 20 W. R., 238.

(6) 22 W. R., 435.

Kant Lahooree (1) and *Duljeet Gorain v. Rewal Gorain* (2) the original decree was not altered, but it was found in the one that the decree-holder had taken in execution land which was in excess of the decree, and in the other that he had taken land which was not at all covered by the decree, and the relief asked for properly fell within the provision relating to the execution of decrees. In the case of *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (3) Petheram, C. J., expressed a decided opinion that, although the Court executing the decree could, when restoring the land, give further relief in the form of mesne profits by way of restitution, the claim for that relief was not a matter which had to be disposed of under section 244, and consequently that it might be made in a separate suit. The cases of *Ram Roop Singh v. Sheo Golam Singh* (4) and *Ram Ghulam v. Dwarka Rai* (5) also show that a suit such as the present one is maintainable.

Unless the question to be decided in this suit is one which clearly related to the execution, discharge, or satisfaction of the decree, the suit is not prohibited by section 244. It did not, we think, relate to the execution, discharge, or satisfaction of the original decree within the meaning of section 244, because it did not arise at all until that decree had ceased to exist. Section 583 provides that the decree of an Appellate Court, by which a party is entitled to any benefit (by way of restitution or otherwise), is to be executed on the application of the person entitled to the benefit by the Court which passed the decree against which the appeal was preferred. Could therefore the plaintiff have got what he now seeks to get in execution of the decree of the Appellate Court which simply reversed the decree of the first Court? Conceding that the reversal carried with it a right to the restitution of what had actually been made over under the decree reversed, and that on the authority of the cases cited, the Court executing the appellate decree could have given the relief now asked for, on the general principle that the parties are to be restored as far as possible to the position they before occupied, we think that

(1) 20 W. R., 415.

(2) 22 W. R., 435.

(3) I. L. R., 14 Calc., 484.

(4) 25 W. R., 327.

(5) I. L. R., 7 All., 170.

1895

 COFFIN
 v.
 KARBARI
 AWAT.

1895

COFFIN
v.
KARBARI
AWAT.

the plaintiff was not restricted to that particular way of getting it. The decree of the Appellate Court did not direct that this particular relief should be given, nor did it direct that any enquiry should be made in connection with it: the plaintiff did not ask the execution Court to give him this relief, and the question whether he was entitled to it can hardly be regarded as one relating to the execution, discharge, or satisfaction of that decree.

We think, therefore, that the Courts have rightly held that the suit is maintainable, and that the appeal must be dismissed with costs.

S. C. G.

Appeal dismissed.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

1895
February 15.

RAM KAWAL SINGH AND OTHERS (PLAINTIFFS) v. RAM KISHORE DAS
AND ANOTHER (DEFENDANTS.)

RAM KISHORE DAS AND ANOTHERS (DEFENDANT) v. RAM KAWAL
SINGH AND OTHERS (PLAINTIFFS).^{*}

Hindu Law—Widow—Mitakshara—Power of a Hindu widow to dispose of property for religious and charitable purposes—Spiritual welfare of the widow and not that of her deceased husband—Suit to set aside alienation by reversioners.

A Hindu widow, inheriting the estate of her deceased husband *K*, executed a deed of endowment in favour of the *pujari* of a *thakurbari* (temple) established by her deceased husband's mother. In a suit brought by the reversionary heirs of her deceased husband, after the death of the widow, to set aside the alienation: *Held* that, inasmuch as the idol was established by the mother of the deceased *K*, and he had made no provision for its maintenance, and the dedication was *prima facie* one for the widow's own spiritual welfare, not for that of her deceased husband *K*, and because the property alienated was of considerable value, the alienation was not valid against the reversioners, either on the ground of religious necessity, or that being for a pious purpose the property alienated represented only a small portion of the estate inherited by the widow.

Collector of Masulipatam v. Cavalry Venkata Narainapah (1), *Lakshmi Narayana v. Dasu* (2), *Puran Dai v. Jai Narain* (3), *Ruma v. Runga* (4) referred to.

^{*} Appeals from Original Decrees Nos. 199 and 217 of 1893, against the decree of Babu Karuna Das Bose, Subordinate Judge of Patna, dated the 10th of April 1893.

(1) 8 Moo. I. A., 500.

(2) I. L. R., 11 Mad., 288.

(3) I. L. R., 4 All., 482.

(4) I. L. R., 8 Mad., 552.