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Having in view the principles which underlie the case to which we have just referred, there can be no doubt that no formal application need have been made by the plaintiff to the suit in which the order of the 10th March 1885 was passed for the purpose of effecting a partition of the property, which was the subject-matter of the suit. The Court was bound upon any application, oral or otherwise, to proceed with the suit, and to make a final decree in it after appointing a Commissioner for the purpose of effecting a partition of the property. The same view was adopted in another case decided by this Court (Prinsep and Ghose, JJ.) on the 4th December 1894 (Appeal from order No. 57 of 1894), and, following this decision, we think there can be no limitation to the application which was made by the plaintiff on the 1st August 1891.

We ought to add that the learned Vakil for the appellants in the course of his argument referred to certain decisions of the Madras High Court, but it will be observed that in none of those cases was the identical question which we have to consider in this case raised or discussed.

As regards the view thrown out by the lower Appellate Court that Article 178 of the Limitation Act may be applicable, we are inclined to think that that article has very little or no application to the facts of this case.

In this view of the matter the appeal will be dismissed with costs.

S. C. C. *Appeal dismissed.*

PRIVY COUNCIL.

P. C.* 1894 *November* 13. *December* 8.

KALKA SINGH AND OTHERS (DEFENDANTS) *v.* PARAS RAM (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mesne profits—Order giving mesne profits not awarded by decree—Jurisdiction—Condition in a bond unfulfilled—Abandonment of part of the amount in appeal—Reduction to below the prescribed limit of appealable amount.

An order, assumed to be made by a Court in execution, that the decree-

Present: LORDS HOBHOUSE, SHAND and DAVEY, and SIR R. COUCH.

holders should have mesne profits which had not been awarded in their decree, was without jurisdiction, and could not be regarded as taking effect.

This order was afterwards reversed, as having been made without jurisdiction, but was standing when the bond in suit was executed by the decree-holders, now defendants, admitting money to be due to the plaintiff, and, as to a particular sum, promising payment out of the mesne profits when realized by them. The decree-holders afterwards compromising with their judgment-debtor abandoned the claim to mesne profits. This, however, was no real concession, because the right to mesne profits had no existence.

Although the unqualified admission of a debt implies a promise to pay it, yet this implication does not necessarily follow where there is an express promise to pay in a particular manner, and on a certain event happening.

Held, on the construction of the bond, that here the admission was referable to the particular obligation agreed to be discharged only in the manner stipulated; and that, therefore, the payment was to be contingent on there being mesne profits.

Held, also, that it had not been established that the non-occurrence of the condition had been occasioned by the conduct, or default, of the defendants, and that, therefore, the objection to pay the sum in question never took effect, or became enforceable.

The defendants, having a *bona-fide* intention to appeal in respect of the whole amount decreed, obtained the certificate and admission of their appeal as competent within the Code of Civil Procedure. Afterwards, in their printed case and at the hearing, they withdrew part of their appeal, reducing, by so doing, the amount in dispute to one below the limit prescribed for appeals, where there is no special leave obtained:—*Held*, that this did not render the appeal incompetent.

APPEAL from a decree (16th June 1890) of the Judicial Commissioner, affirming a decree (12th November 1888) of the District Judge of Sitapur.

The suit out of which this appeal arose was brought to enforce a mortgage bond for Rs. 7,000, granted by the defendants, now appellants, to Salig Ram, the father of the plaintiff, now respondent; and interest at 24 per cent. per annum was claimed from the date of the bond, 23rd August 1879, bringing the amount in suit up to Rs. 17,880. Salig Ram had been the defendants' pleader in suits, and had advanced money to them. In the bond they had agreed that Rs. 2,000, part of the above, should be paid by them on their realizing mesne profits in respect of land for which they had obtained a decree against one Devi Singh on the 10th October 1866.

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The contest in the suit was as to the effect of the agreement in the bond that the obligation as to the Rs. 2,000 should be discharged out of the mesne profits when realized. There were, in fact, no mesne profits for them to realize. None had been ordered in the decree of 1866, but the Court executing that decree had made an order, dated the 3rd April 1877, purporting to order them. This had been reversed in the Court above, and an appeal against this reversal had been dismissed by the Judicial Commissioner on the 18th February 1884. The decree-holders, afterwards, on the 22nd July 1884, entered into a compromise with Devi Singh, their judgment-debtor, and one of the terms of it was that they abandoned their claim to mesne profits, undertaking not to appeal from the order of 18th February 1884.

The principal question, then, on this appeal was whether in this suit the Judicial Commissioner had been right in his opinion that the defendants by not appealing from the order of the 18th February 1884, and by their having entered into the compromise of the 22nd July 1884 had themselves occasioned the result that there had been no possibility of realizing the mesne profits, and that they had thus precluded themselves from relying on the fact in answer to the claim for Rs. 2,000, that the mesne profits had never been obtainable. The facts on which this question of condition unfulfilled depended, had been found by both Courts in concurrence. They are set forth in their Lordships' judgment, and the only question was matter of law and construction..

The District Judge decreed for the whole amount demanded. Interest was fixed at 24 per cent. per annum, on Rs. 5,000, and on Rs. 2,000 from the 22nd July 1884, which was treated as if it had been the date of realizing mesne profits.

On an appeal, the Judicial Commissioner confirmed this, except that he reduced the rate of interest payable from the institution of the suit from 12 per cent. to 6. He considered that the appellants had not done what they could to obtain the mesne profits. It was his opinion that the defendants, by their own deliberate act, prevented the happening of the event on the occurrense of which the Rs. 2,000 were to become payable

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to the plaintiff on the bond. The latter was, therefore, entitled to treat the contract as at an end, and to sue for damages. A fair measure of damages was the principal amount and interest as claimed by the plaintiff. He maintained the decree giving the full amount of principal claimed with interest as above stated.

By order of the 7th October 1890, the Judicial Commissioner certified that the case satisfied the requirements of section 596 of the Civil Procedure Code, and, on the 1st December 1890, an order was made admitting an appeal to the Queen in Council.

On this appeal,—

Mr. *J. D. Mayne*, for the appellants, before entering on his argument on the appeal, asked permission to confine his case to the Rs. 2,000, as he had no prospect of success with regard to the rest of the amount decreed. This appears in the appellants' printed case.

Mr. *C. W. Arathoon*, for the respondent, objected that this would bring the value of the appeal to below the amount of Rs. 10,000, the prescribed limit for the admission of an appeal under the Civil Procedure Code. He referred to sections 595 and 596, and argued that this course showed the appeal to be incompetent.

Their Lordships disallowed the objection, and permitted the withdrawal, observing that there had been no objection taken at the time of the delivery of the appellants' case to the respondent.

Mr. *J. D. Mayne*, for the appellants, then argued that there was error in the judgment of the Judicial Commissioner, and the question between the parties should have been decided on the principal facts that the event upon which the sum of Rs. 2,000 was, according to the contract of 1879, to become payable, never took place. The occurrence of the event had not been prevented by any act, or omission, on the part of the defendants. Referring to the proceedings, it was clear that the order of the Judicial Commissioner of the 18th February 1884 was correct. On the 2nd February 1878 Kalka and Chet applied for execution, treating the order made on the 3rd April 1877, by the Court executing the decree of 1866, as a decree for mesne profits. Their application was pending for more than

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five years, and was dismissed by the District Judge on the 10th August 1883, on the ground that there was no decree giving mesne profits. This was confirmed by the Judicial Commissioner on the 18th February 1884. These decisions were correct and in accordance with decided cases, of which *Mosoodun Lal* v. *Bekaree Singh* (1) might be cited. It was not incumbent on the decree-holders, when the Courts executing the decree of 1866 did not allow execution for mesne profits, to appeal. That would have been to attempt what would have had no probability of succeeding. Also, as to bringing a suit, the decree-holders in 1884 were out of time. Therefore, the compromise of July 1884 could not be treated as having been the cause which prevented the realization of the mesne profits, to which, in truth, the decree-holders never had any right, and they had none which they could abandon. They were in no different position, regarding the mesne profits, after the compromise, from the position they had occupied before it was entered into.

Mr. *C. W. Arathoon*, for the respondent, argued that the judgment of the Appellate Court below was right. Due importance should be given to the fact that both parties to the bond of 1879 had contracted in the belief that the order of the 3rd April 1877 was effective and binding and that mesne profits could be realized. Not for some years afterwards was that order reversed; and it was submitted that the order in 1883 made by the District Judge, reversing it, was beyond his powers and irregular, supported though it was by the Judicial Commissioner in 1874. If to be reversed, it should have been reversed in due course and in due time. Passing to the view taken below that the realizing mesne profits had been prevented by the decree-holders themselves, it was argued that the obligation upon them was to use diligence to get in the mesne profits referred to in their contract. Instead of acting in accordance with this legal duty, they omitted to appeal and had abandoned them in a compromise with the judgment-debtor. Thereupon it was the consequence that they could not insist, by way of defence in a suit for the money which they had contracted to pay, that the event contemplated had not

(1) B. L. R. (Sup. Vol.), 602.

occurred. There was also the admission in the bond that the money was due. If the source, which at the time of the contract was believed to be available, for supplying the money to be paid for services rendered by Salig Ram, was not available, it still remained that the money was claimable; and it had been rightly decreed. For the performance of the contract it was not essential that the money should be raised in the manner indicated as the means of obtaining it; and if the particular means failed, there still remained a right to the money, and it should be decreed.

Mr. *J. D. Mayne* was only called upon to reply as to the costs, and submitted that he should be allowed the costs of the appeal.

Afterwards, on the 8th December, their Lordships' judgment was delivered by

LORD DAVEY.—It is not necessary to state the details of the earlier litigation out of which the present case has arisen. Suffice it to say that prior to and in the month of April 1877, Kalka Singh and Chet Singh, the present appellants, held a decree, dated the 10th October 1866, for recovery of a seven annas' share of the Baniamau Taluq, the remaining shares being held by Devi Singh and Daryao Singh in certain proportions. The decree of the 10th October 1866 did not contain any order or direction for payment of mesne profits.

The present appellants, however, made an application in their suit for payment to them of mesne profits accrued during the time they were out of possession after the decree of the 10th October 1866. On the 3rd April 1877, the Deputy Commissioner made an order in assumed execution of the decree giving the decree-holders mesne profits. This order is said to have been affirmed by the Commissioner, and it is said that the Judicial Commissioner rejected a second appeal as inadmissible.

The order of the 3rd April 1877 was not proceeded with for some reason, and on the 10th August 1883 an application to proceed upon it was dismissed by the District Judge, on the ground that there was no decree giving mesne profits to the applicants, and that decision was affirmed by the Judicial Commissioner on the 15th February 1884. Mr. Arathoon contended that the decision of the District Judge and Judicial Commissioner was beyond their

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jurisdiction and ought to be disregarded, on the technical ground that they were bound by the order of the 3rd April 1877. Their Lordships, however, cannot take this view. It is not disputed that the Court executing the decree of the 10th October 1866 had, in fact, no power to award mesne profits not mentioned in that decree, and their Lordships agree with the Judicial Commissioner that the order of the 3rd April 1877 was no decree and was made without jurisdiction, and the application to the District Judge was, therefore, properly dismissed.

In the meantime the bonds which have given rise to the questions in the present appeal had been executed. The present suit is brought by the minor son of one Munshi Salig Ram, deceased, against the appellants, upon a bond, dated the 23rd August 1879. It will be convenient in the first instance to mention two earlier bonds. On the 1st February 1875 the appellant, Kalka Singh, gave Salig Ram a bond for Rs. 2,500, expressed to be due from Kalka Singh to Salig Ram, and on the 11th December 1877 the same appellant executed a second bond to Salig Ram, who, it should be mentioned, was a pleader, and had acted for the appellants in the previous litigation. The material part of this bond is as follows :—

"Rs. 2,000, on account of pleaders' fee in the suit for mesne profits, are due from me to Salig Ram, pleader, son of Mithu Lal, caste Kayeth, resident of Tarimpur, and whereas a decree for mesne profits has already been passed, and the amount thereof remains to be determined after examining the accounts, therefore I do hereby declare that when the mesne profits of seven annas' share in Ilaka Baniamau are realized, I shall pay Rs. 2,000, a moiety of which is Rs. 1,000, to the said Lala Salig Ram, without any objection and without interest, as soon as any amount is realized by me, and that, if when the mesne profits are realized I do not pay the aforesaid amount, I shall pay interest thereon at the rate of 2 per cent. per mensem from the date of realization."

The operative part of the bond of the 23rd August 1879, which is now in suit, is as follows :—

"Whereas Rs. 5,500 on account of bonds, dated 1st February 1875, and 11th December 1877, are due from me to Salig Ram, son of Mithu Lal, Kanungo, resident and zemindar of Sikandarpur, District Shahjahanpur, at present residing in Narainpur District, Sitapur, and we have borrowed Rs. 1,500 in cash from the said Lala, the first condition is this that Rs. 5,000

we shall pay without interest on the 15th of the month of Magh, 1287 Fasli, and Rs. 2,000 we shall pay at the time of realization of mesne profits, for which a decree has already been passed in favour of us, the declarants, and in execution of which decree the property of Devi Singh and Daryao Singh, judgment-debtors, has been attached."

The sixth and ninth conditions of the bond are as follows :—

"The sixth condition is this that, if at the time of realization of the aforesaid decreed mesne profits, (we) do not pay up the sum of Rs. 2,000 to the mortgagee, interest at 2 per cent., or Rs. 2,000, shall be due from us from the date of realization of the mesne profits, and the mortgagee shall have power to realize the sum of Rs. 2,000 with interest at 2 per cent. per mensem from any of my moveable and immoveable property he please.

"The ninth condition is this that, if (we), notwithstanding the mesne profits being realized, do not pay the sum of Rs. 2,000 and interest at 2 per cent. from the date of realization of the mesne profits, the mortgaged share of the village shall not be deemed liable to redemption till the said amount with interest thereof has been paid up."

It will be observed that prior to the execution of either the bond of 1877 or that of 1879, the order of the 3rd April 1877 had been made and stood unreversed, although nothing had been done in pursuance of it.

It is stated in the record that after the order of the 15th February 1884, the present appellants applied to the Judicial Commissioner for leave to appeal to Her Majesty in Council against that order, but the application was refused. They did not apply to Her Majesty in Council for special leave to appeal. But on the 22nd July 1884 Devi Singh and the appellants signed a deed of release or compromise for settlement of the litigation between them. Thereby Devi Singh agreed to withdraw a petition he had presented for a revival of his appeal against the appellants' decree of the 10th October 1866, and to waive all further claim to the prosecution of such appeal. On the other hand, the appellants renounced all claim to mesne profits on their decree of the 10th October 1866, and specially agreed not to prosecute any appeal to Her Majesty in Council against the Judicial Commissioner's order of the 15th February 1884. And each party gave up all claims to costs against the other.

The present suit was commenced in November 1887. By his plaint the plaintiff and present respondent sued on the bond of the

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23rd August 1879 to recover the sum of Rs. 17,880, the whole amount claimed to be due for principal and interest, treating the bond as a subsisting continuing obligation for payment of the Rs. 2,000 and interest as well as for the larger sum. He also alleged that the defendants had withdrawn from the decree for mesne profits against the judgment-debtor by the deed of compromise. The defendants and present appellants pleaded misrepresentation, fraud and want of consideration to the whole demand. They denied that they had waived their claim against the judgment-debtor for mesne profits, and averred that there was no decree for mesne profits.

On the 12th November 1888, the District Judge gave judgment for the respondent for the whole amount sought by the plaint, and his decree was confirmed by the Judicial Commissioner on the 16th June 1890 with a small variation as to rate of interest. The learned Commissioner held that the appellants by their own deliberate act prevented the happening of the event on the occurrence of which the Rs. 2,000 were to become payable to the respondent, and he was, therefore, entitled to put an end to the contract and sue the appellants for damages.

This is an appeal against the whole decree. A certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs. 10,000. The appellants' Counsel, however, being satisfied that the appeal could not succeed as to the whole demand has by his printed case and at the bar confined his argument to the question of Rs. 2,000, and interest thereon. In these circumstances Mr. Arathoon, for the respondent, made a preliminary objection to the hearing of this appeal, on the ground that the subject-matter of it was now reduced below Rs. 10,000, and the appeal was, therefore, incompetent. Their Lordships cannot accede to this objection. On the one hand there is no doubt that, if a certificate be granted, or leave to appeal given, by the Court below in a matter in which they have no jurisdiction, it would be the right, and, in ordinary circumstances, the duty of their Lordships to dismiss the appeal as incompetent. But, on the other hand, if an appeal is competently made, and it appears to their Lordships after argument, or is admitted at the bar, that the greater part of it must fail, it is the constant practice

of their Lordships to give relief in respect of the portion in which the appellant succeeds, notwithstanding that the subject-matter of that portion of the appeal may be less than the prescribed limit. Their Lordships see no reason to doubt the *bona-fide* intention to appeal against the whole decree, and they regard this case in the same way as if Mr. Mayne had opened the whole case to their Lordships, and his client ought not to be in a worse position, because, in the exercise of his discretion, and availing himself of his experience, the learned Counsel determined not to waste the public time by doing so.

On the merits of the case their Lordships cannot agree with the learned Judicial Commissioner that the appellants were under any obligation to apply to Her Majesty in Council for special leave to appeal against the order of the 18th February 1884, or that by their deliberate act in not doing so, or in executing the deed of compromise, they prevented mesne profits being recovered. The truth is there was no decree for mesne profits, and the Court could not, under the guise of execution, either add words to the decree, or give it a new and extended effect. There was no question of a fresh suit for the recovery of the mesne profits. And, indeed, it appears that such a suit would have been barred by the Limitation Act at the date of the deed of compromise, and could not, therefore, have been commenced with any prospect of success. It is plain when the facts are looked at that there was no real concession made by the appellants in the deed of compromise, because the right purporting to be given up had no existence. Their Lordships are, therefore, of opinion that the obligation for payment of the Rs. 2,000 and interest out of mesne profits never took effect, or became enforceable, and that it is not proved that the non-occurrence of the condition was due to the conduct or default of the appellants.

It was suggested in the course of the argument that, although the payment of the debt in the mode and form agreed upon had become impossible, the obligation to pay the debt (the existence and amount of which is admitted in the bond) remained and might be enforced against the appellants. In the first place, their Lordships observe that no such case is raised in the pleadings, or

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apparently was argued in the Courts below, and further that their Lordships have only a translation of the instrument containing the admission. It is impossible to say that the case, if put forward in the Courts below, might not have been met by some evidence, or that the exact wording of the bond might not have been important from this point of view. In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case; and their Lordships think in the present case that the admission of the debt, by which the obligation is prefaced in the bonds of 1877 and 1879, does not import an unqualified or unconditional promise to pay, but is referable to the particular obligation, or (in other words) is introduced for the purpose only of fixing the amount for which the obligation is given, and which the obligor agrees to pay in the stipulated manner and not otherwise.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by omitting from the amount decreed to the respondent the sum of Rs. 2,000 and the interest on that sum, and the direction as to the costs of the appeal. This will not disturb the order for payment of costs in the decree of the District Judge.

With regard to the costs of the appeal to the Judicial Commissioner and of this appeal, their Lordships consider that, inasmuch as in the result the appellants have partly succeeded and partly failed, the parties should bear their own costs, and they will so advise Her Majesty.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Young, Jackson & Beard.*

C. B.