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confirming that decree. It thus appears that the application contained no reference to the properties which were the subject of the regular suit, and was not therefore either in substance or in form such an application as was contemplated by Mr. Justice Markby in his judgment in the case above quoted.

It is not as though the judgment-creditor had represented that the obstacle which existed to obtaining satisfaction by selling the decree No. 11 of the Subordinate Judge of Rajshahye, in which the judgment-debtor had a title, had been removed by the reversal of the proceedings under s. 246. On the contrary, he asked for a certificate to be sent to the Munsif of Nattore in order that he might proceed against property which, so far as we understand, was quite independent of the property the subject of the regular suit, which suit had its origin in proceedings adverse to the judgment-creditor under s. 246. We are, therefore, of opinion that the case relied upon by the pleader for the respondent is not applicable to the circumstances and facts of the present case, and as it is clear that the application of the 22nd of November 1870 is not an application to keep the decree in force within the meaning of the Full Bench Ruling referred to, the judgment of the Judge must be reversed, that of the Munsif restored, and the appeal decreed with costs.

Appeal decreed.

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 Before Mr. Justice Ainslie and Mr. Justice McDonell.

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 Feb. 14.

LATI KOOER (DECREE-HOLDER) v. SOBADRA KOOER
 (JUDGMENT-DEBTOR).*

Practice—Execution of Decree—Mesne Profits—Act XXIII of 1861, s. 11.

A sued B and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the

* Miscellaneous Special Appeal, No. 200 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 9th of May 1877, affirming the order of Moulvié Imam Ali, Munsif of Buxar, dated the 17th of February 1877.

land was in possession of *A*. *B* thereupon, seeking execution of the Appellate Court's decree, applied to be reinstated in possession, and also for an order awarding her mesne profits for the time during which she was out of possession of the said lands. *Held*, that upon such application, it was competent for the 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 such enforcement (1).

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IN this case Mussamut Sobadra Koor, the judgment-debtor and present respondent, had obtained possession of certain land under a decree dated the 7th May 1870 against the present decree-holder. This decree, after a remand by the High Court, was reversed by the lower Appellate Court on the 14th May 1874. The present decree-holder, the defendant in the original suit, applied to the Munsif's Court for possession of the property taken in execution under the first decree, and also asked for mesne profits in respect of the time during which she was out of possession, and further asked that such mesne profits should be calculated and awarded to her in execution of the decree of the lower Appellate Court which set aside the decree for possession obtained by the present judgment-debtor in the Court below. The Court of first instance refused the application on the ground that the decree-holder could not produce any distinct decree under which mesne profits had been specifically awarded. The lower Appellate Court upheld the decision on the ground that where a decree is silent touching interest or mesne profits, the Court executing the decree cannot assess or give execution for such interest or mesne profits, and quoted the case of *Sadasiva Pillai v. Ramalinga Pillai* (2) in support of this view. It was further of opinion that the judgment-debtor's possession between Bhadro and Falgoon 1281 (August 1874 and January 1875) had not been established. The decree-holder now preferred this appeal to the High Court.

Baboo *Pran Nath Pandit* for the appellant.—This application for mesne profits is maintainable under s. 11 of Act XXIII of 1861. In executing the decree of the Appellate Court, the

(1) See ss. 44, 111, and 112 of the Civil Procedure Code (Act X of 1877). (2) 9 Moo. L. A., 506; 15 B. L. R., 383; 24 W. R., 193.

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Court below was bound to make complete restitution to the person affected by the former erroneous decree. See *Nursing Chunder Sen v. Bidyadhurie Dossee* (1), *Chowdhry Sib Narain Pohraj Mandhati v. Chowdhry Kishore Narain Pohraj Mandhati* (2), *Hurro Chunder Roy Chowdhry v. Shoorodhonnee Debia* (3), *Sheikh Wahid Ali v. Musst. Jamaye* (4), *Raj Kissein Singh v. Baroda Debea* (5), *Bibee Hamida v. Bibee Bhudhur* (6), *Bama Soondery Debea v. Tarini Kant Lahori* (7), *Gooroo Doss Roy v. Stephens* (8), *Raja Lelanund Singh v. Moharajah Luckimpore* (9), *Meer Gowhur Ali v. Hurpal Bhugat* (10), *Ununt Ram Hazrah v. Kurulee Pershad Mistree* (11).

Baboo *Taruck Nath Paulit* for the respondent.—Where a decree is silent as to amount of mesne profits, the decree-holder cannot obtain mesne profits in execution of his decree—*Hurro Chunder Chowdhry v. Sooradhonnee Debea* (12): the same rule holds in respect of interest—*Mosoodun Loll v. Bekaree Singh* (13). Mesne profits are essentially in the nature of damages which do not exist as an obligation to be discharged, but are only payable when due under an order of Court—*Huro Mohini Chowdrain v. Dhun Monee Chowdhraim* (14). Even in cases where mesne profits are given up to date of institution of suit, the Court executing the decree is strictly confined to the words of the decree and can give no more—*Janokee Nath Mookerjee v. Raj Kristo Singh* (15), *Syed Shah Ameen Ahmud v. Syed Shah Zameer Ahmud* (16), *Bhoobunessuree Chowdhraim v. Mansor* (17).

Cur. ad. vult.

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| (1) 2 W. R., 275. | (9) 13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23. |
| (2) 10 W. R., 131. | (10) 22 W. R., 445. |
| (3) B. L. R., F. B., 985; 9 W. R. 403. | (11) 23 W. R., 441. |
| (4) 2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149, 11 W. R., F. B., 1. | (12) 1 W. R., Misc. Rul., 5. |
| (5) 6 W. R., Misc. R., 111. | (13) B. L. R., F. B., 602; 6 W. R. Misc. Rul., 109. |
| (6) 20 W. R., 239. | (14) 10 W. R., 62. |
| (7) 20 W. R., 415. | (15) 15 W. R., 292. |
| (8) 21 W. R., 195. | (16) 18 W. R., 122. |
| | (17) 22 W. R., 160. |

The judgment of the Court was delivered by

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AINSLIE, J. (who, after stating the facts of the case, continued):—It appears to us that the view taken by the subordinate Courts is not correct. A number of decisions of this Court have been cited, which lay down that where property has passed in execution of a decree, and that decree has been set aside, the Court which gave possession of the property is bound to make complete restitution to the person injured by its cancelled decree. The first of those decisions is *Nursing Churn Sein v. Bidyadhuree Dossee* (1); that no doubt is not a case exactly in point. The question there was with reference to a specific sum of money taken out from the Collectorate treasury in execution of a decree; but we think that the principle on which the Court then based its judgment is the same as that on which the judgments in cases to be quoted further on are based. There is a case in *Chowdhry Sib Narain Pohraj Mandhata v. Chowdhry Kishore Narain Pohraj Mandhata* (2), which is distinctly in point; and in that case Mr. Justice Bayley in delivering judgment cites the opinion of the late learned Chief Justice Sir Barnes Peacock—*Hurro Chunder Roy Chowdhry v. Shoorodhonee Dabea* (3). Sir Barnes Peacock said that “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 by reason of its having been enforced.” Further on he says: “In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution. It is not a mere matter of discretion with the Court which reverses a decree whether the party against whom it was given is or is not to be restored to what he has been deprived of under

(1) 2 W. R., 275.

(2) 10 W. R., 131.

(3) B. L. R., F. B., 985; 9 W. R., 403, 407.

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it. There can be no doubt that in point of justice the plaintiff was entitled to have the rents which the defendant had collected from her laud whilst he was in possession of it under the erroneous decree, refunded. This case is not like *Sheikh Wahid Ali v. Musst. Jamaye* (1), a Full Bench case, in which it was held that it was discretionary with the Court which passed the decree to award interest or not." The learned Chief Justice goes on then to cite another case—*Rajhissen Singh v. Baroda Dabea* (2).

Then there are two cases, *Bibee Hamedra v. Bibee Bhudhun* (3) and *Bama Soonduree Dabea v. Tarini Kant Lahori* (4), in which the same view is adopted; and again in *Gooroo Dass Roy v. Stephens* (5), there is a case which came before Mr. Justice L. S. Jackson and myself, in which we held that, with reference to the judgment of the Privy Council in *Raja Leelanund Singh v. Maharaja Luckimpore Singh* (6), this Court was bound to carry out the order for the reversal of a previous order to the full extent so as to relieve the person injured by the first order from all its consequences. The same view was followed in *Meer Gowhur Ali v. Hurpal Bhugut* (7) and *Ununt Ram Huzrah v. Kuralee Pershad Mistree* (8).

The cases cited on the other side do not appear to us to be directly in point. They are, *Huro Chunder Chowdhry v. Sooradhoonee Dabea* (9), *Mosoodun Lall v. Bheekaree Singh* (10), *Huro Mohini Chowdhraïn v. Dhun Monee Chowdhraïn* (11) *Janokee Nath Mookherjee v. Rajkristo Singh* (12), *Syud Shah Ameer Ahmud v. Syud Shah Zameen Ahmud* (13), *Bhoobunesuree Chowdhraïn v. Mansor* (14), *Kaleenath Doss v. Rajah Meah* (15). On reference to these cases, it will be seen that the whole of them refer to the extension of the original decree, and not to the effect of an order for the reversal of a decree.

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| (1) 2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149; 11 W. R., F. B., 1. | (8) 23 W. R., 441. |
| (2) 6 W. R., Misc. Rul., 111. | (9) 1 W. R., Misc. Ru., 5. |
| (3) 20 W. R., 239. | (10) B. L. R., F. B., 602; 6 W. R., Misc. Ru., 109. |
| (4) 20 W. R., 415. | (11) 10 W. R., 63. |
| (5) 21 W. R., 195. | (12) 15 W. R., 292. |
| (6) 13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23. | (13) 18 W. R., 122. |
| (7) 22 W. R., 445. | (14) 22 W. R., 160. |
| | (15) 22 W. R., 406. |

The case cited by the Judge and a later case—*Forrester v. Secretary of State* (1)—only go so far as to establish what had been the practice of all the Courts in India, namely, that nothing could be added to a decree in course of execution: but in this case it is not a question of adding to the decree at all. What the Court is asked to do is simply to set aside that which has resulted from its own action taken under an erroneous decree.

With reference to the case *Hurro Chunder Roy Chowdhry v. Sooradhonee Dabee* (2) it ought to be mentioned that Mr. Justice Loch apparently did not altogether assent to the views expressed by the Chief Justice. An examination of that case, however, will show that in fact it belongs to the same class of cases as the other cases cited by the respondent, namely, that it may be treated as a case in which there was an attempt to extend a definite order. This will be seen by referring to page 405 of the same volume. It is there said that “the Sudder Court, on the 13th of May 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the then plaintiff, and directed that the property should remain with the present plaintiff, who, as widow in the absence of an adoption, was entitled to the estate during her life as heir of her deceased husband.” So that there was a definite declaration by the Court; and it might be agreed that it made that declaration advisedly, and that it was its intention not to go further than that.

In the present case, from the form of the proceedings stated above, it is evident that there could have been no such express or implied intention of the Court which set aside the decree under which possession had been taken. It was, therefore, open to the Munsif in the present application to do all that was necessary to make the restitution complete.

The Judge has said in his judgment: “I note further that the *de facto* possession of Mussamut Sobadra between Falgoon and Bhadro 1281 is not established.” If this were a finding of fact come to on the evidence, no doubt sitting here in special appeal we would be unable to deal with it; but it appears to us

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(1) L. R., 4 I. A., 137.

(2) B. L. R., F. B., 985; 9 W. R., 403.

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that it cannot be treated as such, for although there is evidence on one side which has been uncontradicted by evidence on the other, it does not appear that any particular time was fixed for the parties to appear in Court with all the evidence that they might have to give on questions of fact. The only order which has been brought to our notice is one by which the 23rd of January 1877 was fixed for hearing. That order is to this effect, that it is for the hearing of argument and for making such order as may there be necessary: and it is evident that this was the course adopted by the Munsif. He dealt with the case as one which could probably be disposed of simply on a question of law: and he in fact did dispose of it on a question of law without going into the facts at all. Had his decision been the other way, we think it would follow from the order by which the 23rd of January was fixed for hearing, that he would then have made some order for proceeding upon evidence on the merits of the case. In the absence of such order, the appellant cannot be concluded by the evidence produced by the other side and the absence of evidence on her part.

The case must, therefore, go back to the Court below to ascertain whether, as a matter of fact, Mussamut Sobadra ever was in possession of the property as the result of the execution of her decree; and if so, how much the appellant is entitled to receive from her as mesne profits in respect of the time during which she was in possession.

Costs will follow the result.

Case remanded.
