

(1879) 12 CAL CK 0001

Calcutta High Court

Case No: None

Mohamed Elahee  
Buksh and Others

APPELLANT

Vs

Kally Mohun  
Mookhopadhya and  
Another

RESPONDENT

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Date of Decision: Dec. 4, 1879

Citation: (1880) ILR (Cal) 589

Hon'ble Judges: Prinsep, J; Morris, J

Bench: Division Bench

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### Judgement

Morris, J.

This appeal raises a question as to the proper reading of the decree which is sought to be executed, and the still more important question, whether the lower Court was right in refusing to allow certain moneys that had been paid in execution of the decree to the judgment-creditor, to be recovered back and refunded to the judgment-debtor.

2. The lower Court, as we think, read the decree aright, namely, as a decree containing the condition that the rent claimed for 1279 in excess of the ordinary rate, shall be allowed only in the event of the Appellate Court affirming a previous decree allowing a similar sum in excess as enhanced rent for the year 1278.

3. The decree was positive only in regard to the amount claimed at the old rate of rent. And it seems singular that, in spite of the condition relative to the sum claimed as enhanced rent, the Court, in the execution department, should, before the appeal referred to in the decree was decided, have allowed the judgment-creditor to take out execution and compel the judgment-debtors to pay a portion of the excess demand.

4. When the appeal was decided in favour of the judgment-debtors, and the sum claimed as enhanced rent of 1278 was disallowed by the dismissal of the suit, the judgment-debtors sought a refund of the money that had been paid by them in excess, and referred to the conditional terms of the decree in support of their claim. The Judge has refused their application, on the ground that it ought to have been made when the conditional part of the decree came to be executed, and that, as the decree continues in force, having been neither appealed against nor sought to be altered in review, the order of the execution department cannot be altered. He also adds, that there is no procedure which can be found for remedying the error in the way now sought by the petitioners.

5. The Judge, when he passed this order, could not apparently have had his attention drawn to the opinion expressed by the Privy Council in the case of *Shama Parshad Roy Chowdhry v. Hurro Parshad Roy Chowdhry* (10 I.A., 203; S.C. 3 W.R.P.C., 11, or to the case, somewhat similar to the present, of *Jogesh Chunder Dutt v. Kally Churn Dutt* (I.L.R., 3 Cal., 30). The ruling laid down by the Privy Council is clear, namely, that "money recovered under a decree or judgment cannot be recovered back in a fresh, suit or action, whilst the decree or judgment under which it was recovered remains in force. And this rule of law rests upon this ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding."

6. In the present case, admitting that the execution department allowed the judgment-creditors to realize under their decree a portion of the amount claimed as enhanced rent, there can be no question that, in accordance with its express terms, that part of the decree was "superseded" by the proceeding in appeal relative to the enhanced rent of 1278. And again, under the authority of the Pull Bench above quoted, the decree, if it be a decree for enhanced rent of 1279, must be treated as subordinate to, and dependent upon, the decree which disallowed the enhanced rent claimed for 1278.

7. The order of the Judge is, therefore, set aside, and the judgment-debtors, appellants, are declared entitled to recover back from the judgment-creditors with interest at 6 per cent. per annum such amounts as were realized by them as enhanced rent under the decree. The Judge will, upon this application of the judgment-debtors, take necessary steps for the recovery of the money.