

(1868) 07 CAL CK 0004

Calcutta High Court

Case No: Regular Appeal No. 54 of 1867

Shib Narayan Pohraj

APPELLANT

Vs

Kishor Narayan Pohraj

RESPONDENT

Date of Decision: July 9, 1868

Judgement

Bayley, J.

The defendants in this case originally sued for possession, and got a decree for possession against the plaintiff, and took possession in execution on 30th April 1861. On appeal, this decree was reversed by the High Court, on the 30th April 1864, and plaintiff was restored to possession on the 11th November 1864. Plaintiff next sued separately for mesne profits, for the interval of 3 years, 9 months, and 19 days. Defendants objected that plaintiff had collected rents for a portion of 1270 (1863), and the whole of 1271 (1864), and put in other pleas against plaintiff's claim. The Principal Sudder Ameen gave a decree for a modified amount of mesne profits to plaintiff. The defendants and plaintiff both preferred regular appeals to this Court, and we held that a regular suit would not lie, but that the question of mesne profits must be decided in execution u/s 11 of Act XXIII of 1861. An application for review is now made, and it is contended that Section 11 of Act XXIII of 1861 does not apply to the defendants, who, it was stated by the pleader for the applicant, merely got the decision of the first Court against him reversed by the Superior Court, and that the decree being for possession only, nothing but a decree in a separate suit could award mesne profits. The question now is, whether the decree of this Court, which technically is for possession only, which, however, reinstated the party in the position he was when ousted, also gives a right to mesne profits on ascertainment in execution. To put the question in another way, will the decree, which is in fact for restitution to possession, enable the Zillah Court, in execution, u/s 11 of Act XXIII of 1861, to include in restitution of possession restitution of mesne profits, which would have reached the ousted party had he not been ousted? Of the cases cited by the respective parties, Hara Chandra Chowdry v. Suradhani Debi [1 W.R., (M.R.) 5] may be said to be overruled by Hara Chandra Roy Chowdry v. Suradhani Debt (Case

No. 792 of 1866, 31st March 1868). Joykaran Lal v. Rani Asmudh Kooer (5 W. R, 125) refers only to the execution of the decree of Her Majesty's Privy Council. Masudan Lal v. Bhikari Singh (Case No. 249 of 1865, 15th September 1866) refers to interest. Kashikishor Roy Chowdry v. Nur Khan (7 W.R., 45) is not a suit for possession. Of the cases on the other side, Narsingh Charan Sen v. Bidyadhari Dasi (2 W. E., 275) referred to the restoration of money taken from the Collectorate in execution, on the reversal of the decree of a Lower Court, where, though the money was not actually decreed, its restoration in execution was held to be proper. Rajkrishna Singh v. Barada Debi (Full Bench Ruling of the 15th September 1866) rather supports the pleas of the opposite party who uses it. Gobind Kumar Chowdry v. Krishna Kumar Chowdry (Case No. 530 of 1866, 31st May 1867) refers to restitution of a sum of money according to the terms of a modified decree. Hara Chandra Roy Chowdry v. Suradhani Debt (Case No. 792 of 1864, 31st March 1868) has the following passage: "But for the decision of the Division Bench of " the 6th September 1864 [1 W.R., (M.R.), 5], I should have thought it clear that, " as a matter of law, when the decree under which the plaintiff was turned out " of possession, was reversed by the Sudder Court, and it was ordered that the " property should remain with the plaintiff, she had a right to be restored to the " possession which she had lost, not only of the land, but also of the rents or " profits which had been received by the defendant whilst he was in possession "of the land, by force of the erroneous decree, which was reversed. When a " decree orders a sum of money to be paid to a plaintiff, he is entitled to have " that decree executed, although the decree is silent upon the subject of execution. " It is the legal effect of a decree of reversal, that the party against whom the " decree was given is to have restitution of all that he has been deprived "of under it. A Court of appeal does not necessarily enter into the "question, whether a decree which it is about to reverse has been executed " or not. 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 of by reason of its " having been enforced."

2. Reviewing all the cases cited, and referring to the particular facts of this case, which is one of an order for restitution of possession by this Court, as it was before the decree of the Lower Court held otherwise, I think Hara Chandra Boy Chowdry v. Suradhani Debt (Case No. 792 of 1864, 31st March 1868) governs this case; and that, accordingly, our order was correct. It is urged that the passage cited is an obiter dictum of the learned Chief Justice, and not a legal precedent. But I see no dissentient judgment upon that point (though there is on other points in that Full Bench Ruling), and I think the passage forms part of the judgment, as it contains directly the reasoning by which the conclusion was come to by the Chief Justice in that case. Under this view of the case, I would reject the application for review, with

costs.

Glover, J.

I also think that the application should be rejected. No new argument has been advanced nor any thing shown to us, which induces me to think the original order wrong. That order turned on a point of law solely, which was fully argued and considered at the first hearing.

¹Act XXIII of 1861, sec. II.--All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution fit the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal. Provided that if upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.