
(1878) 02 CAL CK 0007

Calcutta High Court

Case No: None

Lati Kooer

APPELLANT

Vs

Sobadra Kooer

RESPONDENT

Date of Decision: Feb. 14, 1878

Citation: (1878) ILR (Cal) 721

Hon'ble Judges: McDonell, J; Ainslie, J

Bench: Division Bench

Judgement

Ainslie, J.

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 2 W.R. 275; 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 Pohaj Mandhata v. Chowdhry Kishore Narain Pohraj Mandhata 10 W.R. 131 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 B.L.R.F.B. 985 : 9 W.R. 403,. 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 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 land whilst he was in possession of it under the erroneous decree, refunded. This case is not like *Shaik Wahid Ali v. Musst. Jamaye* 2 B.L.R.F.B. 73 : 11 B.L.R.P.C. 149 : 11 W.R.F. 13. I 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--*Rajkissen Singh v. Baroda Dabea* 6 W.R. Misc. Rul. 111.

2. Then there are two cases, *Bibea Hamed v. Bibee Bhudhun* 20 W.R. 239 and *Bama Soonduree Dabea v. Tarini Kant Lahori* 20 W.R. 415 in which the same view is adopted; and again in *Gooroo Das Roy v. Stephens* 21 W.R. 195 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* 18 Moo. I.A. 490 : 5 B.L.R. 605 : 14 W.R.P.C. 23 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. Hural Bhugut* 22 W.R. 445 and *Ununt Ram Huzrah v. Kuralee Pershad Mistree* 23 W.R. 441.

3. The cases cited on the other side do not appear to us to be directly in point. They are, *Hurro Chunder Chowdhry v. Sooradhonee Dabea* 1 W.R. Misc. Rul. 5 *Mosoodun Lall v. Bheekarsee Singh* B.L.R.F.B. 602 : 6 W.R. Misc. Rul. 109 *Huro Mohini Chowdhra v. Dhun Moonee Chowdhra* 10 W.R. 63 *Janokee Nath Mookerjee v. Rajkristo Singh* 15 W.R. 292, *Syud Shah Ameer Ahmud v. Syud Shah Zameen Ahmud* 18 W.R. 122, *Bhoobunessuree Chowdhra v. Mansor* 22 W.R. 160, *Kaleenath Dass v. Rajah Meah* 22 W.R. 406. 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.

4. The case cited by the Judge and a later case--*Forrester v. Secretary of State* L.R. 4 IndAp 137 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.

5. With reference to the case *Hurro Chunder Roy Chowdhry v. Sooradhonee Dabea* B.L.R.F.B. 985 : 9 W.R. 403 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.

6. 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.

7. 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 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.

8. 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.

9. Costs will follow the result.