

(1877) 07 CAL CK 0001

Calcutta High Court

Case No: None

Kali Churn Dutt

APPELLANT

Vs

Jogesh Chunder Dutt

RESPONDENT

Date of Decision: July 20, 1877

Citation: (1878) ILR (Cal) 30

Hon'ble Judges: Richard Garth, C.J; Markby, J; Macpherson, J; Jackson, J; Ainslie, J

Bench: Full Bench

Judgement

Ainslie, J.

It is obvious, that the defendant has received from the plaintiff, under successive decrees made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent, to which the final order in the enhancement suit shows that he is not entitled. The plaintiff as tenant persistently refused to acknowledge his liability, and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he only paid it under compulsion. The Courts were bound to follow the existing judgment by which the liability of the plaintiff to pay enhanced rent had been declared. They had no option in the matter at the time. Under such circumstances, I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhancement for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some fourteen years. The order of Her Majesty in Council was such, that if it had been known at the time of making the decrees, they must, of necessity, have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned; and therefore it seems to me, that it did at once supersede the decrees based upon the reversed order of the High Court.

2. There appears to me to be a wide distinction between the re-opening of decrees based upon, and necessarily controlled by, a previous decree subsequently reversed

on appeal; and the re-opening of decrees which the Court making them might have varied had it not thought fit to follow a decree afterwards set aside. Looking at the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* 10 Moore's I.A. 203; S.C. 3 W.R. P.C. 11 I am of opinion that there is authority for saying that the former class of decrees are ipso facto superseded so soon as the controlling decree is nullified, and that what may have been done under them is not final, but may be undone; the mode of proceeding for this purpose is not a question of serious importance. I agree with the judgment of Mr. Justice Macpherson.

Macpherson, J.

3. In my opinion the principle on which the Privy Council acted in the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* 10 Moore's I.A. 203; S.C. 3 W.R. P.C. 11 is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable and the enhanced rent which he paid pending his appeal against the decree by which the rent was enhanced. That decree (although in a suit instituted in 1859 before Act X came into force) was made by the Principal Sudder Ameen on the 29th of June, 1863. Appeals to the Judge of the district and to this Court were decided on the 18th of June, 1864, and the 6th of February, 1865, respectively. An appeal to the Privy Council was filed here on the 20th of July, 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May, 1873, which reversed the decisions of the Courts in this country, and found that the rent was not liable to enhancement.

4. I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. All these decrees for the enhanced rent were based solely upon the decree for enhancement which the Privy Council reversed in May, 1873, and the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

5. The contention is, that as these subsequent decrees for rent at the enhanced rate are still unreversed, a suit will not lie to recover the money paid under them. It is suggested that though our Courts had decided that the rent could be enhanced, the defendant ought not to have submitted to these latter decrees, but should have contested each case, and appealed, if necessary, to the Privy Council in each; and it is also said that he should apply, or should, on the Privy Council making its order in May, 1873, have applied, for a review of judgment in each of the sixteen cases, and having got the judgments reviewed and reversed, should obtain restitution in each suit.

6. In thirteen out of the sixteen suits the decree was for a sum under Rs. 1,000 (and in seven of them it was for less than Rs. 500), and I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal all these suits and incur the enormous expense necessarily involved in such a

course--an expense far exceeding the amount in dispute. As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained, in the cases under Act X of 1859. Even supposing it obtainable in the four cases under Bengal Act VIII of 1859. But if it be granted that a review might have been obtained in each of the sixteen suits, that mode of proceeding would have been, on the whole, much more cumbrous and inconvenient than the single suit which the plaintiff has instituted embracing his whole claim; of course these questions of convenience and the like could not be taken into consideration at all if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that not only is there no such fixed rule, but that the Privy Council has expressly decided in *Shama Purshad Roy's* case 10 Moore's I.A. 203 S.C. :3 W.B. P.C. 11 that a suit such as this may properly be entertained by this Court. In their judgment, it is said: "There is no doubt that, according to the law of England, and their Lordships see no reason for holding that it is otherwise in India, 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. But this rule of law rests, as their Lordships apprehend, upon the 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. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." Applying that rule to the case before us, I think that the original decree (which is the sole basis of all the decrees made pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was plainly intended by the Privy Council's order, which decided that the rent of this tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable; and it is practically a contravention of the order to permit the decrees obtained by the zemindar pending the appeal to interfere with that intention. The subsequent decrees were mere subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed. I am aware that in *Chama Purshad Roy's* case 10 Moore's I.A. 203 S.C. :3 W.B. P.C. 11 the order made by the Privy Council turned in some decree on the peculiar terms of their original order. But giving full weight to that fact, it seems to me clear that their Lordships admit the principle that the main decree being reversed, which was the basis of the subsequent decrees, these latter, being subordinate and dependent decrees, were superseded. It cannot be disputed, that although the later and subordinate decrees remained unreversed, the Privy Council held that a separate suit lay to recover what had been wrongfully paid under those decrees, and this was

evidently the view taken of the effect of Shama Purshad Roy's case 10 Moore's I.A. 203 S.C.: 3 W.R. P.C. 11 by Kemp and Pontifex, JJ., in the case of Nilmoney Singh Deo Bahadur v. Sharoda Purshad Mookerjee 18 W.R. 431.

7. The question of limitation is not raised in the order of reference. But I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

8. The circumstances of this case are peculiar, and it is impossible in dealing with it to lay down any rule of very general application. The plaintiff has practically no remedy unless this suit will lie.

Garth, C.J.

9. I am of opinion that the decree made by the Privy Council in the case of Ram Churn Dutt v. Romesh Chunder Dutt did not supersede or modify the several decrees which had been previously obtained for enhanced rent by the present defendants, and consequently that the plaintiffs in this case are not entitled to recover.

10. The plaintiffs base their claims entirely upon the authority of the case of Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry 10 Moore's I.A. 203 S.C.: 3 W.P. P.C. 11 contending that the principle upon which that case proceeded applies to the present, and that the decrees for enhanced rent obtained by the present defendant since the year 1864 have been partially superseded or modified by the decree of the Privy Council in the above case of Ram Chunder Dutt v. Romesh Chunder Dutt. We are bound, of course, to accept the decision in Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry 10 Moore's I.A. 203 S.C.: 3 W.R. P.C. 11 as binding upon this Court, so far as it goes; but if the principle of it is to be extended, as the plaintiff's contend it ought to be, it would lead, in my opinion, to very inconvenient consequences, and to a direct departure from a rule of law which has been established for years, and has always been acted upon in England and in this country.

11. Now, in order to see how far the authority of the case of Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry 10 Moore's I.A. 203 S.C.: 3 W.R. P.C. 11 is applicable to the present, it is necessary to ascertain, in the first place, what the grounds of that decision really were. The case was a very peculiar one. In the year 1821, Doorga Purshad, claiming to be heir to his uncle, brought a suit against Shama Purshad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

12. Pending this suit, Tara Purshad sued Doorga Purshad for one half of the uncle's property; and in 1829 a compromise was effected of that suit, under which Tara Purshad became entitled to a 6-anna share of the debt due from Shama Purshad.

13. Subsequently to this Doorga Purshad obtained a decree against Shama Purshad for the principal and interest due upon the bond. From this decree Shama Purshad appealed to the Sudder Court, and pending that appeal in 1831, there was a compromise of that suit also, tender which Shama Purshad was to pay Rs. 27,127 at the end of three years, without interest; in default of which payment Doorga Purshad was to be at liberty to realize the amount. This compromise was made without Tara Purshad's knowledge, and Shama Purshad did not pay the stipulated amount at the end of the three years.

14. In this state of things Tara Purshad, in March, 1835, brought another suit against Doorga Purshad, claiming a 6-anna share of the bond-debt and interest due up to the commencement of Doorga Purshad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond-debt from 1821 to the 27th May, 1829, on which day Doorga Purshad obtained his decree against Shama Purshad.

15. This suit was carried through the Courts of this country up to the Sunder Dewany Adawlut, where eventually a decree was made against Doorga Purshad for the entire amount of principal and interest sued for.

16. From this decree Doorga Purshad appealed to the Privy Council, who decided in 1849 that the decree of the Sudder Court ought to be reversed, and that Doorga Purshad was not liable to Tara Purshad for the whole amount of his 6-anna share and interest of the debt. Their Lordships held that Doorga Purshad ought to be considered as a trustee for Tara Purshad, and was only responsible for so much of the debts as he actually received, or without his wilful default might have recovered, and an order was made accordingly by their Lordships that the decree of the Sudder Dewany Adawlut should be reversed; that Doorga Purshad should be declared liable to Tara Purshad for a 6-anna share of what he had received or might thereafter receive, or what he might have received but for his wilful default, for and in respect of the sum of Rs. 24,217-12-17, and the interest thereon, and the case was referred back to the Sudder Dewany Adawlut to ascertain and carry out and enforce the rights and liabilities of the parties as above declared.

17. From the 11th of March, 1835, when the above suit was commenced, to the 5th July, 1849, when the judgment of the Privy Council was pronounced, upwards of fourteen years had elapsed; and during that interval, in the year 1842, an action was brought in this country by Tara Purshad against Doorga Purshad to recover Rs. 4,392-12-9, being the amount of interest on the 6-anna share of the bond-debt, for which in his previous proceedings he had reserved his right to sue; and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent, amounting to Rs. 11,127-15-3, which he accordingly paid thus--Rs. 8,200-7-3 on the 28th of April, 1848, and Rs. 2,927-8 on the 4th August, 1857.

18. Several attempts were made by Doorga Purshad to have this decree for interest dealt with and adjusted by the Sudder Dewany Adawlut as part of the entire subject-matter of the first suit upon which the Privy Council had passed their judgment; but failing these attempts, he brought a suit against Tara Purshad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay. This was decided against him by the Courts of this country and was taken on appeal to the Privy Council, where the judgment was given, which has been the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

19. Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country as in England money recovered under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it was reversed remains in force. They go on to say, that this rule of law rests upon the ground that the decree or judgment must be considered as subsisting until it has been reversed or superseded by some ulterior proceedings, But where it has been so reversed or superseded, the money paid under it may be recovered back.

20. Their Lordships then go on to say, that the decrees in this country under which the sum of Rs. 11,127-15-3 was recovered were in fact superseded by the order of Her Majesty in Council in 1849. That order they considered extended not only to the claim of the plaintiff in the particular suit in which it was made, but to the adjustment of the rights and interest of the parties in the entire subject-matter of that suit. The order had declared Doorga Purshad to be a trustee for Tara Purshad of the whole Ganna share of the bond and interest, and it had directed the Sudder Dewany Adawlut to adjust and enforce the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewany Adawlut, as their Lordships say, it ought to have been, the interest in question, Rs. 11,127-15-3 would have been refunded to Doorga Purshad by the order of the Sudder Dewany Adawlut under, and by force of their Lordships' previous decree, because that decree had superseded and annulled what their Lordships call the despondent and subordinate decree " which had been obtained for the interest. But as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit, and they, accordingly, reversed the decree of the Sudder Court and adjudged to the plaintiff that amount with interest at 12 per cent.

21. Now two things appear to me clear from this judgment, first, that the Privy Council had no intention of questioning the authority of the rule laid down in *Marriot v. Hampton* 2 Sm. L.C. 375 6th ed.; 405 7th ed.; on the contrary, they distinctly affirm it, because they say, that as long as the decree or judgment under which money has been obtained remains in force, no money paid under it can be recovered back; and, secondly, that their Lordships' judgment is based entirely

upon this principle, viz., that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then sub judice, but also to supersede and annul ipso facto the decrees which had been made in another suit.

22. I have searched in vain to find any other instance in which the decree of an Appellate Court in one suit has been hold to have the legal effect of annulling or altering ipso facto a decree made by a subordinate Court in another suit; but of course we are bound here to treat the decision of the Privy Council as binding upon us as far as it goes, and to deduce as carefully as we can from the language of the judgment what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for Rs. 11,127 interest.

23. It appears to me that the only explanation of the apparent difficulty is this,--that, in the decree of 1849, their Lordships assumed to deal, and were in fact dealing, not only with the actual claim made in the suit, but with the status and rights of the parties with reference to the whole subject-matter of it. They declared that Doorga Purshad was a trustee of Tara Purshad upon certain terms and conditions, and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration; and as the interest of the bond (Rs. 11,127) formed part of the fund in respect of which the trust had been declared, their Lordships considered, that although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment as the decree which had been made with reference to the remainder, of the bond-debt. Upon this ground, and upon this ground only, it appears to me their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in *Marriot v. Hampton* 2 Sm. L.C. 375 6th ed.; 405 7th ed. or to prescribe a different rule of equity in this country from that which obtains in England.

24. It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March, 1873, reversing the first judgment for the enhanced rent, had the legal effect per se of superseding or modifying the subsequent decrees for enhanced rent obtained between the year 1864 and the 25th of November, 1875.

25. Now, on looking at the language of their Lordships in that decree, I cannot discover that they dealt, or intended to deal, with anything also than the actual subject-matter of the suit upon which they were engaged. Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question, whether or no the plaintiff was or was not entitled to enhance the plaintiff's rent, so that unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding or modifying every other decree

inconsistent with it which may have been made between the same parties in any oilier suit brought in a subordinate Court upon the same subject-matter, do not see how we can consistently say that the decree of the Privy Council of the 25th March, 1873, has superseded or modified the subsequent decrees for enhanced rent obtained by the present defendant.

26. It will be observed, that in the case of Doorga Purshad against Tara Purshad the decree, which was superseded by the judgment of the Privy Council, was for interest which that judgment had declared not to be payable, and which their Lordships had in fact directed the Suddor Dewany Adawlut to restore to Doorga Purshad; so that the effect of Her Majesty's order, according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

27. But here the case is very different. Their Lordships here have given no direction which could have the effect of superseding or altering any other decrees; and it is not contended that these subsequent decrees are absolutely superseded. It is said that they are only modified; or, in other words, that the Privy Council judgment has had the effect per se of altering a judgment for one sum into a judgment for another sum.

28. But if that is so, and if this principle is to be consistently carried out, the amount of costs ought to be altered also. The doctrine is certainly a novel one, and if we are to apply it in all cases, as of course we must (if we are to act consistently) it will be attended with some strange consequences. The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other; thus if in a suit like the present a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things were reversed. Suppose, that in the original suit the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled; and suppose also, that pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but in each had only recovered the original rent; if the above principle is to be carried out, the landlord would be entitled, in a fresh suit, to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

29. So again, if the rule is to apply to cases of landlord and tenant, it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those rights are enforced in subsequent suits. The case of Shama Purshad Roy Chowdhry v. Hurro Purshad Roy Chowdhry 10 Moore's I.A. 203 S.C.: 3 W.R. P.C. 11 was not a case between landlord and tenant.

30. Thus, for instance, A sues B to recover the value of coal which he claims as having been taken out of his coal mine. The question depends upon whether B has a right to take the coal from a particular area; and A obtains a decree for damages

upon the ground that B has no such right. B appeals to the High Court; meanwhile B continuing to take the coal, A brings another suit against him for damages, and recovers. The High Court reverses the original decree; B may then sue for the damages, which he has paid in the second action, as money had and received to his use.

31. But if this is to be law, the converse proposition ought to hold good also--that is to say, suppose the decree in the first suit to be in favour of B, on the ground that B had a right to get the coal, and A appealed, and pending the appeal A brought another suit against B and failed upon the same ground. The Court of appeal reverses the final decree. Surely A ought to be entitled to recover by a fresh suit the value of the coal which was due to him in the second action. It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

32. In the cases above mentioned, the question as to the sum to be recovered would be tolerably simple. But suppose a case of this kind : A sues B for damages for building a house upon two pieces of land which he claims, Black-acre and White-acre, the question is, whether B has any right to do this. The Court decides that he has not, and awards damages to A. B. appeals. Meanwhile, the building still going on, A brings a fresh suit for damages, which he has a right to do for the continuing trespass, and recovers further damages. The Court of appeal reverses the first judgment in part, upon the ground that B had a right to build on Black-acre, but not on White-acre, and reduces the damages accordingly, Can B sue to recover part of the damages incurred in the second action and if so, what part, and how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate) Court superseded or altered the decree of the subordinate Court? Then again, it must be borne in mind that if a decree of one Appellate Court is to have the effect of reversing or altering decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council as an Appellate Court cannot have a different effect from that of the High Court or the District Court, or the Court of the Subordinate Judge in its appellate capacity.

33. Thus, suppose that in a suit by a landlord against a tenant for enhanced rent, the Munsif gives the plaintiff a decree. The case is appealed to the Subordinate Judge, who reverses the Munsif's judgment. Meanwhile a second decree has been obtained before the Munsif for the enhanced rent, and the tenant has paid the amount. The tenant, under these circumstances, would be enabled by force of the judgment of the Subordinate Judge, to recover from the landlord the amount which he has overpaid under the second decree. But the landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court; and the High Court reverses that judgment, and affirms the Munsif's. The consequence would be that the landlord would be entitled to recover in a third suit the sum which

he had previously recovered from the tenant in the second suit.

34. If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop; or when people's rights are even to be considered as finally determined. If in cases like the present it is right that the English rule should be departed from at all, it appears to me that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable remedy; but this point we are not asked to decide in the present reference.

35. The only question before us is, whether the present suit will lie; and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* 10 Moore's I.A. 203 S.C. :3 W.R. P.C. 11 decided by the Privy Council; and I cannot help deeply regretting the conclusion at which the majority of my learned brethren have arrived.

36. It is a conclusion directly opposed to what I consider a valuable and well established rule of law; and I believe that it will be attended with most inconvenient and mischievous consequences.

37. The case will be sent back to the Division Bench for final disposal, and speaking only for myself, I trust that the very serious question involved in the case may be taken upon appeal to the Privy Council.