**(1912) 04 CAL CK 0050**

**Calcutta High Court**

**Case No:** None

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| Upendra Chandra Singh | | APPELLANT |
| | Vs | |
| Sakhi Chand | | RESPONDENT |

**Date of Decision:** April 16, 1912

**Citation:** 15 Ind. Cas. 709

**Hon'ble Judges:** Mookerjee, J; Carnduff, J

**Bench:** Division Bench

**Judgement**

1. We are invited in this Rule to set aside an order of the Subordinate Judge, directing that an application for assessment of mesne profits be registered as an application for execution of a decree, notwithstanding the dismissal of a similar application previously made. It appears that the suit in which the plaintiff claimed to recover possession and mesne profits was decreed on the 28th March 1898. Possession was delivered in due course. An application subsequently made for assessment of the mesne profits as directed in the decree, was dismissed for default on the 25th January 1901. On the 13th April following, a fresh application was presented for assessment of mesne profits which was dismissed for default on the 9th May 1905. Upon appeal, the order of the primary Court was reversed by the District Judge on the 2nd January 1906. That order was confirmed on appeal to this Court on the 7th March 1907 Upendra Chandra v. Sakhi Chand 12 C.W.N. 3 : 7 C.L.J. 301. The result was that the primary Court was directed to proceed with the application for assessment of mesne profits. The application, however, was ultimately dismissed for default on the 7th January 1910, by the Subordinate Judge as his order for the payment of fees to the Commissioner has not been carried out. Six days later, on the 13th January i910, the decree-holder presented two applications, one for restoration of the application of the 13th April 1904 and the other a fresh application for assessment of mesne profits. On the 12th March 1910, the decree-holder apparently elected to proceed with the application for assessment of mesne profits and abandoned the application for restoration. The result was that the application for restoration was dismissed on that date and on the 4th May 1910,

the application for assessment of mesne profits was directed to be registered as an execution case. This latter order is now assailed on the ground that it was made without jurisdiction inasmuch as the dismissal of the application of the 13th April 1904 on the 7th January 1910 was equivalent to a dismissal of the claim for mesne profits. In our opinion, there is no room for controversy that this contention is well founded and must prevail.

2. As was pointed out in the case of Ramkishore Ghose v. Gopi Kant Shaha 28 C. 242 an application for assessment of mesne profits has been commonly treated as an application for execution of decree, it is nevertheless clear, upon the decision of a Full Bench of this Court in Puran Chand v. Roy Radha Kishen 19 C. 132, that an application in this behalf is an application in the suit, although Section 244, Clauses (a) and (6), directs that an application of the kind when made should be entertained by the Court in its execution department. The same view was taken in the cases of Harmanoje Narain Singh v. Ram Prosad Narain Singh 6 C.L.J. 4626 C.L.J. 462 and Debendra Nath v. Khirode Chandra 5 Ind. Cas. 272. The true position in the present case, therefore, was that on the 13th April 1904, the decree-holder invited the Court to proceed to a determination of the amount of mesne profits recoverable under the decree. The Court proceeded to hold an investigation and a Commissioner was appointed for the purpose. Indeed, without previous ascertainment by a Commissioner upon evidence taken for the purpose, it would hardly be practicable for the Court to determine the matter in controversy. But the Commissioner was unable to submit his report in time be cause the order for payment of hisfees had not been carried out by the plaintiff decree-holder. The result was that on the 6th January 1910, the Court recorded an order to the effect that the Commissioner be directed to return the commission and that the case be dismissed for default on behalf of the plaintiff. Now, what was the "case" thus dismissed? Clearly, it was the claim of the plaintiff for recovery of mesne profits from the defendants. As that case was dismissed on the 7th January 1910, it was obviously not open to the plaintiff to make a fresh application on the 13th January 1910 because there was no pending suit wherein that application could be deemed to have been made. The view, we take, is supported by the decision in Kewal Kishan Singh v. Sookhari 24 C. 173 : 1 C.W.N. 243. The case of Ramkishore Singh v. Gopi Kant Shaha 28 C. 242 is clearly distinguishable. In that case, an application had been made for the recovery of costs allowed by the decree and in that application a prayer had been inserted to the effect that the mesne profits recoverable under the decree might also be ascertained. When the application came to be considered by the Court, an order was made for recovery of the costs, but the prayer for assessment of mesne profits was apparently overlooked; when the costs had been realised, the application was accordingly treated to have terminated. Subsequently, in answer to a fresh application by the decree-holder for assessment of mesne profits, it was urged by the judgment-debtor that the dismissal of the previous application which embodied a prayer for assessment of mesne profits was equivalent to a dismissal of the claim

for mesne profits. This was overruled by this Court and the course adopted appears to be supported by the observations in Pryag Singh v. Raju Singh 25 C. 203 though the reasons assigned were not quite consistent with the principle of the decision in Puran Chand v. Roy Radha Kishen 19 C. 132. The case of Barn Krishna Ghose v. Gopi Kanth Saha 28 C. 242 plainly is of no assistance to the decree-holder in the case before us; but if it lays down any rule of law inconsistent with the decision of the Full Bench in Puran Chand v. Roy Radha Kishen 19 C. 132, it cannot be treated as a binding authority. In the case before us, the Court had been invited to adjudicate upon the question of amount of mesne profits recovers able by the plaintiff from the defendant. The Court took steps to ascertain the amount, but could not determine the sum because of laches of the plaintiff. Under these circumstances, we are of opinion that the dismissal of the case on the 7th January, 1910 was equivalent to a dismissal of the claim for the mesne profits, and a fresh application in the same matter was not admissible. The order of the 4th May 1910 must consequently be discharged as made without jurisdiction.

3. The question next arises what further direction, if any, should be given in this matter. It is clear that the application for restoration to which we have referred was abandoned because the plaintiff erroneously believed that the proper procedure to follow was to make a fresh application for assessment of mesne profits. That application, as we have just held, cannot be entertained. Consequently, in the interests of justice, the order of the 12th March 1910 by which the application for restoration was dismissed should also be cancelled.

4. The result is, that the Rule is made absolute. The orders of the 12th March and the 1st May 1910 are both discharged; the application of the 13th January 1910 for assessment of mesne profits will stand dismissed; but the application of the same date for restoration will stand revived and the Court will now proceed to consider that application on the merits. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at two gold mohurs.