
(1870) 02 CAL CK 0033

Calcutta High Court

Case No: Miscellaneous Special Appeal No. 476 of 1869

Mussamat Bibi Maniran

APPELLANT

Vs

Mussamat Bibi
Mashihaan

RESPONDENT

Date of Decision: Feb. 8, 1870

Judgement

Norman, Officiating C.J.

1. This was a suit by the plaintiff, Mussamat Bibi Mashihan, alleging that her property was injured by the erection of a bund, or hattah, by the defendant. She obtained a decree declaring her right to have certain shali lands irrigated by the water of Tal Burka, and directing that the flow of water in the Tal be not interrupted; that the new bund erected by the defendant be broken up; and that at the time of the execution of the decree the amount of damages to the crops of the plaintiff should be ascertained--the amount to be allowed not exceeding the sum claimed in the plaint. There was an appeal, and the decree was affirmed on that appeal. The question now before us arises in proceedings taken in the execution of the decree. The Subordinate Judge of Shahabad, on the ground that the boundaries of the property to which the decree related were not stated in the decree or in the plaint, held that the decree could not be executed.

2. On appeal, the Judge found, that although the boundaries are not set forth in the plaint, "there is at the foot of the plaint a detailed list of kittahs, with the names of the cultivators, comprising the 96 bigas, 15 katas of land for which he calls wasilat is claimed." He says, that an intelligent ameen would have no difficulty whatever in accurately discovering the lands for which wasilat" is claimed, as also the position of the hatta, the demolition of which is sought. He considered that the objections raised by the judgment-debtor are frivolous, and directed the Sasseeram ameen to be deputed for the enquiry needed, and that every assistance be given him in effecting the execution of the decree." The Judge, therefore, treats the decree as complete in itself, and supposes that damages can be ascertained in execution.

3. In the case of *Mussumat Benda Bibi v. Lalla Ramsaran Sing*, 1 B.L.R. S.N. 23 the Chief Justice pointed out that, in some recent cases, he had observed that the lower Courts do not assess the damages themselves, but leave them to be assessed in execution. This, he remarks, is clearly wrong. He says: There is no power given by the Code of Civil Procedure, in an ordinary suit for damages, to direct the amount to be assessed in execution, as there is with regard to *wasilat* by section 197, Act VIII of 1859."

4. The Chief Justice then goes on to say : There was an *ameen* deputed in this case, and he might just as well have assessed the damages as an "*ameen* in execution of the decree, and the additional expense would have "been saved." The Chief Justice then says that there was no ground of appeal upon this point, but he thought it right to notice it, in order that the lower Court's attention might be directed to this irregularity.

5. I entirely concur in the doctrine laid down in that case, that damages must be assessed by the Court which tries the case, and not in execution of the decree. *Baboo Ramesh Chandra Mitter* has objected that the decree before us is incomplete. I think that this argument is well founded, and the very fact that the decree is incomplete makes it impossible for the Court to work it out. The direction as to the time when the amount of damages was to be ascertained, viz., the time of execution, is incorrect. The decree determines the right of the plaintiff to damages. It may be that it would have been more proper that the damages should have been ascertained by the original decree. But there is no appeal before us on that ground. In a great number of cases it is convenient that the rights of parties should be ascertained before a commissioner is deputed to enter upon what are very often protracted and expensive enquiries as to the extent of such right. On the original side of this Court, it is constantly found to be a convenient practice for an enquiry to take place as to the amount to which partners are respectively entitled under a decree for dissolution of partnership and accounts; but such enquiry does not take place until after a decree has been passed at the hearing. Defining exactly the rights of the parties, and determining the period over which such accounts are to extend, section 180, Act VIII of 1859, provides for such investigations as may be requisite or proper for the purpose of ascertaining the amount of any damages; and this enquiry may take place after the rights of the parties have been determined in the manner to which I have alluded. The enquiry which in this case will take place, as to the extent of damages to the plaintiff's crops, will not be a proceeding in execution, but be an enquiry, u/s 180, preliminary to the final decree. The report of the *ameen* as to the amount of damages will have to be brought up before the Court. If necessary, the parties will be heard upon it, and upon such report hereafter the amount of damages will be ascertained and assessed by the Court; and a decree for payment of the sum so adjudged will be embodied in an ultimate final decree for costs and damages.

6. We modify the decree of the Judge by directing that the enquiry proceed before the *Sasseeram ameen* as ordered by him, and that such *ameen* do make his report to the Court.

7. As to the other part of the decree, there seems no reason to suppose that the decision of the Judge is not perfectly correct. The Ameen will see to the demolition of the bund as provided by the decree. The appellant has failed to establish either of the grounds on which he comes to this Court by way of appeal, but as it is shown that the Judge's order is not perfectly correct as it stands, we direct that each party do bear his own costs in this appeal. The order of the lower Court, so far as it gives to the plaintiff the costs in the lower Courts, will stand.