

17 B. 35.

## [35] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and  
Mr. Justice Telang.

1892  
JAN. 18.  
APPEL-  
LATE  
CIVIL.  
17 B. 35.

KACHAR ALA CHELA (*Original Defendant and Opponent*), Appellant v. SHA OGHADBHAI THAKARSHI (*Original Plaintiff and Claimant*), Respondent, and SHA OGHADBHAI THAKARSHI (*Original Plaintiff and Claimant*), Appellant v. KACHAR ALA CHELA, (*Original Defendant and Opponent*), Respondent.\* [18th January, 1892.]

Decree—Execution of decree—Mesne profits, ascertainment of—Duty of the Court—Deductions claimed—Res judicata.

Where a decree awarded mesne profits of the lands claimed in the suit, and the Court declined, in execution of the decree, to investigate questions relating to deductions claimed by the defendant, on the ground that to do so would be "to go behind the decree," and that it was not competent to the Court to do that in executing the decree.

Held, that the mesne profits could only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made, and also to determine the question, whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent free.

The Court having awarded a particular sum as annual mesne profits without setting forth in the judgment the details thereof, and it having, therefore, become impossible to say that the right to a particular deduction therefrom claimed by the defendant was adjudicated on by the Court,

Held, that the rule of *res judicata* did not apply to the question as to the payment by the defendant.

THESE were cross-appeals from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

The facts of the case were as follows:—

The plaintiff, Sha Oghadbhai Thakarshi, brought a suit in the District Court at Ahmedabad to recover possession of 423 acres and 15 gunthas of land situate at the village of little Matra, in the Dhandhuka Taluka, alleging that he had purchased the land in execution of a decree against Giga Uga and Hatia Giga and had obtained possession, but was forcibly dispossessed by the defendant. The plaintiff also sought to recover Rs. 4,200 as mesne profits for three years preceding the suit.

[36] Defendant, Kachar Ala Chela, Chief of Jasdán, denied that he had forcibly dispossessed the plaintiff, and alleged that the land did not belong to the plaintiff, or to Giga Uga or to Hatia Giga, and that they never had possession.

The District Judge (J. W. Walker) passed a decree directing the plaintiff to recover possession of a portion of the land claimed by him, and also to recover Rs. 2,100 as mesne profits for the three years preceding the suit, with mesne profits from the institution of the suit to the time of obtaining possession. The rest of the plaintiff's claim was rejected.

Against the decree of the District Court the defendant appealed to the High Court, and the plaintiff presented cross-objections under s. 561

\* Cross Appeals Nos. 23 and 79 of 1891.

1892  
JAN. 18.  
—  
APPEL-  
LATE  
CIVIL.  
—  
17 B. 35.

of the Civil Procedure Code (Act XIV of 1882). The High Court confirmed the decree (1).

After the confirmation of the decree by the High Court, the plaintiff applied in execution for the recovery of mesne profits. The defendant claimed certain deductions and produced a document which he contended showed that he was entitled to make these deductions. The District Judge refused to allow any deductions, on the ground that to do so would be to go behind the decree, which made no provision for any allowances to the defendant. In making his order he said :—

"I must reject this document as irrelevant to the present inquiry. We cannot go behind the decree. Mr. Verajrai (defendant's pleader) argues that, according to the terms of Ex. 148, Hatia Giga was not entitled to the *santi vero* and *kharajat* leviable on a portion of the land in dispute. He contends, therefore, that, as the plaintiff's title is derived from Hatia Giga, he cannot recover this *vero* and *kharajat*, for which allowance must be made to the defendant in the computation of mesne profits. The answer to this argument is that the decree finally determines the rights of the parties, and it awards the land to the plaintiff without any reservation on account of *vero* and *kharajat*. If there was any mistake in the decree, the proper steps should have been taken to get it amended. In [37] execution no evidence, therefore, can be received to show that the defendant is entitled to allowance for *vero* and *kharajat*.

"Similarly no deduction can be made on account of the proportion of Government assessment, which, it is argued, ought to fall on the plaintiff's land. Mr. Narbheram (plaintiff's pleader) contends that, owing to certain circumstances, the plaintiff's predecessor was entitled to hold his land free of contribution for Government assessment, but that is a question into which I cannot enter without going behind the decree. The *jama* of the village is paid in a lump by the defendant, and, if he was entitled to recover contribution from the plaintiff, he should have taken steps to get the right expressly declared by the decree. Instead of this, when the plaintiff in his plaint specified the mesne profits, the defendant does not seem, in his written statement, to have asked to set off any portion of the *jama*. He denied the plaintiff's claim *in toto*, but did not specially plead for reduction of mesne profits on account of assessment. Consequently, when the judgment was written, no allowance seems to have been made for assessment. Under these circumstances no allowance can now be made in execution.

"Similarly with regard to local funds. As the decree does not entitle the defendant to contribution for the cess that may be levied from him by Government, no allowance can be made in execution. Whether by representing the matter properly the defendant can obtain a reduction of local-fund cess with which he is charged under s. 7 of Bombay Act III of 1869, is a question which I need not discuss; but, in any case, there seems no doubt that under Mr. Walker's decree he is not entitled to credit from the plaintiff for any payments which he may have made."

The final order passed by the District Judge ran thus :—

"Mr. Walker fixed the mesne profits at Rs. 700 per annum for the years prior to the suit and his decision was confirmed on appeal. I think the same sum may now be fixed. I, therefore, direct that for the (*Samvat*) years 1941, 1942, 1943, 1944 and 1945, the plaintiff do recover mesne profits at the rate of Rs. 700 per annum, *i.e.*, Rs. 3,500 in all.\* \* \*"

(1) See P.J. 1889, p. 222.

[38] Against the said order, the defendant and the plaintiff presented cross appeals, Nos. 23 and 79 of 1891, respectively.

*Latham* (Advocate-General with *F. E. Vicaji* and Rao Saheb *Vasudev Jagannath Kirtikar*), for Giga Uga appellant in appeal No. 23 and respondent in appeal No. 79.—The lower Court erred in omitting to deduct the amount of Government assessment and local-fund cess from the profits of the property in dispute. If the decree-holder had been in possession, he would have been liable to pay the cess and the assessment. We have paid these during the period of our management, and we are entitled to this deduction—*Mayne on Damages*, 4th Ed., p. 420. The lower Court held that because the decree does not provide for a deduction on this account, we are not entitled to it. But when the decree was passed, the present question had not arisen. It is therefore, open to us to raise it now in execution proceedings. The same may be said as to our right to the *vero* and *kharajat*.

*Branson* (with *Ganpat Sadashiv Rao*), for Sha Oghadbhai, respondent in appeal No. 23 and appellant in appeal No. 79.—To allow the appellant to raise in the execution proceedings the questions about the assessment and the local cess, the *vero* and the *kharajat*, would be to go behind the decree. These questions were either raised before the judgment, or they were not. If raised, the decree decided the questions against the appellant. If not, he cannot raise them now. The decree is a final and complete adjudication of the rights of the parties, and it cannot be varied in execution. In awarding mesne profits, the lower Court has omitted to award them for two years with interest thereon.

#### JUDGMENT.

SARGENT, C.J.—We think that the District Judge was wrong in not investigating the questions between the parties relating to the deductions claimed by the defendant on account of the Government assessment and local cess paid by him and also on account of the *vero* and *kharajat* payments. The learned Judge was of opinion that to investigate these questions would be “to go behind the decree,” and that it was not competent to him to do that in the course of the execution of the decree. The decree however, awarded the plaintiff mesne profits of the lands claimed [39] in the suit, and such profits can only be ascertained after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. It is hardly necessary to cite authorities for this proposition, but reference may be made to those which were relied on by the Advocate General. See *Mayne on Damages*, 4th Ed., p. 420, and the cases there cited. It was, therefore, the duty of the Court executing the decree to inquire into the payments which the defendant alleged he had made on this account, and also to determine the question whether, as alleged by the plaintiff, the lands forming the subject-matter of the suit were rent-free.

As regards the other question touching the *vero* and *kharajat* payments, it cannot be said that that was determined by the decree. The defendant's case on that point would have afforded no proper defence to the suit as a suit in ejectment. No doubt, there was a prayer for mesne profits also made in the plaint, and that prayer was granted by the Court. But the details of the item of Rs. 700 allowed by the Court as the annual mesne profits of the lands, are not set forth in the judgment of the Court, and it is, therefore, impossible to say that the right to this

1892  
JAN. 18.  
—  
APPEL-  
LATE  
CIVIL.  
—  
17 B. 35.

1892  
 JAN. 13.  
 —  
 APPEL-  
 LATE  
 CIVIL.  
 —  
 17 B. 35.

particular deduction claimed by the defendant was adjudicated on by the Court. In a very recent case of *In re Browne and Wingrove; ex parte Ador* (1) the debtors, who had jointly guaranteed to one Ador the payment with interest of a sum of £1,000 lent by him, presented a bankruptcy petition on which a receiving order was made, and ultimately a scheme of arrangement with the creditors was approved of by the Court. \*

\* \* Ador tendered a proof under the scheme for £1,000 principal and £11-16-8 interest down to the date of the receiving order. The trustee under the scheme rejected the proof as regarded the interest, and allowed it for the principal only, on the ground that the debtors had not guaranteed the payment of interest. Ador did not appeal from this rejection. On the case coming up before the Court of appeal to determine for what amount Ador could prove, and how the dividend payable was to be calculated, it was argued for the [40] trustee under the scheme that the matter of the claim for interest was *res judicata* "by reason of the trustee's rejection of the proof for £11-16-8 interest and the appellant's omission to appeal against the rejection" within the time allowed. But Lindley, L. J., having held that the guarantee extended to the interest as well as the principal, proceeded to say: It was contended that an order had been already made, which was inconsistent with this view, and that that order not having been appealed from, it was not competent to the appellant to contend that the interest was guaranteed. The order in question, however, related only to a sum of £11-16-8 for interest up to the date of the receiving order, and the appellant is content to have that sum rejected. The point now before the Court is a totally different one, and ought to be decided upon its merits, although that course unquestionably renders it necessary to reconsider the construction of the letter in question." In the present case there is even less ground than there was in *Ex parte Ador* for applying the rule of *res judicata*, because there is not here any evidence to show that the question as to the payments in question was in truth adjudicated on by Mr. Walker. And there is, of course, no attempt now on the part of the defendant to get rid of the order to pay Rs. 700 per annum as mesne profits for the period to which Mr. Walker's order in terms applies.

The order of the Court below must, therefore, be reversed, and the matter remitted for the mesne profits to be ascertained according to the principles now laid down. In the view, which we have taken, we have not considered it necessary to hear any argument with respect to the other objections of the appellant to the order of the Court below. But the parties agreeing to this course, we direct that the Court below should take an account of the mesne profits for the years 1940 and 1946 in the present proceeding, and that interest should be allowed to the plaintiff on the amount of mesne profits which the Court may award. Costs including the costs in this Court to be dealt with by the Court below.

*Order reversed.*