

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Sadasiva Pillai v. Ramalinga Pillai, from the High Court of Judicature at Madras; delivered 22nd June, 1875.

Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

SHUNMOOGA PILLAI and Chiddunbrun Pillai were cousins, and the only members of a joint and undivided Hindoo family. Shunmooga died first, and in 1858 the Appellant, claiming to be his adopted son, brought a suit to enforce his rights against Chiddunbrun, who denied the validity of the alleged adoption. The suit was in its nature one to establish the Plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion, that is to say, from the Fusli year 1267, corresponding with 1857-58, but did not claim mesne profits for the subsequent years.

On the 11th of June, 1859, the Civil Judge of Cuddalore made a Decree in the Plaintiff's favour, which affirmed his title as adopted son of Shunmooga, awarded to him a moiety of the joint estate, including certain lands, and the sum of rupees 4,395 : 6 : 7½ as his share of the mesne profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this Decree to the High Court of Madras, which, by its Decree dated the 24th of September, 1860, dismissed the Defendant's Appeal

and modified the Decree of the Civil Court by awarding to the Plaintiff a further sum of rupees 3,494 : 4 : 1 as the value of his share in certain jewels and other movable property. It left the Decree of the Civil Court untouched in respect of the mesne profits of the immovable property.

The Defendant appealed against the Decree of the High Court to Her Majesty in Council. His Appeal abated on his death in 1862, but was revived by his son, the present Defendant, and was finally dismissed by an Order in Council in February 1864. This antecedent litigation, therefore, has conclusively established the title of the Plaintiff to whatever he can claim under the Decree of the 11th of June, 1859, as varied by that of the 24th September, 1860.

In September, 1864, the Plaintiff commenced the proceedings out of which this Appeal has arisen, in order to obtain execution of the Decree made in his favour. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the Decree, including the mesne profits for the Fusli year, 1267, with the interest thereon; and also to have execution for the two further sums of rupees 48,075 : 14 : 1, and rupees 15,890 : 15 : 7, the first being the alleged amount of mesne profits for the six years from Fusli, 1268, to Fusli, 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the Decree except the two last mentioned items; or, such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the Respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court dated the 31st of January, 1872, which awarded to the Plaintiff the sum of rupees 36,223 : 6 : 2 for mesne profits, but rejected his claim for interest thereon.

Against that order both parties appealed, the Plaintiff insisting that he was entitled to more than

had been awarded to him for mesne profits, and also to interest on such profits; the Respondent for the first time contending that inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the Plaintiff in the Decree, the Civil Judge had no jurisdiction to award them under section 11 of Act 23 of 1861, the enactment under which he had proceeded, and taking other objections to the Order.

On the 28th of June, 1872, the High Court of Madras disposed of these appeals by reversing the Order of the Civil Court on the ground that under the Decree in the original suit mesne profits subsequent to 1858 were not recoverable. The present Appeal is against the last mentioned Order.

The first question to be considered is the construction to be put upon the 11th section of Act XXIII of 1861, of which the material portion is in the following words: "All questions regarding the amount of any mesne profits which, by the terms of the Decree, may have been reserved for adjustment in the execution of the Decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit, between the date of the suit and the execution of the Decree, . . . and any other questions arising between the parties to the suit in which the Decree was passed, and relating to the execution of the Decree, shall be determined by order of the Court executing the Decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is contended, on behalf of the Appellant, that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the suit and the execution of the Decree," are wide enough to embrace, and ought to be taken to embrace, the claims now under consideration. On the other hand, the learned Counsel for the Respondent insist that the word "payable" is to be read as "payable under the Decree," and have cited numerous cases to show that, notwithstanding some earlier decisions to the contrary, all the High Courts of India have now accepted as settled law these propositions: 1st, that where the Decree is silent touching

interest or mesne profits, subsequent to the institution of the suit, the Court executing the Decree cannot under the clause in question assess or give execution for such interest or mesne profits; and 2nd, that the Plaintiff is still at liberty to assert his right to such mesne profits in a separate suit. That this construction has now for several years prevailed in the High Court of Calcutta is shown by the full bench ruling of the 13th of September, 1866, 6 W. R., p. 109, the decision of the 18th of June, 1868, 1 Beng. L. R., 138, and numerous other cases. That it has been adopted by the other High Courts is shown, as to that of the North-West Provinces, by the decision of the 10th of November, 1869, cited by Mr. J. Kemp, in the 22 W. R. p. 260; as to that of Madras, by the full bench ruling of the 10th of December, 1867, 4 Madras, H. C. R. 257; and as to that of Bombay, by the full bench ruling of the 10th of December, 1867, 4 Bomb., H. C. R., 181, followed by the decision of the 15th of June, 1869, 6 Bomb., H. C. R. 109.

The alleged *consensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure,—it being admitted that the Plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the **claim to interest** on the subsequent mesne profits **which is raised** by the present Appeal.

It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the Plaintiff's claim out of the general rule; and are sufficient to support the order of the Civil Court of the 31st of January, 1872. And their Lordships will now proceed to consider what those circumstances are, and the legal effect of them.

The Decree of the 16th of June, 1859, conclusively established the right of the Plaintiff as against the Defendant to a share in the lands forming part of the joint estate, and to the mesne

profits attributable to that share for the Fusli year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands of which he has obtained possession, and to mesne profits on those lands from a certain date, cannot be impugned. Had there been no Appeal, and the Decree had been followed by immediate execution, the Plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arisen, would have been those for the year which elapsed between the date of the institution of the suit and that of the Decree. Execution was suspended, but not necessarily suspended by the Appeals, and the Defendant could only remain in possession on the terms of giving security for the execution of the Decree, should it be affirmed against him.

Such being the legal position of the parties, the Plaintiff, on the 8th of December, 1869, presented a Petition (p. 78) to the Civil Judge of Cuddalore, claiming, in addition to the mesne profits specifically given by the Decree, a certain sum as the then ascertained mesne profits for the Fusli year 1268 (being that which immediately followed the institution of the suit), and a further sum for the mesne profits not yet ascertained for the Fusli year 1269; and praying that, should the Defendant fail to give security for the subsequent profits, security to abide the event of the Appeals should be taken from the Plaintiff, and that he should be allowed to take out immediate execution. A counter Petition was filed, and other proceedings had; but ultimately an order of the Court was made, under which the Defendant executed the instrument of the 26th of January, 1860, which is set out at p. 81 of the Record.

The High Court made its Decree disposing of the appeals in August 1860; and on the 11th of December in that year the Plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of Cuddalore, praying that the Defendant might give further security to cover both the additional sum awarded to the Plaintiff by the Decree of the High Court, and the mesne profits of the lands for the current

Fusli year 1270; and that in default of his doing so security to abide the event of the Appeal might be taken from the Plaintiff, and he be allowed to execute the Decree. Upon this second application an Order of the Court was made, under which, on the 19th of March, 1861, the Defendant executed the further security which is set out at p. 85 of the Record.

The original Defendant died, and the Appeal was revived by the Respondent as his son and heir some time in 1862.

On the 29th of January, 1863, the Plaintiff applied again to the Civil Court of Cuddalore, praying that the Respondent, as the heir of the original Defendant, should give security for the mesne profits for the Fusli years 1271 and 1272, with the usual alternative that, if he should fail to do so, security to abide the event of the Appeal should be taken from the Plaintiff, and he be allowed to have execution. On this application an Order of the Court was made, under which, on the 25th of April, 1863, the Respondent executed the document at p. 87 of the Record.

That instrument is addressed to the Civil Court of Cuddalore, is entitled "A Ready Money Security Bond respectively executed by the Respondent as son and heir of the original Defendant," and is in these words:—

"Pursuant to the Order passed by the Court requiring me to furnish security for the two Fuslies 1271 and 1272, the probable amount whereof has been put down at rupees 9,880 : 12 : 11 for both the Fuslies, in original suit (O. S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original Decree comes to be executed. Failing to do so, I consent to my property hereunder mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of rupees 9,880 : 12 : 11 rupees 4,616 : 15 : 11, which is the surplus in the security furnished in 1270, the remainder is rupees 5,264 : 13 : 0; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original Defendant are substantially to the same

effect. They are also addressed to the civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover, and point even more plainly to the ascertainment of the amount of such profits when the Decree should come to be executed, and to their realisation, if not then paid, by the Court. The effect then of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the Appeal, he will, if the Appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shown by the earlier proceedings in execution, and in particular by the Respondent's counter petitions of the 13th of October, 1864, and the 25th of April, 1868. (Record, pp. 9 and 31.) By the first of these the Respondent, not disputing his liability for the six years' mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement: "The Plaintiff now claims mesne profits for the years subsequent to the Decree. Though this Petitioner is bound to pay the same, still the amount asked by the Plaintiff is excessive, and has been fixed by him at his pleasure;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the Respondent in the grounds of Appeal filed by him in May 1872. That the Respondent should have come under the obligation supposed; that the Plaintiff should have failed to apply either to the Civil Court or to the Appellate Court for the amendment of the original Decree by making it a Decree for mesne profits subsequent to the institution of the suit; and that the Respondent should have omitted whilst the proceedings in execution were pending in the Civil Court to take the objection now taken to them, are all circumstances which the fact that up to December 1867 the wider construction for which the Appellant contends was put upon the 11th section of the Act of 1861 by the Courts of the

Presidency of Madras, and regulated their practice, goes far to explain. But if the Respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a Statute which has since been pronounced to be erroneous.

Their Lordships will now consider some of the objections which have been taken to the conclusion that the Respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) "security bond" was alone the act of the Respondent, and a distinction was taken between his obligation under that, and those incurred by his father under the two other instruments. Their Lordships, however, observe that these are not mere bonds of the father, in respect of which the Respondent, as heir, might be liable in the ordinary way. They are proceedings in Court importing a certain liability to be enforced in the suit against the Defendant to that suit. By reviving the Appeal the Respondent substituted himself for his father as Defendant in the suit; and assumed the position of Defendant, with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shown by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the Lower Court, which resulted in these security bonds, were irregular; that after the Appeal to the High Court the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but, whether it be so or not, it comes too late. It was never taken in the Lower Court where the proceedings were had. There was no Appeal from the orders of that Court, which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the Appellant.

Again, Mr. Norton argued that the proceedings of the Civil Court of Cuddalore in the appointment

of the Commission, and the assessment of the mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. Ellis, the then Judge, in January, 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. Ellis, or his successor, Mr. Hodgson, was to give the Plaintiff execution as prayed by his petition, but to give it piecemeal, and as it could conveniently be given. The order in question gave him execution for the ascertained sums to which he was entitled under the Decree. In December, 1865, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by inquiry. The same proceedings would probably have been had if the Decree had expressly given the mesne profits subsequent to the institution of the suit under section 196 of the Code of Procedure.

Upon the whole, their Lordships are of opinion that the Respondent, by the proceedings in question, did come under an obligation to account in this suit for the subsequent mesne profits of the Appellant's land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act of 1861, which now prevails in Madras. They conceive that this liability made the accounting "a question relating to the execution of the Decree," within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel the Respondent cannot now be heard to say that the mesne profits in question are not payable under the Decree. Nor do they feel pressed by the observations made by Mr. Justice Markby in the case reported in the 4 Beng. L. R., p. 113.

The Court here had a general jurisdiction over the subject matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of "*Pisani v. the Attorney-General of Gibraltar*, 5 L. R., P.C. 516," in which the parties were held to an agreement that the questions between them should be heard and

determined by proceedings quite contrary to the ordinary *cursus curiæ*.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court which is under appeal ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the Plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the Plaintiff; if it were unsuccessful, the Respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this Appeal; since in such a suit the Plaintiff might recover interest.

With the claim for interest made by the present Appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the Appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the Plaintiff's share in the outstanding debts. On the other hand, the Respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its Order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the Order of the High Court of the 28th of June, 1872, and in lieu thereof to order that the Appeal against the Order of the Civil Court of Cuddalore of the 31st of January, 1872, do stand dismissed, and the said order affirmed, and that each party do pay his own costs, both of the Appeal to the High Court and of this Appeal.

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Rajah Ameer Hussun Khan v. Mukhdoom
Singh and others, from the Court of the
Judicial Commissioner of Oudh; delivered
Friday, June 25th, 1875.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from a decision of the Judicial Commissioner of Oudh which affirmed the judgments of the Assistant Commissioner, and of the officiating Commissioner who heard the case on appeal from the Assistant Commissioner.

The suit was brought by Mukhdoom Singh, Mohun Singh, and Esree Singh against the Rajah Ameer Hussun Khan to redeem talooka Rawapoor, which they alleged had been mortgaged to one Oomrao Singh for Rs. 3,067, and after his death had got into the possession of the Rajah Nawab Ali Khan, in consequence of a sub-mortgage from the widow of Oomrao Singh. The Defendant (the present Appellant) is the son of the Rajah Nawab Ali Khan, and his case appears to be that the Rajah was in possession from a period prior to the settlement in 1858; that in that year he was admitted as talookdar to the talook, and he claims to hold it free of any claim on the part of the original mortgagors.

That the Respondent, Mohun Sing, was entitled to the talook, and mortgaged it to Oomrao

Singh, is not disputed in the present Appeal, nor was it disputed in the Courts below. The mortgage made to Oomrao Singh is of the English date of July 1846. It is a usufructory mortgage of a very formal and precise kind, and states that Mohun Singh, the son of Purtab Singh, mortgaged the talook to Thakoor Oomrao Singh for the sum of Rs. 3,067, and fixes the amount of interest at "rupees three and two annas per cent. per month." The mortgage also states that possession had been delivered to the mortgagee, and it contains this clause:—"I moreover agree that whenever I be disposed to redeem I engage to repay every fraction of a pie of the principal and interest in a lump sum, at the time when crops are not standing on the ground at the end (fallow portion of the agricultural year) of the month of Jeith, and then have the estate redeemed."

It appears to be clear that the mortgagee, Oomrao Singh, was put into possession. It is admitted that as against Oomrao Singh the right to redeem has been in no way foreclosed or barred, and the question, and the only question in this case, upon the merits, is whether the Rajah Nawab Ali Khan came in under the mortgagee's title, or whether he came in as a stranger to it, so that he can hold the estate by virtue of title or possession against both the mortgagor and the original mortgagee. The Assistant Commissioner and the officiating Commissioner have found as a fact that there was a sub-mortgage from the widow of Oomrao Singh to Rajah Nawab Ali. It is said that they have found this fact upon insufficient evidence. Undoubtedly the evidence is slight, but upon a review of it, and giving full weight to the considerations which have been presented by the learned counsel for the Appellant, their Lordships think that there is enough, in the absence