

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Kirpal Shukul v. Mussumat Rup Kuari, from the High Court of Judicature for the North-Western Provinces of Bengal, delivered 1st December 1883.*

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Present :

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

This is an appeal from an order of a Divisional Bench of the High Court of Judicature for the North-Western Provinces of Bengal, dated the 10th of August 1880, by which an order of the Subordinate Judge of Gorukhpore and an order of the Judge of the same district were reversed. The order of the Subordinate Judge was dated the 10th of May 1879, and was made upon a claim by Ram Kirpal Shukul, the present Appellant, for mesne profits in execution of a decree of the late Sudder Court, by which a decree of the Principal Sudder Ameen of the district of Gorukhpore, dated the 12th June 1862, in a suit in which Shumbu Pershad Shukul, under whom the Appellant claims, was the Plaintiff and the present Respondent was the Defendant, was upheld upon appeal. Upon the claim for execution being made, a question arose whether or not the decree in execution awarded future mesne profits.

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That question had been determined in the affirmative on the 20th December 1867 by Mr. Probyn, the Judge of Gorukhpore, in a previous stage of the proceedings for execution of the same decree by the widow of the said Shumblu Pershad Shukul, who in consequence of his death was the holder of the decree, and had been declared entitled against the present Respondent to proceed with the execution. The Subordinate Judge considered himself bound by the decision of Mr. Probyn, and he held that the debtor's objection in respect of mesne profits and his prayer for the exclusion thereof should be disallowed, and that the officer should prepare a correct account of the mesne profits. He accordingly made the order of the 10th May 1879 to that effect.

The order of the Subordinate Judge was affirmed on appeal by order of the Judge, dated the 26th July 1879. The order of the Subordinate Judge, and that of the Judge affirming the same, were appealed to the High Court, and came on to be heard before a Divisional Bench, who referred to a Full Bench the question whether the law of *res judicata* applies in proceedings in execution of a decree. The Full Bench, after referring to Section 13, Act 10 of 1877, answered the question in the negative, whereupon the Divisional Bench, on the 10th of August, ordered that the appeal be decreed, and that the orders of the Judge and the Subordinate Judge be reversed, and that the execution of the decree for mesne profits be disallowed.

The judgement of the Divisional Bench upon which the order was drawn up was in the following terms :—

“The Full Bench has expressed an unanimous opinion that the law of *res judicata* does not apply in proceedings in execution of decree.

“The question which the Lower Court held to be finally determined by Mr. Probyn's decision, dated 20th December 1867, is therefore open to re-adjudication by us; and, on

examining the terms of the late Sudder Court's decree, we are constrained to declare that mesne profits are not awarded by it.

"The execution of the decree for mesne profits must therefore be disallowed, and we need not consider any other matters.

"The appeal is decreed by reversal of the orders of the Lower Courts ; but, under the circumstances, we direct that the parties bear their own costs in all the Courts."

It is unnecessary for their Lordships to express any opinion as to the answer of the High Court to the question propounded by the Divisional Bench, though they must not be understood as concurring in it. (*See* 8, Law Reports; Indian Appeals, 133.) The question, if the term "*res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgement in a suit is binding upon the parties in every proceeding in that suit, or as a final judgement in a suit is binding upon them in carrying the judgement into execution. The binding force of such a judgement depends not upon Section 13, Act 10 of 1877, but upon general principles of law. If it were not binding there would be no end to litigation. The judgement or order of Mr. Probyn was an interlocutory judgement, he merely held that according to the proper construction of the decree of the Sudder Court mesne profits were awarded by it. He did not assess the amount. That had to be done in a subsequent stage of the proceedings in execution. The report of the Mohurrir of the 11th March 1879 gives a detail

of the proceedings by which the Plaintiff in the suit, in which the Sudder Court gave judgement, and those claiming under him had been striving without success to obtain execution of the decrees of the Sudder Court from the time of Mr. Probyn's judgement of the 20th December 1867 to the 11th September 1878, when the application for execution upon which the orders under consideration were made was presented. In the course of those proceedings the case was, for various reasons, several times "struck off," that is to say, struck off the file of the business pending in the Court of the Subordinate Judge; but the application for execution, upon which Mr. Probyn's judgment was pronounced, was not dismissed, or finally disposed of. Mr. Probyn's judgement and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgement did not lie to the High Court. If so, the judgement was final; if an appeal did lie and none was preferred the judgement was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if, after endeavouring for 11 years to obtain execution for mesne profits in accordance with a judgement of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgement was erroneous, and that they were not entitled to mesne profits. It was contended at the bar, on behalf of the Respondent, that if the decree of the Sudder Court did not award mesne profits. Mr. Probyn had no jurisdiction to hold that it did, and consequently that in that case the subsequent orders, which were based upon Mr. Probyn's judgement, were properly reversed by the High Court, who were correct in putting their own construction upon the decree of the Sudder Court. Their Lordships cannot concur

in that view. The decree of the Sudder Court was a written document. Mr. Probyn had jurisdiction to execute that decree, and it was consequently within his jurisdiction, and it was his duty, to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them—8, Law Reports, Indian Appeals, 123. It is not necessary, nor would it be correct, for their Lordships to put their construction upon the decree of the Sudder Court. If the Subordinate Judge and the Judge were bound by the order of Mr. Probyn in proceedings between the same parties on the same judgement, the High Court were bound by it, and so also are their Lordships in adjudicating between the same parties.

For the above reasons their Lordships are of opinion that the High Court was in error in putting a construction upon the decree at variance with that of Mr. Probyn, and reversing the orders of the Judge and Subordinate Judge. The High Court acted as if they had been sitting upon an appeal against the order of Mr. Probyn, but they were not so sitting.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the order of the High Court, and to order that the orders of the Judge and Subordinate Judge be affirmed, and that the

Respondent do pay the costs incurred in the High Court by the present Appellant. The Respondent must also pay the costs of this appeal.

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