

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Kalka  
Singh and another v. Paras Ram, from the  
Court of the Judicial Commissioner of Oudh,  
Lucknow ; delivered 8th December 1894.*

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Present :

LORD HOBHOUSE.

LORD SHAND.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

It is not necessary to state the details of the earlier litigation out of which the present case has arisen. Suffice it to say that prior to and in the month of April 1877 Kalka Singh and Chet Singh the present Appellants held a decree dated the 10th October 1866 for recovery of a seven annas share of the Baniamau Taluq, the remaining shares being held by Debi Singh and Daryao Singh in certain proportions. The decree of the 10th October 1866 did not contain any order or direction for payment of mesne profits.

The present Appellants however made an application in their suit for payment to them of mesne profits accrued during the time they were out of possession after the decree of the 10th October 1866. On the 3rd April 1877 the Deputy Commissioner made an order in assumed execution of the decree giving the decree-holders mesne profits. This Order is said to have been affirmed by the Commissioner, and it is said that the Judicial Commissioner rejected a second appeal as inadmissible.

The Order of the 3rd April 1877 was not pro-

ceeded with for some reason, and on the 10th August 1883 an application to proceed upon it was dismissed by the District Judge on the ground that there was no decree giving mesne profits to the applicants, and that decision was affirmed by the Judicial Commissioner on the 15th February 1884. Mr. Arathoon contended that the decision of the District Judge and Judicial Commissioner was beyond their jurisdiction and ought to be disregarded, on the technical ground that they were bound by the Order of the 3rd April 1877. Their Lordships however cannot take this view. It is not disputed that the Court executing the decree of the 10th October 1866 had in fact no power to award mesne profits not mentioned in that decree, and their Lordships agree with the Judicial Commissioner that the Order of the 3rd April 1877 was no decree and was made without jurisdiction, and the application to the District Judge was therefore properly dismissed.

In the meantime the bonds which have given rise to the questions in the present Appeal had been executed. The present suit is brought by the minor son of one Munshi Salig Ram deceased against the Appellants upon a bond dated the 23rd August 1879. It will be convenient in the first instance to mention two earlier bonds. On the 1st February 1875 the Appellant Kalka Singh gave Salig Ram a bond for Rs. 2,500 expressed to be due from Kalka Singh to Salig Ram, and on the 11th December 1877 the same Appellant executed a second bond to Salig Ram, who it should be mentioned was a pleader and had acted for the Appellants in the previous litigation. The material part of this bond is as follows :—

“ Rupees 2,000, on account of pleaders fee in the suit for mesne profits, are due from me to Salig Ram, pleader, son of Mithu Lal, caste Kayeth, resident of Tarimpur, and whereas a decree for mesne profits has already been passed and the

amount thereof remains to be determined after examining the accounts, therefore I do hereby declare that when the mesne profits of 7 annas share in Ilaka Baniamau are realised, I shall pay Rs. 2,000, a moiety of which is Rs. 1,000, to the said Lala Salig Ram, without any objection and without interest, as soon as any amount is realised by me, and that, if when the mesne profits are realised, I do not pay the aforesaid amount, I shall pay interest thereon at the rate of 2 per cent. per mensem from the date of realisation."

The operative part of the bond of the 23rd August 1879 which is now in suit, is as follows:—

"Whereas Rs. 5,500 on account of bonds, dated 1st February 1875, and 11th December 1877, are due from me to Salig Ram, son of Mithu Lal, Kanungo, resident and zemindar of Sikandarpur, District Shahjahanpur, at present residing in Narainpur, District Sitapur, and we have borrowed Rs. 1,500 in cash from the said Lala, the first condition is this that Rs. 5,000 we shall pay without interest on the 15th of the month of Magh, 1287 Fasli, and Rs. 2,000 we shall pay at the time of realization of mesne profits, for which a decree has already been passed in favour of us, the declarants, and in execution of which decree the property of Debi Singh and Daryao Singh, judgment debtors, has been attached."

The sixth and ninth conditions of the bond are as follows:—

"The sixth condition is this that, if at the time of realization of the aforesaid decreed mesne profits, (we) do not pay up the sum of Rs. 2,000 to the mortgagee, interest at 2 per cent. or Rs. 2,000 shall be due from us from the date of realization of the mesne profits, and the mortgagee shall have power to realise the sum of Rs. 2,000 with interest at 2 per cent. per mensem from any of my movable and immovable property he please.

"The ninth condition is this that, if (we) notwithstanding the mesne profits being realized do not pay the sum of Rs. 2,000 and interest at 2 per cent. from the date of realization of the mesne profits, the mortgaged share of the village shall not be deemed liable to redemption till the said amount with interest thereof has been paid up."

It will be observed that prior to the execution of either the bond of 1877 or that of 1879 the Order of the 3rd April 1877 had been made and stood unreversed although nothing had been done in pursuance of it.

It is stated in the Record that after the Order of the 15th February 1884 the present Appellants

applied to the Judicial Commissioner for leave to appeal to Her Majesty in Council against that Order, but the application was refused. They did not apply to Her Majesty in Council for special leave to appeal. But on the 22nd July 1884 Debi Singh and the Appellants signed a deed of release or compromise for settlement of the litigation between them. Thereby Debi Singh agreed to withdraw a petition he had presented for a revival of his appeal against the Appellants' decree of the 10th October 1866 and to waive all further claim to the prosecution of such appeal. On the other hand the Appellants renounced all claim to mesne profits on their decree of the 10th October 1866 and specially agreed not to prosecute any appeal to Her Majesty in Council against the Judicial Commissioner's Order of the 15th February 1884. And each party gave up all claims to costs against the other.

The present suit was commenced in November 1887. By his plaint the Plaintiff and present Respondent sued on the bond of the 23rd August 1879 to recover the sum of Rs. 17,880, the whole amount claimed to be due for principal and interest, treating the bond as a subsisting continuing obligation for payment of the Rs. 2,000 and interest as well as for the larger sum. He also alleged that the Defendants had withdrawn from the decree for mesne profits against the judgment debtor by the deed of compromise. The Defendants and present Appellants pleaded misrepresentation fraud and want of consideration to the whole demand. They denied that they had waived their claim against the judgment debtor for mesne profits, and averred that there was no decree for mesne profits.

On the 12th November 1888 the District Judge gave judgment for the Respondent for the whole amount sought by the plaint, and

his decree was confirmed by the Judicial Commissioner on the 16th June 1890 with a small variation as to rate of interest. The learned Commissioner held that the Appellants by their own deliberate act prevented the happening of the event on the occurrence of which the Rs. 2,000 were to become payable to the Respondent, and he was therefore entitled to put an end to the contract and sue the Appellants for damages.

This is an appeal against the whole decree. A certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs. 10,000. The Appellants' Counsel however being satisfied that the appeal could not succeed as to the whole demand has by his printed case and at the bar confined his argument to the question of the Rs. 2,000 and interest thereon. In these circumstances Mr. Arathoon for the Respondent made a preliminary objection to the hearing of this appeal on the ground that the subject matter of it was now reduced below Rs. 10,000 and the appeal was therefore incompetent. Their Lordships cannot accede to this objection. On the one hand there is no doubt that if a certificate be granted or leave to appeal given by the Court below in a matter in which they have no jurisdiction it would be the right and in ordinary circumstances the duty of their Lordships to dismiss the appeal as incompetent. But on the other hand if an appeal is competently made and it appears to their Lordships after argument or is admitted at the bar that the greater part of it must fail it is the constant practice of their Lordships to give relief in respect of the portion in which the Appellant succeeds, notwithstanding that the subject matter of that portion of the appeal may be less than the prescribed limit. Their Lordships see no reason to doubt the *bonâ fide* intention to appeal against the whole decree, and

they regard this case in the same way as if Mr. Mayne had opened the whole case to their Lordships, and his client ought not to be in a worse position because in the exercise of his discretion and availing himself of his experience the learned Counsel determined not to waste the public time by doing so.

On the merits of the case their Lordships cannot agree with the learned Judicial Commissioner that the Appellants were under any obligation to apply to Her Majesty in Council for special leave to appeal against the Order of the 18th February 1884, or that by their deliberate act in not doing so or in executing the deed of compromise they prevented mesne profits being recovered. The truth is there was no decree for mesne profits, and the Court could not under the guise of execution either add words to the decree or give it a new and extended effect. There was no question of a fresh suit for the recovery of the mesne profits. And indeed it appears that such a suit would have been barred by the Limitation Act at the date of the deed of compromise, and could not therefore have been commenced with any prospect of success. It is plain when the facts are looked at that there was no real concession made by the Appellants in the deed of compromise, because the right purporting to be given up had no existence. Their Lordships are therefore of opinion that the obligation for payment of the Rs. 2,000 and interest out of mesne profits never took effect or became enforceable, and that it is not proved that the non-occurrence of the condition was due to the conduct or default of the Appellants.

It was suggested in the course of the argument that although the payment of the debt in the mode and form agreed upon had become impossible the obligation to pay the debt (the existence and amount of which is admitted in the bond) remained and might be enforced against the

Appellants. In the first place their Lordships observe that no such case is raised in the pleadings or apparently was argued in the Courts below, and further that their Lordships have only a translation of the instrument containing the admission. It is impossible to say that the case if put forward in the Courts below might not have been met by some evidence, or that the exact wording of the bond might not have been important from this point of view. In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case; and their Lordships think in the present case that the admission of the debt by which the obligation is prefaced in the bonds of 1877 and 1879 does not import an unqualified or unconditional promise to pay, but is referable to the particular obligation, or (in other words) is introduced for the purpose only of fixing the amount for which the obligation is given, and which the obligor agrees to pay in the stipulated manner and not otherwise.

Their Lordships therefore will humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by omitting from the amount decreed to the Respondent the sum of Rs. 2,000 and the interest on that sum, and the direction as to the costs of the appeal. This will not disturb the order for payment of costs in the decree of the District Judge.

With regard to the costs of the appeal to the Judicial Commissioner and of this appeal, their Lordships consider that, inasmuch as in the result the Appellants have partly succeeded and partly failed, the parties should bear their own costs, and they will so advise Her Majesty.

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