

*Privy Council Appeal No. 49 of 1940*  
*Allahabad Appeal No. 13 of 1937*

**Kunwar Rohani Ramandhwaj Prasad Singh** - - *Appellant*

*v.*

**Thakur Har Prasad Singh and others** - - - *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE AT ALLAHABAD**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL DELIVERED THE 24TH JUNE, 1943

*Present at the Hearing:*

LORD MACMILLAN  
LORD PORTER  
LORD CLAUSON  
SIR GEORGE RANKIN  
SIR MADHAVAN NAIR

[*Delivered by SIR GEORGE RANKIN*]

The appellant is the proprietor of an estate called the Beswan estate at Aligarh. In 1923 the third respondent Mahabir Singh, herein called "the plaintiff," brought a suit *in forma pauperis* claiming the estate and seeking to eject the appellant's elder brother who was then in possession. The elder brother died while the suit was pending and the appellant who was a minor at the time was substituted in his stead as the defendant and the Court of Wards acted on his behalf. The trial Court gave decree for the plaintiff on 2nd June, 1925, but on 12th February, 1929, the High Court at Allahabad reversed this decision and dismissed the suit. Their decree was confirmed upon appeal to His Majesty in Council.

On 16th February, 1926, while the case was pending before it the High Court ordered that the plaintiff should be put in possession of the estate in execution of the trial Court's decree on his depositing in the trial Court security in the sum of Rs.42,000. On 1st April, 1926, one Jiwan Singh, father of the first respondent Har Prasad Singh, executed a security bond which is the foundation of the present proceedings. This bond was not expressed to be in favour of any specified individual nor was any person other than Jiwan Singh mentioned as a party thereto, but by it Jiwan Singh hypothecated a number of items of zemindari property and the terms of the security were as follows:—

"If the decree passed by the Court of first instance is amended or set aside by the Appellate Court, the plaintiff-respondent shall re-convey the property, whereof he shall obtain possession under the security bond in the same condition as it is at present and shall pay, according to the orders of the Appellate Court, such amount of mesne profits in respect of the property in dispute as may be found due by the plaintiff decree-holder when the possession of the property is delivered. If the plaintiff fails to comply with the orders of the Appellate Court, the amount may be recovered by auction sale of the property hypothecated under this deed which is specified below. If the sale proceeds be inadequate, my person and other property shall remain liable to the extent of the amount of security and I, the executant, in person and my heirs and representatives shall remain liable for payment of the same."

On these clauses it may be convenient to observe that the only personal liability assumed by Jiwan Singh arises in the event of the charge failing to yield a sum of Rs.42,000 and is in respect of any such deficiency. Also that while the mesne profits for which the security is given must be payable in respect of the appellate Court's decree, their Lordships do not construe the bond as meaning that they must be assessed by the appellate Court itself—a procedure which would be contrary to the usual practice and to the

course laid down by the Code. When a decree is varied or reversed in circumstances giving rise to a right by way of restitution, the right arises automatically and is claimable under section 144 of the Code before the trial Court. In accordance with the usual practice the appellate Court's decree made no mention of mesne profits by way of restitution though it is the origin and source of the right.

The plaintiff was put in possession of the Beswan estate in July, 1926, and after the trial Court's decision had been reversed possession was in 1929 returned to the Collector and to the Court of Wards for the appellant. Meantime Jiwan Singh had died in 1928. In April, 1930, the Collector settled with the second respondent Musammat Maharani Kuer, the plaintiff's aunt, as the plaintiff's guardian, the sum due for mesne profits while the plaintiff had been in possession. It was fixed at Rs.24,722 and paid without any order having to be obtained from the Court. A receipt therefor dated 23rd April, 1930, was granted by the Collector and was registered in due course. In 1933 the Court of Wards released the estate to the appellant who had attained majority and obtained from him a *safinama* dated 10th March, 1933, discharging them from all obligations to or claims by him.

In April, 1933, the appellant filed in the trial Court—the Court of the Subordinate Judge at Aligarh—the application which is now before their Lordships. It is "in a tabular form" under Order XXI, rule 11, with the addition of a statement of facts in twenty-one paragraphs. It is headed "Application under sections 145, 151 C.P.C.", which are as follows:—

" 145. Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47:

" Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

" 151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The application asked relief against the first respondent Har Prasad Singh only, stating that the other two respondents, Musammat Maharani Kuer and Mahabir Singh had been formally impleaded.

The main claim is made against the first respondent as heir and sole legal representative of his father Jiwan Singh. It is a claim, based upon the security bond of 1st April, 1926, for mesne profits and damages due from the plaintiff in respect of the period of the plaintiff's possession of the estate from 1926-1929. This in the mouth of the successful defendant was a claim for restitution as against the plaintiff and for enforcement as against the surety of the security given therefor. No mention was made in the application of the settlement of April, 1930, or the sum of Rs.24,722 paid thereunder.

To this claim was, however, added another claim of a wholly different character arising out of an allegation that Jiwan Singh and Har Prasad Singh had themselves committed acts of mismanagement of the property between 1926 and 1929. For this an action for damages might lie, but such a claim had no place in an application for restitution or for execution. It was wholly misconceived and was not persisted in before the Board as a claim which could be enforced in these proceedings.

When this head of claim is eliminated and the claim upon the security bond is considered by itself, the figure of Rs.72,240 at which the mesne profits and damages were at first put in the application—it was later increased to Rs.1,23,448—can be seen at once to be excessive. No more than Rs.42,000 could be recovered upon the bond whether out of the property charged or otherwise—apart altogether from the fact that a sum of Rs.24,722 was paid in 1930.

The first respondent having set up the settlement of 1930 and various other matters by way of objection to the application, it was stated in reply by the present appellant that the settlement had been obtained from the Collector by fraud.

Shortly put, what has happened is that the learned Subordinate Judge on 28th February, 1936, dismissed the application as incompetent, and has in this been upheld by the High Court whose decree of 2nd December, 1936, is

now before their Lordships on appeal. The reasons given by both Courts are to the effect that the case made by the appellant is not within section 145 of the Code and can only be made in a suit. Upon examination of the matter it appears to their Lordships that the Courts in India were right in holding that the case is not within section 145 if only because the section applies only to the personal liability of the surety. But the appellant's claim is nevertheless one which cannot be made by a suit but can only be made by application to the trial Court under section 144 of the Code and under its inherent powers to enforce the security. The decision of the Board in *Raghubar Singh v. Jai Indra Bahadur Singh* (1919) L.R. 46 I.A. 228 was not cited in either of the Courts in India. It was there held that an instrument which does not bind the surety to any individual can only be enforced "by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money." The application now before the Board though it was headed by a reference to sections 145 and 151 really invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution under section 144 and to enforce the security by the method laid down in *Raghubar Singh's* case. It may be that the first respondent was not a necessary party to the assessment of mesne profits and damages under section 144 but he was a very proper party—all the more so as the plaintiff and his guardian were impecunious persons from whom the appellant did not attempt to extract anything. But this aspect of the appellant's claim was necessarily a matter for the trial Court and under subsection 2 of section 144 could not be made by separate suit, just as the application to enforce the security could not be made by another suit but had to be made in the plaintiff's ejectment suit. It was suggested that the appellant would have to show that the settlement of 1930 did not bind him and therefore he was obliged to proceed by suit; but there is no substance in that contention. Again, section 61 of the Court of Wards Act has no bearing upon the question between the appellant and the first respondent as is very properly admitted by learned counsel for the respondents. There is no reason why the appellant's case, brought before the only tribunal competent to deal with either part of it, should not be tried.

For this purpose the case must go back to the Court of the Subordinate Judge in order that he may in the presence of the first respondent assess the amount of mesne profits and damages due from the plaintiff Mahabir Singh in respect of the period of his possession of the estate (1926-1929). For this purpose it will be necessary to decide whether the settlement made with the Collector in April, 1930, is binding upon the appellant and in any event the sum paid thereunder, Rs.24,722, will be taken into account. When it has been ascertained whether the plaintiff still owes any and what sum for mesne profits and damages by way of restitution under section 144, the learned Subordinate Judge will be in a position to begin proceedings, if necessary, to enforce the charge created by the bond of 1st April, 1926, in the manner described by the Board's judgment in the case of *Raghubar Singh (supra)*. But these proceedings are to be confined strictly to the assessment of the sum for which the plaintiff is liable by way of restitution, and no claims against the first respondent or the estate of Jiwan Singh for damages for wrongful acts done by them or either of them are to be entertained except in so far as they come within the scope of that enquiry. The liability of the first respondent is solely that created by the bond of 1st April, 1926, and can in no event exceed Rs.42,000. Even if the sum due from but not paid by the plaintiff amounts to or exceeds Rs.42,000 it may be that the first respondent can claim credit for the sum already paid, Rs.24,722, by proving that it was paid by him or by his father's estate. The appellant will be held to the statement in his application which prevents him from seeking to enforce his claim against the plaintiff Mahabir Singh or his aunt Musammat Maharani Kuer, though these persons are necessary parties to the assessment of mesne profits and damages. The learned Subordinate Judge will have full power to require the appellant to amend his application so as to accord with what their Lordships have now indicated as the proper procedure.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decrees of the Courts in India set aside and the case remitted to the Court of the Subordinate Judge of Aligarh for disposal in accordance with the judgment. Each party will pay its own costs of this appeal and of the proceedings which have hitherto taken place in the Courts in India.

If any costs have been already paid under orders of the Courts in India they are to be repaid.



In the Privy Council

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KUNWAR ROHANI RAMANDHWAJ  
PRASAD SINGH

v.

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DELIVERED BY SIR GEORGE RANKIN

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