

Before Mr. Justice Blair and Mr. Justice Banerji.

MUHAMMAD UMARJAN KHAN (DEFENDANT) v. ZINAT BEGAM

(PLAINTIFF).\*

1903  
March 5.

*Mesne profits—Decree for mesne profits to be subsequently assessed—Application for assessment of mesne profits not an application in execution, but an application in the suit.*

Held that, where a decree awards mesne profits to be subsequently assessed, an application for the assessment of such mesne profits is not an application in execution of the decree, which does not become an "operative decree" until such assessment is completed, but is an application in the suit in which the decree is made. *Radha Prasad Singh v. Lal Sahab Rai* (1) and *Puran Chand v. Roy Radha Kishen* (2) followed. *Kallu Rai v. Fahiman* (3), *Tarsi Ram v. Man Singh* (4), and *Daya Kishan v. Nanhi Begam* (5) referred to.

IN this case the plaintiff had brought her suit for possession and mesne profits, and obtained a decree on the 30th of August, 1889, which was confirmed on appeal on the 18th of December, 1893. The plaintiff had asked the Court to decree mesne profits both past and future. The decree decreed the suit, giving a specified amount for past mesne profits, but was silent as regards future mesne profits. The judgment was a judgment decreeing the plaintiff's claim, which was for mesne profits both past and future. Possession was given on the 21st of September, 1894. The plaintiff then instituted a suit for mesne profits from the 31st of August, 1889, to September, 1894, but that suit was subsequently withdrawn. The plaintiff also made an application to have the decree brought into conformity with the judgment, and the decree was amended on the 23rd of February, 1899. That amendment gave the plaintiff a right to recover mesne profits from the date of the suit up to the date of possession. On the 3rd of May, 1899, the plaintiff applied for ascertainment of the amount of mesne profits so due. The Court of first instance (Subordinate Judge of Meerut) assessed the amount due to the plaintiff at Rs. 1,043-5-0, and an appeal from the Subordinate Judge's order was dismissed by the Additional District Judge.

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\* Second Appeal No. 331 of 1901, from a decree of Rai Kishun Lal, Additional District Judge of Meerut, dated the 5th of January, 1901, confirming a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 24th of March, 1900.

(1) (1890) I. L. R., 13 All., 53.                      (3) (1890) I. L. R., 13 All., 124.  
 (2) (1891) I. L. R., 19 Calc., 132.                (4) (1886) I. L. R., 8 All., 492.  
 (5) (1898) I. L. R., 20 All., 304.

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The defendant judgment-debtor thereupon appealed to the High Court.

Babu *Devendra Nath Ohdedar*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Rahmat-ullah*), for the respondent.

BLAIR and BANERJI, JJ.—This is an appeal from an order made by the Additional District Judge affirming an order of the Court of first instance for the ascertainment of mesne profits after commencement of suit. The circumstances under which the application was made were as follows. A suit was brought for possession and mesne profits, and a decree was passed on the 30th of August, 1889, which was afterwards confirmed on appeal on the 18th of December, 1893. The plaintiff had asked the Court to decree mesne profits, both past and future. The decree decreed the suit, giving a specified amount for past mesne profits, but was silent as regards future mesne profits. The judgment was a judgment decreeing the plaintiff's claim, which had been a claim for mesne profits, both past and future. An application was made, whether time-barred or not it is needless to inquire, for the purpose of obtaining future mesne profits. Possession was given on the 21st of September, 1894. The plaintiff then instituted a fresh suit for mesne profits from the 31st of August, 1891, up to September, 1894. The suit was withdrawn. An application having been made for amendment of the decree, in order to bring it into conformity with the judgment, that amendment was granted on the 23rd of February, 1899. That amendment gave the plaintiff a right to recover mesne profits from the date of the suit up to the date of possession. The application out of which this appeal arises was made on the 3rd of May, 1899, for the ascertainment of the amount of mesne profits so due.

The contention urged upon us by Mr. *Ohdedar* for the appellant is that that application was a proceeding in execution, and that the *terminus a quo* for applications in execution must be taken to be the date of the original decree. We have had cited before us a number of cases—*Kallu Rai v. Fahiman* (1), *Tarsi Ram v. Man Singh* (2) and *Daya Kishan v. Nanhi*

(1) (1890) I. L. R., 13 All., 124.

(2) (1886) I. L. R., 8 All., 492.

*Begam* (1) as supporting the contention that the date of amendment of the decree does not give a fresh starting point to limitation for an application in execution; and, indeed, we might be forced to that conclusion if we were of opinion that the application for the assessment of mesne profits was a proceeding in execution. In our opinion that question is concluded by authority to which we are bound to defer. In the case of *Radha Prasad Singh v. Lal Sahab Rai* (2) there are expressions from which it is manifest that their Lordships of the Privy Council look upon proceedings up to the assessment of mesne profits as being proceedings in the suit and not in the execution. They speak of the decree which has upon such an application been made to include mesne profits as having become an "operative decree." The only inference which we can draw from these words is that the decree was not an operative decree until the amount for which execution was to be had had been ascertained by the Court. The same view has been held by the Full Bench of the Calcutta High Court in *Puran Chand v. Roy Radha Kishen* (3). We are therefore face to face with an authority which we cannot dispute and which compels us to find that this is not an application in execution and therefore not an application to which article 179, of schedule ii of the Indian Limitation Act, No. XV of 1877, applies. It seems to us unnecessary to decide whether the general article 178, which provides for applications not otherwise dealt with, prescribes the limitation applicable to a case of this kind, because, assuming that it does so, the application of the 3rd of May, 1899, was well within the three years prescribed by article 178. That being so, we must dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1898) I. L. R., 20 All., 304.

(2) (1890) I. L. R., 13 All., 53.

(3) (1891) I. L. R., 19 Cal., 132.

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