

1891

ANANDA
CHANDRA
BHUTTA-
CHARJEE
v.
CARR
STEPHEN.

ultra vires and could not be made under section 144. That this is so has been accepted in this Court for a great many years, both under section 144 of the present Code and section 518 of the old Code. There is a whole current of decision to that effect with which we agree [see *Bance Madhub Ghose v. Wooma Nath Roy Chowdhry* (1), *Chunder Coomar Roy v. Omesh Chunder Mojoomdar* (2), *Sree Nath Dutt v. Unnoda Churn Dutt* (3), *Shurut Chunder Banerjee v. Bama Churn Mookerjee* (4), *Bradley v. Jameson* (5), *Gopi Mohun Mullick v. Taramoni Chowdhurani* (6), *Empress v. Prayag Singh* (7), *Abayeswari Debi v. Sidheswari Debi* (8)]. The learned vakeel for the opposite party before us has, however, relied upon a Full Bench decision of this Court in *Re Chunder Nath Sen* (9), but that case was considered and explained in the case of *Krishnar Mohun Bysack* (10), and in the case of *Gopi Mohun Mullick v. Taramoni Chowdhurani* (6) which was a case decided by a Full Bench composed of 12 Judges of this Court. The rule will be made absolute.

Rule absolute.

A. A. C.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

1891
Nov. 23.

PURAN CHAND AND OTHERS (DECREE-HOLDERS) v. ROY RADHA KISHEN (JUDGMENT-DEBTOR).*

Mesne profits, application for ascertainment of—Limitation Act (XV of 1877), arts. 178 and 179—Code of Civil Procedure Act (XIV of 1882), ss. 211, 212.

Neither article 178 nor article 179 of the Limitation Act applies to an application to ascertain the amount of mesne profits awarded by a decree in

* Appeal from order No. 123 of 1891, against the order of the District Judge of Patna, dated the 26th January 1891, reversing an order of Babu Karuna Das Bose, Subordinate Judge of that district, dated the 16th September 1890.

(1) 21 W. R., (Cr.) 26.

(2) 22 W. R., (Cr.) 78.

(3) 23 W. R., (Cr.) 34.

(4) 4 C. L. R., 410.

(5) I. L. R., 8 Calc., 580.

(6) I. L. R., 5 Calc., 7.

(7) I. L. R., 9 Calc., 103.

(8) I. L. R., 16 Calc., 80.

(9) I. L. R., 2 Calc., 293.

(10) 1 C. L. R., 58.

accordance with the provisions of sections 211 or 212 of the Code of Civil Procedure. n

1891

THIS was a reference to a Full Bench by PETHERAM, C.J., and BEVERLEY, J., arising out of an order of the District Judge of Patna, who had dismissed the petition of the decree-holders for realization of mesne profits, on the ground that the claim was barred by limitation, the case being governed by the ruling in *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1).

PURAN
CHAND
v.
ROY RADHA
KISHEN.

The order of reference ran as follows:—

This is a second appeal under the following circumstances:—

On the 31st May 1884, the appellants obtained a decree for possession of certain lands apparently with mesne profits. The decree is silent as to the period for which mesne profits are decreed; all that is said is:—“The amount of mesne profits shall be ascertained in the execution department.”

On the 22nd June 1886, the decree-holders applied for execution of the decree, and in pursuance of that application possession is said to have been delivered on 6th September 1886.

On the 27th May 1887, the decree-holders complained that possession had not been regularly made over to them, and possession was accordingly again delivered on the 17th August 1887. The costs of the suit were also realized.

The applications of June 1886 and May 1887 had also contained a prayer that the mesne profits might be ascertained. Another application to this effect was made on the 3rd August 1889, but that appears to have been met by an objection that no mesne profits were awarded by the decree. That objection, however, was overruled, and on the 10th June and again on the 19th July 1890, the decree-holders applied to have the mesne profits ascertained.

On this last occasion the judgment-debtor, relying on the decision in *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1), objected that the application was barred, not having been made within three years from the date on which possession was given of the lands in suit.

(1) I. L. R., 14 Calc., 50.

1891
 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

The first Court overruled this objection, but its order has been reversed by the District Judge of Patna, on the ground that possession of the lands was given on the 6th September 1886, and that, under the decision above referred to, the application of the 19th July 1890 was barred by Article 178, Schedule II of the Limitation Act.

We are not prepared to assent to the correctness of the decision in *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1). The principle upon which that decision is based is that an application to ascertain the amount of mesne profits decreed is not an application to execute the decree, but an application to complete the decree, and that the period within which such an application must be made is prescribed by Article 178, and that Article 179 will not apply. But, putting aside the question whether, in this view of the application, it would be incumbent on the decree-holder to make an application to complete the decree, we think that under the terms of the Code the application must be regarded as an application to execute the decree within the meaning of Article 179. Reading sections 211, 212, 230 (b) and 244 (a) and (b) of the Code together, we are of opinion that the intention of the Legislature was that an application to ascertain the amount of mesne profits awarded by a decree should be deemed to be an application in execution of the decree, and therefore governed as regards limitation by the provisions of Article 179 of the Limitation Act.

We therefore refer the following question for the decision of a Full Bench :—

Whether an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of sections 211 or 212 of the Code of Civil Procedure is, as regards limitation, to be governed by Article 178 or by Article 179 of the Limitation Act?

If the decision of the Full Bench be that Article 179 is applicable, this appeal must be allowed, and the order of the first Court restored with costs in all Courts; if, on the other hand, Article 178 is held to be applicable, we think that upon the Judge's finding the appeal must be dismissed.

(1) I. L. R., 14 Calc., 50.

Babu *Uma Kali Mookerjee* for the appellants.—I submit the view taken by the referring Judges is the correct view. The present application is clearly an application to execute the decree and not to complete the decree, and Article 179 of the Limitation Act will therefore apply. The decree is made under section 211 of the Code, and the question regarding the amount of the mesne profits has to be determined in execution as provided by section 244 (a) and (b). The case of *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1) should be overruled.

1891
 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

Munshi *Mahomed Yusuf* for the respondents.—Article 178 of the Limitation Act was intended to apply to a case of this kind. This application is not for the purpose of executing the decree, but is in continuance of the original suit in order to complete the decree—*Bunsee, Singh v. Mirza Nusuf Ali Beg* (2), *Wodoy Tara Chowdhraïn v. Syud Abdool Jubbar Chowdhry* (3), *Fuseelun v. Syud Keramat Hossein* (4).

Baboo *Uma Kali Mookerjee* was heard in reply.

The judgment of the Full Bench (PETHERAM, C.J., PRINSEP, FIGOT, O'KINEALY, and GHOSE, JJ.) was as follows:—

It appears that the appellants in this case obtained a decree on the 31st May 1884 for possession of certain lands, with a direction that the amount of mesne profits should be ascertained in execution of the decree. An application for execution was made on the 22nd June 1886 in regard to the immoveable property. It was renewed on the 27th May 1887, and, on the 17th of August of that year, possession of the real property was delivered to the appellants. The costs of the suit were also realized. In the applications of June 1886 and May 1887, the appellants also asked that the mesne profits might be ascertained according to the direction in the decree. Another application to the same effect was made on the 3rd August 1889 and was met by the objection that no mesne profits had been awarded by the decree. This objection was overruled, and, on the 19th July 1890, the decree-holders applied to have the mesne profits ascertained. The judgment-debtor then objected that the application was barred, and, in support of that objection, he cited

(1) I. L. R., 14 Calc., 50.

(3) 24 W. R., 338.

(2) 22 W. R., 328.

(4) 21 W. R., 212.

1891
 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

the case of *Anando Kishore Dass Bakshi v. Anando Kishore Bose* (1), which decided that all applications of that nature fell within Article 178, Schedule II of the Limitation Act, and were barred if not made within three years from the delivery of possession of the lands decreed. This objection was overruled by the first Court, but was given effect to in the Court of First Appeal. The appellants, dissatisfied with that decision, brought a second appeal in this Court, and the Judges of the Divisional Bench who heard the appeal, dissenting from the decision already referred to, referred the following question for the decision of a Full Bench:—"Whether an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of sections 211 or 212 of the Code of Civil Procedure is, as regards limitation, to be governed by Article 178 or by Article 179 of the Limitation Act."

Sections 211 and 212 of the present Procedure Code correspond to sections 196 and 197 of Act VIII of 1859. In order to determine the question referred to the Full Bench, we must first consider the form of the order. No time is stated in the order as to the period for which mesne profits should be calculated; but, in the subsequent applications for mesne profits made by the appellants, the order was always treated as an order for mesne profits from the date of suit to the date of obtaining possession. This view of the order may be supported by the judgment of their Lordships of the Privy Council in the case of *Fakharuddin Mahomed Ahsan Chowdhry v. The Official Trustee of Bengal* (2). We shall therefore take it, for the purposes of the decision of this case, that the meaning of the present order regarding *wasilut* is that *wasilut* should be calculated from the institution of the suit to the date of obtaining possession. The object of the Legislature in enacting section 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts to give, with the possession of the real property, such *wasilut* as they thought the plaintiff would be entitled to by law. The proceedings, therefore, in determining the amount of *wasilut* are not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the original suit and carried on in the same way as if a single suit were brought for mesne profits by

(1) I. L. R., 14 Cal., 50.

(2) L. R., 8 I. A., 197.

itself. This has been the view accepted by this High Court in the cases of *Fuseelun v. Syud Keramat Hossein* (1), *Bunsee Singh v. Mirza Nuzuf Ali Beg* (2), *Dildar Hossein v. Mujeedunnissa* (3), and *Anundo Kishore Dass Bakshi v. Anundo Kishore Bose* (4). We must therefore take it as settled law, so far as this Court is concerned, that an order and decree in this case referring to mesne profits is in the nature of an interlocutory order, and that there is nothing that can be executed under section 255 of the Code until the actual amount of mesne profits has been found and determined—*Radha Prasad Singh v. Lal Sahab Rai* (5).

Nor is the question, if any, and, if so, what limitation applies to applications to have mesne profits assessed, devoid of authority. In the case of *Fuseelun v. Syud Keramat Hossein* (1), it was argued that applications asking the Court to assess mesne profits were governed by section 20 of Act XIV of 1859, which was the Limitation Act then in force. That section ran as follows:—“No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.”

That contention was overruled, and it was decided that there was no bar to proceedings for assessment of mesne profits arising out of the Limitation Act. This decision was followed in the case of *Bunsee Singh v. Mirza Nuzuf Ali Beg* (2), and this latter decision was approved of in the case of *Dildar Hossein v. Mujeedunnissa* (3); and made applicable to decrees passed under section 197 of Act VIII of 1859 which corresponds to section 212 of the present Code. Thus it is clear that the view which prevailed till the decision of the case of *Anundo Kishore Dass Bakshi v. Anundo Kishore Bose* (4), was that proceedings under sections 196 and 197 of Act VIII of 1859 were proceedings similar to those in a regular suit not governed by the Limitation Act at all, although it had been argued that section 20 of that Act, which more or less corresponds

(1) 21 W. R., 212.

(3) I. L. R., 4 Calc., 629.

(2) 22 W. R., 328.

(4) I. L. R., 14 Calc., 50.

(5) I. L. R., 13 All., 53 (65).

1891

 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

1891
 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

with Article 179 of the present Limitation Act, applied. The case of *Anundo Kishore Dass Bakshi v. Anundo Kishore Rose* (1) was one under the present Civil Procedure Code, and the Judges who decided it in no way dissented from the opinion of the previous Courts in so far as Article 179 of the Limitation Act was concerned; but, dissenting from the decision in the case of *Baroda Sundari Dabia v. Fergusson* (2), they decided that Article 178 of Schedule II of the Limitation Act applied to applications under section 211 of the Code. Article 178 runs as follows:—"Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, section 230,—three years from the time when the right to apply accrues."

In the case of *Govind Chunder Goswami v. Rungunmoney* (3) it was pointed out that where general words are used, those words must be construed with some limitation; that the article was not intended to govern applications for transfer of cases from one Court to another or to transfer a case to the bottom of the board, or to applications for change of attorneys or other applications of that nature. The same principle was laid down in the case of *Kylasa Goundan v. Ramasami Ayyan* (4) and *Vithal Janardan v. Vithojirav Puttajirav* (5), in which it was held that to make the provisions of Article 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief, an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound, on the oral applications of the appellants' pleader, indeed without any such application at all, to fix a date for the first hearing of the enquiry, and after hearing the parties and fixing such issues as might be necessary for the disposal

(1) I. L. R., 14 Calc., 50.

(3) I. L. R., 6 Calc., 60.

(2) 11 C. L. R., 17.

(4) I. L. R., 4 Mad., 172.

(5) I. L. R., 6 Bom., 586.

of the subject-matter in dispute, to proceed with it as if it were dealing with a case based on a plaint. Upon the dates of the previous applications made for execution of the decree, and having regard to the nature of them, we think that the applications, were Article 178 or 179 applicable, would not have been barred. But upon the question referred to us, we think the conclusion must be that neither Article 178 nor Article 179 of the Limitation Act is applicable, that the application is not barred, and that this appeal must be decreed with costs.

1891

 PURAN
 CHAND
 v.
 ROY RADHA
 KISHEN.

Appeal decreed.

A. A. C.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

ASHUTOSH BANNERJEE (JUDGMENT-DEBTOR, APPELLANT) v.

LUKHIMONI DEBYA (DECREE-HOLDER, RESPONDENT).*

1891

Nov. 23.

Future maintenance, decree declaring right to—Maintenance subsequently falling due enforced in execution.

Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit.

On the 4th January 1889 one Lukhimoni Debya obtained a consent decree for maintenance against Ashutosh Bannerjee in the High Court. The decree was in the following terms :—“It is ordered and declared by consent of parties that the decree of the lower Court be, and it hereby is, set aside, and, in lieu thereof, that the defendants 2 and 3 do pay, out of the estate of the late husband of the plaintiff, Rs. 2,000 on account of maintenance from September 1882 to December 1885, with interest at the rate of 6 per cent. per annum from the date of the lower Court's decree until payment; and it is further ordered and decreed, by and with the like consent, that the defendants 2 and 3 do pay to the plaintiff, out of the estate of the late husband of the plaintiff, which is now in their hands, Rs. 50 per month, on account of her maintenance from 1st January 1886, and onwards, during the lifetime of the said plaintiff.” And the decree further declared the maintenance

* Full Bench reference on appeal from order No. 91 of 1891, against the order of Babu Hemango Chunder Bose, Third Subordinate Judge of Hooghly, dated the 28th February 1891.