

of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. It would have been well if we had a copy of the decree upon the record but in the absence of the decree I rely on the description thereof given in the execution petition and the judgment of the Munsif. I therefore set aside the order of the Subordinate Judge and restore that of the Munsif and direct the execution to proceed except as against the deceased judgment-debtor, Chhedi Singh, and his legal representatives. The decree so far as Chhedi and his legal representatives are concerned is null and void. The appeal is decreed with costs. There is no appearance on behalf of the opposite party.

MACPHERSON, J.—I agree.

*Appeal decreed.*

## APPELLATE CIVIL.

*Before Jwala Prasad and Kulwant Sahay, J.J.*

HARAKHPAN MISSIR

*v.*

JAGDEO MISSIR.\*

1924.

*July, 8.*

*Mesne profits, application for ascertainment of—Limitation—cause of action, when accrues—Civil Procedure Code, 1908, Order XX, rule 12.*

Under the Civil Procedure Code, 1908, an application for ascertainment of future mesne profits is no longer an application in execution but a part of the suit itself.

*Gangadhar Manika v. Balkrishna Soiroba Kasbekar*(1), *Ramana Reddi v. R. Babu Reddi*(2) and *Puran Chand v. Roy Radha Kishen*(3), distinguished.

\* Second Appeals nos. 1845 of 1921 and 111 of 1922, from a decision of B. Krishna Sahay, Subordinate Judge of Gaya, dated the 5th September, 1921, reversing a decision of M. Muhammad Shams-ud-din, Munsif of Aurangabad, dated the 29th March, 1921.

(1) (1921) 61 Ind. Cas. 448.

(2) (1904) I. L. R. 37 Mad. 186.

(3) (1892) I. L. R. 16 Cal. 182, F. B.

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When a decree awards future mesne profits the right to apply for ascertainment of the amount of mesne profits does not accrue until the period for which the mesne profits have been awarded has expired and, therefore, time for such an application runs from the expiry of such period and not from the date of the final decree in the case.

*Gangadhar Marwari v. Lachman Singh* (1), referred to.

Appeal by the defendant.

Both these appeals arose out of the same decision of the Court below, dated the 8th September, 1921. By that decision the Court below ascertained the mesne profits awarded to the plaintiff in a suit for possession. The original decree passed by the trial Court was dated the 29th August, 1911. That decree was in favour of the plaintiffs nos. 1 and 2. On appeal to the lower appellate Court the decree was set aside so far as the plaintiff no. 1 was concerned and was upheld in favour of the plaintiff no. 2. That decree is dated the 6th May, 1912. It was upheld by the High Court on the 7th January, 1916. The decree directed delivery of possession to the plaintiff no. 2 and mesne profits under Order XX, rule 12(1), of the Civil Procedure Code. An application for execution of the decree was made on the 23rd December, 1918, and the plaintiff opposite-party obtained delivery of possession on the 14th February, 1919. On the 19th July, 1919, he applied to the Court which passed the decree for ascertainment of mesne profits and to make the decree final under Order XX, rule 2, of the Civil Procedure Code. This was done by the decision of the Munsif passed on the 9th March, 1920.

Against that decision both the plaintiff and the defendants filed separate appeals in the Court below. These appeals were disposed of by the Subordinate Judge on the 8th September, 1921.

The defendant alone appealed from the decision of the Subordinate Judge and as there were two appeals

in the Court below he filed two second appeals in the High Court but the points raised were the same in both the appeals.

*Atul Krishna Rai*, for the appellant.

*Sarju Prasad*, for the respondent.

JWALA PRASAD, J. (after stating the facts as set out above, proceeded as follows) :—

The first question raised on behalf of the defendant-appellant is that the application for ascertainment of mesne profits was barred by limitation. His contention is that such an application should have been made within three years from the date of the final judgment in the original suit, namely, on the 7th January, 1916, passed by the High Court. The contention is that an application for ascertainment of mesne profits is governed by Article 181 of the Limitation Act. In support of this contention reliance has been placed upon the case of *Gangadhar Manika v. Balkrishna Soiroba Kasbekar* (1), a case of the Bombay High Court, and the case of *R. Ramana Reddi v. R. Babu Reddi* (2). Both these cases relate to decrees passed before the present Code of Civil Procedure and in both of them the direction in the decree was that the mesne profits should be ascertained in execution. A full bench of the Calcutta High Court, however, took a contrary view in the case of *Puran Chand v. Roy Radha Kishen* (3), holding that Articles 178 and 179 of the old Limitation Act (corresponding to Articles 181 and 182 of the present Limitation Act), do not apply to applications for ascertainment of mesne profits. This case also was with respect to a decree prior to the passing of the present Code of Civil Procedure. There was, therefore, a divergence of opinion between the High Courts upon this point and the present Code of Civil Procedure has tried to solve it by making the ascertainment of mesne profits a part of the suit and

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(1) (1921) 61 Ind. Cas. 448.

(2) (1904) I. L. R. 37 Mad. 186.

(3) (1892) I. L. R. 19 Cal. 132, F. B.

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PRASAD, J

in continuation thereof. No longer is such a proceeding a separate proceeding and an application for ascertainment of mesne profits is no longer an application in execution. Under the present Code the case of *Gangadhar Marwari v. Lachman Singh* (1) is to the effect that the right to apply for ascertainment of mesne profits does not arise until the delivery of possession. This is an authority under the present Code and seems to apply to the present case. Mr. *Rai* disputes the correctness of that authority. Whereas I am not prepared to hold that in all cases the right to apply for ascertainment of mesne profits arises from the date of delivery of possession I think that the right to apply does not in any case arise from the date of the decree. Order XX, rule 12, requires that the decree shall direct an enquiry to be made for the ascertainment of rent or mesne profits from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor or the expiration of three years from the date of the decree, whichever event first occurs. Therefore the decree has to direct an enquiry with respect to mesne profits for a period subsequent to the date of the decree, the limit being three years from the date thereof, and, until the period for which the mesne profits is to be awarded under the decree expires, the decree-holder will not be entitled to apply for ascertainment of the mesne profits. It is obvious that mesne profits for a period cannot be ascertained until it has already expired. Therefore the right to apply will arise either when the delivery of possession is actually given or three years expire from the date of the preliminary decree. The decree in the present case has not been filed and therefore we do not know up to what future period the mesne profits has been directed to be given but we know that the plaintiff got delivery of possession on the 14th February, 1919. The three years from the date of the High Court decree expired on the 7th January, 1919. The application

(1) (1910) 11 Cal. L. J. 541.

for ascertaining mesne profits was made on the 19th July, 1919. Hence whether the right to apply accrued on the 14th February, 1919, the date of the delivery of possession or on the 7th January, 1919, the date on which three years from the decree expired, the application was not barred by limitation. Therefore this contention of the appellant must fail.

The other points are so unsubstantial that they do not require any discussion. The first is that the decree-holder should get interest on mesne profits up to 1916 only. There is nothing on the record to show that there has been a miscalculation or misascertainment of mesne profits. The second is that interest should have been allowed only up to the 7th January, 1916, and not up to the date of the judgment of the first Court, that is, up to the 29th March, 1921. Mesne profits now include interest so the decree holder is entitled to interest up to the date of realization of the mesne profits. The Court below is therefore right in allowing interest and in holding that the interest should have been calculated up to the date of the final decree of the Court below. The result is that these appeals are dismissed with costs.

KULWANT SAHAY, J.—I agree.

*Appeal dismissed.*

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### PRIVY COUNCIL.

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LACHMI NARAIN MARWARI

v.

BALMAKUND MARWARI.\*

1924.

July, 10.

*Code of Civil Procedure 1908 (Act V of 1908) Order XVII rule 2—Default of Appearance—Dismissal of Suit—Decree of High Court—Suit remitted for disposal.*

\* PRESENT: Lord Shaw, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.