1899.

JOHARMAL v. EKNATH.

will be found in the cases of *Narayanacharya* v. *Narso*[1] and *Chintamanrav* v. *Kashinath*[2]. It does not appear under which of these the Subordinate Judge placed the present case. Moreover, he has not alluded to a circumstance now mentioned before us that the sons were not in existence at the time of the suit and decree. We do not know whether this is so or not, but it can easily be ascertained in the further enquiry we are obliged to order. We ask the Subordinate Judge to take evidence and find on the following issue :—

Whether the interests that Eknath and Rangnath now claim in the ancestral property passed to the plaintiff under the execution sale or not?

and certify his finding to this Court within two months.

Issue sent down.

(1) (1876) 1 Bom., 262. (2) (1889) 14 Bom., 320.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

1899.
November 30.

NARAYAN GOVIND MANIK (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* SONO SADASHIV, DECEASED, BY HIS HEIRS AND SONS VINAYAK AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), *Secs.* 211 *and* 331—*Limitation Act (XV of* 1877), *Sch. II, Art.* 178—*Decree for possession with mesne profits till delivery of possession—Darkhást for execution—Obstruction—Application for removal of obstruction—Application registered as a suit—Disposal of the darkhást—Decree in the suit—Execution—Limitation—Mesne profits for three years subsequent to the suit.*

The plaintiffs having obtained a decree for possession of certain lands with mesne profits till delivery of possession, applied for execution. An obstruction having been caused to the execution, plaintiffs applied for the removal of the obstruction, and their application was registered as a suit under section 331 of the Civil Procedure Code (Act XIV of 1882), and their darkhást for execution was disposed of by the Court. The suit was decided in plaintiffs' favour, and they having applied for execution it was contended that the application was

* Second Appeal, No. 547 of 1899.

1899.

NARAYAN v. SONO.

time-barred, as it was presented after the expiration of three years from the time of the disposal of the original darkhást, and it was wrong to grant mesne profits for more than three years from the date of the decree though possession was not delivered during that period.

Held, that when litigation under section 331 of the Civil Procedure Code (Act XIV of 1892) is pending, the proceedings in execution are suspended during that litigation.

Where a decree directed that plaintiffs should get mesne profits from a certain date till delivery of possession, the amount to be fixed in execution—

Held, that the decree was necessarily subject to the limitation laid down in section 211 of the Civil Procedure Code (Act XIV of 1882), and that mesne profits for more than three years from the date of the decree should not be awarded even though possession was not delivered during that period.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, confirming the order of Ráo Sáheb S. V. Joshi, Subordinate Judge of Rájápur in an execution proceeding.

The plaintiffs sued the defendants in Suit No. 348 of 1883 to recover possession of certain lands with mesne profits. The decree awarded possession of the lands and mesne profits of the same till delivery of possession, and directed that the amount of the mesne profits should be determined in execution. The said decree was confirmed, in appeal, by the District Court and in second appeal by the High Court on the 12th January, 1887—with the modification that the plaintiffs should recover mesne profits for three years before date of suit. The plaintiffs then gave darkhást No. 69 of 1888 to execute the above decree on the 10th January, 1888, but they were obstructed in taking possession of the land by an undivided son of one of the defendants on the 20th January, 1888. The plaintiffs, therefore, applied for the removal of the obstruction, and their application being registered as Suit No. 620 of 1888 under section 331 of the Civil Procedure Code (Act XIV of 1882), the Court disposed of the darkhást on the 18th August, 1888. The minor brothers of the defendant in the latter suit were joined as co-defendants. The Court decided the suit against the defendants, and the decree was finally confirmed by the High Court in Second Appeal No. 133 of 1892 on the 11th October 1894. On the 7th October, 1897, the plaintiffs presented a darkhást for the execution of their

decrees, No. 348 of 1883 and No. 620 of 1888, and to recover possession of the lands with costs of the suits and mesne profits from the 1st September, 1880, till delivery of possession.

The defendants contended (*inter alia*) that the darkhást was time-barred, as it was not presented within three years from the 18th August, 1888, when darkhást No. 69 of 1888 was disposed of, and that mesne profits for more than three years after the date of the decree could not be claimed.

The Subordinate Judge having granted the darkhást, defendant No. 1 appealed to the Judge, who confirmed the order. The defendant, therefore, preferred the present second appeal.

S. S. Patkar, for the appellant (defendant No. 1) :—The Judge has based his decision on the ruling in *Chintaman* v. *Balshastri*[1], but the Madras High Court has come to a contrary conclusion in *Narayana* v. *Pappi*[2]. Even if the ruling in *Chintaman* v. *Balshastri*[1] be held to be applicable, the Judge has ignored Exhibit 24, which shows that darkhást No. 69 of 1888 was cancelled on the 18th August, 1888. The darkhást was, therefore, not capable of being continued or revived. Further, the order that costs of the darkhást were to be paid by the applicant and not by the judgment-debtor shows that the darkhást was disposed of by the Court on that day.

[JENKINS, C. J.:—Did the applicant know that such an order was passed?]

We submit that he knew of it, because the order was passed on his application. Thus the present darkhást, being presented after more than three years from the disposal of the previous darkhást, is time-barred. Granting that the previous darkhást was not disposed of, still the present darkhást is beyond time. If the suit under section 331 had been unsuccessful, the time spent in carrying on the suit would not be excluded in computing the period of limitation—*Shivram* v. *Sarasvatibai*[3]. Though the present darkhást is within three years from the 11th October, 1894, when the High Court passed its decree in

(1) (1891) 16 Bom., 294. (2) (1886) 10 Mad., 22.

(3) (1894) 20 Bom., 175.

1899.

NARAYAN v. SONO.

Second Appeal No. 133 of 1892, yet even deducting the time occupied by the obstruction and its removal, that is, from the 20th February, 1888, to 11th October, 1894, the present darkhást would be more than three years after the previous darkhást. In *Chintaman* v. *Balshastri*[1] this point was not raised and decided.

As regards mesne profits, the order is clearly wrong. At the most, three years' mesne profits should have been allowed. In awarding mesne profits till delivery of possession the Judge has given the go-by to the provisions of section 211 of the Civil Procedure Code—*Prayag Singh* v. *Raju Singh*[2]; *Uttamram* v. *Kishordas*[3].

Manekshah J. Taleyarkhan for the respondents (plaintiffs):—The present darkhást is a revival or continuation of the previous darkhást and, therefore, it is not time-barred—*Chintaman* v. *Balshastri*[1]. This ruling shows that the time should be computed from the date of the removal of the obstruction, that is, from the 11th October, 1894.

As regards mesne profits, we contend that, according to the terms of the original decree as passed by the High Court, we are entitled to the mesne profits from the 1st September, 1880, to the delivery of possession. It is the judgment-debtor and afterwards his brother who kept us off from the property, and we should not be put to loss on their account. The decree directs that mesne profits should be determined in execution. The limitation laid down in section 211 of the Civil Procedure Code cannot govern such a decree—*Bai Jasoda* v. *Kishordas*[4]. The Court executing the decree cannot go behind the decree and cannot consequently interfere with that part of it which relates to mesne profits.

JENKINS, C. J.:—Two points have been taken in this appeal: first, that the application for execution is barred by limitation. We think that there is no such bar. The original application was in January, 1888. Resistance to execution occurred in

(1) (1891) 16 Bom., 294.
(2) (1897) 25 Cal., 203, 206.
(3) P. J., 1899, p. 340.
(4) P. J., 1889, p. 143.

February, 1888. This led to a suit under the 2nd clause of section 331, which was finally decided by the High Court decree dated 11th October, 1894. The present application is within three years of that date.

It appears that the original application of January, 1888, was "disposed of" by the Subordinate Judge on 18th August, 1888. This order was apparently passed in the absence of the parties, and there is nothing to show that the decree-holder knew of it. It is perfectly clear that the order was irregular, and is directly opposed to Circular No. 79, page 46 of the Circular Book. We cannot agree with the contention of the pleader for the judgment-debtor before us that the application of January, 1888, was entirely at an end, and that the decree-holder was bound, in order to keep his decree alive, to make applications for execution within the period of limitation, even though such an application must have been refused on the ground that the litigation under section 331 was still pending. The fact is that the proceedings in execution were suspended during that litigation. The authorities for such a proposition are numerous and need not be quoted in detail.

It is contended that there is a further bar of limitation even under article 178, but this is clearly not so; for this is not a fresh application for execution. It is an application to revive the prior application which had been suspended pending the litigation.

The second point is that no more than three years' mesne profits can be awarded, the decretal order dated 19th September, 1884, directing "the plaintiff to get mesne profits from 1st September, 1880, to the delivery of possession, the amount to be fixed in execution of the decree" being necessarily subject to the limitation laid down in section 211, Civil Procedure Code. The District Judge held that he could not go behind the decree. But we may point out that, as held by the Full Bench in *Puran Chand* v. *Roy Radha Kishen*[1], the proceedings for the purpose of ascertaining the amount of mesne profits are a continuance of the original suit, and the Court in so ascertaining the amount is

(1) (1891) 19 Cal., 132.

1899.

NARAYAN v. SONO.

bound by the provisions of section 211. It is true that possession has not yet been delivered to the decree-holder. But this fact does not prevent the clear provisions of the law being followed.

We must vary the decree of the lower appellate Court by limiting the mesne profits to three years subsequent to 12th January, 1887, the date of the High Court decree. Appellant must pay his own costs and half respondents'.

Decree varied.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

1900.
March 9.

BANK OF BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS, *v.* AMBALAL SARABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Bank of Bombay—Shares—Registration and transfer of shares—Rights of surviving co-parceners—Necessity of probate or letters of administration—Presidency Banks Act (XI of 1876), *Secs.* 20, 22 *and* 23.

Thirteen shares of the Bank of Bombay stood in the name of one Sarabhai, who died in March, 1895. The plaintiff, who was the minor son of Sarabhai and joint and undivided with him, applied to the Bank to have the shares transferred to his name as the sole surviving co-parcener. The Bank contended they were not bound to do so without production of the probate of the will of Sarabhai or letters of administration to his estate.

Held, (reversing RUSSELL, J.) that having regard to the terms of the Presidency Banks Act (XI of 1876) the Bank were right in their contention. For a share in the Bank, for the purpose of devolution or survivorship, must be deemed, as far as the Bank was concerned, the exclusive property of its registered holder, and that, therefore, the sole surviving co-parcener of a deceased Hindu cannot demand that the Bank of Bombay should by reason of his survivorship register him as a shareholder in respect of shares in the Bank which stand in the name of his deceased co-parcener.

THIS was an appeal from the decision of Russell, J., who directed the defendant Bank to issue fresh certificates in the name of the plaintiff in respect of the shares standing in the name of the deceased Sarabhai.

The facts sufficiently appear from the judgment of Russell, J., which was as follows:—

* Suit No. 798 of 1899; Appeal No. 1094.