

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

UTTAMRAM AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS, v.
KISHORDAS AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

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September 4.

Decree—Construction—Suit for land—Mesne profits—Decree for mesne profits—Decree silent as to the time down to which mesne profits were given—Construction of such decree—Civil Procedure Code (Act X of 1877), Sec. 211—Limitation—Limitation Act (XV of 1877), Arts. 178, 179.

A decree, dated 3rd July, 1878, awarded possession of certain land with mesne profits to be ascertained in execution, but specified no time down to which the mesne profits were to be computed.

Held, that under section 211 of the Code of Civil Procedure (Act X of 1877) the decree could not be construed as giving mesne profits for a period longer than three years from the date of the decree.

APPEAL from the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge of Surat.

On the 3rd July, 1878, one Uttamram Jamyatmal obtained a decree in the High Court, which directed that he should recover certain land specified therein, and further declared him to be entitled to mesne profits (to be ascertained in execution by the Subordinate Judge) of all of the said lands sued for in the plaint, such mesne profits to be computed from the date of possession being given to the defendants.

The decree was silent as to the date down to which the mesne profits were awarded.

On 24th April, 1881, the decree-holder applied for execution of the decree, and asked for possession of the lands awarded to him, and for mesne profits from 1870 (the date at which the defendants had obtained wrongful possession) down to the date of his application, and for further mesne profits from the date of the application until delivery of possession.

The Subordinate Judge ordered possession to be given to him and awarded him mesne profits from 1870 down to the date of the

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application, but made no order as to further mesne profits. This decision was upheld, on appeal, by the High Court.

The decree-holder was put into possession on 19th September, 1882, and died in 1883 leaving two minor sons.

In 1897 his sons applied for mesne profits from the 24th April, 1881, (the date of the former application) to 19th September, 1882, on which day their father obtained possession through the Court.

The Subordinate Judge rejected this application, holding (i) that it was time-barred, and (ii) that the matter was *res judicata*.

The applicants appealed.

Gokaldas K. Parekh for appellants (applicants) :—The present application is not barred by limitation. The decree sought to be executed, leaves the amount of mesne profits to be determined in execution. And until the Court determines this question, no final decree can be said to have been passed, which can be executed. A decree directing mesne profits to be determined in execution is in the nature of an interlocutory order, and there is nothing that can be executed until the actual amount of mesne profits has been determined—*Puran Chand v. Roy Radha Kishen*⁽¹⁾. An application to the Court to determine the amount of mesne profits as directed by the original decree is an application not for execution of the decree, but in pursuance of the decree—*Pryag Singh v. Raju Singh*⁽²⁾. Such an application is not governed either by article 178 or by article 179 of the Limitation Act. In the present case the amount of profits from the date of the former darkhást to the date of delivery of possession has not been determined, and until that is done no period of limitation applies. The decree does not specify the time up to which the mesne profits are to be calculated. But it must be taken to have awarded profits up to the recovery of possession—*Bijai Bahadur Singh v. Bhup Indar Bahadur Singh*⁽³⁾ ; *Mon Mohun Sirkar v. The Secretary of State for India*⁽⁴⁾.

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

(2) (1897) 25 Cal., 203.

(3) (1897) 19 All., 296.

(4) (1890) 17 Cal., 968.

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K. M. Jhaveri, for respondent No. 1 (opponent):—Section 211⁽¹⁾ of the Code of Civil Procedure (Act X of 1877) restricts the award of mesne profits to three years from the date of decree. In the present case, where the decree is silent as to the time up to which mesne profits are awarded, the Court must be presumed to have awarded profits for three years only. Otherwise the Court would award more than the law allows. Moreover, the decree-holder did ask in his former application for mesne profits for the year 1881-82. Neither the Court of first instance nor the High Court awarded these profits. The question is, therefore, *res judicata*, and cannot be re-opened at this distance of time.

T. R. Kotwal, for respondent No. 2.

PARSONS, J.:—The facts are these. The appellants' father obtained in this High Court on the 3rd July, 1878, a decree for the possession of certain land "with mesne profits to be ascertained in execution by the Subordinate Judge of all of the said lands sued for in the plaint, such mesne profits to be computed from the date of possession being given to the defendants." Nothing was said as to the date down to which the mesne profits were awarded.

On the 24th April, 1881, the appellants' father presented a darkhást in which he asked for possession and for the sum of Rs. 9,465 which he estimated to be the amount of mesne profits from 1870 to the date of the darkhást and for further mesne profits until possession was obtained. The Court ordered possession to be given to him and awarded him the sum of Rs. 6,573 for mesne profits for the years 1870 to 1881 (inclusive). It said

(1) Section 211 of Act X of 1877 is in the same words as section 211 of Act XIV of 1882 and is as follows:—

"When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs) with interest thereupon at such rate as the Court thinks fit.

"*Explanation.*—'Mesne profits' of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom together with interest on such profits."

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nothing about the further mesne profits, and the prayer for these was not persisted in though there was an appeal to this High Court. The darkhást was finally disposed of on the 15th July, 1882, and possession was given on the 19th September, 1882.

Now, on the 3rd September, 1897, the appellants applied to the lower Court asking it in execution of the decree to ascertain the amount of mesne profits of the land for the year 1881-82, that is, for the period between the date of the darkhást of 1881 and the date of obtaining possession in 1882. The Subordinate Judge rejected the application, holding that it was both time-barred and *res judicata*.

The bar of time depends upon the application of articles 178 and 179 of the Limitation Act, 1877, and of section 230 of the Civil Procedure Code. The bar of *res judicata* is based upon the refusal of the Court to grant the prayer contained in the darkhást of 1881 to compute and award the amount of mesne profits from its date until actual delivery of possession. A Full Bench of the Calcutta High Court has held that "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 accordance with the provisions of section 211 or 212 of the Code of Civil Procedure"—*Puran Chand v. Roy Radha Kishen*⁽¹⁾. Section 230 of the Code of Civil Procedure relates only to decrees for the payment of money or delivery of other property, and a Division Bench of the same High Court has held that a decree directing that the plaintiffs should get *vasilat* from the defendants but that the same should be ascertained through the intervention of a Court Amin and in the course of execution proceedings, was an interlocutory decree only so far as *vasilat* was concerned and did not become final until the amount of *vasilat* had been ascertained by the Amin and until his report had been adopted or confirmed by the Court—*Hajon Manick v. Bur Sing*⁽²⁾.

There are numerous decisions to the effect that where a decree is silent as to mesne profits for the period subsequent to institution of a suit, a separate suit for the same will lie—*Bhivrav v. Sitaram*⁽³⁾, even when there was an express prayer for the same—

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

(2) (1884) 11 Cal., 17.

(3) P. J., 1894, p. 255.

Mon Mohun Sirkar v. The Secretary of State for India in Council⁽¹⁾.

There are, therefore, difficulties in the way of our accepting the view taken by the Subordinate Judge and holding the darkhást to be either time-barred or *res judicata*. I do not intend to discuss these difficulties and see whether or not they are unsurmountable, because there is an objection taken here which seems to me to be absolutely fatal to the application. It is that this Court by its decree did not award to the appellants' father the mesne profits now asked for, namely, the profits for the year 1881-82, because it could not award mesne profits for a period longer than three years from the date of the decree under the provisions of section 211 of the Code of Civil Procedure, 1877, which was then in force. In the Civil Procedure Code of 1859, under which the decision in the case of *Fakharuddin v. Official Trustee of Bengal*⁽²⁾ was passed, there was no time specified, down to which mesne profits could be awarded, short of that of obtaining possession. Section 211 of the Code of 1877, however, enacts that the Court can provide for the payment of mesne profits "from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs)." It thus restricts the time for which mesne profits can be allowed in a decree to three years from the date of the decree. In the decree in the present case no period was mentioned, down to which mesne profits were awarded, but we cannot construe it as giving the plaintiffs profits for a period longer than what the law allowed the Court to give. The decree may be supplemented by the law on a point upon which it is silent, but we cannot introduce into it a provision which would be contrary to the law and *ultra vires* on the part of the Court pronouncing it.

For this reason, therefore, namely, that the decree did not award and could not legally have awarded the appellants mesne profits for the year 1881-82, I would confirm the order dismissing the application. The order of this Court now is that the appeal is dismissed with costs.

RANADE, J.:—The appellants' father, in Suit No. 449 of 1872, sought to recover possession of certain lands, and obtained a

(1) (1890) 17 Cal., 968.

(2) (1881) L. R., 8 I. A., 197; 8 Cal., 178.

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decree on 5th July, 1876, which awarded possession of some of the lands, and directed that mesne profits should be determined in execution. There were cross appeals from this decree, and the High Court varied the decree by awarding possession of all the lands with the mesne profits, which were to be determined in execution, computing the profits from the date on which possession was made over to the respondent-defendant. The decree was silent as to the date up to which the profits should be calculated. This decree was passed on 3rd July, 1878. A darkhást application was made in April, 1881, for the execution of the High Court's decree, and there was a prayer for the possession of the lands and for mesne profits up to 24th April, 1881, the date of the darkhást, as also for future mesne profits till the possession of the lands was made over to the appellants' father.

The Subordinate Judge made over possession of the lands on 19th September, 1882, and gave a portion of the past mesne profits claimed, but he made no order about the future mesne profits. An appeal was preferred to the High Court by the respondents, but the High Court confirmed the order passed by the Subordinate Judge in December, 1883, and a Review Petition made in 1884 was dismissed later on in 1885. The present darkhást was presented on 4th September, 1897, by the appellants, whose father died in 1883, without making any application for the mesne profits for 1882, and the minor applicant's certificated guardian also made no application till 1897. This application was made for the recovery of the mesne profits from the date of the institution of the darkhást of April, 1881, to the date when the lands were made over into the appellants' father's possession in September, 1882. The Subordinate Judge held that the darkhást of 1897 was time-barred, and the claim was also *res judicata*.

The chief question for consideration is whether both these objections were rightly held to bar the claim. Mr. Gokuldas for the appellants first referred to *Bijai Bahadur Singh v. Bhup Indar Bahadur Singh*⁽¹⁾ and *Mon Mohun Sirkar v. The Secretary of State for India in Council*⁽²⁾. They have not much bearing on the present dispute. In the first of these cases, it was held that when

(1) (1897) 19 All., 296.

(2) (1890) 17 Cal., 968.

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no point of time is fixed up to which profits should be calculated, a decree of the Privy Council was properly construed as awarding profits up to the date of the recovery of possession, while in the second it was held that where a decree is silent on the point, a separate suit will lie. In the present case the decree did fix the time from which mesne profits were to be allowed, and in the previous darkhast the profits were claimed for the period up to 1881, and a claim was made for the future profits also. It was this latter claim which was not specially noticed in the order passed in this darkhast, which only gave mesne profits up to 1881. The contention of the appellants is that as long as the mesne profits for 1882 had not been ascertained, as directed by the High Court decree, no period of limitation governed the claim for the same. The authority of the ruling in *Puran Chand v. Roy Radha Kishen*⁽¹⁾, followed in *Pryag Singh v. Raju Singh*⁽²⁾, was cited, but the view taken by the Calcutta High Court on the operation of articles 178, 179 in such cases was not accepted by the Allahabad High Court, and this Court in *Bhagwan v. Gana*⁽³⁾ expressed its agreement with the Allahabad High Court's view as opposed to the Calcutta rulings. In this last case the point was considered with reference to the operation of section 89 of the Transfer of Property Act, and it was held that a decree for redemption was subject to the operation of limitation if no proceeding were taken in time under section 89 to make the decree absolute. This analogy must govern the present case where the inquiry into mesne profits was delayed till September, 1882.

Lastly, there can be no doubt that under section 211 of Act X of 1877, which governed the order under the decree, there was a three years' limit from the date of decree within which mesne profits might accrue, if that event took place earlier than the delivery of possession. As the decree was silent, this provision of the law must be held to have been in the intention of the parties. This three years' limitation also bars the present claim for the profits of 1882. For these several reasons, I would confirm the order, and dismiss the appeal with costs.

Order confirmed.

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

(2) (1897) 25 Cal., 203.

(3) P. J., for 1899, p. 145.