application under section 47 of the Code. The result reached in the lower Courts is due to a certain extent to the form in which the plaintiffs put forward their claim in this suit. I am clearly of opinion that the questions arising between the parties must be ultimately decided in a suit, and may be appropriately decided in this suit. On the merits the issues now suggested by this Court represent the real questions to be determined between the parties. I do not say anything as to what the proper form of relief would be if the issues are decided in favour of the plaintiff. It will be for the trial Court to consider the nature of the relief to be granted in case the plaintiffs are able to establish the case set up by them. As to the merits of the plaintiffs' claim I express no opinion ; nor do I express any opinion as to the effect of the application (Exhibit 56) on the question of fact, which the plaintiffs have to establish.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1920.

September 13.

GANGADHAR BIN MANIKA AND OTHERS, HEIRS AND LEGAL REPRESENTATIVES OF MANIKA TAI KRISHNA (ORIGINAL OPPONENTS), APPELLANTS *v.* BALKRISHNA SOIROBA KASBEKAR, TRUSTEE OF SHRI MAHADEV TEMPLE OF KADVAD (ORIGINAL APPLICANT), RESPONDENT *.

Indian Limitation Act (IX of 1908), Schedule I, Article 182—Application for ascertainment of mesne profits—Application for execution—Civil Procedure Code (XIV of 1882), sections 211, 212 and 244.

An application for ascertainment of mesne profits is an application for execution of a decree and is governed by Article 182 of the Limitation Act, 1908.

* Second Appeals Nos. 638 and 639 of 1919.

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Uttamram v. *Kishordas* (1); and *Ramana* v. *Babu* (2), approved.

Puran Chand v. *Roy Radha Kishen* (3), disapproved.

SECOND appeals against the decision of V. M. Ferrers, District Judge of Kanara, reversing the decree passed by V. V. Wagh, First Class Subordinate Judge at Karwar.

Proceedings in execution.

In 1901 the plaintiff-respondent as a manager of Shri Mahadev Temple of Kadvad, taluka Karwar, filed two Suits Nos. 1 and 2 of 1901 in the Court of the First Class Subordinate Judge at Karwar to recover possession of certain lands leased to defendant No. 1 in 1883 by the then managers of the temple. Decrees were passed in favour of the plaintiff on the 19th March 1902. The terms of the decree were :—

" Plaintiff do take possession of the land in suit from defendants Nos. 1 to 3 and recover Rs. 27-2-7 the costs in suit from defendants Nos. 1 and 2. And plaintiff do recover from defendant No. 1 the amount remaining after deducting the cash amounts paid to Government for the said land by him for the said years out of the value to be ascertained in execution for 33 Khandis of paddy at the rate now prevailing in respect of three years previous to the date of suit, and plaintiff do recover from defendant No. 1 the produce from the date of suit, viz., from 20th December 1900 up to realization of possession, or if the possession is not obtained early, plaintiff do recover the produce of 3 years from this date. And defendant No. 2 is liable (to pay) to plaintiff the rent and produce from July 1900. The income from the date of suit is to be ascertained in execution ".

The plaintiff got possession of the suit land in 1903, but the decree for mesne profits was not enforced and it was believed that that decree had become useless. The neglectful steward was removed from his office and a successor was appointed who sued his predecessor to recover from him damages which the temple had sustained by his neglect. The suit was dismissed

(1) (1899) 24 Bom. 149. (2) (1912) 37 Mad. 186.

(3) (1891) 19 Cal. 132, F. B.

by Mr. Vernon, who was then the District Judge, on the ground that it was still possible to recover mesne profits as no period of limitation was prescribed for their ascertainment.

In 1906 an application for recovery of costs was made.

In 1917, the plaintiff filed Darkhast No. 285 of 1917. He stated :—

" Rs. 50 was due in respect of mesne profits for three years before suit. Profits from date of suit, up to delivery of possession, i.e., 1900-1901-1902 at the rate of 11 Khandis per year ; total of three years was 33 Khandis. The value of which at the rate of Rs. 46 per Kumbh was Rs 75-14-4. Deducting from this Rs. 15-14-0 being the amount of assessment for three years, the balance due was Rs. 60-0-4. Therefore, the total amount due was Rs. 110-0-4. which sum or any other sums which might appear to the Court proper might be determined as due in respect of profits recoverable as per decree together with the costs of the Darkhast might be realized by attachment and sale of the movable property belonging to defendant No. 2 but in the possession of opponents Nos. 1 to 5.

The Subordinate Judge held that the application for ascertainment of mesne profits was an application for execution and was, therefore, barred under Articles 181 and 182 of the Limitation Act, 1908. His reasons were as follows :—

" Mr. Joshi tells the Court that he relies on the application as one in execution and not one in suit. Yet in the same breath he says that his application for ascertainment of mesne profits cannot be treated as one in execution and that, therefore, it is not barred by Articles 181 and 182 of Schedule I of the Limitation Act. He relies on the cases *Waliya* v. *Nazar* (I. L. R. 26 All. page 623) and *Puran Chand* v. *Roy Radha Kishen* (I. L. R. 19 Cal., page 132) Mr. Haldipur for the opponent relies on *Raman Reddi* v. *Babu Reddi*, I. L. R. 37 Mad., page 186, and cites the case of *Uttamram* v. *Kishordas*, I. L. R. 24 Bom., page 149 at page 155, as showing that the Madras and Bombay High Courts disapprove of the Calcutta High Court's view.

It appears to me that according to the view taken in the Madras and Bombay cases the application is clearly time-barred. It may further be pointed out that the Allahabad case followed the Calcutta case cited above. The Calcutta case deals with a decree in which no time is stated as to the period for which mesne profits should be calculated. At page 136 of the Report

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lines 18 and 19 distinctly say so. In the present decree the period, for which mesne profits should be ascertained, is fixed to 3 years from date of decree. The Calcutta case is not, therefore, applicable.

The form in which the application is made is to all intents and purposes in the form prescribed for an application in execution; it is named by the applicant as an application in execution. The decree on which this application is based, provided that the mesne profits should be ascertained in execution. The applicant had to sue out execution and as part of that proceeding have the mesne profits ascertained. If by lapse of time the decree holder allowed his right to sue out execution to be barred, the loss of his right to the mesne profits follows it as a matter of natural consequence. The decree did not provide that the plaintiff should move the Court first to have the mesne profits ascertained and then sue out execution after the mesne profits were ascertained. The decree-holder was to have the mesne profits ascertained in execution, and applications in execution are governed by Articles 181 and 182. The application is, therefore, time-barred."

On appeal the District Judge relying on the principle of "*stare decisis*", inasmuch as Mr. Vernon had found that no period of limitation would begin to run until the mesne profits had in fact been ascertained, held that the application for execution was not barred. He referred to *Waliya Bibi* v. *Nazar Hasan* (I. L. R. 26 All. 623); *Narsingh Das* v. *Debi Prasad* (I. L. R. 40 All. 211); *Puran Chand* v. *Roy Radha Kishen* (I. L. R. 19 Cal. 132).

The defendants-opponents appealed to the High Court.

Nilkant Atmaram, for the appellants.

V. R. Sirur, for the respondent.

MACLEOD, C. J.:—In Civil Suit No. 2 of 1901, in the Court of the First Class Subordinate Judge of Karwar, a decree was passed in favour of the plaintiff directing him to get possession of the suit lands from defendants Nos. 1 to 3 and costs, and plaintiff was to recover from the 1st defendant the amount of the value to be ascertained in execution for 33 *khandis* of *paddy* at the

rate then prevailing in respect of the three years previous to the date of suit, which remained after deducting the cash amounts paid to Government for the said land by him for the said years, and plaintiff was to recover from the 1st defendant the produce from the date of suit, viz., from 20th of December 1900, up to realization of possession, or if the possession was not obtained early, plaintiff was to recover the produce of three years from the date of the decree. Defendant No. 2 was liable to pay the plaintiff the rent and produce from July 1900. The income from the date of suit was to be ascertained in execution. That decree was passed in March 1902. The plaintiff got possession of the suit land in 1903. The plaintiff has filed this Darkhast No. 285 of 1917 in which he describes in what modes the assistance of the Court was required:

"Rs. 50 was due in respect of mesne profits for three years before suit. Profits from date of suit up to delivery of possession, *i.e.*, 1900-1901-1902, at the rate of 11 Khandies per year; total of three years was 33 Khandies. The value of which at the rate of Rs. 46 per Kumbh was Rs. 75-14-4. Deducting from this Rs. 15-14-0 being the amount of assessment for three years the balance due was Rs. 60-0-4. Therefore the total amount due was Rs. 110-0-4 which sum or any other sums which might appear to the Court proper might be determined as due in respect of profits recoverable as per decree together with the costs of the Darkhast might be realized by attachment and sale of the movable property belonging to defendant No. 2 but in the possession of opponents Nos. 1 to 5."

It is clear then that this was an application in execution and the plaintiff's pleader admitted that in the trial Court. But although he admitted that it was an application in execution, it was contended that the application for the ascertainment of mesne profits could not be treated as one in execution, and therefore it was not barred by Articles 181 and 182 of the Indian Limitation Act. The learned trial Judge said that an application in execution for recovery of costs was filed in 1906. No other application was filed in

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execution until the present one had been made. He found, therefore, that the application was governed by Articles 181 and 182 and rejected it as time-barred. In appeal the learned District Judge referred to the circumstances in which the application was made. It appears that the original decree was obtained by a religious foundation against its defaulting tenant. It is true that the steward of the foundation neglected to enforce the decree and it was believed that by this neglect the decree had become useless. The neglectful steward was removed from his office and a successor was appointed who sued his predecessor to recover damages which the temple had sustained by his neglect. When that suit came on, it was dismissed by Mr. Vernon, who was then the District Judge, on the ground that it was still possible to recover mesne profits as no period of limitation was prescribed for their ascertainment. The learned District Judge in appeal therefore seemed to think that he should follow the principle *stare decisis* and he also referred to the decisions of *Puran Chand* v. *Roy Radha Kishen*[1], *Muhammad Umarjan Khan* v. *Zinat Begam*[2], *Waliya Bibi* v. *Nazar Hasan*[3] and *Narsingh Das* v. *Debi Prasad*[4] in support of Mr. Vernon's decision. He therefore allowed the appeal and held that the application was not barred by lapse of time.

Now this decree was passed under the Code of 1882 and the sections applicable were sections 211, 212 and 244, and under section 211 when the suit was for recovery of possession of immovable property yielding rent or other profit, the Court might 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

(1) (1891) 19 Cal. 132, F. B.
(2) (1903) 25 All. 385.
(3) (1904) 26 All. 623.
(4) (1918) 40 All. 211.

whose favour the decree was made, or until the expiration of three years from the date of the decree whichever event first occurred. By section 212 when the suit was for the recovery of possession of immovable property and for mesne profits which had accrued on the property during a period prior to the institution of the suit and the amount of such profits was disputed, the Court might either determine the amount by the decree itself or might pass a decree for the property and direct an inquiry into the amount of mesne profits and dispose of the same on further orders. Therefore section 211 dealt with mesne profits from the date of the suit, while section 212 dealt with past mesne profits, and although in both cases by the decree itself the Court might ascertain the amount, in section 211 nothing was said as to how the mesne profits were to be ascertained if the Court did not provide for the amount in the decree, while under section 212 the Court might direct an enquiry as to the amount of past mesne profits and dispose of the same on further orders. Then by section 244 the following question should be determined by order of the Court executing a decree and not by a separate suit, viz., (*a*) questions regarding the amount of any mesne profits as to which the decree had directed inquiry (that must refer to past mesne profits) ; (*b*) questions regarding the amount of mesne profits or interest which the decree had made payable in respect of the subject-matter of a suit between the date of the institution and the execution of the decree or the expiration of three years from the date of the decree, and (*c*) any other questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. The ordinary meaning, therefore, of that section would be that certain questions were to

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be determined by the order of the Court in execution and not by a separate suit, viz., the amount of past mesne profits, the amount of future mesne profits, or, lastly, any other questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree. It would then follow logically that any question with regard to past mesne profits was a question in execution. Clearly, then, in drawing up the present decree the Court correctly interpreted section 244, because it distinctly provided that the amount in cash value of the mesne profits, past and future, should be ascertained in execution. At first sight, therefore, it would appear beyond all argument that the application for the ascertainment of the mesne profits, past and future, came within Article 182 of Schedule I of the Indian Limitation Act. But there is no doubt that that is not the view which has been taken by the Calcutta and Allahabad High Courts and most probably Mr. Vernon in his first decision thought he should follow the Full Bench decision in *Puran Chand* v. *Roy Radha Kishen*[1] which was to the effect that proceedings for the ascertainment of mesne profits after a decree awarding possession were proceedings in continuation of the suit and were not proceedings in execution, as until the amount of mesne profits had been ascertained, there would be no final decree. However that may be, that view was not accepted in full by Mr. Justice Ranade in *Uttamram* v. *Kishordas* [2]. There was a decree dated the 3rd of July 1878 which awarded possession of certain land with mesne profits to be ascertained in execution, but the decree specified no time down to which the mesne profits were to be computed. The question there was whether the decree, being drawn up in that form, could be construed as giving mesne profits for a period longer

[1] (1891) 19 Cal. 132, F. B.

[2] (1899) 24 Bom. 149.

than three years from the date of the decree, and it was held that that construction could not be put on the decree. The point which is now in issue may not have been directly in issue in that case, but Mr. Justice Ranade at page 155 said: "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. *Ganu*[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." It appears, therefore, that Mr. Justice Ranade did not agree with the decision in *Puran Chand* v. *Roy Radha Kishen*[1] and, if the point which is now in issue had been in issue in that case, I think we may presume that *Puran Chand* v. *Roy Radha Kishen*[1] would not have been followed. But it appears to me that the reasoning of the learned Judges in *Ramana* v. *Babu*[4]

(1) (1891)19 Cal. 132, F. B.
(2) (1897) 25 Cal. 203.
(3) (1899) P. J. 143.
(4) (1912) 37 Mad. 186.

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on this question is unanswerable. At page 196, after referring to the decisions of the Calcutta and Allahabad High Courts, the learned Judges proceed: "Whatever the strictly logical view of the matter may be, it appears to us that the object of the provisions of the Code was to enable the Court to separate the question of mesne profits from the claim to the land and to relegate the former to proceedings in execution. It was certainly within the competence of the legislature to do so; and it was regarded as promoting the convenience of litigants and the Court. According to section 244 the enquiry need not be held by the Court which tried the suit. If the execution of the decree is transferred to another Court it might be held by such Court. The enquiry may not logically be one relating to the execution of the decree; but in our opinion it was the intention of the legislature to make it a part of the execution proceedings. This explains the reason for its inclusion in section 244. The language of clause (*c*) of that section 'any other question relating to the execution' shows that the inquiry into the amount of mesne profits was also to be regarded as a question relating to execution. An application for the ascertainment of mesne profits must therefore according to the Code be regarded as an application for execution, though it may be that the decree, in so far as mesne profits are concerned, would be incomplete until they have been ascertained. It may be right to hold that within the meaning of section 230 of the repealed Code, the twelve years prescribed therein for the execution of a decree for money decree would run only from the date when the mesne profits are ascertained; for it may be said that until that is done, it cannot be said that there is a decree for money." Here there is no question under section 48 of the Code of 1908. The only question is whether this claim was barred under Article 182, and agreeing with

the passage in *Ramana* v. *Babu*[1], I have quoted above, it seems to me that this application is one which comes under Article 182 of the Indian Limitation Act, Schedule I, and therefore the application is time-barred.

In my opinion, therefore, the appeal should be allowed and the Darkhast dismissed with costs throughout.

This judgment will govern both appeals.

SHAH, J.:—I concur.

Decree reversed.

J. G. R.

[1] (1912) 37 Mad. 186.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1920.

September 14.

VAMAN VITHAL KULKARNI (ORIGINAL PLAINTIFF) APPELLANT *v.* VENKAJI KHANDO KULKARNI AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS*.

Hindu law—Adoption—Widow of predeceased nephew adopting with the consent of the widow of the last co-parcener—Subsequent adoption by the the latter widow not legal—Effect of invalid adoption—Status of a person in the natural family, when his adoption is invalid.

K, a Hindu, died leaving him surviving his widow G and A the widow of his pre-deceased nephew. A adopted a son with the consent of G. Afterwards G adopted defendant No. 1 to her husband. A question having arisen as to the validity of the defendant No. 1's adoption and whether he lost his rights in his natural family :—

Held, that on the adoption by A with the consent of G, the whole estate vested in the adopted son and the right of G to adopt to her husband came to an end.

Held, further, that defendant No. 1 did not lose his rights in his natural family, inasmuch as his adoption was invalid and was not acquiesced in by any person in the family of K.

* Cross Appeals Nos. 978 and 979 of 1917.