

APPELLATE CIVIL.

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

1923.

March 9.

SAYAD YUSUF ALLI WALLAD MUJAWAR ALLI KHATIB (ORIGINAL PLAINTIFF), APPELLANT v. SAYAD AMIN ALIAS PAPA MIYA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Civil Procedure Code (Act V of 1908). Order XX. Rule 12—Civil Procedure Code (Act XIV of 1882), sections 211, 212—Decree for past and future mesne profits—Execution of decree—Stay of execution—Sureties for judgment-debtors—Application for ascertainment of future mesne profits—Application does not keep the decree alive against sureties.

A decree for possession and mesne profits past as well as future was passed in 1907. An application was made in 1908 to execute the decree; but the defendant appealed and obtained stay of execution of the decree on his furnishing three sureties. The Court confirmed the decree on the 14th September 1915. The plaintiff proceeded to execute the decree and in July 1916 recovered possession and past mesne profits. He applied in April 1918 to have the future mesne profits ascertained; and after such ascertainment he applied in January 1920 to recover the amount from the defendant and his three sureties:—

Held, that the application against the sureties was time-barred, since the application to have the future mesne profits ascertained would not keep the decree alive against the sureties.

Gangadhar v. Balakrishna⁽¹⁾ and *Narayan v. Timmaya*⁽²⁾, referred to.

SECOND Appeal from the decision of N. S. Lokur, Assistant Judge, A. P., at Sholapur, confirming the decree passed by N. G. Chapekar, First Class Subordinate Judge at Sholapur.

Execution proceedings.

On the 10th December, 1907, the plaintiff obtained a decree for possession and past as well as future mesne profits. The amount of the future mesne profits was left to be determined in execution. The plaintiff

* Second Appeal No. 29 of 1922.

⁽¹⁾ (1920) 45 Bom. 819.

⁽²⁾ (1906) 31 Bom. 50.

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applied in March 1908 to execute the decree. In the meanwhile, the defendant appealed from the decree, and obtained stay of execution on his furnishing three sureties. The Court confirmed the decree on the 14th September 1915. The plaintiff thereafter proceeded with the execution, recovered possession and realised past mesne profits in July 1916.

The plaintiff then applied in April 1918 to have the future mesne profits ascertained. The profits were so ascertained in February 1919.

The plaintiff next applied on the 3rd January 1920 to recover the ascertained amount from the defendant and his sureties.

The application was dismissed as time-barred by both lower Courts.

The plaintiff appealed to the High Court.

P. B. Shingne, for the appellant.—The sureties were not necessary parties to the application for ascertainment of future mesne profits: *Raghubar Singh v. Jai Indra Bahadur Singh*⁽¹⁾. There is no executable decree, so long as there is no ascertainment: *Puran Chand v. Roy Radha Kishen*⁽²⁾. The present application having been within three years of the date of the application for ascertainment was within time.

G. S. Mulgaonkar, for respondent No. 5, was not called upon.

MACLEOD, C. J. :—The plaintiff obtained a decree in Suit No. 871 of 1906, in the Court of the First Class Subordinate Judge of Sholapur, on the 10th December 1907 by which he was awarded possession with past and future mesne profits of the property in suit. In

(1) (1919) 22 Bom. L. R. 521.

(2) (1891) 19 Cal. 132.

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March 1908 he filed a Darkhast for executing the decree for recovering possession and the past mesne profits. Meanwhile the defendant preferred an appeal, but the appeal was dismissed. The defendant preferred a second appeal and in the second appeal further execution of the decree was stayed under the orders of the High Court, after three sureties passed security-bonds for the due fulfilment of the decree that might be eventually passed against the defendant. The High Court confirmed the decree of the first Court on the 14th September 1915, and the execution proceedings that had been stayed were continued. The plaintiff recovered possession and the past mesne profits in July 1916, and the proceedings terminated. Since then the question of future mesne profits had not been agitated.

The decree was passed in 1907 under the Civil Procedure Code of 1882 according to the provisions of which mesne profits would have to be ascertained in execution. The appellate Court might have passed a decree under the Code of 1908 directing an inquiry as to mesne profits under Order XX, Rule 12, but it refrained from doing so. In April 1918 the plaintiff made an application for determination of the future mesne profits from the date of the decree. This application was treated as an application in the suit and the decree was made final in February 1919 determining the amount of mesne profits from 1906 to 1916. It was wrong to consider that application as an application in the suit and it must be, for the purpose of this appeal, treated as a proceeding in execution. The sureties were not made parties in this proceeding. But when the mesne profits had been ascertained, the present Darkhast was taken out by the plaintiff on the 3rd January 1920 for recovering the amount of future mesne profits so determined from the judgment-debtor or from the three sureties. Both the

lower Courts have held that the Darkhast was time-barred as against the sureties.

It may be that the sureties were not necessary parties in the plaintiff's application for ascertaining the mesne profits; see *Raghubar Singh v. Jai Indra Bahadur Singh*⁽¹⁾. But it does not follow that although the sureties were not necessary parties to the application to ascertain the amount of mesne profits, the decree had been kept alive against them by reason of that application. In *Puran Chand v. Roy Radha Kishen*⁽²⁾ it was held that neither Article 178 nor Article 179 of the Indian Limitation Act applied 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, 1882. The learned Judges there seemed to have thought that although the proceedings for the ascertainment of mesne profits were proceedings in execution, still they were of an interlocutory nature and that there was nothing that could be executed under section 255 of the Code until the actual amount of mesne profits had been found and determined. All the authorities on that question were referred to by this Court in *Gangadhar v. Balkrishna*⁽³⁾ in which it was held that an application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, was not a proceeding in the suit but a proceeding in execution and came within Article 182 of the Indian Limitation Act of 1908. The decision in the case of *Ramana v. Babu*⁽⁴⁾ was followed in preference to the decisions of the High Courts of Calcutta and Allahabad. Then in *Narayan v. Timmaya*⁽⁵⁾ it was held that the

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(1) (1919) 22 Bom. L. R. 521.

(3) (1920) 45 Bom. 819.

(2) (1891) 19 Cal. 132.

(4) (1912) 37 Mad. 186.

(5) (1906) 31 Bom. 50.

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application to execute the decree against the surety was barred by time since the decree could not be treated as passed jointly as against the judgment-debtor and the surety, within the meaning of Article 179, explanation 1, paragraph 2, of the Second Schedule to the Indian Limitation Act (XV of 1877).

In this case, therefore, the limitation as against the sureties ran from the date of the High Court order of 14th September 1915. Though the application to ascertain the amount of mesne profits was made to keep the decree alive against the judgment-debtor it would not keep the decree alive as against the sureties as this application was made more than three years after 14th September 1915. Therefore the application against the sureties was time-barred. If the contention of the appellant is right, it would follow that the decree-holder might keep the decree alive against the sureties by making applications for the ascertainment of mesne profits, which might extend to the full time allowed for the execution of the decree. It seems to us that under the provisions of the Code of 1882 the period for executing the decree would not be extended unless proper steps were taken for ascertaining the mesne profits within the period prescribed for taking steps in execution.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

R. R.