

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.*

DULLABHBHAI HANSJI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS  
*v.* GULABBHAI MORARJI DESAI, RECEIVER OF THE ESTATE OF INSOLVENT  
 GULABCHAND RUPAJI (ORIGINAL PLAINTIFF), RESPONDENT.\*

1937  
 July 29

*Indian Limitation Act (IX of 1908), Article 109—Mesne profits—Sale by insolvent—  
 Sale set aside—Suit by Receiver to recover mesne profits—Starting point.*

Article 109 of the Indian Limitation Act, 1908, does not provide that the starting point of time for the recovery of mesne profits wrongfully received shall be the date when the cause of action to recover those profits arose; the starting point is the date when the profits were received.

On March 13, 1929, an insolvency Court set aside a certain sale under section 53 of the Provincial Insolvency Act, 1920. The sale in question had taken place on March 14, 1925. On March 6, 1931, the Receiver in insolvency brought a suit to recover from the alienees mesne profits for the years 1925 to 1928. A question having arisen whether the claim was in time:—

*Held*, that the suit was barred as to profits received more than three years before the institution of the suit, that is, before March 6, 1929.

*Peary Mohon Roy v. Khelaram Sarkar*<sup>(1)</sup>; and *Kishna Nand v. Kunwar Partab Narain Singh*,<sup>(2)</sup> referred to

*Mathuswami v. Official Assignee, Madras*,<sup>(3)</sup> distinguished.

FIRST APPEAL from the decision of K. V. Mehta, First Class Subordinate Judge, Surat, in suit No. 136 of 1931.

Suit to recover mesne profits.

On March 14, 1925, one Gulabchand Rupaji executed in favour of Dullabhbhai Hansji and another (defendants) a sale deed for Rs. 24,975 in respect of a ginning factory situated at Madhi, a village in the Surat District.

On August 10, 1925, the creditors of Gulabchand applied to the Court of the First Class Subordinate Judge, Surat, to have him adjudged insolvent. On March 3, 1927, he was adjudicated an insolvent and Gulabbhai Morarji (plaintiff) was appointed Receiver of his estate.

\*First Appeal No. 152 of 1934.

<sup>(1)</sup> (1908) 35 Cal. 996.

<sup>(2)</sup> (1884) L. R. 11 I. A. 88, s. c. 10 Cal. 785, p. c.

<sup>(3)</sup> (1936) 59 Mad. 1020, F. B.

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The Receiver in insolvency then applied to have the sale set aside and the Court set aside the same on March 13, 1929.

On March 6, 1931, Gulabbhai sued to recover from Dullabbhai and another Rs. 6,000 being the amount of mesne profits at the rate of Rs. 1,500 per year for the years 1925 to 1928, alleging that the cause of action to recover the same arose on March 13, 1929, when the sale was set aside.

The defendants contended, *inter alia*, that the plaintiff should have claimed mesne profits in the suit to have the sale set aside, that the present separate claim was not maintainable, and that the claim for mesne profits beyond three years from the date of suit was not maintainable.

The learned Subordinate Judge gave the plaintiff a decree for Rs. 4,796 holding that the suit for mesne profits claimed was maintainable.

The defendants appealed.

*H. M. Choksi*, for the appellants.

*N. K. Desai*, with *S. G. Chitale*, for the respondent.

BEAUMONT C. J. This is an appeal from a decision of the First Class Subordinate Judge of Surat. The suit is a suit for mesne profits of certain immoveable property which accrued during the years 1925 to 1928, more than three years before the institution of the suit.

The material facts are that in 1925 one Gulabchand was adjudicated insolvent and the plaintiff was appointed receiver of his estate under the Provincial Insolvency Act. The insolvent had within two years prior to his insolvency sold the property from which the mesne profits in suit are derived to the defendants, and on an application made by the plaintiff as receiver in the insolvency under section 53 of the Provincial Insolvency Act the sale was set aside. That was in March, 1929. This suit was instituted in March, 1931, and the question is whether the claim for mesne profits for the years 1925 to 1928 is barred by limitation.

The learned Judge dealt with that point as a preliminary issue and held that the claim was not barred. His view was that the cause of action to recover these mesne profits only arose when the sale to the defendants was set aside, and, that date being within two years before the institution of the suit, he held that the suit was in time. I am not able to agree with that view. Article 109 of the Indian Limitation Act provides that where the suit is for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendants the suit must be brought within three years from the date when the profits were received. We are told that part of the profits for the year 1928 was received within three years from the institution of the suit, and if so the suit is in time as to that part; our judgment only applies to profits received more than three years before suit. The plaintiff cannot say that the profits were not wrongfully received, because if the profits were rightfully received by the defendants the plaintiff has no right to recover them. The effect of the order of the insolvency Court setting aside the sale to the defendants is to render the sale null and void from its inception. It is no doubt perfectly true that the plaintiff could not have sued to recover these mesne profits until he had got the sale set aside. But Article 109 does not provide that the starting point of time for the recovery of mesne profits wrongfully received shall be the date when the cause of action to recover those profits arose; the starting point is the date when the profits were received. It cannot, in my opinion, be said that the profits were received in the first instance rightfully, and that the receipt afterwards became wrongful. In the event which happened of the sale being set aside, the receipt of the profits was always wrongful, and the terms of Article 109 are in my opinion perfectly plain and require the suit to be brought within three years from the date when the profits were received.

This view of the Act was taken in *Peary Mohon Roy v. Khelaram Sarkar*,<sup>(1)</sup> and I think also by the Privy Council in

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*Kishna Nand v. Kunwar Partab Narain Singh*,<sup>(1)</sup> though there are earlier decisions in an opposite sense. We have been referred to a recent decision of the Full Bench of the Madras High Court: *Muthuswami v. Official Assignee, Madras*.<sup>(2)</sup> In that case a mortgage-deed was set aside in insolvency and the Official Assignee called upon the mortgagee to account for the rents and profits which he had received from the mortgaged property. The Court there held that the Indian Limitation Act applied to such an application and that the mortgagee was liable for mesne profits for the period of three years immediately preceding the Official Assignee's application. So far as I can see, however, the question of the starting point of limitation under Article 109 was not considered by the Court. The Court considered only the question whether the Indian Limitation Act applied to the proceedings in insolvency.

In my opinion we are bound to give effect to the words of Article 109 which in my view covers this suit, and we must hold that the suit is barred as to profits received more than three years before the institution of the suit. The appeal must be allowed with costs and the suit dismissed in respect of mesne profits received before the 6th of March 1928.

The case to go back to the lower Court for the plaintiff to prove if he can that any part of the profits was received within three years before suit. The defendants will be allowed costs in the trial Court so far as relates to mesne profits received more than three years before the date of the suit; and the plaintiff will be allowed costs in the trial Court so far as relates to mesne profits received within three years of the date of the suit. Costs to be apportioned if necessary.

SEN J. I agree.

*Appeal allowed : case sent back.*

Y. V. D.

<sup>(1)</sup> (1884) L. R. 11 I. A. 88, s. c. 10 Cal. 785, p. c.

<sup>(2)</sup> (1936) 59 Mad. 1020, F. B.