

Then Section 147 provides for the case of failure to appear on adjournment and points out a mode of proceeding which is strictly applicable to non-appearance, and Section 148 provides in quite general terms that on default by a party to whom time has been allowed the Court shall proceed to a decision. There is no reason why Section 147 any more than Section 148 should apply when a party has committed both the defaults mentioned in the Sections, and it could not be given that operation without detracting from the plain language of Section 148. The Legislature could not have intended that in case of default by reason of failure to perform the act for which time had been allowed, the proceeding should be different when the party appeared from that when he did not appear. In the latter instance, the non-appearance is really but a part of the default, and it is made obligatory on the Court to proceed under Section 148 by terms which include every case of such default.

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For these reasons we are of opinion that the decrees of the Original Court are not *ex-parte* decrees for non-appearance passed under Section 147 but are decrees under Section 148. They were therefore appealable to the Civil Court and these special appeals must be dismissed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 290 of 1868.

SUBBA VENKATARAMAIYAN... ..*Petitioner.*

SUBRAYA AIYAN and 2 others... ..*Counter Petitioners.*

Where no liability to mesne profits is imposed by a decree Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree.

THIS was a petition against the order of G. Muttusami Chetti, Principal Sadr Amin of Madura, dated 20th August 1868.

1869.
February 12.
C. M. S. A.
No. 290 of
1868.

(a) Present: Scotland, C. J. and Collett, J.

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Sanjiva Row, for the petitioner.

Sloan, for *Snell*, for the 1st counter-petitioner.

The facts appear from the following

JUDGMENT:—This is an appeal from an order of the Principal Sadr Amin's Court at Madura reversing an order passed by the Original Court in execution of the decree in the suit to enforce the delivery of possession of a piece of land and the payment of mesne profits between the date of the institution of the suit and the execution of the decree. The first ground of appeal relating to the piece of land was hardly insisted upon in argument, and it is only necessary to say that it is untenable. The second ground of appeal raises the question whether the Principal Sadr Amin has rightly decided that an adjudication in the decree of the right to the mesne profits claimed was necessary to warrant an order under Section 11 of Act XXIII of 1861.

We are of opinion that his decision is right. The suit, as appears from the plaint, was brought for the recovery of land and mesne profits for one year, but the plaintiff failing to prove his claim to mesne profits it was disallowed and the decree simply adjudged his right to the possession of the land. No liability to mesne profits therefore was imposed by the decree, and we think that Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree. The general words "any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree" following the specific terms "any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree" suggested at first sight a little doubt, but when the whole provision is read with the enactments in Sections 196 and 197 of Act VIII of 1859, it is clear that the words relating to mesne profits subsequent to the date of the suit must be limited strictly to mesne profits made payable by the decree in the suit.

The recovery of land and of the mesne profits thereof may be, as the Procedure Code (Section 10) shews, separate causes of action. But the plaintiff's cause of action in respect to mesne profits is at the institution of the suit limited to such as have then accrued due, and in respect to subsequently accruing mesne profits he has a fresh cause of action. Then Section 196 permits the Court to provide in its decree for the payment of such subsequently accruing mesne profits though not asked for in the plaint, but does not take away the plaintiff's cause of action in respect thereof, and if their payment is provided for in the decree then all questions regarding the amount thereof are by Section 11 of the amending Act to be determined in the course of execution. This construction is supported by two decisions of this Court in the cases of *Kuppu Aiyar v. Venkataramana Aiyar*, 3 *Madras H. C. R.*, 421, and *Lakshmana Naik v. Nanthogopal Naik* decided on the 27th July 1865 (not reported,) and also by the decision of a Divisional Court at Calcutta in the case of *Haramohini Chowdhraïn v. Dhmmmani Chowdraïn*, 1 *Bengal Law Reports*, 138.

In the latter case we find that this Court's decision in *Chennapa Nayadu v. Pitchi Reddi*, 1 *Madras H. C. Reports*, 453 was cited as an authority for a contrary construction of the Section, and we are led by the remarks of the Court upon it to observe that the claim in the suit was a right to depasture cattle and water them at a particular tank and to recover damages for the loss of the profits of pasturage during three years, and the decision proceeded on the ground that the intended effect of the decree passed was to make damages for the loss of the profits of pasturage from the date of the suit payable in addition to the amount awarded for the loss sustained at the institution of the suit, which effect had been given to the decree by an order in execution. Here the decree is not merely silent as to mesne profits, but the claim to those before suit has been expressly disallowed. The decision viewed in that way has been followed in *Narayana Aiyar v. Srinivassa Aiyar*, 2 *Madras H. C. Reports*, 435, and in *ex-parte Rudrarapur Vissam Raz*, 3 *Madras H. C. Reports*, 287, where the decree was for land and mesne profits and had in like

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manner been given effect to by an order in execution. Perhaps a proper degree of strictness was not applied to the operation of the decrees in those cases, and we go with the observation in the judgment in the last-mentioned case that "Care is needed in drawing up decrees by Courts of First Instance to provide for the payment of interest or mesne profits." In every case in which the Court intends the payment of mesne profits or interest from the date of the suit, the decree should expressly so provide.

For these reasons the order appealed from must be affirmed and the appeal dismissed with costs.

Appellate Jurisdiction (a)

Civil Miscellaneous Regular Appeal No. 272 of 1868.

RAMANUJA AIYANGAR.....*Petitioner.*

VENKATA CHARRY*Counter Petitioner.*

The period of limitation provided by Section 20 of Act XIV of 1859 runs not from the date of a former application for process of execution to enforce the decree, but from the date of the order upon the application.

An application to enforce the execution of a decree was made on the 30th August 1865. The application was dismissed by an order of the Court dated the 14th October 1865. The second application was made on the 6th October 1868.

Held, that the second application was not barred by the Limitation Act.

1869.
March 10.
C. M. R. A.
No. 272 of
1868.

APPEAL from the order of E. B. Foord, the Civil Judge of Chingleput, dated the 13th October 1868.

Srinivassa Charyar, for the petitioner.

Sunjiva Row, for the counter-petitioner.

The material facts and dates are set forth in the following

JUDGMENT:—This is an appeal from an order dismissing the plaintiff's application for process of execution to enforce the decree in the suit, on the ground that Section 20 of Act XIV of 1859 was a bar to the issuing of such process. The undisputed facts are that the present application was made on the 6th October 1868, and that a previous similar application had been made on the 30th

(a.) Present: Scotland, C. J. and Collett J.