*Before Mr. Justice Ainslie and Mr. Justice Wilson.*

DILDAR HOSSEIN AND OTHERS (DEFENDANT) *v.* MUJEEDUNNISSA (PLAINTIFF).* 1878 *Nov.* 19.

*Suit for Possession—Decree—Application for Assessment of Mesne Profits—Order—Execution—Appeal from Order—Limitation.*

Where a decree is made under s. 197 of Act VIII of 1859, proceedings taken after the original decree for possession, for the purpose of determining the amount of mesne profits, are in effect proceedings in continuation of the original suit, and until those proceedings are brought to a close, and an assessment of the mesne profits come to, it cannot be said that a decree for any specific amount of money exists.

The wording of s. 197 is quite consistent with the view that, where a decree for possession is given, and an enquiry as to the amount of mesne profits is reserved, the decree for possession of the land is only a partial decree in the suit, and that there is to be a further enquiry and a further decree in respect of mesne profits. The words "for the execution of the decree" refer only to the execution of the decree for the land, and cannot refer to execution of that which has not then taken the form of a decree.

ON the 31st January 1860, one Mujeedunnissa obtained a decree for possession of certain property together with mesne profits against one Dildar Hossein. Execution was taken out in March 1863, and the plaintiff obtained possession of the land. On the 3rd March 1866, the judgment-creditor made a further application to the Court to have determined the amount due to him as mesne profits, the question having been reserved, under s. 197 of Act VIII of 1869, in the original decree. The judgment-debtor filed objections to the assessment proposed by the Ameen; but, eventually, his objections were overruled and the order upheld on appeal on the 31st of August 1871. The case was struck off the file on the 28th August 1872. On the 25th August 1874, the judgment-creditor applied to the Court to

* Appeal from Appellate Order, No. 132 of 1878, against the order of Baboo Kedernath Mozoomdar, Acting Additional Subordinate Judge of Zilla Gya, dated the 6th February 1878, affirming the order of Baboo Sheo Sarun Lall, First Munsif of that District, dated 17th of February 1877.

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realize the amount due to him as mesne profits, whereupon the judgment-debtor objected that the application was out of time, inasmuch as no steps had been taken to execute the decree since the 3rd March 1866.

The decree-holder contended that the petition of the 3rd March 1866 should be considered as pending until the 31st August 1871, inasmuch as when the amount due for mesne profits was ascertained, an appeal was preferred on the part of the judgment-debtor, and it was not until the 31st August 1871, that the decision was confirmed on appeal.

The Munsif found that the application for execution made on 3rd March 1866 must be considered as pending until the 31st August 1871, and therefore held that the application, made on the 25th August 1874, must be considered as having been made within three years from the 31st of August 1871.

The judgment-debtor appealed to the Subordinate Judge who, however, upheld the Munsif's decision dismissing the appeal with costs.

The judgment-debtor then appealed to the High Court.

Mr. *M. L. Sandel* and Mr. *C. Gregory* for the appellant.—The application referred to in cl. 4, art. 167 of Act IX of 1871, is an application for the execution of a decree, such as is contemplated in s. 212 of the Code of 1859, and no other.—*Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy* (1); Section 197 of Act VIII of 1859, shows that the application, to assess the amount of mesne profits, must be treated as an application for execution of a decree, and must be governed by the rule of limitation applicable to such applications.—*Woodoy Tara Chowdhrain* v. *Syud Abdool Jubbar Chowdhry* (2).

Moonshee *Mahomed Yusoof* for the respondent.—The application of the 25th August 1874 was within time, inasmuch as it was in reality the first application to execute that part of the decree which relates to mesne profits, which decree was only made final on the 31st August 1871, as to this see the

(1) I. L. R., 3 Calc., 235. (2) 24 W. R., 339.

cases of *Mussamut Fuzeelun* v. *Syud Keramut Hossein* (1) and *Bunsee Singh* v. *Mirza Nuzuf Ali Beg* (2) where the Courts have held that, when a decree is made under s. 197, proceedings taken after the original decree for possession for the purpose of determining the amount of mesne profits are in effect proceedings in continuance of the suit, and that, until such proceedings are ended, no decree for any specific amount exists.

The judgment of the High Court was delivered by

AINSLIE, J. (WILSON, J., concurring).—The question raised in this appeal is one under the Limitation Act of 1871. A decree for possession of certain property and mesne profits was made on the 31st of January 1860. Execution was taken out in 1863, and possession was obtained, and a portion of the interest realized on the 6th of March of that year. On the 3rd of March 1866, the judgment-creditor made a further application to the Court to determine the amount due to him as mesne profits, the question having been reserved under s. 197 in the original decree. An enquiry having been held, the judgment-debtor raised objections to the assessment proposed by the Ameen. Those objections were eventually disposed of by the first Court on the 29th of June 1869, and the order of that Court was confirmed on appeal on the 31st of August 1871. On the 25th of August 1874, the judgment-creditor applied to the Court to realize the amount due to him as mesne profits, and thereupon it was objected that this application was out of time. That objection has been overruled by the Courts below.

The appellant before us relies upon the decision of a Full Bench of this Court on the meaning of art. 167, sched. ii, of the Limitation Act of 1871. The Court decided that the application referred to in cl. 4, art. 167, is an application for execution of a decree such as is contemplated in s. 212 of the Code of 1859, and no other. But in answer to this the respondent urges that he is in time, inasmuch as this is really the first application to execute that part of the decree which relates to mesne profits, which was only made final on the 31st

(1) 21 W. R., 212. (2) 22 W. R., 328.

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of August 1871. This view is supported by judgments of this Court in *Mussamut Fuzeelun* v. *Syud Keramut Hossein* (1) and *Bunsee Singh* v. *Mirza Nuzuf Ali Beg* (2) in which the Court held, that when a decree is made under s. 197 proceedings, taken after the original decree for possession for the purpose of determining the amount of mesne profits payable to the plaintiff, are in effect proceedings in continuance of the original suit, and that until those proceedings are brought to a close and a declaration has been made as to the amount actually due, it cannot be said that any decree for a specific sum of money exists. In this view of the law we concur.

The case of *Woodoy Tara Chowdhrain* v. *Syud Abdool Jubbar Chowdhry* (3) has been cited by Mr. Sandel for the appellant, in which the learned Judges have not followed the decisions already cited, although one of them was a party to those decisions. Mr. Justice Markby puts his decision on the ground that "the judgment-creditor, whether rightly or wrongly, is now and has been all along, as appears from his own application, executing the decree of 1864, and must, therefore, be bound by the rules of law which relate to the execution of the decree of that date." Mr. Justice Morris does not take quite such a strict view of those proceedings, but adopts the view already expressed in an earlier decision. He, however, for reasons which he gives, thought that in the particular case the judgment-creditor was not entitled to proceed.

We think that we ought to look, not to the form of the application, but to its object, and that, although it may be and, undoubtedly, was, drawn up as an application under s. 212, yet its only object was to have the case further proceeded with, and a determination arrived at as to the amount actually due from the defendant to the plaintiff. In fact there could have been no other object at the time, because the decree in all other respects had already been completely executed. Whether in March 1866 the plaintiff was out of time, is a question which cannot now be considered, seeing that that application led to litigation extending over five years, and it must be taken that all questions, which

(1) 21 W. R., 212. (2) 22 W. R., 328. (3) 24 W. R., 339.

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might properly have been raised at the time, were raised and disposed of by the Court, and that the order of the 31st of August 1871, declaring that the defendant was bound to pay to the plaintiff a given sum of money, was a good and binding order.

The learned pleader for the appellant has referred to s. 197 of the Code of 1859 as showing that the application to assess must be treated as an application for execution of a decree, and must, therefore, be governed by the rule of limitation applied to such applications; but it seems to me that the wording of that section is perfectly consistent with the view taken by Mr. Justice Phear, that where the enquiry as to the amount of mesne profits is reserved, the decree for the possession of land is only a partial decree in the suit, and that there is to be a further enquiry and a further decree in respect of mesne profits. The words "for the execution of the decree" refer only to the execution of the decree for the land, and cannot refer to execution of that which has not yet taken the form of a decree.

In this view we think that the appeal should be dismissed with costs.

*Appeal dismissed.*

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# PRIVY COUNCIL.

RAMESSUR PERSAD NARAIN SING (PLAINTIFF) *v.* KOONJ BEHARI PATTUK AND ANOTHER (DEFENDANTS).

P. C.* 1878 *Nov.* 8, 9, 12; *Dec.* 3.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Right to the use of Water—Artificial Watercourse.*

The right to water flowing to a man's land through an artificial watercourse, constructed on a neighbour's land, must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal origin.

Such a right may be presumed from the time, manner, and circumstances under which the easement has been enjoyed.

THE suit in which this appeal arose was brought by the appellant as plaintiff in order to establish against the defend-

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.