

Before Mr. Justice Deverley and Mr. Justice Ameer Ali.

KEWAL KISHAN SINGH (JUDGMENT-DEBTOR) v. SOOKHARI
(DECREE-HOLDER.) *

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December 7.

Court Fees Act (VII of 1870), section 11—Suit for possession and mesne profits—Code of Civil Procedure (Act XIV of 1882), section 212—Assessment of mesne profits—Dismissal of suit—Application for execution.

Where, upon the application of the decree-holder, the Court executing the decree has assessed the amount of mesne profits, but the necessary Court fees have not been deposited within the time fixed by the Court as provided by section 11 of the Court Fees Act (VII of 1870), the suit, that is, the claim in respect of those mesne profits, must be dismissed; after such dismissal, no application for execution of the decree for mesne profits can be entertained, as no such decree is in existence.

The word "suit" in the last part of para. 2 of section 11 of the Court Fees Act does not mean the entire suit; it means the claim in respect of the mesne profits.

THE facts of the case, so far as they are necessary for the purposes of this report, are fully set out in the judgment of the High Court.

Dr. Asutosh Mookerjee for the appellant.

Babu Karuna Sindhu Mookerjee for the respondent.

Dr. Asutosh Mookerjee.—An application for the assessment of mesne profits is not an application for the execution of the decree, but an application in the original suit for the purposes of obtaining a final decree; see *Puran Chand v. Roy Radha Kishen* (1). If, after assessment of mesne profits, the Court fees are not paid, the suit, so far as it relates to mesne profits, must be dismissed under section 11, para. 2 of the Court Fees Act. After such dismissal, no fresh application for execution can be entertained, as there is no decree in existence capable of execution; the decree-holder is not entitled to apply for leave to put in additional Court fees, as after such dismissal there is no pending suit before the

* Appeal from Appellate Order No. 101 of 1895, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 4th of December 1895, affirming the order of Babu Gobind Chander Basack, Munsif of Patna, dated the 9th of September 1895.

1896 Court. The decree-holder's remedy is either by an application
 KIWAL for review of the order of dismissal under section 628 of the Civil
 KISHAN Procedure Code, or by a fresh suit for mesne profits under section
 SINGH 56 of the Civil Procedure Code, subject to the law of limitation.
 v. The observations of Edge, C. J., in *Balkaran v. Gobind* (1) support
 SOOKHARI. this contention.

Babu *Karuna Sindhu Mookerjee* for the respondent.—The word “suit” in the last clause of para. 2, section 11 of the Court Fees Act means the execution proceeding, that is, the application for the assessment of mesne profits. Sections 9 and 10 show that this is the meaning. If so, one such application being rejected, there is no bar to a fresh application. The word “suit” in section 11 cannot possibly mean the whole suit.

Dr. *Asutosh Mookerjee* replied.

The judgment of the High Court (BEVERLEY and AMEER ALI, JJ.) was delivered by

BEVERLEY, J.—This second appeal is on behalf of the judgment-debtor, and it raises an important question as to the construction of section 11 of the Court Fees Act. The respondent had obtained a decree for possession of immovable property with mesne profits, which were to be assessed in the course of executing the decree. In March 1893 the decree-holder presented an application to execute the decree as to the possession of the property and to ascertain the mesne profits. The application for execution as regards possession was separately registered, and, as we understand, that portion of the decree has been executed and possession has been delivered to the decree-holders. On the 22nd March 1895, a further application as regards the mesne profits appears to have been filed, and on the 27th of the same month the mesne profits were assessed at a certain sum, and an order was made upon the decree-holder to deposit the necessary Court fees under section 11 of the Court Fees Act on the following day. On that day, namely, the 28th of March 1895, the decree-holder having taken no steps, the case was dismissed. Then, on the 17th August, a fresh application was made by the decree-holder to execute the decree in respect of the mesne profits which had been ascertained

(1) I. L. R., 12 All., 129 (148).

in the previous March, and on the 27th August the judgment-debtor objected that the suit having been dismissed there was no decree in existence of which the applicant could take out execution. On the 9th September the Munsif held that all that was done on the 28th March 1895 was to strike off the application for executing the decree in respect of mesne profits, and he accordingly allowed the execution to proceed, and this order has been upheld in appeal.

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Now, section 11 of the Court Fees Act provides that in suits for immoveable property and mesne profits, if the profits decreed are in excess of the profits claimed, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so decreed shall have been paid to the proper officer, and the second clause, which is the important clause in this case, is as follows : "Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." The question before us is as to what meaning is to be attached to the words "the suit shall be dismissed." It seems clear that these words are intended to have a different signification from the words used in the former part of the section to the effect that the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable is paid. But it is contended on the other side that inasmuch as the suit had been already decreed, certainly so far as the possession of the property is concerned, and it may fairly be argued also as regards mesne profits, it cannot have been intended that the words "the suit shall be dismissed" should mean that the entire suit shall be dismissed; and it is argued that the proper meaning to be put on these words is merely that the application for execution shall be dismissed, leaving it open to the decree-holder to make a fresh application. We are of opinion that *that* is not the correct con-

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struction, having regard to the wording of the previous section, section 10 of the Act. According to that section, when an insufficient Court fee has been paid upon a plaint, the Court shall require the plaintiff to pay so much additional fee as would have been payable, and the suit shall be stayed until the additional fee is paid. "If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed," and by analogy we are of opinion that the meaning of section 11 is that in case the additional fee required in respect of the excess mesne profits is not paid, execution of the decree shall be stayed until it is paid, and if it is not paid within the time fixed by the Court, then the suit, that is to say, the claim in respect of those mesne profits, shall be dismissed. We think it is unnecessary to hold that the word "suit" in this clause means the entire suit, including the claim for possession which had been decreed and the decree for which had been executed, but we think it can fairly be construed as the suit or claim in respect of the mesne profits in respect of which the Court fee payable has not been paid within the time fixed by the Court. If this construction be correct, it follows that no decree in respect of these mesne profits was any longer in existence and it could not be executed. It might of course be open to the decree-holder to obtain a revival of the suit by applying for a review of judgment, or in some other way, but not having done this, we are unable to hold with the lower Courts that he was entitled to make a fresh application for execution of the decree.

Under these circumstances this appeal must be allowed, the orders of the lower Courts reversed, and the application of the 17th August 1895 rejected.

The appellant is entitled to his costs in both the Appellate Courts.

S. C. C.

Appeal allowed.