

(1895) 01 CAL CK 0004
In the Calcutta High Court

Dwarka Nath Misser and Others

APPELLANT

Vs

Barinda Nath Misser

RESPONDENT

Date of Decision : 08-01-1895

Acts Referred:

Civil Procedure Code, 1882 — Section 211, 212
Limitation Act, 1963 — Article 178

Citation : (1895) ILR (Cal) 425

Hon'ble Judges : Rampini, J; Ghose, J

Bench : Division Bench

Judgement

Ghose, J.—This appeal arises out of an application made on the 1st August 1891 for the purpose of giving effect to an order which was drawn up in the form, and which has in law the effect, of a decree. The order in question was made on the 10th of March 1885 in a suit for partition. At the time when it was passed, the Court determined the rights of the respective parties, but no partition by metes and bounds was then come to. Subsequently an application was presented by both the parties to the suit on the 19th January 1886, asking the Court to appoint a certain individual as an arbitrator for the purpose of dividing the properties between them. The Court, in compliance with the prayer thus made, sent the record to the person whom the parties nominated; but it appears that, after certain steps had been taken by the parties for the purpose of partition, they made default, the result being that the arbitrator appointed returned the papers to the Court, which, on the 26th August 1886, struck off the application. Afterwards, another application was presented on the 22nd June 1888 for the same purpose, upon which the same person, who had been previously appointed arbitrator by the parties, was again appointed, but he declined to act in the matter, and accordingly sent back the record on the 12th September 1888. The proceedings were then struck off, and the present application was made, as already mentioned, on the 1st August 1891 for the purpose of having the partition of the properties, the subject-matter of the suit, effected between the parties.

2. The defendants objected to this application upon the ground that it was barred under the provisions of Article 179 of Schedule II of the Indian Limitation Act (XV of 1877).

3. The Court of appeal below has held that if any limitation is applicable to the case, it is Article 178 of the Limitation Act, and that the present application, having been made within three years from the time when the arbitrator appointed by the Court declined to act, is amply within time.

4. The present appeal is by the defendants, and the learned Vakil for the appellants has contended before us that the Article of the Limitation Act which is applicable to this case is Article 179, and not Article 178, and that no proceedings having been taken by the decree-holder within three years from the date of the previous application, which was on the 22nd June 1888, the present application is barred by lapse of time.

5. On a reference, however, to the suit, and to the terms of the order that was drawn up between the parties on the 10th March 1885, we take it that the order in question was one under the provisions of the first paragraph of Section 396 of the Code of Civil Procedure, which runs as follows: "In any suit in which the partition of Immovable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights." The section further provides: "The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares. The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports, appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, Shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith."

6. It seems to us to be clear enough that the proceeding of the Court determining the rights of the parties is not the decree in the case, but that the decree has to be made after the Commissioner appointed by the Court actually divides the property.

7. In the present case what the parties applied for was a partition by metes and bounds of the property which was the subject-matter of the suit. That partition has not yet been made, and until the partition has been made, and the final decree pronounced, it could not be said that any decree in terms of the last paragraph of Section 396 has been passed in the case. The order that is made,

and which was made in this case, under the first paragraph of Section 396, has no doubt the force of a decree; but the question that we have to consider is whether the proceedings that are taken subsequent to such order being passed for the purpose of effecting a partition are proceedings in the suit itself, or proceedings in execution of the decree. We think that they are proceedings in the suit itself, and not proceedings in execution of the decree.

8. In the case of *Paran Chand v. Roy Radhakishen* ILR Cal. 132 decided by a Full Bench of this Court, a somewhat analogous question was discussed and considered. There, a decree had been passed for recovery of possession of certain Immovable property with mesne profits, the amount of which mesne profits was to be ascertained in the execution department; and the question that was referred to the Full Bench was, whether an application for ascertaining the amount of mesne profits awarded by a decree in accordance with the provisions of Section 211 or 212 of the CPC is, as regards limitation, to be governed by Article 178 or by Article 179 of the Limitation Act; and it was held that neither of these articles applied to an application for ascertaining the amount of such mesne profits. The Full Bench in delivering the judgment of the Court among other matters observed as follows:

The object of the Legislature in enacting Section 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts to give, with the possession of the real property, such *wasilat* as they thought the plaintiff would be entitled to by law. The proceedings, therefore, determining the amount of *wasilat* are not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the original suit and carried on in the same way as if a single suit were brought for mesne profits by itself. This has been the view accepted by this High Court in the cases of *Fazilan v. Keramat Hossein* 21 W.R. 212, *Bansi Singh v. Nazaf Ali Beg* 22 W.R. 328, *Dildar Hossein v. Majed-un-nissa* ILR Cal. 629 and *Anando Kishore Das Bakshi v. Anando Kishore Bose* ILR Cal. 50. We must therefore take it as settled law, so far as this Court is concerned, that an order and decree in this case, referring to mesne profits, is in the nature of an interlocutory order, and that there is nothing that can be executed u/s 255 of the Code until the actual amount of mesne profits has been found and determined.

9. And later on the Full Bench observe as follows: "The same principle was laid down in the case of *Kylasa Goundan v. Ramasami Ayyer* ILR Mad. 172 and *Vithal Janardan v. Vithojirav Pattajimv* ILR 6 Bom. 586, in which it was held that to make the provisions of Article 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief an application must be made; but there is nothing in the Code compelling a person, having the conduct of a pending suit, to make formal applications from time to time, asking the Court to proceed to judgment. The form of procedure and the manner of dealing with

suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound, on the oral application of the appellants' pleader- indeed without any such application at all- to fix a date for the first hearing of the inquiry; and after hearing the parties and fixing such issues as might be necessary for the disposal of the subject-matter in dispute to proceed with it as if it were dealing with a case based on a plaint."

10. Having in view the principles which underlie the case to which we have just referred, there can be no doubt that no formal application need have been made by the plaintiff to the suit in which the order of the 10th March 1885 was passed for the purpose of effecting a partition of the property, which was the subject-matter of the suit. The Court was bound upon any application, oral or otherwise, to proceed with the suit, and to make a final decree in it after appointing a Commissioner for the purpose of effecting a partition of the property. The same view was adopted in another case decided by this Court (Prinsep and Ghose, JJ.) on the 4th December 1894 (Appeal from order No. 57 of 1894), and, following this decision, we think there can be no limitation to the application which was made by the plaintiff on the 1st August 1891.

11. We ought to add that the learned vakil for the appellants in the course of his argument referred to certain decisions of the Madras High Court, but it will be observed that in none of those cases was the identical question which we have to consider in this case raised or discussed.

12. As regards the view thrown out by the Lower Appellate Court that Article 178 of the Limitation Act may be applicable, we are inclined to think that that article has very little or no application to the facts of this case.

13. In this view of the matter the appeal will be dismissed with costs.