

(1923) 03 BOM CK 0023
In the Bombay High Court

Sayad Yusuf Alli wallad Mujawar Alli Khatib	APPELLANT
Vs	
Sayad Amin alias Papa Miya and Others	RESPONDENT

Date of Decision : 09-03-1923

Acts Referred:

Civil Procedure Code, 1882 — Section 211, 212

Citation : (1923) ILR (Bom) 778

Hon'ble Judges : Norman Macleod, J;Crump, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiff obtained a decree in Suit No. 871 of 1906, in the Court of the First Class Subordinate Judge of Sholapur, on the 10th December 1907 by which he was awarded possession with past and future mesne profits of the property in suit. In March 1908 he filed a Darkhast for executing the decree for recovering possession and the past mesne profits. Meanwhile the defendant preferred an appeal, but the appeal was dismissed. The defendant preferred a second appeal and in the second appeal further execution of the decree was stayed under the orders of the High Court, after three sureties passed security-bonds for the due fulfilment of the decree that might be eventually passed against the defendant. The High Court confirmed the decree of the first Court on the 14th September 1915, and the execution proceedings that had been stayed were continued. The plaintiff recovered possession and the past mesne profits in July 1916, and the proceedings terminated. Since then, the question of future mesue profits had not been agitated.

2. The decree was passed in 1907 under the CPC of 1882 according to the provisions of which mesne profits would have to be ascertained in execution. The appellate Court might have passed a decree under the Code of 1908 directing an inquiry as to mesne profits under Order XX, Rule 12, but it refrained from doing so. In April 11)18 the plaintiff made an application for determination of the future mesne profits from the date of the decree. This application was treated as an application in the suit and the decree was made final in February 1919

determining the amount of mesne profits from 1906 to 1916. It was wrong to consider that application as an application in the suit and it must be, for the purpose of this appeal, treated as a proceeding in execution. The sureties were not made parties in this proceeding. But when the mesne profits had been ascertained, the present Darkhast was taken out by the plaintiff on the 3rd January 1920 for recovering the amount of future mesne profits so determined from the judgment-debtor or from the three sureties. Both the lower Courts have held that the Darkhast was time-barred as against the sureties.

3. It may be that the sureties were not necessary parties in the plaintiff's application, for ascertaining the mesne profits; see *Raghubar Singh v. Jai Indra Bahadur Singh* (1919) 22 Bom. L.R. 521. But it does not, follow that although the sureties were not necessary parties to the application to ascertain the amount of mesne profits, the decree had been kept alive against them by reason of that application. In *Puran Chand v. Roy Radha Kishen* (1891) 19 Cal. 132 it was held that neither Article 178 nor Article 179 of the Indian Limitation Act applied to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of Section 211 or 212 of the Code of Civil Procedure, 1882. The learned Judges there seemed to have thought that although the proceedings for the ascertainment of mesne profits were proceedings in execution, still they were of an interlocutory nature and that there was nothing that could be executed u/s 255 of the Code until the actual amount of mesne profits had been found and determined. All the authorities on that question were referred to by this Court in *Gangadhar v. Balkrishna* (1920) 45 Bom. 819 in which it was held that an application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, was not a proceeding in the suit but a proceeding in execution and came within Article 182 of the Indian Limitation Act of 1908. The decision in the case of *Ramana v. Babu* (1912) 37 Mad. 186 was followed in preference to the decisions of the High Courts of Calcutta and Allahabad. Then in *Narayan v. Timmaya* (1906) 31 Bom. 50 it was held that the application to execute the decree against the surety was barred by time since the decree could not be treated as passed jointly against the judgment-debtor and the surety, within the meaning of Article, 179, explanation I, paragraph 2, of the Second Schedule to the Indian Limitation Act (XV of 1877).

4. In this case, therefore, the limitation as against the sureties ran from the date of the High Court order of 14th September 1915. Though the application to ascertain the amount of mesne profits was made to keep the decree alive against the judgment-debtor it would not keep the decree alive as against the sureties as this application was made more than three years after 14th September 1915. Therefore the application against the sureties was time-barred. If the contention of the appellant is right, it would follow that the decree-holder might keep the decree alive against the sureties by making applications for the ascertainment of mesne profits, which might extend to the full time allowed for the execution of the decree. It seems to us that under the provisions of the Code of 1882 the

period for executing the decree would not be extended unless proper steps were taken for ascertaining the mesne profits within the period prescribed for taking steps in execution.

5. The appeal, therefore, fails and must be dismissed with costs.