Special Appeal No. 673 *of* 1865.

JIVA' PATEL RAHIMNA' ..... *Appellant.*

MA'LU'KJI' MA'RU' NATHUNA' and others. *Respondents.*

Mesne profits—Interest—Separate suit—Act XXIII. *of* 1861.

Held, under Section 11 of Act XXIII. of 1861, that a separate suit could not be maintained to recover mesne profits or interest, payable in respect of the subject matter of a suit instituted after Act VIII. of 1859 came into operation; but that all questions relating thereto ought to be urged before, and be determined by, the court executing the decree passed in such suit.

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THIS was a special appeal from the decision of A. Grant, District Judge of Ahmedábád, in Appeal Suits Nos. 159 and 172 of 1864, amending the decree of the Munsif of Dhandúká.

The Judge, in appeal, recorded the following judgment:—

"The brothers Málúkjí and Issá Márú succeeded, after a long course of litigation, in obtaining a decree establishing their title to a field of seven bighás; but were wrongfully kept out of possession for two years by Rahimná, father of defendants.

"They, therefore, brought a suit to recover the mesne profits for the two years Samvat 1916 and 1917 amounting to Rs. 416, together with Rs. 84 on account of interest, in all Rs. 500.

"The defence set up was, that the plaintiffs should have taken measures for enforcing their decree sooner; and that the suit was barred by Sec. 11 of Act XXIII. of 1861, according to which the plaintiffs should have made their demand for mesne profits in applying for execution of their decree.

"The Munsif of Dhandúká awarded plaintiffs the mesne profits claimed; but disallowed their claim for interest thereon.

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"The defendants appeal (Suit No. 159) on the grounds taken in their answer to the original suit. They also contend that the suit is barred by the Limitation Act.

"The plaintiffs appeal (Suit No. 172) on the grounds:—(1) That the Munsif was wrong in not awarding them the costs incurred in the revenue courts; (2) and also in disallowing their claim for interest.

"Issues: (1) Is the claim barred by the Limitation Act, No. XIV. of 1859; (2) or by Sec. 11 of Act XXIII. of 1861; (3) if not are plaintiffs entitled to judgment; (4) if so, should they be allowed the costs incurred in the revenue courts; (5) if so, also the interest claimed.

"I cannot find that claims for mesne profits are expressly provided for by any section of Act XIV. of 1859; and I am, therefore, of opinion on the 1st issue that the suit will come under Sec. 1., Cl. 16, and that it is not barred.

"The claim for interest is a corollary to that for mesne profits, and if the latter be allowed the former should be allowed also; and, under this view of the matter, I find on the 5th issue also in favor of the plaintiffs.

"The chief objection taken to the decree by the defendants is that founded on Sec. 11 of Act XXIII. of 1861, viz. that, by this section, which is a repetition of Sec. 283 of the Civil Procedure Code, all questions relating to 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, 'shall be determined by order of the Court executing the decree, and not by separate suit.' The argument on the other side is, that the original suit was instituted under the old law; and that it would be unjust to enforce the letter of the present law against the equity of the case, and at variance, moreover, with Sec. 387 of the Code, which says, 'But if, in any suit pending at the time when this Act shall come into operation, it shall appear that the application of any provision of this Act would deprive any party to the suit of any right in reference

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to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect.'

"I think the principle contended for is a very fair one, and that the case under consideration is one in which there is special reason for applying it, in accordance with the equity of the matter; because the plaintiff's original application for the enforcement of their decree was made shortly after the new Procedure Code came into operation. I find, therefore, on the 2nd issue, that it is not necessary by law to enforce the strict letter of Sec. 11 of Act XXIII. of 1861; and, consequently, that the suit is not barred by that section. The very fact of the plaintiffs having, in the first instance, filed their suit in the revenue court shows that they misunderstood the nature of their claim, which is an additional reason for not exacting from them too severe a penalty for their ignorance of a new law. The technical objection to the suit having been overruled, the finding of the court, on the 3rd issue, must necessarily be that the plaintiffs have a right to recover the profits of which they were deprived by the wrongdoing of their opponents.

"As regards the costs incurred in the revenue courts, it is certain that the plaintiffs made a mistake in going into them at all; but, on the other hand, they were right in the appeal to the Collector, and had, moreover, justice on their side. I, therefore, resolve upon allowing them the whole of the costs in the Collector's court, along with the costs incurred in this and the Munsif's court; but order each party to bear his own expenses in that of the Mamledar.

"The Munsif's decree is, accordingly, amended by adding to the sum awarded to the plaintiffs the amount of interest claimed in the plaint, and apportioning costs as above set forth."

The grounds of objection taken to this decision in special appeal were as follows:—"(1) That it is contrary to

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the provisions of Sec. 11, Act XXIII. of 1861; (2) that the Acting Judge was wrong in holding that Sec. 387 of the Civil Procedure Code applied to the present suit, which was not *pending* when that Code came into operation; (3) that he was wrong in deciding that it was not necessary to enforce strictly Sec. 11, Act XXIII. of 1861; (4) that he disregarded the rule of law, that ignorance of law cannot be urged as a defence; (5) that in awarding interest he acted contrary to the provisions of Act XXXII. of 1839; (6) that he was wrong in awarding to the opponents costs incurred by them in a wrong court."

Nánábhái Haridás for the appellant.

Shántarám Naráyán for the respondent.

PER CURIAM (TUCKER and WARDEN, JJ.):—We have come very reluctantly to the conclusion that the decrees of the lower courts cannot be upheld.

This suit was instituted in the year 1864 to recover the mesne profits of lands, during the fiscal years 1859-60 and 1860-61. The plaintiffs had obtained a decree declaring their right to the said lands on the 8th of November 1859, which was affirmed in appeal on the 30th of January 1860; and the mesne profits claimed are those which had been wrongfully enjoyed by the defendants, between the institution of the plaintiffs' suit for the recovery of the lands and the execution of their decree.

Long prior to the institution of the present suit the Code of Civil Procedure and its supplemental Act (XXIII. of 1861) had become law; and in Sec. 11 of the latter Act it was enacted that 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 the execution of the decree, shall be determined by the court executing the decree and not by separate suit. These words are precise, and, as has been said in a judgment of the High Court of Madras in a similar case, "they indicate positively the procedure

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which ought to be adopted, and declare that the procedure here taken shall not be adopted" (*a*).

In the face of this positive direction of the law the form of action which the plaintiffs have adopted cannot be permitted. The District Judge considered that as the plaintiffs could have instituted a separate suit for these mesne profits prior to the introduction of the Code of Civil Procedure, and as their present cause of action had been barred by that Code and the subsequent enactment, they are still entitled, under Sec. 387 of Act VIII. of 1859, to have recourse to the old procedure. The section of the Code which the Judge has quoted applies, however, only to the procedure to be observed in suits "pending at the time when this Act shall come into operation." The present suit was not pending at that time; and the section referred to cannot be construed to support its institution, in opposition to an express prohibition.

The new code cannot be said to have deprived the plaintiffs of a privilege which they formerly possessed. It substituted a cheap and summary process for an expensive and tardy one; and the plaintiffs, having failed to avail themselves of the benefit conferred on them within the time prescribed for the execution of decrees, have sought to have recourse to the ancient remedy which is no longer open to them.

The decrees of the lower courts must be reversed; and as the defendant has from the commencement contested the plaintiffs' right to bring the action, and pointed out the course which the law directed, we consider that the plaintiffs should pay his costs.

Decrees reversed with costs.

(*a*) *Chennapa Náyudu* v. *Pitchi Reddi and others*, 1 Mad. H. C. Rep. 453.