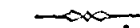


and another (b) is, that a Hindú widow, as holder of a certificate under Act XXVII. of 1860, is not necessarily the proper person to continue a suit for the recovery of immoveable property; though she is entitled to do so as heir of the deceased if he died without issue and was the sole owner of the property. We hold, therefore, that the Judge was wrong in treating the certificate as *prima facie* evidence.

This being the only ground taken before us, we reverse the decree of the lower court, and remand the case for retrial with reference to what is stated above. Costs to follow the final decision.

*Decree reversed and suit remanded.*

b) 8 Cal. W. R., C. R. 2.



*Civil Petition.*

Dec. 10.

RA'DHA'BA'I, widow of DA'MODHAR ..... *Petitioner.*

RA'DHA'BA'I, widow of KRISHNANA'TH... *Opponent.*

*Mesne Profits—Immoveable Property—Execution of Decree—Act XXIII. of 1861, Sec. 11.*

Where a decree awarding possession of immoveable property is silent as to mesne profits accruing between the filing of the plaint and the execution of the decree, the Court executing the decree has no power to award such; the proper course for the plaintiff to adopt under such circumstances is to apply to the Court which passed the decree for a review, or else to file a separate suit.

*Jivá Pátíl Rahinná v. Malukji Mant Nathuná (a) overruled.*

THIS was an application for the reversal of an order passed in appeal by R. W. Hunter, Acting Assistant Judge of Solápúr, in the matter of the execution of a decree.

The facts appear from the following judgment of the Acting Assistant Judge:—

“The original plaintiff sued the defendant and two others to recover possession of a field, and obtained a decree accordingly. The decree made no provision for mesne profits or rent from the date of the suit until the date of delivery of possession to the plaintiff.

(a) 3 Bom. H. C. Rep., A. C. J. 31.

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"The plaintiff, therefore, brought a separate suit for mesne profits during the above period. The late Şadr Amín, whose decision was confirmed in appeal by the Joint Judge, held that the suit was barred by Sec. 11 of Act XXIII. of 1861, the claim being determinable at the time of execution.

"At the time of execution, the plaintiff prayed the present Şadr Amín (the court executing the decree) to allow her mesne profits as above.

"The Şadr Amín was of opinion that, as no provision was made in the decree for such profits, the plaintiff's sole remedy lay in a separate suit; but, as a separate suit had been brought, and as the Joint Judge had determined that such profits could be allowed at the time of execution, the Şadr Amín felt he had no alternative but to dispose of the claim summarily, as the only remedy that remained available to the plaintiff. Under this view, he determined that the plaintiff was entitled to mesne profits during the above period, and decided that the appellant should pay her on that account Rs. 246 and costs.

"The present appeal is from that decision.

"The petition of appeal contains four clauses, of which the first is—that, as in the plaintiff's decree for possession no provision was made for the payment of mesne profit from the date of suit till the date of delivery of possession, to allow such profits was opposed to Sec. 11 of Act XXIII. of 1861.

"The first question to be determined is, whether this objection is sustained.

"I am of opinion that when the law has provided a certain means whereby a particular right may be secured, the person claiming such right must seek it by such means, and by such only. It is open to a plaintiff who sues for land to ask the court to provide in its decree, for payment of mesne profits from the date of suit, under Sec. 196 of Act VIII. of 1859; and I am inclined to think that if a plaintiff neglects to do so, he has no other remedy. I concur with the Şadr Amín that the question is not, under the circumstances stated, determinable by the court executing the decree, for

such court has only ministerial duties to perform. It is both proper and convenient that it should determine the amount of mesne profits that may be payable under the decree, but it would be improper for it to determine the title to such. If, therefore, no title to mesne profits is declared in the decree for possession, I think the court executing the decree cannot go beyond the decree itself, and has in that case nothing whatever to do with the amount of such profits. \* \* \*

“ In the present instance, as in the plaintiff’s decree for possession, no provision was made for the payment of mesne profits from the date of the suit. I think no such profits should have been allowed her.

“ I, therefore, reverse the Şadr Amín’s order appealed against. All costs on the respondent.”

The case was argued before COUCH, C.J., NEWTON, TUCKER, WARDEN, and GIBBS, JJ.

*Nánábhái Haridás*, for the petitioner :—This court has held that whether the decree awards mesne profits or not, they can be claimed at the time of the execution of the decree : *Jivá Pátíl Rohimná v. Málúkji Mará Nathuná* (b). The Madras High Court has likewise ruled that, even with the permission of the court, a separate suit for mesne profits will not lie : *Chennapa Náyudu v. Pitchi Reddi and others* (c). See too *Baboo Issur Dutt Singh and others v. Alluck Misser and others* (d); and in the case of *Hookum Bibee v. Mahomed Moosa Khan and others* (e) it was held that mesne profits for the period during which the decree-holder was executing the decree, and kept out of possession by the opposite party, might be awarded by the court executing the decree, under Sec. 11 of Act XXIII. of 1861.

[COUCH, C.J. :—The miscellaneous rulings in *Hironath Roy v. Indoo Bhoosun Deb Roy* (f), and in *Mosoodun Lal v. Bheekaree Singh* (g), are to the contrary, and they overrule the other decisions.]

(b) 3 Bom. H. C. Rep., A. C. J. 31. (c) 1 Mad. H. C. Rep. 453.

(d) 7 Cal. W. Rep., Civ. R. 429. (e) 6 Cal. W. Rep., Mis. Ap. 13.

(f) 6 Cal. W. Rep., Mis. Ap. 33. (g) 6 Cal. W. Rep., Mis. Ap. 109.

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It is quite sufficient that the rulings of the Madras and Bombay courts are in my favour. In the present case, instead of having recourse to a review of judgment, my client, as he was advised by the lower court, appealed. There can now be no review of the original decree, as there has been an appeal.

[COUCH, C. J. :—It is an omission in the decree. Can you point out any case in which the omission was supplied by the court executing the decree?]

*Dhirajlal Mathuradas* :—The proper course for the plaintiff to have adopted was to get the decree reviewed, and then apply for its execution. The court executing the decree has to perform ministerial duties only, and the later Calcutta decisions are decisive upon the point. He cited *Gour Kishen Singh v. Fukeer Chund* (h).

*Cur. adv. vult.*

COUCH, C. J. :—The question in this case is whether Sec. 11 of Act XXIII. of 1861 empowers the court executing a decree to award mesne profits. There are conflicting decisions, and the Act leaves the matter questionable. This court has held that a separate suit does not lie, and that the court executing the decree can award mesne profits. The Madras High Court is of the same opinion, but not the Calcutta High Court. I concur with the Calcutta High Court, for the reasons given by Sir Barnes Peacock. Sec. 196 of Act VIII. of 1859 should be compared with Sec. 11 of Act XXIII. of 1861; and taking these two sections together it appears to me that the term "payable" means payable, or liable to be paid, by virtue of a decree; and it does not mean recoverable by law. When a person is entitled to land, it does not follow that all the defendants are liable for the mesne profits. Many persons may be defendants who were never in possession and who never received the profits. The court making the decree is the proper court to determine who is liable. The High Court at Calcutta allowed a separate suit to be entertained for mesne profits under circumstances similar to these.

The party cannot come to this court for execution. The petitioner, no doubt, is in a position of hardship, her suit having been rejected; still a review of the decree of the District Judge can be made, as the matter has not come before this court.

NEWTON, J.:—Sec. 11 provides only that questions as to *amount* shall be determined by order of the court executing the decree; questions as to *title* cannot be so determined. The word “payable” can apply only where mesne profits have been made payable by the decree. Sec. 11 of Act XXIII. of 1861 puts interest in the same position as mesne profits. It is not argued that a court executing a decree can give interest when the right to interest has not been determined in that decree.

TUCKER, J.:—As one of the Judges who are responsible for the decision of this court in the case of *Jivá Pátíl Rahinná v. Málukjí Marú*, it becomes my duty to state that, after hearing the arguments which have been urged against that decision, and after considering the judgment of a Full Bench of the High Court at Calcutta on this point which has been referred to by the Chief Justice, I have come to the conclusion that the interpretation which my brother-Warden and I placed upon the words “payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree” in Sec. 11 of Act XXIII. of 1861 was incorrect.

It was originally my opinion that the Legislature had intended to declare that in all suits in which the right to the possession of land had been decreed, mesne profits would be necessarily recoverable or “payable” for the time which intervened between the date of the institution of the suit and the date of the execution of the decree; but on a further consideration of Secs. 10, 196, and 197 of the Civil Procedure Code, and on reading those sections together with Sec. 11 of Act XXIII. of 1861, I feel constrained to admit that the language used does not support this wide construction of the word “payable,” and that the more limited signification

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which has been attached to it by the Calcutta High Court is a more true exposition of the intention of the framers of the law.

I now hold that it is only when mesne profits have been declared payable by a decree, that the court executing that decree can determine the amount which may be due on this account between the date of suit and the date of the execution of the decree, and that the prohibition to bring a fresh suit for the recovery of such mesne profits applies only to cases in which the right has been declared in a previous suit, and that, consequently, when there has been no such declaration, a new suit may be maintained.

I regret extremely that I should have taken a view of the law which I now find to have been mistaken, and I shall be willing to admit a review of the decision in Special Appeal No. 673 of 1865 which will now be overruled, or of any other decision in which I have taken part and in which a similar doctrine has been upheld.

WARDEN, J. :—I also, as one of the Judges who was a party to the cases that have been referred to to-day, feel myself called on to say that I concur in the observations of my brother Tucker, and that I also acquiesce in the views which have been expressed by the Chief Justice.

GIBBS, J. :—I have only to say that I entirely concur with what has been said by the Chief Justice. My opinion has always been in accordance with that which will now be decided to be the ruling of this court.

*Petition rejected, each party to pay his own costs.*