

15 B. 416.

[416] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Telang.

RAMKRISHNA BHIKAJI (*Original Plaintiff*), *Judgment-creditor v.*
 BHIMABAI AND OTHERS (*Original Defendants*), *Judgment-debtors.**
 [15th December, 1890.]

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Mesne profits from the institution of suit, claim as to—Section 169 of the Code of Civil Procedure (Act VIII of 1859)—Sections 50, cl. (f), and 211 of the Code of Civil Procedure (Act XIV of 1882)—Sections 7 and 11 of the Court Fees Act (VII of 1870).

The plaintiff in his plaint prayed for mesne profits only from the institution of his suit till the property in question was restored to him, and the decree awarded him those profits and directed that they should be determined in execution. After the property was restored to the plaintiff, he applied, in execution of the decree, to have the amount of mesne profits determined, which being done, a question arose as to whether the plaintiff could proceed to further execute his decree without paying the Court-fee on the amount so awarded in execution.

Held, that no Court-fee was required.

Section 11 of the Court Fees Act (VII of 1870) applies to a claim for mesne profits for which an amount can be and has been claimed by the plaintiff, and in respect of which some fee has been actually paid.

[F., 21 M. 371; *Rel. on*, 24 Ind. Cas. 232; R., 33 C. 1232; 34 C. 954 (F.B.)=6 C.L.J. 255=11 C.W.N. 1133; 13 C.L.J. 132=15 C.W.N. 506=8 Ind. Cas. 34 (36); 13 C.W.N. 815=1 Ind. Cas. 670; 5 Ind. Cas. 880=20 M.L.J. 98; 1 O.C. 8 (10).]

THIS was a reference submitted for the opinion of the High Court under s. 617 of the Code of Civil Procedure (Act XIV of 1882) by Ray Saheb Mahadeo Shridhar Kulkarni, Subordinate Judge of Amalner, in the Khanēsh District.

One Ramkrishna Bhikaji obtained a decree against Bhimabai Dagadu and Ganpat for possession of certain land and for mesne profits from the date of the institution of the suit. The decree directed that mesne profits should be determined in the course of execution.

According to the decree the land was delivered into the decree-holder's possession, and when the amount of mesne profits was ascertained, a question arose as to whether the decree-holder should pay a Court-fee on the award before he could be allowed to proceed with execution to recover the amount. The Subordinate Judge thereupon referred the following question to the High Court:—

[417] “(1) Whether any fee is leviable on the amount of mesne profits or of interest accruing subsequent to the date of the institution of the suit, and if so, what fee is appropriate? and whether it is to be according to the amount claimed or the amount awarded?”

The Subordinate Judge was of opinion that no fee should be charged on such mesne profits, as none is charged on the interest awarded on the decree from the date of filing the suit till realization under s. 209 of the Civil Procedure Code (XIV of 1882).

The Government Pleader (*Shantaram Narayan*) for the Government, with *Vasudeo Gopal Bhandarkar*, for the judgment-debtors.—The plaintiff expressly asked for the future mesne profits in the plaint. Section 50, cl. (f), of the Civil Procedure Code requires a plaintiff to state approximately

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the amount of mesne profits, implying thereby that the Court-fee should be paid on the amount so stated. Form No. 94, sch. IV of the Civil Procedure Code also contemplates that some amount should be mentioned. In the present instance the amount of mesne profits was not stated in the plaint, nor any Court-fee paid. The plaintiff, therefore, must pay the Court-fee on the amount now determined in execution before he can be allowed to take the amount—*Chedilal v. Kirath Chand*(1).

Vishnu Krishna Bhatavadekar (amicus curiae) for the judgment-debtors:—Section 11 of the Court Fees Act contemplates that some fee was paid at the presentation of the plaint, and does not cover the case where no such fee was paid. Under s. 211 of the Civil Procedure Code, the Court can award mesne profits although they were not claimed in the plaint. In such a case no Court-fee would be required to be paid under the section.

JUDGMENT.

SARGENT, C. J.—In this case the plaintiff asked by his plaint for mesne profits only from the institution of his suit until the property in question was restored to him, and the decree awarded him those mesne profits and directed that they should be determined in execution. After the property had been restored to [418] plaintiff, he applied, in execution of the decree, to have the amount of mesne profits determined, which was done, and the question referred to us is, whether the plaintiff can proceed to further execute his decree without paying the Court fee on the amount so awarded in execution.

The question turns upon the application of s. 11 of the Court Fees Act of 1870. It is plain, we think, that had the plaint not asked for future mesne profits, but they had been awarded by the Court under s. 169 of the Code of Civil Procedure of 1859 or s. 211 of the present Code, to be determined in execution, s. 11 would not have been applicable, as the plaint would not have been one for mesne profits or for immoveable property and mesne profits. In the present case the plaint does ask for future mesne profits, but the claim would not, we think, be one in respect of which a fee could be payable under s. 7, as the amount could not have been stated as required by the Code of Civil Procedure (VIII of 1859) or even approximately as provided by s. 50, cl. (f) of the present Procedure Code. This would appear to have been the view of Spankie and Oldfield, JJ., in *Chedilal v. Kirath Chand*(1). If this be so, the present plaint cannot, we think, be treated as one to which s. 11 applies, as the language of that section clearly points to a claim for mesne profits for which an amount can be and has been claimed by the plaint and in respect of which some fee has been "actually paid." To hold otherwise would, we think, be straining the language of a fiscal Act. It is true that in the case of *Chedilal v. Kirath Chand* above referred to, Spankie and Oldfield, JJ., thought it probable that s. 11 would apply to the future rents in that case regarded as mesne profits—but there the plaint asked for past as well as future mesne profits, and an amount was claimed and fee paid in respect of the former. If the mesne profits, past and future, be regarded in such a plaint as one entire claim for mesne profits, the language of s. 11 might perhaps apply. On the whole we think the question referred to us should be answered in the affirmative.

Order accordingly.

(1) 2 A. 682 (685).