

Mujeedunnissa Vs. Dildar Hossein and ors.

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SooperKanoon Citation : sooperkanoon.com/864871

Court : Kolkata

Decided On : Nov-19-1878

Reported in : (1879)ILR4Cal629

Judge : Ainslie and ;Wilson, JJ.

Appellant : Mujeedunnissa

Respondent : Dildar Hossein and ors.

Judgement :

Ainslie, J.

1. The question raised in this appeal is one under the Limitation Act of 1871. A decree for possession of certain property and mesne profits was made on the 31st of January 1860. Execution was taken out in 1863, and possession was obtained, and a portion of the interest realized on the 6th March of that year. On the 3rd of March 1866, the judgment-creditor made a further application to the Court to determine the amount due to him as mesne profits, the question having been reserved under Section 197 in the original decree. An enquiry having been held, the judgment-debtor raised objections to the assessment proposed by the Ameen. Those objections were eventually disposed of by the first Court on the 29th of June 1869, and the order of that Court was confirmed on appeal on the 31st of August 1871. On the 25th of August 1874, the judgment-creditor applied to the Court to realize the amount due to him as mesne profits, and thereupon it was

objected that this application was out of time. That objection has been overruled by the Courts below.

2. The appellant before us relies upon the decision of a Full Bench of this Court on the meaning of Article 167, Scheduleii, of the Limitation Act of 1871. The Court decided that the application referred to in Clause 4, Article 167 is an application for execution of a decree such as is contemplated in Section 212 of the Code of 1859, and no other. But in answer to this the respondent urges that he is in time, inasmuch as this is really the first application to execute that part of the decree which relates to mesne profits, which was only made final on the 31st of August 1871. This view is supported by judgments of this Court in *Mussamut Suzeelun v. Pyud Keramut Hossein* (21 W.R. 212) and *Bunsee Singh v. Mirza Nuzuf Ali Beg* (22 W.R., 328) in which the Court held that when a decree is made under Section 197, proceedings taken after the original decree for possession for the purpose of determining the amount of mesne profits payable to the plaintiff, are in effect proceedings in continuance of the original suit, and that until those proceedings are brought to a close and a declaration has been made as to the amount actually due, it cannot be said that any decree for a specific sum of money exists. In this view of the law we concur.

3. The case of *Woodoy Tara Chowdhrair v. Syud Abdool Jubbar Chowdhry* (24 W.R., 339) has been cited by Mr. Sandal for the appellant, in which the learned Judges have not followed the decisions already cited, although one of them was a party to those decisions. Mr. Justice Markby puts his decision on the ground that the judgment-creditor, whether rightly or wrongly, is now and has been all along, as appears from his own application, executing the decree of 1864, and must, therefore, be bound by the rules of law which relate to the execution of the decree of that date.' Mr. Justice Morris does not take quite such a strict view of those proceedings, but adopts the view already expressed in an earlier decision. He, however, for reasons which he gives, thought that in the particular case the judgment-creditor was not entitled to proceed.

4. We think that we ought to look, not to the form of the application, but to its object, and that, although it may be and undoubtedly was drawn up as an

application under Section 212, yet its only object was to have the case further proceeded with, and a determination arrived at as to the amount actually due from the defendant to the plaintiff. In fact there could have been no other object at the time, because the decree in all other respects had already been completely executed. Whether in March 1866 the plaintiff was out of time, is a question which cannot now be considered, seeing that that application led to litigation extending over five years, and it must be taken that all questions which might properly have been raised at the time, were raised and disposed of by the Court, and that the order of the 31st of August 1871, declaring that the defendant was bound to pay to the plaintiff a given sum of money, was a good and binding order.

5. The learned pleader for the appellant has referred to Section 197 of the Code of 1859 as showing that the application to assess must be treated as an application for execution of a decree, and must, therefore, be governed by the rule of limitation applied to such applications; but it seems to me that the wording of that section is perfectly consistent with the view taken by Mr. Justice Phear, that where the enquiry as to the amount of mesne profits is reserved, the decree for the possession of land is only a partial decree in the suit, and that there is to be a further enquiry and a further decree in respect of mesne profits. The words 'for the execution of the decree' refer only to the execution of the decree for the land, and cannot refer to execution of that which has not yet taken the form of a decree.

6. In this view we think that the appeal should be dismissed with costs.