

for costs or with regard to the deposit, they had not purported to do so."

It seems to me, for the reasons I have stated, the answer to the question referred to us is that the rule is *ultra vires*.

SANKARAN NAIR, J.—I agree that the rule is *ultra vires*.

OLDFIELD, J.—I concur.

K.R.

MADRAS  
PILLAI  
v.  
MUTHU  
CHETTY.

WHITE, C.J.,  
SANKARAN  
NAIR, J.,  
OLDFIELD, J.

## APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.*

PONNAMMAL (PLAINTIFF), APPELLANT,

v.

RAMAMIRDA AIYAR AND TWO OTHERS (DEPENDANTS).

RESPONDENTS.\*

1914.  
February 9,  
and  
September  
21 and 24.

*Civil Procedure Code (Act V of 1908), O. II, rr. 2 and 4—Previous suit for possession of lands only—Claim for past mesne profits, not included—Subsequent suit for the same, not barred—Cause of action for mesne profits different from that for possession of land.*

Claim for possession and claim for mesne profits are separate causes of action and have been always so treated under the Codes of Civil Procedure.

Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for mesne profits and damages, it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit.

*Monohur Lall v. Gouri Sunkur* (1883) I.L.R., 9 Calc., 283; *Tirupati v. Narasimha* (1888) I.L.R., 11 Mad., 210; *Lessor Babui v. Janki Bibi* (1892) I.L.R., 19 Calc., 615 and *Gutta Saramma v. Maganti Ramineedu* (1908) I.L.R., 31 Mad., 405, followed.

SECOND APPEAL against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Appeal No. 840, preferred against the decree of K. GOPALAN NAIR, the District Munsif of Mannargudi, in Original Suit No. 117 of 1909.

The material facts appear from the Order of Reference to the Full Bench.

This Second Appeal came on for hearing before SANKARAN NAIR and AYLING, JJ. who made the following.

\* Second Appeal No. 1804 of 1911.

## ORDER OF REFERENCE TO THE FULL BENCH.

PONNAMMAL  
 v.  
 RAMANIRDA  
 AIYAR.  
 SANKARAN  
 NAIR AND  
 AYLING, JJ.

Plaintiff is the daughter-in-law of one Sundarappier. In a partition between him and his sons 30 *mahs* of land were allotted to him which under the partition deed on his death were to devolve in equal shares on the plaintiff's husband and his brothers, defendants Nos. 1 and 3. He died in 1888. On account of the minority of the plaintiff's husband, the defendants Nos. 1 and 3 continued in possession of the entire property including the plaintiff's husband's share, paying him his share of the profits till 1890. After her husband's death, the plaintiff sued for partition of her husband's share and got a decree. She now sues for mesne profits. The question for decision is, whether her claim for mesne profits prior to the institution of the suit for partition is barred.

The following cases are relied upon in favour of the plaintiff's contention :—

*Monohur Lall v. Gouri Sunkur*(1), *Tirupati v. Narasimha*(2), *Lalessor Babui v. Janki Bibi*(3) and *Gutta Saramma v. Maganti Raminedu*(4).

On behalf of the defendant, the following cases are relied upon :—

*Venkoba v. Subbanna*(5), *Mewa Kuar v. Banarsi Prasad*(6) and *Shanmugam Pillai v. Syed Gulam Ghose*(7).

All these cases are referred to and discussed in *Subraya Chetti v. Rathnavelu Chetti*(8), in which however the question argued before us was not decided.

On this question which we propose to refer to a Full Bench for decision, there is a real difference of opinion. We accordingly refer to the Full Bench the question :—

If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, is it open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit ?

The Honourable Mr. L. A. Govindaraghava Ayyar for the appellant.

(1) (1883) I.L.R., 9 Calc., 283.

(3) (1892) I.L.R., 19 Calc., 615.

(5) (1888) I.L.R., 11 Mad., 161.

(7) (1904) I.L.R., 27 Mad., 116.

(2) (1888) I.L.R., 11 Mad., 210.

(4) (1908) I.L.R., 31 Mad., 405.

(6) (1895) I.L.R., 17 All., 533.

(8) (1909) I.L.R., 32 Mad., 330.

*T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for the respondents. PONNAMMAL  
v.  
RAMAMIRDA  
AIYAR.

The Second Appeal coming on for hearing as per above Order the Court expressed the following

OPINION.—The answer to the reference must be in the affirmative. It seems to us that claims for possession and claims for mesne profits have always been treated as separate causes of action in the Codes of Civil Procedure following in this the English law. At common law claims for ejectment and for mesne profits were separate causes of action, and before the Common Law Procedure Act, 1852, an action for mesne profits did not lie until judgment had been recovered in ejectment. Section 10 of the Code of 1859 expressly provided that a claim for the recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action within the meaning of the two preceding sections which dealt with joinder of causes of action in the same suit. When the Code was remodelled in 1877 after the Judicature Act and the Rules of Practice framed thereunder had come into force in England, the language of these rules was in many instances substituted for the language of the Code of 1859, and in this way section 10 dropped out and was replaced by section 44 (now Order II, rule 4 of the Civil Procedure Code, 1908) the language of which was taken from Order XVII, rule 2 of the English rules. The effect however is the same because, when the rule says that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except (a) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the legislature considered that claims for the recovery of land and claims for mesne profits were separate causes of action, and that it was not intended to depart from the express provisions to that effect in section 10 of the Code of 1859. We have also been referred to *Payana Reena Saminathan v. Pana Lana Palaniappa* (1), a decision on section 34 of the Ceylon Code of Civil Procedure which is in the same terms as section 43 of the Code of 1882, in which their Lordships discuss the scope of that rule, and lay down that it is not intended to secure the inclusion in one and the same action

WALLIS, C. J.,  
AYLING AND  
SESHAGIRI  
AIYAR, JJ.

(1) (1919) 41 L.A., 142; s.c. (1914) A.C., 618 (P.C.).

PONNAMMAL  
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WALLIS, C.J.,  
 AYLING, AND  
 SEFHAGIRI  
 AYYAR, JJ.

of different causes of action, even if they arise out of the same transactions, and point out that the provision that an obligation and a collateral security for its performance should be deemed to constitute but one cause of action is a substantive enactment making what would otherwise be two independent causes of action one cause of action for the purposes of the section. This shows that the distinction between different causes of action must be strictly observed. For the foregoing reasons and following the decisions quoted in the reference, *Monohur Lall v. Gouri Sunkur*(1), *Tirupati v. Narasimha*(2), *Lalessor Babui v. Janki Bibi*(3) and *Gutta Saramma v. Maganti Raminedu*(4), we answer the reference in the affirmative.

K. R.

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## APPELLATE CIVIL.

*Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.*

1914.  
 January 7.

L. KRISHNA BHOOPATHI DEO GARU (DEFENDANT),  
 APPELLANT,

v.

THE HON'BLE MR. SRI MIRZA SRI PASUPATI  
 VIJARAMA GAJAPATHIRAJA MAHARAJA MANYA  
 SULTAN BAHADUR GARU, RAJA OF VIZIANAGARAM  
 AND ANOTHER (PLAINTIFF AND TRANSFEREE—DECREE-HOLDER),  
 RESPONDENT.\*

*Civil Procedure Code (Act V of 1908), O. XLV, rr. 15 and 16; O. XXI, r. 16; ss. 37, 38 and 50—Privy Council, order of, transmitted to the original Court—Execution—Application to the original Court—Application by transferee of the decree—Competency of the original Court to entertain application—Power-of-Attorney, construction of.*

Where an order of His Majesty in Council was transmitted under Order XLV, rule 15 of the Civil Procedure Code, by the High Court to the District Court as the Court which passed the first decree, the latter Court has jurisdiction to entertain an application made by an assignee of the decree under Order XXI, rule 16, of the Civil Procedure Code, to recognise the assignment and to allow him to execute the decree.

(1) (1883) I.L.R., 9 Cal., 283.

(2) (1888) I.L.R., 11 Mad., 210.

(3) (1892) I.L.R., 19 Cal., 615.

(4) (1908) I.L.R., 31 Mad., 405.

\* Civil Miscellaneous Appeal No. 145 of 1913.