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case to which I was a party [*Mamubeari, In re*(1)] while in another reported case [*Ramasami* v. *Kandasami*(2)] it is made clear that the defaulting contractor was a person of the coolie class who bound himself to render personal labour, if the advance was not worked out by the coolies whom he contracted to supply.

I find two early cases, *High Court Appellate Side Proceedings 13th July* 1867(3) and *Rowson* v. *Hanama Mestri*(4) in which the enforcement of the Act was certainly allowed without, so far as appears, any consideration of this point—merely on the ground that the contract was one to get work performed. But it seems to me more likely that the point was one to which the attention of the learned Judges was not directed, rather than one which they considered immaterial. There is nothing in these judgments to suggest that they adopted the reasoning referred to above. All the later cases tend in the contrary direction, and they seem to me to be in accord with the wording of the Act.

After careful consideration I can only concur in the conclusion of SADASIVA AYYAR, J., and direct that the order be set aside.

Attorneys for the respondent—*Messrs. King and Partridge.*

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Kumaraswami Sastriyar.

1917, May, 2 and 4, and October, 10 and 26.

DORAISWAMI AYYAR AND FIVE OTHERS (PLAINTIFFS), APPELLANTS,

v.

T. SUBRAMANIA AYYAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Res judicata—*Civil Procedure Code (Act V of 1908), sec. 11, expl. V, sec. 47 and O. XX, r. 12—Previous suit for land and past and future profits—Decree for land and past profits and no decision as to future profits—Second suit for future profits, maintainability of.*

Held by the Full Bench (AYLING, J., *contra*) :—When in a suit for possession and past and future mesne profits the Court gives a decree for mesne profits

(1) (1914) 27 M.L.J., 392. (2) (1885) I.L.R., 8 Mad., 379.
(3) (1867) 3 M.H.C.R., App. xxv. (4) (1877) I.L.R., 1 Mad., 280.

* Second Appeal No. 100 of 1916 (Full Bench).

down to the date of suit and says nothing about subsequent mesne profits, a fresh suit to recover them is not barred under section 11, Civil Procedure Code.

Ramaswami Iyer v. *Sri Rangaraja Iyangar* (1915) 2 L.W., 8, overruled.

Kuppusamy Aiyar v. *Venkataramier* (1905) 15 M.L.J., 462, applied.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Tanjore, in Appeal No. 680 of 1914 preferred against the decree of C. GOVINDAN NAYAR, the District Munsif of Tiruvadi, in Original Suit No. 20 of 1914.

The necessary facts are given in the first paragraph of the ORDER OF REFERENCE.

C. V. Anantakrishna Ayyar for the appellants.

S. T. Srinivasa Gopalachariyar for the respondents.

This Second Appeal came on for hearing in the first instance before SADASIVA AYYAR and SPENCER, JJ., who made the following :—

ORDER OF REFERENCE TO A FULL BENCH.—This is a suit for mesne profits. The plaintiffs brought a previous suit (Original Suit No. 288 of 1909) for partition of family property including a prayer for mense profits.

They obtained a decree directing a division to be made into five equal shares and awarding Rs. 108 for past mesne profits. The judgment was silent on the subject of future mesne profits.

In the present suit the District Munsif gave the plaintiffs a decree for the recovery of Rs. 254–8–0 mesne profits accruing after the institution of Original Suit No. 288 of 1909; but on appeal, the Subordinate Judge dismissed the suit with the remark that, although his decision might seem hard, he was bound by the ruling in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), to hold that no separate suit could be brought for mesne profits claimed in a previous suit as the matter was *res judicata* by reason of the former decision.

Under the Code of 1882 it was well settled by a Full Bench decision of this Court—*Kuppusamy Aiyer* v. *Venkataramier*(2)—that such a suit would lie. The same principle was upheld in Calcutta in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(3) (see the observations of AMEER ALI, J., at pages

(1) (1915) 2 L.W., 8. (2) (1905) 15 M.L.J., 462.
(3) (1890) I.L.R., 17 Calc., 968.

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970 and 971 on the discretionary form of section 211 of the Code of Civil Procedure, 1882). It was also decided by another Full Bench that claims for possession and claims for mesne profits form separate causes of action under the old Code and under the new Code: vide *Ponnammal* v. *Ramamirda Aiyar*(1).

The learned Judges who decided *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(2) base their opinion on the change of language in the Code of 1908. They say that in this Code, section 211 of the Code of 1882 disappears altogether, and, as Order XX, rule 12, now reads, it is made equally a matter of discretion with Courts to direct an enquiry into future mesne profits as it is to pass a decree for possession or for future mesne profits.

With due respect to those learned Judges, we are unable to see that there has been any substantial change of language. Section 211 has not disappeared, but combined with section 212 it has been recast into Order XX, rule 12.

Section 211 declared "the Court may provide in the decree" for the payment of future mesne profits. Order XX, rule 12 (1) (*c*), declares that "the Court may pass a decree . . . directing an enquiry as to rent or" future mesne profits.

Section 212 permitted the Court either to determine the amount of past mesne profits by the decree itself or to pass a decree for the property and direct an enquiry into the amount of mesne profits. Order XX, rule 12 (1) (*a*) and (*b*) is to the same effect. The only essential difference in procedure is that under the new Code mesne profits are not to be left to be determined in execution.

A more important change and one to which the judgment in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(2) contains no allusion, is the omission of the proviso to section 244 from section 47 of the new Code. This ran as follows:—

"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree."

It may be that these words were omitted because they were considered superfluous. Similarly a provision that a claim for the recovery of land and a claim for mesne profits from such land

(1) (1915) I.L.R., 38 Mad., 829 (F.B.). (2) (1915) 2 L.W., 8.

should be deemed to be distinct causes of action, found place in the Code of 1859 but dropped out of the Code of 1882 for the reason that it became superfluous, as explained in *Ponnammal* v. *Ramamirda Aiyar*(1), but this did not prevent the Court from arriving at a conclusion that such claims constitute separate causes of action in the present state of the law.

The use of the word 'may' in Order XX, rule 12, like the same word in the old section 211, seems to indicate that it is discretionary with the Court to award future mesne profits. The plaintiff could not insist on their being granted to him because at the date of the first suit the cause of action for mesne profits is not completed. In this connection the use of the word 'shall' in Order XX, rule 16, which deals with suits for accounts may be compared with the use of the word 'may' in Order XX, rule 12.

As regards the question of *res judicata*, section 11, explanation 5, declares that any relief claimed in the plaint, which is not expressly granted by the decree, shall be, for the purposes of this section, deemed to have been refused. But if mesne profits were claimed in the first suit and through mistake or oversight they were neither granted nor refused, the section will not prevent a second suit being instituted for their recovery, when the relief claimed in the plaint is a relief which the Court was not bound to grant if the defence failed. This is made clear in *Kuppusamy Aiyer* v. *Venkataramier*(2).

Ramaswami Iyer v. *Sri Rangaraja Iyangar*(3) has since been followed in C.R.P. No. 858 of 1913 (unreported), but one of the two learned Judges who decided it was a party one and a half months later to *Thavasi* v. *Arumugam*(4), which followed *Kuppusamy Aiyar* v. *Venkataramier*(2), without referring to the more recent decision under the Code of 1908. The other learned Judge was a party to the Full Bench in *Ponnammal* v. *Ramamirda Aiyar*(1), which proceeds on considerations not easily reconcilable with those upon which *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) was decided.

We are inclined to the opinion that *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) was wrongly decided and requires reconsideration and as the question involved is of considerable

(1) (1915) I.L.R., 38 Mad., 829 (F.B.). (2) (1905) 15 M.L.J., 462.
(3) (1915) 2 L.W., 8. (4) (1915) M.W.N., 170.

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importance and of frequent occurrence, we refer to the decision of a Full Bench the question:

"*Whether after a suit for possession of lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession.*"

ON THIS REFERENCE

C. V. Anantakrishna Ayyar for the appellants.—The present suit is not *res judicata*: compare *Kuppusamy Aiyar* v. *Venkataramier*(1). In this respect there is no change between the old and the new Civil Procedure Codes. Claim for future mesne profits is not 'relief' within section 11(5), Civil Procedure Code. It is not part of 'the cause of action.' 'Future mesne profits' need not be valued for purposes of Court Fees Act; see also *Ponnammal* v. *Ramamirda Aiyar*(2). *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) is wrong. See sections 211 and 244, Civil Procedure Code of 1882 and Order XX, rule 12. What was left to be done in execution by section 244 of the old Civil Procedure Code is now left to be done before the final decree under Order XX, rule 12 of the new Civil Procedure Code, in the form of a preliminary decree. The word 'may' in Order XX, rule 12, Civil Procedure Code, is used only to enable a Court to pass a preliminary decree for future mesne profits also if it is so inclined. Compare Order XX, rule 16, Civil Procedure Code, which says that a Court *shall* pass a preliminary decree in a suit for accounts; see *Ram Dayal* v. *Madan Mohan Lal*(4) and *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(5). Compare section 34, Civil Procedure Code and *Seth Gokul Dass Gopal Dass* v. *Murli and Zalim*(6).

S. T. Srinivasa Gopalachariyar for the respondent.—*Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(3) is right and the present suit is *res judicata*. Future mesne profits are put

(1) (1905) 15 M.L.J., 462.
(2) (1915) I.L.R., 38 Mad., 829 (F.B.).
(3) (1915) 2 L.W., 8.
(4) (1899) I.L.R., 21 All., 425 at 1433 (F.B.).
(5) (1890) I.L.R., 17 Calc., 968.
(6) (1878) I.L.R., 3 Calc., 602 at p. 609 (P.C.).

by the new Code on the same footing as past profits. Even if *Kuppusamy Aiyar* v. *Venkataramier*(1) was right, the new Code has made certain changes under which it must now be held that it is wrong. The changes are provided by Order XX, rule 12. Future mesne profits can now be included in the preliminary decree. Under the new Code the grant of future mesne profits is not a matter of discretion with the Court. A plaintiff is not compelled to join a claim for past or future mesne profits with a suit for land but he has got an option. But once he exercises his option and sues for future mesne profits also, section 11, Civil Procedure Code, comes into operation: *vide* Order X, rule 4, Civil Procedure Code. If the principle of *res judicata* applies when future mesne profits are expressly granted or expressly refused, it must equally apply where the decree is silent about it. 'Shall be deemed to have refused' mean shall be deemed to have been *heard* and refused; *Bayyan Naidu* v. *Suryanarayana*(2), *Fakharuddin Mahomed Ahsan* v. *Official Trustee of Bengal*(3). If silence in a previous decree as to past profits acts as *res judicata*, similar must be the result in the case of future mesne profits; see Woodroffe's Civil Procedure Code, page 880.

The Court expressed the following OPINIONS:—

WALLIS, C.J.

WALLIS, C.J.—I agree with the referring Judges. Explanation V to section 11 of the present Code of Civil Procedure is in exactly the same terms as the corresponding explanation III to section 13 in the Code of 1882. Under the Code of 1882 it was held by a Full Bench of this Court in *Kuppusamy Aiyar* v. *Venkataramier*(1), in conformity with the decisions of other High Courts, that the word 'relief' in the explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant. The explanation having been reproduced in exactly the same words, the presumption is that it was intended to have precisely the same effect. I do not find any sufficient

(1) (1905) 15 M.L.J., 462. (2) (1914) I.L.R., 37 Mad., 70 (F.B.).
(3) (1882) I.L.R., 8 Calc., 178 (P.C.).

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indication to rebut this presumption in the fact that sections 211 and 212 of the old Code were amalgamated to form Order XX, rule 12. The change introduced by the new rule is that the award of mesne profits in all cases is to be by preliminary decree, and that when ascertained they are to be embodied in a final decree, whereas under sections 211 and 212 they were to be ascertained in execution. This change does not appear to me to affect the construction of explanation V to section 11, nor do I think is effected by the omission in section 47 of the new Code of the proviso to the corresponding section 244 of the old Code. I answer the question in the affirmative.

AYLING, J.

AYLING, J.—I regret that I am unable to concur. The point referred is identical with that considered by HANNAY, J., and myself in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), and with all respects after hearing it reargued, I remain of the same opinion.

I would answer the question in the negative.

KUMARASWAMI

KUMARASWAMI SASTRIYAR, J.—The question referred to us for decision is

"Whether after a suit for possession for lands and mesne profits past and future has been brought and decided and a decree has been obtained for possession and past mesne profits without the claim to future mesne profits being decided, a second suit will lie to recover mesne profits from the institution of the first suit till delivery of possession."

I agree with the CHIEF JUSTICE whose Judgment I have had the advantage of perusing and with SADASIVA AYYAR and SPENCER, JJ., the referring Judges, that the question should be answered in the affirmative.

As there has been no adjudication as to future mesne profits the second suit can only be barred if it can be brought under explanation V to section 11, Civil Procedure Code, 1908. It is now well settled that the word 'relief' in explanation V means a relief which the plaintiff can claim as a matter of right in respect of a cause of action which has accrued to him at the date of suit and that relief in respect of future mesne profits is not claimable as a matter of right no cause of action accruing to the plaintiff at the date of suit in respect of the future injury

(1) (1915) 2 L.W., 8.

he might suffer if the defendant continues to be in wrongful possession in spite of the suit and that explanation III of section 13 of the Code of 1882 which is the same as explanation V of section 11 of the Code of 1908 will not bar a second suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*(1), *Jiban Das Oswal* v. *Durga Pershad Adhikari*(2), *Bhivrav* v. *Sitaram*(3), *Ram Dayal* v. *Madan Mohan Lal*(4) and *Kuppusamy Aiyar* v. *Venkataramier*(5).

There is nothing in the present Code that alters the nature of the claim for future mesne profits. It is still a claim in respect of a cause of action that has not accrued to the plaintiff at the date of suit and it cannot be contended after the recent decision of the Full Bench in *Ponnammal* v. *Ramamirda Aiyar*(6), that if the plaintiff had omitted to ask for the relief in his plaint a separate suit would be barred.

The main contention for the respondents is that Order XX, rule 12, has now rendered it obligatory on the Court to pass a decree as to mesne profits from date of suit to date of delivery of possession if the plaintiff makes out a claim for such relief and that consequently the decisions under the Code of 1882 have no application.

I do not think that the Code of 1908 which enacts as Order XX, rule 12, what was contained in sections 211 and 212 of the Code of 1882 has made any material alteration in the nature of the claim as to future mesne profits. Rule 12 provides that the Court may pass: (1) a decree for possession of the property, (2) a decree for rent or mesne profits up to suit or direct an inquiry as to the same and may (3) direct an inquiry as to future mesne profits. It provides for a final decree being passed after the inquiry directed is made and the liability ascertained. So far as clause (*c*) of Order XX, rule 12, is concerned the power of the Court is still discretionary as all the Order does is to provide that the Court *may* pass a decree directing an inquiry as to rent or mesne profits from the institution of the suit till the period provided for by clauses (i), (ii) and (iii). It has been argued that even as regards clauses (*a*) and (*b*) the word used is 'may' and not 'shall' though the Court is

(1) (1890) I.L.R., 17 Calc., 968.
(2) (1894) I.L.R., 21 Calc., 252.
(3) (1895) I.L.R., 19 Bom., 532.
(4) (1899) I.L.R., 21 All., 425 (F.B.).
(5) (1905) 15 M.L.J., 462.
(6) (1915) I.L.R., 38 Mad., 829 (F.B.).

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bound to pass a decree in terms of clauses (*a*) and (*b*) if plaintiff's claim is established. Section 212 of the old Code provides that the Court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into mesne profits and dispose of the same on further orders and the legislature in including in one section what was embodied in two by using the word 'may' which occurred in both the sections cannot be said to have introduced any new principle as regards future mesne profits. When different claims are dealt within one rule under various sub-sections the fact that the word 'may' should be construed as 'shall' in respect of one of the sub-sections owing to nature of the claim which it deals with, does not necessarily mean that the word cannot be construed in its ordinary sense as regards other clauses. With all respect I am unable to agree with the decision in *Ramaswami Iyer* v. *Sri Rangaraja Iyangar*(1), that the grouping out one section of past and future mesne profits affects the nature of future mesne profits so as to attract to it the provisions of explanation V to section 11. The omission of the proviso to section 244 in section 47 of the Code of 1908 is due to the fact that under the Code of 1908 the determination of questions as to mesne profits was to be in the suit itself and not subsequent to decree in execution proceedings. Under the scheme of the present Code there is no necessity for any such proviso to section 47 which corresponds to section 244 of the old Code.

There being in my opinion no material difference between section 211 of the old Code and rule 12, clause (*c*) of Order XX of the present Code, there is no reason for departing from the decisions of this and the other High Courts as to the second suit not being barred by explanation V of section 11 of the Code.

N.R.

(1) (1915) 2 L.W., 8.