

We accept the finding and allow appeals Nos. 514 to 560 and 562 to 564 of 1919. In Second Appeals Nos. 514 to 556 of 1919, we dismiss the suits with costs, throughout, and in Second Appeals Nos. 557 to 560 and 562 to 564 of 1919, we modify the decree of the Lower Appellate Court, by restoring the clause in the original patta as to second crop.

The respondents to pay the appellants' costs.

In Second Appeals Nos. 817 to 825 of 1919, we dismiss the Second Appeals with costs. We allow a fee of Rs. 5 in each of the 59 cases.

K.R.

THE MIDNA-  
PORE  
ZEMINDARY  
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## APPELLATE CIVIL.

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

VENKATARAMA AIYAR (TWENTY-THIRD DEFENDANT),  
APPELLANT,

1920,  
November 1.

v.

RAMASAMI AIYAR AND TWO OTHERS (SECOND AND THIRD  
PLAINTIFFS AND TWENTY-SECOND DEFENDANT), RESPONDENTS.\*

*Transfer of Property Act (IV of 1882), sec. 6 (e)—Assignment of a decree passed for immoveable property and for ascertainment of mesne profits—Transferee's right to be made a party and to mesne profits.*

Where the right to mesne profits has been declared by a decree, but the exact amount has been left to be ascertained at a future stage in the same suit, a transfer of such right is not invalid under section 6 (e) of the Transfer of Property Act as the transfer of a "right to sue."

APPEAL against the order of C. V. VISWANATHA SASTRI, Subordinate Judge of Kumbakōnam, in E.A. No. 291 of 1918 in Original Suit No. 41 of 1909.

First plaintiff and his son, the second plaintiff, in Original Suit No. 41 of 1909 on the file of the Subordinate Judge's Court of Kumbakōnam obtained a decree for partition and delivery to

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them of their one-third share in the joint family properties belonging to them and to defendants Nos. 1 and 2. An enquiry into mesne profits was also ordered by the decree. The first plaintiff transferred for consideration his one-sixth share in all the moveable and immoveable properties covered by the said decree and also his right to get the mesne profits under the decree. The assignment empowered the assignee to bring himself on record as the transferee in the place of the first plaintiff. The second defendant in the suit having died his widow transferred his rights under the decree to the twenty-third defendant. On an application by the assignee of the first plaintiff to have the mesne profits ascertained and decreed to him the twenty-third defendant objected on the ground that the assignment did not entitle him to that relief. The Subordinate Judge ordered the ascertainment of mesne profits and passed a decree for the amount of mesne profits to be ascertained.

The twenty-third plaintiff preferred this Appeal.

*T. M. Krishnaswami Ayyar* for appellant.

*T. V. Muttukrishna Ayyar* for respondent.

SADASIVA  
AIYAR, J.

SADASIVA AIYAR, J.—The twenty-third defendant is the appellant before us. The purchaser from the first plaintiff who was entitled to and given a decree for the one-sixth share in certain properties prayed under Order XX, rule 2, to have the mesne profits due to the petitioner by the twenty-third defendant ascertained, the decree in the suit having, as I read it, declared the first plaintiff's right to recover mesne profits from the date of suit against the twenty-third defendant and having only left the actual amount to be ascertained and awarded in a supplemental decree. I do not agree with the contention of the appellant's learned vakil that the sale-deed to the petitioner by the first plaintiff did not transfer the first plaintiff's rights under the decree, but transferred merely a right to claim mesne profits.

The only remaining contention which has to be considered is whether, when a decree declaring such a right has been passed in favour of a litigant against another litigant, such a right can be transferred lawfully and whether the transferee is entitled to have the mesne profits due to his transferor ascertained

by the ordinary procedure in the same suit in the ordinary course. Reliance is placed by the appellant's learned vakil on the decisions beginning with *Shyam Chand Koondoo v. The Land Mortgage Bank of India*(1). See also *Seetamma v. Venkataramanayya*(2), and *Muthu Hengsu v. Netravathi Naiksvi*(3), in which it has been held that a claim for mesne profits is a claim for damages in tort which falls under the heading of "mere right to sue" in section 6 (e) of the Transfer of Property Act and hence cannot be assigned. I am inclined to hold that those decisions are the result of what I consider, with the greatest respect, to be an unnecessarily close adherence to the development of the Law of Torts in English Courts. I think a suit for mesne profits (as pointed out by my learned brother during the course of the argument) partakes more of the nature of a suit for account (along with which it is enumerated in the schedule to the Provincial Small Cause Courts Act). I think also that such a suit has under ordinary circumstances some affinity to a suit for money had and received, and I see no reason why in India, where according to the Privy Council the law of champerty and maintenance as developed in England has very little application, the transfer of a right to claim mesne profits should be held invalid. I think the reasoning in *Ramiah v. Rukmani Ammal*(4), rather points to the conclusion that the transfer of such a right is not invalid. It is, however, unnecessary to express a final opinion on the question whether a claim for mesne profits which has not been declared to exist in the transferor by a decree of Court can be validly transferred or not. Where, however, such a claim has been declared by a decree, and only the exact amount recoverable has been left to be ascertained in future proceedings in the same suit, I think there can be no difficulty in holding that the transfer of such a right is valid, and I find that in *Prasanno Kumar Panja v. Ashutosh Ray*(5), and *Hari Prasad Misser v. Kodo Marya*(6), the validity of the transfer of such a right has been upheld. Following those decisions, I would dismiss this appeal with costs.

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(1) (1883) I.L.R., 9 Cal., 695.

(3) (1920) 12 L.W., 44.

(5) (1913) 18 O.W.N., 450.

(2) (1915) I.L.R., 38 Mad., 308.

(4) (1918) 24 M.L.J., 313.

(6) (1916) 1 Pat. L.J., 427.

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SESHAGIRI AIYAR, J.—I agree. The question for decision is whether after a preliminary decree which directs enquiry into the mesne profits and after a declaration has been inserted in the final decree regarding the rights of the parties, such a decree can be assigned to a stranger to enable him to execute it against one of the parties to the decree. My learned brother has said that the technicalities of the English Law should not be imported into this country. I take a different view. My complaint is not that we too slavishly follow English Law, but that we have not kept pace with the development of that law during the last few years. I may refer to one of the recent decisions, namely, *Ellis v. Torrington*(1), where the exact import of the expression "a bare right to sue" has been well pointed out. SCRUTTON, L.J., at page 411, says thus:

"But early in the development of the law, Courts of Equity and perhaps the Courts of Common Law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance."

BANKES, L.J., takes even a stronger view and says that where a right to profits is appurtenant to the right to property it can be assigned. WARRINGTON, L.J., expresses himself similarly. The interpretation here given should govern Courts in India in construing section 6 of the Transfer of Property Act. Applying that principle, there can be no doubt that the right to sue for mesne profits assigned in this case is appurtenant to the right of enjoyment of the property itself and, therefore, that right was an enforceable right. Reference may also be made to one other English case, *Hambleton v. Brown*(2) where it was held that after a decree there can be an assignment of the rights litigated. Therefore, if the English Law were properly applied in this country, there can be no doubt that this case can be decided only in one way, and that is against the appellant.

As regards the cases quoted, I wish to say a word. In my opinion, while *Ramiah v. Rukmani Ammal*(3) is quite in consonance with the view taken in England, *Seetamma v. Venkata-*

(1) [1920] 1 K.B., 399.

(2) [1917] 2 K.B., 93.

(3) (1913) 24 M.L.J., 313.

*ramanayya*(1), as well as the decision to which I was a party, viz., *Muthu Hengsu v. Netravathi Naiksavi*(2), do not seem to have recognized the distinction between a bare right to sue and a right which became only subsidiary to the enjoyment of the property itself. I was under the impression that in the case to which I was a party there was an assignment of the mortgage right, and the question was whether after the assignment of the mortgage, by virtue of section 8 of the Transfer of Property Act, the transferee can claim mesne profits which had accrued due before the date of the transfer. If that was the question the decision will be right. But my learned brother has drawn my attention to the fact that in that case there was an actual transfer of the right to mesne profits. Apparently that fact was not brought to our notice at the hearing. If the decision to which I was a party is to be understood as laying down that even in cases of actual transfer of mesne profits as subsidiary to the enjoyment of the property the right cannot be enforced, I am not prepared to stand by it. So far as the present case is concerned, the matter seems to be very clear. Applying section 6 as strictly as possible, the present right cannot be said to be in any way a bare right to sue. The suit had been instituted and the cause of action had become merged in the decree of the Court. Consequently, it was no longer a bare right, the transfer of which is forbidden by section 6, clause (e). The view taken in *Prasanno Kumar Panja v. Ashutosh Ray*(3), and *Hari Prasad Misser v. Kodo Marya*(4), is quite consistent with the strictest enforcement of section 6 of the Transfer of Property Act, and I respectfully follow them. I agree with my learned brother in holding that the appeal should be dismissed with costs.

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(1) (1915) I.L.R., 38 Mad., 308.

(2) (1920) 12 L.W., 44.

(3) (1913) 18 C.W.N., 450.

(4) (1916) 1 Patna L.J., 427.