possession, it was held that the cause of action did not arise till possession was in fact disturbed.

SANKARA VARIAR v. UMMER.

ODGERS, J.

Under these circumstances it appears to me that the Privy Council decision, qualified as it is, must be taken to be applicable to the facts of the particular case before their Lordships and that we are not justified in extending it generally to cases in which actual possession of the property has been given and been enjoyed for a number of years. In such a case, on the authorities quoted above, the starting point of limitation must be (at all events in the case of a sale not *ab initio* void but only voidable) the date of dispossession. I am therefore of opinion that this Second Appeal should be dismissed with costs.

Ayling, J.—I agree.

AYLING, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

T. RAMASAMY AIYAR (FIRST PLAINTIFF), APPELLANT,

1922, April, 20.

v.

T. SUBRAMANIA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partition—Co-owner — Trustee—Mesne profits—Profits claimed by a member of Hindu joint family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to.

The claim for profits, made by a member of a Hindu joint family in a suit for partition, is not technically one for "*mesne profits*," as used in the Civil Procedure Code.

* Civil Miscellaneous Second Appeal No. 40 of 1919.

RAMASAMY AIYAR v. SUBRAMANIA AIYAR.

A co-owner, who is awarded profits in a partition suit against another co-owner in possession, is not entitled to *interest* on such profits in the absence of proof of fraud or inefficiency in the realization of the profits.

APPEAL against the order of F. A. COLERIDGE, the District Judge of Madura, preferred against the order of V. DANDAPANI PILLAI, Subordinate Judge of Madura, in Interlocutory Applications Nos. 287 of 1909, 187 of 1910, 122 and 123 of 1914 and 266 of 1916 in Original Suit No. 19 of 1895.

The first plaintiff instituted this suit in 1895 (Original Suit No. 19 of 1895 on the file of the Sub-Court of Madura) for partition and delivery of his share of the family property together with profits appurtenant to his share for three years prior to suit and for future profits. The suit was in the first instance wholly dismissed, but on appeal to the District Court, a judgment and decree were passed on the 14th September 1899, directing the division of the family properties and awarding the plaintiff an one-fifth share of the same, as it then was. The claim for past profits was negatived, but the judgment and decree were silent as to future profits. On 22nd April 1909, the plaintiff filed an application in the Sub-Court for the appointment of a commissioner to divide the lands, and prayed *inter alia*, for the ascertainment of "mesne profits." The Subordinate Judge disposed of this and other petitions by other parties to the suit, by an order, dated 29th November 1915, under which a commissioner was appointed with certain directions; but he held as to mesne profits that the plaintiff was not entitled to the same on the ground that the *preliminary* decree did not make any mention of mesne profits nor was any provision made therein. On the report of the commissioner, what was called a final judgment and decree were passed on the 13th September 1916. In the so-called final judgment, the

claim for mesne profits was again considered and negatived by the then Subordinate Judge who observed :

"In this order of my predecessor" (referring to the previous order of 29th November 1915 on the application for appointment of commissioner), "the claim for mesne profits was disallowed and I have no authority to vary the order."

The plaintiff preferred an appeal to the District Court against the so-called final decree of the Subordinate Judge, dated 13th September 1916, and again claimed mesne profits. The learned District Judge disposed of the appeal by a decree, dated 3rd August 1917, but negatived the claim for mesne profits, and observed in his judgment as follows :

"It has already been decided that the preliminary decree did not provide for mesne profits, and I cannot go into that in this appeal."

Against this decree, the plaintiff preferred this Civil Miscellaneous Second Appeal. The case came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who held that the plaintiff was entitled not to past but only to future profits under the circumstances of this case, and called for findings on two issues regarding the same ; and on receipt of the findings from the lower Court, the case was finally disposed of when the question as to interest on mesne profits was dealt with.

T. R. Venkatarama Sastri, *S. Parthasarathi Ayyar*, *M. S. Venkatarama Ayyar* and *S. Vaidyanatha Ayyar* for respondent.

T. R. Ramachandra Aygar, *T. S. Narayana Ayyar*, *T. S. Anantarama Ayyar* and *T. L. Venkatarama Ayyar* for appellant.

JUDGMENT.

OLDFIELD, J.—On the second issue remanded, relating to plaintiff's share of the net profits received by second defendant and to be accounted for by him from plaintiff's

OLDFIELD, J.

RAMASAMY AIYAR v. SUBRAMANIA AIYAR.

OLDFIELD, J.

share of the lands, or rather from the lands assigned to the latter, we have been unable to ascertain and the learned vakils concerned cannot say how the total found payable to plaintiff has been reached. We, therefore, can only with the assistance of the materials now available and accepted by the lower Court indicate the lines, on which the account must be taken. The second defendant was in possession as manager of the family, until on the date of the plaint the joint family became divided and a tenancy-in-common replaced it, second defendant continuing in possession as one of the co-tenants. It is, therefore, possible to say at once that he has, from the date of the plaint (22nd August 1895), been accountable for plaintiff's share of the produce of all the lands with the exception for the present of Survey Nos. 228-B (representing items 1 and 2), and 233 (item 3 and items 4 to 6), because the special considerations applicable to these require separate treatment.

The next question is whether plaintiff is entitled to interest on his share of the profits for each year from the time when second defendant received it. As a co-owner in possession of the co-ownership property, he was, it may be conceded, a constructive trustee with reference to section 94 of the Trust Act and was subject to the same liabilities as a trustee with reference to section 95. But it does not follow that he is liable for interest on the profits. For, it has not been shown how a trustee can ordinarily be so liable in the absence of any breach of trust established against him in the special circumstances enumerated in section 23. There is no imputation on second defendant's realization of profits as fraudulent or inefficient; and, when the suit might at any moment during the long period of its suspension have been resumed and it might have been necessary for second defendant to produce the funds in his hands, we are not prepared to hold that he

was bound by section 20 to invest them. Authority is, as my learned brother has shown, against the duty of a trustee ordinarily to pay interest on profits. We accordingly cannot hold second defendant liable for it, and, taking this view, we need not consider whether the learned Judges, in holding him liable for profits, not mesne profits, in the order of remand, intended, as has been argued before us, to deal with the matter.

OLDFIELD, J.

* * * *

VENKATASUBBA RAO, J.—I am of the same opinion, and I should like to state my reasons for holding that the second defendant is not liable for interest.

VENKATASUBBA RAO, J.

On behalf of the plaintiff it is argued that the second defendant stood in a fiduciary relation to him and would therefore be liable to pay interest upon the rents received from the lands.

In the first place, I am not satisfied that there is any fiduciary relation between the plaintiff and the second defendant. After the interlocutory order of 1899 it is no doubt conceded that the parties became tenants-in-common with reference to the properties in question. But we have not been referred to any authorities in support of the proposition that the second defendant stood in any fiduciary relation to the plaintiff. The decision in *Kennedy* v. *De Trafford*(1) is the other way. Action was brought against the mortgagees of some property to set aside a sale made by them under the power of sale contained in their mortgage deed. The property mortgaged was held by two persons as tenants-in-common. They were co-owners, each possessing an undivided moiety. The mortgagees gave notice that unless the parties paid off the mortgage the former would be prepared to sell the property at a price which would realize

(1) [1897] A.C., 180 at 189.

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principal, interest and costs, and finally one of the mortgagors became the purchaser. The sale was impeached by the representative of the other mortgagor on the ground that it was made to a person who was incapable of buying the property because he was in a fiduciary relation. Lord HERSCHELL observes :

"But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such relationship between them that one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one-half of that purchase should be his. My Lords, no authority has been cited in support of such a proposition."

In the Court of Appeal LINDLEY, L.J., made the following observation in regard to this contention by the plaintiff, the co-tenant :—

"We are asked to say, and the point is an important one, that one of several tenants-in-common cannot get in for his own benefit an outstanding encumbrance or an outstanding estate or cannot be treated otherwise than as fiduciary owner standing in some fiduciary relation to his co-tenant. As a general proposition that appears to me not to be the law of England. *Kennedy* v. *DeTrafford*(1)."

Even assuming that there was a fiduciary relation, is the second defendant liable for interest upon the rents of the lands in his possession? In *Blogg* v. *Johnson*(2), Lord CHELMSFORD L.C., stated that generally interest cannot be recovered upon the arrears of income. Several cases are referred to in the judgment and the rule is said to be the established rule of the Court, which however, is only general and not inflexible.

In *Silkstone and Haigh Moor Coal Company* v. *Edey*(3), it was held that upon the setting aside of a sale by a trustee of a trust property to himself and the reconvey-

(1) [1896] 1 Ch., 762 at 774. (2) [1867] 2 Ch. App., 225.
(3) (1900) 1 Ch., 167.

ance of the property to the beneficiaries it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

Lewin states the law relating to the right of the beneficiary to have the property reconveyed to him thus :

" The cestui que trust, if he chooses it, may have the specific estate reconveyed to him by the trustee or where the trustee has sold it with notice by the party who purchased, the cestui que trust on the one hand paying the price at which the trustee bought with interest at four per cent and the trustee or purchaser on the other accounting for the profits of the estate but not with interest."

STIRLING, J., in *Silkstone and Haigh Moor Coal Company* v. *Edey*(1) approves of the statement of the law in "Lewin on Trusts," page 576.

Macartney v. *Blackwood*(2), which is referred to in the judgment of STIRLING, J., is also an authority for the proposition that when the sale is set aside interest on the rents is not allowed.

In Halsbury's Laws of England, Vol. 28, at page 191, a statement of law is made to the same effect.

Interest was, no doubt, charged on arrears in some cases as *Melland* v. *Gray*(3), and *Gilroy* v. *Stephen*(4), but it seems to me that the cases fall, in the words of Lord CHELMSFORD, L.C., in *Blogg* v. *Johnson*(5), within the range of another principle of equity that where an executor or a trustee unnecessarily detains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will have to pay interest for it. The LORD CHANCELLOR observes :

" Where money is thus improperly retained, it appears to me to be immaterial how the sum has arisen, whether from a legacy or a distributive share or a residue or the arrears of

(1) (1900) 1 Ch., 167. (2) (1795) Ridg. L. & S., 602.
(3) (1845) 2 Coll., 295. (4) (1882) 46 L.T., 761.
(5) [1867] 2 Ch. App., 225.

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income ; in the latter case the claim for interest is not made on account of arrears, but for the improper keeping back of a sum of money, from whatever source derived which the executor or the trustee ought to have paid over."

As my learned brother has pointed out, it cannot be said in this case that the second defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it was quite open to him at any moment to ask for possession of the properties, for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the second defendant, and the plaintiff has failed to show any grounds for making the second defendant liable for interest.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C. Chief Justice, and Mr. Justice Coutts Trotter.

1922, August, 1.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER), APPELLANT,

v.

ALLU RAMACHANDRA AYYAR AND OTHERS (MINOR BY MOTHER AND GUARDIAN SWARANAMBAL, RESPONDENT), RESPONDENTS.*

Hindu Law—Insolvency—Joint family—Managing member adjudicated insolvent—Effect of adjudication—Rights of Official Assignee—Joint possession—Exclusive possession of joint family property—Personal rights of manager, whether transferred to Official Assignee—Vesting of other members' shares—Alienee—Joint owner—Rights of Official Assignee and other members—Right of Official Assignee to deal with other members' shares—Nature of debt.

Where the managing member of a joint Hindu family, consisting of himself and his sons, is adjudicated an insolvent

* Original Side Appeal No. 48 of 1921.