APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

1923. September, 7.

RAMAKKA (COUNTER-PETITIONER), APPELLANT,

v.

V. NEGASAM (PETITIONER—4TH DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), *ss.* 2 (12) *and* 141, *O. XVIII, r.* 1, *and O. XXVI, r.* 10—*Application for restitution of lands with mesne profits—Appointment of Commissioner—Inquiry—Burden of proof—Right to begin—Indian Evidence Act (I of* 1872), *sec.* 106—*Information of persons, not called as witnesses, whether admissible—Local inspection by Commissioner—Report based on same, crop experiment and information, whether legal.*

Where a defendant applied for recovery of mesne profits from the plaintiff who had taken possession of certain lands in execution of a decree of the original Court which was reversed on appeal, and the Court appointed a Commissioner to ascertain the amount of mesne profits,

Held that, in the inquiry held by the Commissioner, the defendant was bound to let in his evidence in the first instance, and thereafter the plaintiff was entitled to let in her evidence, under the provisions of Order XVIII, rule 1, and section 141 of the Civil Procedure Code;

that although, under section 106 of the Indian Evidence Act, the burden of proving the amount of mesne profits *actually received* is on the person receiving them, yet as regards the amount of mesne profits that *might, with ordinary diligence, have been* received by the person in occupation, the burden of proving it is on the person claiming it; *Krishna Mohun Basak* v. *Kunjo Behari Basak* (1881) 9 C.L.R., 1, referred to;

and that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment

* Appeal against Order No. 411 of 1921.

conducted by him, but not on information obtained from certain persons whose evidence was not recorded by him under Order XXVI, rule 10, Civil Procedure Code, as information given by witnesses which was not reduced to writing was not legal evidence upon which the Court could decide. *Harvey* v. *Shelton*, (1844) 7 Beav., 455 ; 49 E.R., 1141, referred to.

APPEAL against the order of A. J. CURGENVEN, District Judge of Anantapur, in Interlocutory Application No. 95 of 1920 in Original Suit No. 31 of 1912 on the file of the District Court of Bellary.

This appeal arises out of an application by the fourth defendant for recovery of mesne profits on certain lands which had been taken over by the plaintiff under the decree of the first Court which was reversed on appeal. The mesne profits related to the period between the date of the original decree and the decision of the appeal therefrom. The lower Court appointed a Commissioner to ascertain the amount of mesne profits due from the plaintiff. The Commissioner, in the course of his inquiry, directed the plaintiff to adduce her evidence in the first instance. The plaintiff refused to do so, and the defendant let in his evidence and closed his case ; thereupon the plaintiff applied to the Commissioner to allow her to adduce her evidence ; the Commissioner refused her request, and submitted his preliminary report to the Court on 15th November 1920. The plaintiff applied to the District Court in I.A. No. 49 of 1921, to direct the Commissioner to record her evidence. The District Judge passed an order on that petition on 22nd March 1921, holding that the Commissioner was right in his view that the plaintiff was bound to adduce her evidence first and, on her refusal to do so, she was not entitled to adduce it at a later stage ; he also held that the Commissioner was right in refusing to allow her to cross-examine the fourth defendant on his previous statement in writing without production of the document

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and he dismissed the petition. Against the final order of the District Judge on the Original Petition (I.A. No. 95 of 1920), the plaintiff preferred this Miscellaneous Appeal to the High Court. The other irregularities in procedure appear from the judgments.

L. A. Govindaraghava Ayyar for appellant.

B. Somayya for respondent.

JUDGMENT.

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SPENCER, J.—This was an application by the fourth defendant for mesne profits on the extent of land in the enjoyment of the plaintiff between the date of the decree in the first Court and the decision of the appeal. The matter was referred by the District Judge to a Commissioner to ascertain the amount of mesne profits due. The Commissioner directed the plaintiff to adduce her evidence first, on the ground that she had been in possession of the property and was thus in the best position to state how much profit she had obtained. The plaintiff's pleader refused to open his case, upon which the petitioner's witnesses were examined and the case was closed. Meanwhile, the counter-petitioner (plaintiff) applied to the District Court to direct the Commissioner to record her evidence. The District Judge in an order on the interlocutory application decided that the Commissioner was right and refused the counter-petitioner's request.

The questions now before us are (1) whether the District Judge was right in giving the petitioner mesne profits upon 15 acres 42 cents of wet land and (2) whether he was right in not allowing the appellant an opportunity to adduce her evidence. As regards the extent of the land, the plaintiff's pleader relies on an admission made by the fourth defendant in another suit,

O.S. No. 393 of 1916, that she (plaintiff) was only in possession of 8 acres 47 cents, and he argues that the petitioner is not entitled to get mesne profits on a larger extent than what he admitted that she was in possession of. The circumstances under which the statement was made in the other suit have not been proved. The Judge relied on the extent as given in the delivery warrant and I think he was right in doing so.

On the second point, I am of opinion that the Commissioner and the District Judge were in error in requiring the plaintiff to open her case. Order XVIII, rule 1, Civil Procedure Code, which is applicable to miscellaneous proceedings through section 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff. In a case like the present, where the fourth defendant is the person claiming mesne profits, he is in the position of a plaintiff, as it is his petition that is the foundation of the proceedings and, if he adduces no evidence at all, no mesne profits can be awarded to him. Section 2, clause (12) defines mesne profits as those profits which a person in wrongful possession of such property actually received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under section 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them. The cases cited for the respondent, *Brojendro Coomar Roy* v. *Madhub Chunder Ghose*(1) and *Dinobundhoo Nundee* v. *Keshub Chunder Ghose*(2), do not go further than to show

(1) (1882) I.L.R., 8 Calc., 343. (2) (1865) 3 W.R. Mis., 25.

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that it lies on the person who actually received mesne profits to show how much he received. These two cases are not authorities for saying that it is for the person in occupation to prove what mesne profits should be awarded, which is a very different thing. In *Krishna Mohun Basak* v. *Kunjo Behari Basak*(1), it was observed that there may be cases in which the defendants in a suit for mesne profits may properly be called upon to produce their accounts and to give information upon facts within their special knowledge, but that, under the provisions of section 179, Civil Procedure Code of 1879, which corresponds to Order XVIII, rule 1, the right to begin was with the plaintiff and the appellant's contention that it was for the defendant to begin was not entitled to any consideration.

The counter-petitioner applied to the District Judge to be allowed to examine her witnesses and this application was refused. As the case cannot be satisfactorily disposed of without hearing the evidence on both sides, I think it is necessary that we should send the case back to the District Judge and ask him to record such evidence as the counter-petitioner may produce on her side and such further evidence as the petitioner may adduce on the same points.

Another error into which the Commissioner has fallen which has been referred to in the course of argument is the fact that he obtained information from certain persons whose evidence was not recorded by him. The Judge considered that this information was admissible. I am of opinion that the Commissioner was entitled to base his report on his local inspection and also upon the crop experiment conducted by him, but that any evidence that he took should have been recorded in

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(1) (1881) 9 C.L.R., 1.

writing. Order XXVI, rule 10, requires that he should reduce to writing the evidence taken by him. Information given by witnesses which is not reduced to writing is not legal evidence upon which the Court can decide. If either of the parties desires to have the benefit of the statements of those persons from whom the Commissioner obtained information, they should now cite them as witnesses; otherwise, the District Judge should come to a conclusion on the rest of the evidence before him without any reference to such unrecorded statements. The District Judge is directed to return his revised findings within three months. Ten days for objections.

VENKATASUBBA RAO, J.—I agree and I wish to add a few words. The plaintiff filed a suit for the recovery of certain property and obtained judgment. In pursuance of it she took possession of 15 acres and 42 cents of wet land with which we are mainly concerned. In appeal the judgment was reversed and the fourth defendant now seeks restitution of mesne profits. I may note that the fourth defendant by way of restitution already obtained 15 acres of wet land from the plaintiff. There is no need to refer to the dry land claimed so far as this judgment is concerned. The first question that had to be decided by the lower Court was whether mesne profits were to be given in respect of 15 acres of wet land or merely in respect of 8 acres which the plaintiff said was the extent of the land she had taken possession of from the fourth defendant. The lower Court, having regard to the plaint, the decree, the execution proceedings and the delivery warrant, came to the conclusion that the plaintiff was accountable for mesne profits in respect of 15 acres of wet land. The matter was fully dealt with by the District Judge and it is sufficient to say that the lower Court rightly allowed mesne profits in respect of 15 acres and odd so far as the wet land is concerned.

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The next question is, what is the proper amount of mesne profits? The District Judge referred the matter of the ascertainment of the mesne profits to a Commissioner. This is what the District Judge says in his preliminary order—

"Under Order XXVI, rule 9, Civil Procedure Code, I resolve to appoint a Commissioner to make a local investigation and ascertain the amount of mesne profits which may be awarded to the fourth defendant on the abovementioned extent of land comprised in the items specified in paragraph 2 *supra* after examining witnesses and receiving any documentary evidence which the parties may produce before him."

When the enquiry was taken up by the Commissioner, the plaintiff contended that the fourth defendant should begin and adduce evidence on the ground that the burden was upon him to make out what the mesne profits allowable to him were. The Commissioner ruled that the plaintiff was the party who was to begin, thus implying that the burden of proof was upon the plaintiff. The plaintiff's vakil declined to call evidence objecting to the ruling and allowed the fourth defendant to examine his witnesses. The latter's case was closed on 13th February 1921 when the plaintiff apparently made an application to be allowed to examine her witnesses at that stage. The Commissioner refused the request. Thereupon, on the 16th February 1921, the plaintiff applied to the District Court to be allowed to examine her own witnesses and the District Judge decided that the ruling of the Commissioner was right and rejected the plaintiff's application. Before I deal with the objection that relates to this, I may advert to certain other matters that transpired before the Commissioner himself.

The plaintiff desired to cross-examine the fourth defendant with reference to a certain allegation made in the latter's written statement in another proceeding.

The Commissioner disallowed the plaintiff's request and on application by the plaintiff to the District Judge, the order of the Commissioner was confirmed.

Exception is taken to the report of the Commissioner on another ground. Under the impression that he could gather information by instituting enquiries regarding the correct amount of mesne profits and act upon such information, he interviewed several ryots and others and collected their opinion and based his conclusions *inter alia* upon the information so obtained.

Next it is said that the Commissioner conducted certain experiments. He had the crop harvested. He confined himself to two small plots of land, and on the results obtained, he based his calculation in regard to the whole land. It has been argued before us that the Commissioner was wrong in adopting this procedure.

I shall deal shortly with these objections. In regard to the last objection it seems to be untenable. It has been pointed out that the two plots were selected out of the entire lands and it has not been shown that the yielding capacity of the other portions which are adjacent to the plots selected is different.

In regard to the objection that the Commissioner was wrong in refusing to allow the plaintiff to cross-examine the fourth defendant in respect of a statement made by the latter in a previous proceeding, the objection must be upheld. Under section 145 of the Evidence Act a witness may be cross-examined as to previous statement made by him in writing without such writing being shown to him or being proved. Only if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Commissioner refused to allow cross-examination on the ground that the document

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which contained the previous statement was not produced. The plaintiff was entitled to cross-examine the fourth defendant in regard to his previous statement without showing the latter the document. Only if it became necessary to contradict the fourth defendant, his attention should be called to the writing. The Commissioner acted clearly wrongly in this respect. On another ground the Commissioner's order is sought to be justified. It is said that, when the preliminary order was passed, the Court refused to attach any weight to the fourth defendant's previous statement, and, for that reason, the Commissioner also was justified in refusing to allow questions to be asked in regard to it.

This position is entirely wrong. The Court when passing the preliminary order declined to make any inference from the previous statement as regards the extent of the land in the fourth defendant's possession. The writing was sought to be used before the Commissioner for altogether a different purpose, the purpose being to ascertain the probable yield.

The contention that the Commissioner was not justified in obtaining information in the absence of the parties must be upheld. The Court is not entitled to act on information received in the absence of the parties, nor can it base its judgment on its own knowledge of the facts. The law on this subject is well settled. Lord LANGDALE, M.R., observes in *Harvey* v. *Shelton*(1)—

"In every case in which matters are litigated, you must attend to the representation made on both sides, and you must not, in the administration of justice, in whatever *forum*, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side."

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(1) (1844) 7 Beav., 455; 49 E.R., 1141.

To say that the Commissioner could have come to the same conclusion on the other material before him is no answer. If the case is brought within the general principle that the Judge's mind may, by a possibility, have been biassed, there is a sufficient objection. See *Dobson* v. *Groves*(1) and *Walker* v. *Frobisher*(2).

The only other point that remains to be dealt with has reference to the objection that the ruling of the Commissioner in regard to the right to begin is wrong. The District Judge expressed the opinion that the ruling was correct. The fourth defendant claims in this proceeding mesne profits from the plaintiff. Section 2, clause (12) of the Civil Procedure Code, defines mesne profits thus:

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received *or might with ordinary diligence have received therefrom.*"

It will be seen that mesne profits are not merely profits which a person in wrongful possession has actually received. The argument therefore that the amount of profits actually received is within the knowledge of the person in possession and that therefore the latter should in the first instance give evidence is clearly untenable. In a suit for mesne profits the burden is always held to be on the plaintiff to prove the amount. This is the recognized practice. The proceeding before us is really in the nature of a suit for mesne profits. No ground has been shown why this practice should be departed from. The Commissioner's ruling that the plaintiff should begin is tantamount to a decision that the burden of proof is upon the plaintiff. From the nature of the controversy, what the parties were disputing about was not in regard to the right to begin

(1) (1844) 6 Q.B.R., 637. (2) (1801) 6 Ves. Jun., 70; 31 E.R., 943.

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but the duty to begin. I am of the opinion that the fourth defendant was bound to adduce evidence in the first instance regarding the amount of mesne profits. (See *Krishna Mohun Basak* v. *Kunjo Behari Basak*(1).)

I therefore hold that the Commissioner as well as the District Judge were wrong in regard to this matter.

Now that we have decided that the ruling is incorrect, what follows? It has been contended on behalf of the fourth defendant that the plaintiff's vakil having refused to adduce evidence when he was called upon to do so, he should not be allowed an opportunity to examine his witnesses. This contention I am unable to understand. When the Commissioner gave a ruling, the plaintiff took a risk in refusing to accept it. But what is the extent of the risk that she took? She took the risk of the ruling of the Commissioner being ultimately pronounced to be correct. If it should be held to be correct by the final tribunal, the plaintiff not having examined her witnesses when she ought to have done so she would of course be completely debarred from adducing any evidence whatsoever. But this is the only risk that the plaintiff took. Immediately the fourth defendant's case was closed, the plaintiff's vakil made an application that he should be allowed to let in evidence. The effect of our decision is that the plaintiff should give evidence only after the fourth defendant had closed his case. It therefore follows that the plaintiff should be allowed to examine her witnesses at the close of the fourth defendant's case. The following passage from Taylor on Evidence, Vol. 1, page 291, section 388, has been relied upon by the fourth defendant :—

"The question respecting the right to begin is a matter of practice and regulation upon which the presiding Judge

(1) (1881) 9 C.L.R., 1.

must exercise his discretion; and the Court will not interfere with his decision unless it be clearly proved, not only that the ruling on this point was manifestly wrong, but that it has occasioned substantial injustice."

This passage would certainly be of assistance to the fourth defendant, if the plaintiff accepting the ruling of the Commissioner had given evidence in the first instance. In that case the Court, although it came to the conclusion that the ruling was incorrect, would not ordinarily interfere with the final decision in the suit. But here the plaintiff did not accept the ruling and refused to examine the witnesses before the fourth defendant gave evidence. In the circumstances, the passage relied upon has no bearing. I have disposed of all the objections taken to the procedure adopted by the Commissioner. I am of the opinion that it is clearly necessary to have another finding in regard to the amount of mesne profits.

I agree with the order that has been proposed by my learned brother.

In compliance with the order contained in the above judgment, the District Judge of Anantapur submitted a finding that a sum of Rs. 1,128-3-8 was due to the petitioner (fourth defendant) from the counter-petitioner (plaintiff).

On receipt of the above finding, their Lordships delivered the following

JUDGMENT:—

The District Judge's finding is based mainly upon the lease-deeds executed in respect of the lands upon which mesne profits accrued during the years that the defendant was out of possession. We have heard no

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good reasons for doubting the genuineness of these documents, and if they are genuine they afford the best possible evidence of the amount of profits.

The counter-petitioner does not press her objections as to interest. We accept the District Judge's findings.

Civil Miscellaneous Appeal No. 411 of 1921 is allowed. Each side to pay and receive proportionate costs.

K.R.