

We allow this appeal, and, setting aside the decree of the Court below, remand the suit under s. 562 of the Code of Civil Procedure to the Court below, to be decided on the merits. It will be competent for the guardian to apply to the Court for permission to compromise the suit, and if the Court grants leave, after considering the question of the interests of the minor, and the parties agree to the compromise, it will then be the duty of the Court to make a decree in accordance with s. 375 of the Code of Civil Procedure. If the suit is tried out, the Court must take special care to see that justice is done to the minor, if she has any title. The costs of this appeal will abide the event.

1895

 KALAVATI
 v.
 CHEDI LAL.

Appeal decreed and cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

MEWA KUAR (DEFENDANT) v. BANARSI PRASAD (PLAINTIFF).*

1895

 May 8.

Civil Procedure Code, ss. 43, 44—Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.

Where a plaintiff sued for possession of immovable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and, having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the forfeiture to the date of the institution of the former suit. *Held* that the claim for mesne profits for the period above mentioned was barred by s. 43 of the Code of Civil Procedure. *Lalji Mal v. Hulasi (1) and Venkoba v. Subbanna (2)*, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Mudho Prasad* for the appellant.

Mr. *D. N. Banerji* and Pandit *Sundar Lal* for the respondent.

EDGE, C. J., and BANERJI, J.—In this suit the plaintiff claimed mesne profits. Part of the period for which the mesne profits were claimed was from the 31st of January 1889 to the 23rd of Decem-

* First Appeal No. 63 of 1894, from a decree of Munshi Mata Prasad, Subordinate Judge of Bareilly, dated the 1st December 1890.

(1) I. L. R., 3 All., 600.

(2) I. L. R., 11 Mad., 151.

1895

MEWA KUAR
v.
BANARSI
PRASAD.

bér 1889. The plaintiff got a decree and the decree gave him interest on the *mesne* profits at the rate of Rs. 12 per cent. per annum. The defendant has appealed from that decree.

The first point taken on behalf of the defendant was as to the plaintiff's title. That point is not open to the defendant. She is bound by the decree in the previous suit, which established against her the title of the plaintiff to the land in question from the 31st of January 1889.

The second point was as to the amount of interest allowed on the *mesne* profits. Twelve per cent. per annum is a little high, but not an unreasonable nor an unusual rate of interest in these provinces. On the question of interest we see no reason for interfering with the discretion of the Court below.

The next point raised for the appellant is as to the plaintiff's right to claim *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. In the previous suit, which was a suit for ejectment on a forfeiture, rent was claimed up to the 31st of January 1889. That was the date on which the forfeiture was alleged to have taken place, the date on which the plaintiff's right to possession was disputed, and from which he alleged that this defendant and the other defendant wrongfully held possession against him. It has been contended on behalf of the defendant that the plaintiff's claim for *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 is barred by s. 43 of Act No. XIV of 1882. In support of that contention a Full Bench ruling of this Court—*Lalji Mal v. Hulasi* (1)—has been cited. On the other hand, on behalf of the plaintiff-respondent it is contended that the effect of clause (a) of s. 44 of Act No. XIV of 1882 is to differentiate the cause of action for the recovery of land from the cause of action for the recovery of *mesne* profits in respect of that land, and the decision of the Calcutta High Court in *Lallessor Babui v. Janki Bibi* (2) following a Full Bench

(1) I. L. R., 3, All., 666.

(2) I. L. R., 19 Calc., 615.

ruling of that Court was relied upon. The wording of ss. 43 and 44 of Act No. XIV of 1882 is not happy and suggests confusion. In s. 43 the word "claim" is treated as something arising out of a "cause of action" and as distinct from the term "cause of action." When we come to s. 44 we find that "cause of action" and "claim," are treated as synonymous. Whether it was intended by s. 44, which provides a rule of procedure, to enact that a claim for *mesne* profits and a claim to recover the land in respect of which the *mesne* profits are claimed, cannot arise out of the same cause of action, we do not know. It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim *mesne* profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that that clause (a) of s. 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen. What the first paragraph of s. 43 enacts, so far as it is necessary to refer to it, is that—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." In the former suit the cause of action in respect of which the claim for possession was made was, so far as the present defendant was concerned, the forfeiture entitling the plaintiff to possession and the wrongful keeping of the plaintiff out of the possession and enjoyment of the property. Now what was the cause of action for the *mesne* profits claimed from the defendant-appellant? It was stated briefly that, the plaintiff being entitled by reason of the forfeiture to possession, this defendant wrongfully withheld possession from the plaintiff and deprived him of the profits of the land. It appears to us that there were here not two causes of action, but one and the same cause of action, and that the same cause of action which supported the plaintiff's claim for possession in the previous suit supports his claim for *mesne* profits in the present suit, so far as the period between the 31st of January 1889 and the 23rd of December 1889 is concerned. The claim for possession and the claim for *mesne* profits in respect of the period between the

1895

MEWA KUAR

v.
BANARSI
PRASAD.

1895

MEWA KUAR

v.

BANARSI
PRASAD.

31st of January and the 23rd of December 1889 were claims which the plaintiff was in our opinion entitled to make in the former suit against the defendant in respect of the cause of action on which he sued in the former suit within the meaning of s. 43. The previous suit was instituted on the 23rd of December 1889. Consequently in respect of the cause of action upon which the present plaintiff succeeded in obtaining a decree for possession in that suit he was in that suit entitled, if he had made it, to support his claim for *mesne* profits between the date of the wrongful withholding of possession, namely, the 31st of January 1889, and the date when he brought that suit, namely, the 23rd of December 1889. This view is supported by the Full Bench decision of this Court referred to above, and by a decision of the Madras High Court in *Venkoba v. Subbanna* (1).

We hold that the plaintiff is, by reason of s. 43 of Act No. XIV of 1882 and the previous suit, disentitled to claim *mesne* profits between the 31st of January 1889 and the 23rd of December 1889 in this suit. As the parties cannot agree as to the amount of *mesne* profits to be deducted from the decree of the Court below as the result of our judgment, we remand this case to the Court below under the provisions of s. 566 of the Code of Civil Procedure to find what are the *mesne* profits to which the plaintiff is entitled after excluding the *mesne* profits for the period between the 31st of January 1889 and the 23rd of December 1889. Ten days will be allowed for filing objections on the return to our order. The Court below may take such further evidence as may be necessary.

Cause remanded.

(1) I. L. R., 11 Mad., 151.