FULL BENCH.

1899
May 29.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

RAM DAYAL (DEFENDANT) *v.* MADAN MOHAN LAL (PLAINTIFF).*

Res judicata—Civil Procedure Code, section 13, *Explanation III—Suit for possession of land and mesne profits past and future—Future mesne profits not granted—Subsequent suit for such future mesne profits not barred.*

Held that where a suit has been brought for possession of immovable property and for mesne profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of section 13, Explanation III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (1) followed. *Jiban Das Oswal* v. *Durga Pershad Adhikari* (2); *Pratab Chandra Burua* v. *Rani Swarnamayi* (3); *Julius* v. *The Bishop of Oxford* (4); *In re Baker* (5); *Bhivrav* v. *Sitaram* (6) and *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (7) referred to. *Ramabhadra* v. *Jagannatha* (8) discussed. *Narain Das* v. *Khan Singh* (9) overruled.

THIS was a suit for the recovery of mesne profits of certain zamindari property for the year 1301 Fasli, *i.e.*, from the 26th of September 1893 to the 14th of September 1894.

The facts of the case are as follows:—

The plaintiff had brought a previous suit against the same defendant on the 5th of December 1893 claiming possession of a share of zamindari property and of a dwelling house. He also claimed mesne profits as follows,—first, mesne profits for 1298 to 1300 Fasli, both years inclusive, and, secondly, future mesne profits, that is, mesne profits from the date of the institution of the suit up to the date when possession of the property should be

* Second Appeal No. 920 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 20th August 1896, confirming a decree of Pandit Girraj Kishor Dat, Munsif of Bareilly, dated the 27th June 1896.

(1) (1890) I. L. R., 17 Calc., 968.
(2) (1893) I. L. R., 21 Calc., 252.
(3) (1869) 4 B. L. R., 113.
(4) (1880) L. R., 5 App., Cas., 214.
(5) (1880) L. R., 44 Ch. D., 262.
(6) (1894) I. L. R., 19 Bom., 532.
(7) (1881) I. L. R., 4 Mad., 308.
(8) (1890) I. L. R., 14 Mad., 328.
(9) Weekly Notes, 1884, p. 159.

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delivered to him. The decree in that suit was passed on the 6th of June 1894. It awarded to the plaintiff possession of both the properties claimed, and awarded mesne profits up to the 25th September 1893. Then followed the words :—"The rest of the claim is dismissed." The plaintiff subsequently filed the present suit claiming mesne profits subsequent to the 25th of September as stated above. The defendant resisted the suit on the ground that the claim for future mesne profits was barred by the operation of section 13, Explanation III, of the Civil Procedure Code, the claim for future mesne profits in the former suit not having been dealt with, and therefore by implication having been refused. It should be noted, as stated hereafter in the judgment, that the order in the decree above quoted—"The rest of the claim is dismissed"—did not refer to the claim for future mesne profits but to a portion of the mesne profits claimed for a period before suit.

The Court of first instance (Munsif of Bareilly) overruled the defendant's plea of *res judicata* and gave judgment for the plaintiff, though for a sum less than that which he claimed. On appeal the lower appellate Court (Subordinate Judge) upheld the decree of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, contended that the present suit was barred by the rule of *res judicata*. In the former suit for possession between the same parties, the mesne profits between the date of suit and the date when possession of the property should be delivered to the plaintiff had been expressly claimed. The decree after giving certain reliefs went on to say :—"The rest of the claim be dismissed." This was an express refusal of the relief relating to future mesne profits. Even if it be not so, Explanation III to section 13 would bar a claim like the present, because in the former suit it was a relief claimed in the plaint which was not granted by the decree and for the purposes of *res judicata* must be deemed to have been refused. This position is supported by a ruling of this Court

directly in point—*Narain Das* v. *Khan Singh* (1)—where the learned Judges held that Explanation III to section 13, would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. Section 211 and the last paragraph but one of section 244 of the Code in order to make them consistent with Explanation III to section 13 should be read as applying only to cases where the plaint does not claim mesne profits accruing after the institution of the suit. The same principle is also laid down in the case of *Ramabhadra* v. *Jagnatha* (2). When *wasilat* is claimed without further specification, it means mesne profits up to the date of delivery of possession, see *Fakhar-ud-din Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal* (3) also *Puran Chand* v. *Roy Radha Kishen* (4).

A contrary view has been taken in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (5) and in *Jiban Das Oswal* v. *Durga Pershad Adhikari* (6). The latter of these cases has no bearing on the present case as there no future mesne profits were claimed. The ruling in I. L. R., 17 Calcutta, is a doubtful one. On general principles a suit for future mesne profits would lie in cases where the plaintiff simply asks for possession, but in cases where future mesne profits are claimed and the decree expressly refuses them or is silent with reference to them no subsequent suit will lie. See also *Anund Chander Pal* v. *Punchoo Lal Soobalah* (7), Maxwell on the interpretation of statutes (2nd edition) p. 286, and *Julius v. the Bishop of Oxford* (8).

Mr. *S. Sinha*, for the respondent.

In the first place the clause in the decree—"the rest of the claim is dismissed,"—if construed in conformity with the judgment, clearly refers, not to any mesne profits after the date of the suit,

(1) Weekly Notes, 1884, p. 159.
(2) (1896) I. L. R., 14 Mad., 328.
(3) (1881) L. R., 8 I. A., 197.
(4) (1881) I. L. R., 19 Calc., 132.
(5) (1890) I. L. R., 17 Calc., 968.
(6) (1893) I. L. R., 21 Calc., 252.
(7) (1870) 14 W. R., (F. B.) 33; at p. 36.
(8) (1880) 49 L. J., Q. B. 577; at pp. 588, 590.

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but to the mesne profits claimed for the period before suit in excess of the sum to which the Court, in the previous suit, considered the plaintiff to be entitled.

But even supposing that the clause refers, as contended by the other side, to the mesne profits that might have accrued after the date of suit, still the present suit cannot be held to be barred, as Explanation III to section 13 of the Code of Civil Procedure can have no reference to a case of this kind. The case of *Narain Das* v. *Khan Singh* (1), relied upon by the appellants, does not lay down the law on the point correctly, and is in conflict with the decision of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2) and of the Madras High Court in *Ramabhadra* v. *Jagannatha* (3). The learned Judges who decided the case of *Narain Das* v. *Khan Singh* seem to have been led to hold as they have done, under the impression that but for their so holding there would be an inconsistency between sections 211 and 244 (penultimate paragraph) and Explanation III to section 13. That view, it is submitted, is not correct, on the ground—supported by the Calcutta and Madras cases above referred to—that the mesne profits after the date of the suit could not be said to form part of the plaintiff's cause of action, as he was not entitled to claim as a matter of right what had not accrued due at the date of the institution of the suit. In fact, had it not been for the provisions of section 211, which enables a plaintiff to claim mesne profits which might accrue in the future, and the object of which is merely to avoid multiplicity of suits, it would not have been open to the plaintiff to claim future mesne profits at all.

Now section 211 is not mandatory but merely an enabling and permissive section, which gives the Court only a discretionary power which it is free to exercise or not as it thinks fit, regard being had to the circumstances of each particular case. The case of *Julius* v. *The Bishop of Oxford* (4), relied upon by the

(1) Weekly Notes, 1884, p. 159.
(2) (1890) I. L. R., 17 Calc., 968.
(3) (1890) I. L. R., 14 Mad., 328.
(4) (1880) L. R., 5 App. Cas., 214.

appellants, lays down that the party who contends that the power given to a court by an enabling provision, such as the word "may" imports, is to be regarded as an imperative obligation should prove that contention. There is nothing to show that in enacting section 211 the Legislature intended that the courts were not free to exercise their discretion in granting or refusing a relief claimed in the plaint as to future mesne profits. That being so, the dismissal of a claim for future mesne profits cannot be said to be barred by reason of Explanation III to section 13, as the words "relief claimed" in the explanation can only be taken to apply to what has actually accrued to the plaintiff, that is, what the plaintiff could claim as a matter of right, as included in his cause of action, not to something which he could only claim as an appeal to the discretionary power of the Court, which might be granted or refused.

STRACHEY, C. J.—The plaintiff in this case claimed a sum of money in respect of the mesne profits of a zamindari property for the year 1301 Fasli, that is to say, from the 26th September, 1893, to the 14th September, 1894. The suit was instituted in June 1896. In defence to the suit it was pleaded that inasmuch as the mesne profits claimed in the suit had been expressly claimed in a previous suit, and had not been allowed in that suit, the claim was barred as *res judicata* by virtue of Explanation III to section 13 of the Code of Civil Procedure. That plea was overruled by both the lower Courts. It is again raised by the defendant in his Second Appeal to this Court. The only question which we have to decide is whether the Courts ought to have held the suit to be barred by section 13 of the Code.

The former suit was brought by the same plaintiff against the same defendant on the 5th December, 1893. In the plaint the plaintiff claimed to recover possession of the same share of zamindari property, and of a dwelling-house. He also claimed mesne profits as follows—first, mesne profits for 1298 to 1300 Fasli both years inclusive; and secondly, future mesne profits that is,

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mesne profits from the date of the institution of the suit up to the date when possession of the property should be delivered to him.

The decree in that suit was passed on the 6th June, 1894. It awarded possession to the plaintiff of both the properties claimed. As regards mesne profits, it awarded to the plaintiff a sum of Rs. 1,882-9-11, out of Rs. 3,089-10-10 which were claimed in the plaint as mesne profits for the Fasli years prior to the suit. That is, it awarded mesne profits up to the 25th September, 1893. Then followed the words—"The rest of the claim is dismissed." In the present suit the claim is for mesne profits for the year 1301 Fasli, that is, from the 26th September, 1893, to the 14th September, 1894, in other words, from the date up to which the decree in the first suit awarded mesne profits. The contention of the defendant is that as in the former suit the plaint included a prayer for future mesne profits subsequent to the institution of that suit and up to the date of delivery of possession, and as that claim must, in view of Explanation III to section 13, be deemed to have been refused, the plaintiff cannot now claim any profits subsequent to the institution of that suit.

Before dealing with this contention I must again refer to the terms of the decree of the 6th June, 1894. The expression "the rest of the claim is dismissed" suggests at first sight that the dismissal expressly referred, and was intended to refer, to the claim for mesne profits after the institution of the suit. If it did so, then the prayer for such future profits was of course expressly refused. We are, however, entitled in construing the decree to look at the judgment, and when the judgment is looked at, I think it is clear that the Court in using the expression "the rest of the claim is dismissed" was referring, not to any mesne profits after suit, but to the mesne profits claimed for the period before suit in excess of the Rs. 1,882-9-11, which was all that the Court considered the plaintiff entitled to for that period. The judgment further shows that, for some unexplained reason the Court was not dealing at all with the claim for future mesne profits. It

either overlooked that claim or purposely refrained from dealing with it. However, if the argument of the learned advocate for the appellant is correct, the present claim is none the less barred by Explanation III to section 13, because in the former suit it was a relief claimed in the plaint which was not expressly granted by the decree, and which, therefore, for the purpose of *res judicata* must be deemed to have been refused.

This case has been referred to a Full Bench for the purpose of considering a ruling of this Court which is directly in point, according to which the argument for the appellant would be correct. That is the case of *Narain Das* v. *Khan Singh* (1). In that case the learned Judges undoubtedly held that Explanation III to section 13 would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. They appear to have thought that section 211 and the last paragraph but one of section 244 of the Code, in order to make them consistent with Explanation III to section 13, must be read as limited to cases where there is no prayer in the plaint for mesne profits accruing after the institution of the suit. The question is whether that view is right. The conclusion at which I have arrived is that Explanation III to section 13 does not apply to a case like this. It is necessary to see what was the nature of the claim in the first suit to the mesne profits asked for accruing due after the institution of that suit. Those mesne profits formed no part of the cause of action on which the plaintiff came into Court. The cause of action on which he came into Court was the trespass committed by the withholding from him of the possession of land to which he was entitled, and the mesne profits corresponding to that cause of action were the profits appropriated by the defendant during the continuance of that trespass, that is to say, mesne profits up to and ending with the institution of the suit. In the absence of any specific provision in the Code, that is where his

(1) Weekly Notes, 1884, p. 159.

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claim would have had to stop. He could not in that suit have anticipated any cause of action which might subsequently have accrued to him by the continuance of the trespass, or claimed further mesne profits by way of damages for such subsequent trespass. The object of section 211 was that, in order to avoid multiplicity of suits, a Court in a suit for recovery of possession of immovable property yielding rent or other profit should be competent to provide in the decree, not only for the mesne profits for which the plaintiff is entitled to sue as forming part of his cause of action, that is, mesne profits prior to the suit, but also mesne profits which, but for section 211, he could not have claimed in the suit at all, mesne profits from the institution of the suit until the delivery of possession, or until the expiration of three years from the date of the decree, whichever event first occurs.

Now it appears to me that section 211 is a purely enabling section and gives the Court a discretion to award future mesne profits which it is free to exercise or not according to all the circumstances of the particular case. It was argued that in cases where a plaintiff expressly asks in his plaint for mesne profits after the institution of the suit, the Court, notwithstanding the enabling language of section 211, has no discretion in the matter, but is bound, if it awards possession of the property, to make a decree for future mesne profits in the terms of the section. I do not agree with this argument. In the decision of the Full Bench of the Calcutta High Court in *Pratap Chandra Burua* v. *Rani Swarnamayi* (1), the Court had to consider the language of the corresponding section (section 196) of the Code of 1859, and it was there held that the section was enabling and permissive, and only gave the Court a discretionary power. As shown by the case of *Julius* v. *The Bishop of Oxford* (2) and by the case of *In re Baker* (3), it lies upon the party who contends that the power or authority given to a Court by enabling language such as the

(1) (1869) 4 B. L. R., 113, at pp. 126 and 129.

(2) (1880) L. R., 5 App. Cas., 214.

(3) (1890) L. R., 44 Ch. D., 262.

word "may" is coupled with an imperative obligation to use it, to prove that contention. There is nothing in my opinion, in section 211, or in the objects which the Legislature in passing that section had in view, to suggest that a Court acting under section 211 is not free to grant or to refuse a prayer in the plaint for mesne profits accruing after the institution of the suit.

Turning to section 244 I cannot agree that the penultimate paragraph of that section is limited to cases in which the plaint omits to ask for future mesne profits. The earlier part of section 244 refers to cases in which the decree deals with mesne profits *(a)* under section 212, *(b)* under section 211. In those cases, as well as in those falling under *(c)* the questions referred to can only be dealt with in execution, and a separate suit is expressly barred. The latter portion of the section, on the other hand, refers to cases of mesne profits accruing after the institution of the suit, which the decree does not deal with, and a separate suit is expressly authorized. The learned Judges in *Narain Das* v. *Khan Singh* adopted the construction to which I have referred, apparently because they saw no other way of reconciling section 244 with Explanation III of section 13. The reconciliation which I suggest is this. The words "relief claimed" in Explanation III apply only to something which forms part of the "claim" strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action, and which, if he establishes his cause of action, the Court has no discretion to refuse. The words "relief claimed" do not, in my opinion, include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court, and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise, even if the cause of action is fully established. As was pointed out by Sir Barnes Peacock in the Full Bench case to which I have referred, the future mesne profits accruing after the institution of the suit do not form

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part of the cause of action, cannot be claimed as of right, could not, but for section 211, be asked for at all, and may in any case be refused by the Court at its discretion.

There is no other case besides that of *Narain Das* v. *Khan Singh* (1) which fully supports the appellant's contention. The case of *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2) on which the lower Courts have relied, is fully in accord with the views which I have expressed. When that case is compared with the later case of *Jiban Das Oswal* v. *Durga Pershad Adhikari* (3) the view of Explanation III of section 13 becomes, I think, very clear. In the later case the former suit was for recovery of possession and for mesne profits prior to the institution of the suit. The decree awarded possession, but was silent as regards mesne profits. The plaintiff brought a subsequent suit in which he claimed both mesne profits prior to the institution of the first suit and also mesne profits for a period subsequent to that suit. It was held that the claim for mesne profits prior to the institution of the first suit was barred by section 13 of the Code, but that the claim for subsequent mesne profits was not. The case of *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* was distinguished with reference to the essential difference between a claim for mesne profits accrued due before the institution of a suit and subsequent mesne profits asked for in the plaint by reason of section 211, but not then accrued due. In the former case a refusal or an omission by the decree to grant relief falls within Explanation III, because it is a refusal to grant a relief, which, if the plaintiff had made out his case, the Court would have been bound to grant, which related to matters in respect of which he had a complete cause of action—a claim in the sense of a claim as of right. In the latter case these conditions are not satisfied, and if it is proper to describe the prayer in plaint as "claiming" a relief, it is not a relief "claimed" in the sense of Explanation III.

(1) Weekly Notes, 1884, p. 159. (2) (1890) I. L. R., 17 Calc., 968.
(3) (1893) I. L. R., 21 Calc., 252.

The case of *Ramabhadra* v. *Jagannatha* (1) has been referred to., I must say, with all respect, that I find it extremely difficult to understand that decision. There was a suit for partition brought in September, 1883. The plaintiffs in that suit asked for mesne profits for ten years prior to the suit and subsequent profits. The decree in that suit awarded the plaintiffs mesne profits for three years prior to the suit, but was silent as to the subsequent profits. There is nothing in the report which suggests that the subsequent profits claimed were only profits up to the date of the decree, or were not in respect of the whole period up to the time when the plaintiffs should obtain possession. In 1888 the same plaintiffs brought another suit to recover mesne profits for five years from the date of the former suit. The question before the High Court was whether the suit was barred on the ground that the mesne profits claimed must be deemed to have been refused by the decree in the partition suit, having regard to section 13, Explanation III of the Code. In the earlier part of the judgment the learned Judges came to the conclusion that the decision of the Court below was right "so far as it treats the decree in the partition suit on a construction of Explanation III, section 13, as if it expressly refused subsequent mesne profits." So far the judgment is in accord with the view expressed in *Narain Das* v. *Khan Singh*. Having then arrived at the conclusion that the first decree must be construed as if there were inserted in it by reason of Explanation III to section 13 the words "subsequent profits are refused," the learned Judges proceed to ask, "what is the construction to be placed on the decree as to the period for which mesne profits were refused? Was it the intention to refuse subsequent profits up to the date of decree or for all time to come until partition is effected and separate possession is awarded of appellant's moiety? In ascertaining the intention two things have to be kept in view, *viz.*, (1) the terms of the latter portion of the decree, so that words inserted with reference to Explanation III may fit into it; and (2) the provisions of

(1) (1890) I. L. R., 14 Mad., 328.

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section 211 as to the extent to which subsequent profits accruing after suit may be claimed and adjudged." They came to the conclusion that the true construction of the first decree was that it refused the subsequent mesne profits claimed only up to the date of the decree, and therefore that the claim before them was only to that extent barred by section 13. It appears to me that on the principles stated by the learned Judges themselves, what they had to look to was the plaint. If the plaint in asking for subsequent profits only meant profits from the institution of the suit until decree, then, no doubt, the decision would be correct, that the decree refusing subsequent profits refused no more than that. But if as one would gather from the report, and as one would naturally expect, the plaintiffs in asking for subsequent profits meant the subsequent profits referred to in section 211 of the Code, that is, from the institution of the suit until delivery of possession, then the words inserted in the decree "subsequent profits are refused" must have been a refusal to award profits after the decree as well as profits between the institution of the suit and the passing of the decree. Assuming that for the reasons given by the learned Judges, the decree could otherwise be construed as only refusing mesne profits up to its date, still if the plaint asked for mesne profits after that date, it follows that the decree, as to that prayer, was silent, and, if so, then on the principles laid down in the earlier part of the judgment, that silence must itself be treated as a further refusal. Having regard to the nature of the claim in the former suit, I cannot understand the importance attached by the High Court to the date of decree or the distinction between the subsequent profits prior to decree and the subsequent profits after decree. At p. 331 of the report they say:—"It is clear that if subsequent mesne profits were expressly refused by that decree the claim in respect of them *up to the date of that decree* would clearly be *res judicata*, the parties and the title under which the claim is made being the same in both suits." I cannot understand why they say "up to the date of that decree." There is an important distinction between the mesne

profits before institution of the suit which, but for section 211, are all that the plaintiff could claim, and the subsequent mesne profits which by reason of section 211 he can further ask for, but as regards the latter, there is, so far as I am aware, no further distinction in principle between subsequent mesne profits between institution and decree, and subsequently mesne profits between decree and possession. In this respect there is a material difference between section 211 and section 209 to which I shall presently refer.

The only other decisions which I need mention are the cases of *Bhivrav* v. *Sitaram* (1), in which the decision in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* is approved, and the case of *Thyila Kanai Ummatha* v. *Thyila Kandi Cheria Kunhamed* (2) where it was held that "Explanation III of section 13 of the Code of Civil Procedure refers to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue."

I think that section 209 of the Code affords some support to the views which I have expressed with regard to sections 13, 211 and 244. Section 209 allows the Court in the case of decrees for the payment of money to order interest from the date of the suit to the date of the decree in addition to interest for any period prior to the institution of the suit with further interest on the aggregate sum so adjusted until payment. The second paragraph of the section provided that "where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie." This express provision that the silence of the decree as to further interest on the aggregate sum adjudged is to be deemed a refusal and this express prohibition of a separate suit therefor show that the Legislature did not consider section 13, Explanation III, applicable to such a case. When this is compared with the absence

(1) (1894) I. L. R., 19 Bom., 532. (2) (1886) I. L. R., 4 Mad., 308.

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of any similar provision in section 211 coupled with the express allowance in section 244 of a separate suit for future mesne profits not dealt with by the decree, I infer that, as regards a claim for such future mesne profits, the silence of the decree is not to be deemed a refusal, and that a separate suit in respect of such a claim will lie.

On the whole case I think that the lower Courts were right in following the decision in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (1), that the case of *Narain Das* v. *Khan Singh* (2) was decided wrongly and must be overruled, and that this appeal must be dismissed with costs.

BANERJI, J.—I agree with the learned Chief Justice that the plea of *res judicata* raised in this appeal should be overruled, and the appeal dismissed. It is contended that as in the former suit brought by the present plaintiff he claimed mesne profits, not only for the period prior to the date of the suit, but also for the period subsequent to that date, the present claim, which relates to the period subsequent to the date of the former suit, is not maintainable under the rule of *res judicata*. It is urged that the relief which was claimed in respect of future mesne profits in the former suit was expressly refused, and that if it be not held to have been expressly refused, it must be deemed to have been refused having regard to the provisions of Explanation III to section 13 of the Code of Civil Procedure. In the former suit the plaintiff must be held to have claimed mesne profits for the period subsequent to the date of the suit, although the 4th relief claimed in the plaint in that suit was not happily worded. In the decree, no doubt, the Court after decreeing a portion of the amount claimed as mesne profits for the period prior to the date of the suit proceeded to declare that the remainder of the suit was dismissed, but, reading the decree by the light of the judgment, it is clear that the dismissal related only to that portion of the mesne profits claimed for the period preceding the date of the suit which the plaintiff had failed

(1) (1890) I. L. R., 17 Calc., 968. (2) Weekly Notes, 1884, p. 159.

to prove. I therefore agree with the learned Chief Justice that the relief sought in the present suit was not expressly refused in the former suit. The next question which arises is —should that relief be deemed to have been refused in the former suit? The contention of the learned counsel for the appellant is no doubt supported by the ruling of this Court in *Narain Das* v. *Khan Singh* (1), but with reference to that ruling it may be observed that no other ruling has been cited to us in which the same view was adopted in its entirety. With all deference, I am unable to agree with the view which the learned Judges who decided that case took of the question before us. That view is opposed to the ruling of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (2), which was approved by the same Court in *Jiban Das Oswal* v *Durga Pershad Adhikari* (3) and by the Bombay High Court in *Bhivrav* v. *Sitaram* (4). I agree with the learned Chief Justice in the construction which he would place on the third explanation to section 13 of the Code of Civil Procedure. That explanation refers, as held by the Madras High Court in *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (5), to a relief applied for by the plaintiff, which it would be the duty of the Court to grant if the cause of action on which the relief was claimed was established. In the present instance the plaintiff was not entitled in his suit for possession to claim as of right mesne profits for the period subsequent to the date of the suit. No cause of action had on that date accrued to him for those mesne profits, and it was only by virtue of the provisions of section 211 of the Code that he could claim and the Court could award to him such mesne profits in his suit for possession. That section has been repeatedly held to be an enabling section. It was held to be so even by the Madras High Court in *Ramabhadra* v. *Jagannatha* (6), which the learned Chief Justice has criticized.* As that section only vests the Court with a discretion

(1) Weekly Notes, 1884, p. 159
(2) (1890) I. L. R., 17 Calc., 968.
(3) (1893) I. L. R., 21 Calc., 252.
(4) (1894) I. L. R., 19 Bom., 532.
(5) (1881) I. L. R., 4 Mad., 308.
(6) (1890) I. L. R., 14 Mad., 328

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and there was no obligation on the Court to make a decree for mesne profits for the period subsequent to the date of the suit for possession, the omission to grant such mesne profits cannot by virtue of Explanation III to section 13 preclude a subsequent suit for mesne profits.

AIKMAN, J.—I am of the same opinion and have little to add to what has been said by the learned Chief Justice and my brother Banerji. The question which we have to consider is whether when in a suit for the recovery of immovable property the plaintiff has claimed future mesne profits, that is mesne profits subsequent to the date of the institution of the suit, and his claim has either been refused or has not been expressly granted, a subsequent suit for those mesne profits is barred by the provisions of section 13 of the Code of Civil Procedure. It cannot be said that in the present case the issue as to the plaintiff's right to the mesne profits now claimed was ever heard and finally decided, but reliance is placed on Explanation III to section 13, and it is contended that as the mesne profits claimed were not granted they must be deemed to have been refused. Whether this is so or not depends upon whether the plaintiff can as of right ask the Court to adjudicate on his claim for future mesne profits. In my opinion he cannot. Section 211 of the Code gives a Court a discretionary power of providing in its decree for the payment of mesne profits which had not accrued due at the date of the suit. If it has refused to exercise this discretion, there is nothing, in my judgment, to bar a subsequent suit. Section 209 of the Code of Civil Procedure gives the Court a somewhat similar discretionary power where a decree is made for payment of money, to award future interest from the date of the decree to the date of payment. The last paragraph of that section provides that when a Court has not chosen to exercise this power, and when its decree is silent as to the payment of future interest, it shall be deemed to have refused such interest and no separate suit therefor shall lie. The absence of any such provision in section 211 makes it clear to me that the Legislature did not intend to bar a subsequent suit in cases

where a Court had not seen fit to exercise the discretion conferred upon it by that section. For these reasons I am of opinion that the appeal should be dismissed.

BY THE COURT:—

The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

RAM GOPAL (DEFENDANT) *v.* PIARI LAL (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Plaintiff's title to sue for pre-emption lost after suit but before decree—Suit to be dismissed.

Where a plaintiff who had filed a suit for pre-emption based on the provisions of a wajib-ul-arz lost during the pendency of the suit the right to pre-empt by reason of the mahal in which both properties were originally comprised having become the subject of a perfect partition, it was *held* that the suit for pre-emption should be dismissed. *Sakina Bibi* v. *Amiran* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

The Hon'ble Mr. *Conlan* and Mr. *E. Chamier*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STRACHEY, C. J.—This was a suit for pre-emption in respect of a sale of a share in a mahal, the sale having been made on 20th of March, 1894. The suit was based upon a provision of the wajib-ul-arz giving a right of pre-emption to co-sharers in the mahal. At the time of the sale the plaintiff was a co-sharer of the mahal with the vendor. Before the sale, proceedings for perfect partition of the mahal had begun. The suit was instituted on the 19th of March, 1895. On the 1st of July, 1895, while the suit was pending, the partition proceedings were completed and

* Second Appeal No. 64 of 1897 from a decree of Maulvi Syed Tajammal Husain, Subordinate Judge of Saháranpur, dated the 10th December 1896, confirming a decree of Munshi Sheo Sahai, Munsif of Kairana, dated the 19th September 1895.

(1) (1888) I. L. R., 10 All., 472.