1916
November, 24.

Before Sir Henry Richards, Knight, Chief Justice, and Sir Pramada Charan Banerji.

RAM SARUP AND ANOTHER (DEFENDANTS) *v.* HARPAL (PLAINTIFF).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 109—*Usufructuary mortgage—Suit by mortgagee for possession and mesne profits—Limitation.*

Where a usufructuary mortgagee is wrongfully kept out of possession of the mortgaged property, his proper remedy is a suit for possession and for mesne profits. As regards the latter remedy the period of limitation applicable is that prescribed by article 109 of the first schedule to the Indian Limitation Act, 1908.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case sufficiently appear from the judgement under appeal, which was as follows:—

"In this case the defendant mortgaged certain property for Rs. 500 on the 12th of September, 1898, to the plaintiff. The property consisted of certain occupancy holdings. The plaintiff lived some distance away and the rents were collected for him by an uncle who died in the year 1906. After that date the defendant collected the rents and thereby became possessed of the property. That was an actionable wrong which took place seven years before the commencement of the suit. The plaintiff in 1913 sued for and recovered possession, and that part of the judgement of the first court is not contested. The plaintiff also claimed the rents received by the defendant from the mortgaged property from time to time during the last three years immediately preceding that suit.

"It cannot be denied that the defendant's possession has throughout been wrongful. He had no shadow of right to take the rents, and each time that he took them he was putting in his pocket money which under the contract belonged to the plaintiff. That of course was a tort, but it was also a breach of contract. It is said that this began seven years ago; that the limit for actions for damages for breach of contract is six years from the breach and that therefore the action for rent wrongfully received by the defendant is barred because the rents have been received for more than six years. So far as the act of dispossession is concerned this argument is perfectly sound. It is immaterial in this case, because the period is twelve years, and the suit has been brought after the lapse of seven. But so far as the actual receipts of rent are concerned I am unable to follow the argument. Each time the defendant received rent he committed a breach of contract. It was none the less a breach of contract, because he had already committed several others, and had been in wrongful possession for a long time. His possession was still wrongful, and he had acquired no title to the money. I hold that the article of the Limitation Act which is applicable is article 62. (Vide I. L. R., 32 All., 491, per STANLEY, C. J., at page 496.)

* Appeal No. 36 of 1916, under section 10 of the Letters Patent.

The respondent's counsel was forced to admit that he might have been sued for each given period in respect of which he had received rent. That seems to me to knock the bottom out of his case. Damages for a wrong can only be claimed once. But if another person receives money which belongs to me I have a right to sue him each time it occurs. It is not damages at all. It is money had and received to my use which gives me the cause of action defined in article 62 whenever the money is received. In this case the plaintiff described his claim in his plaint as one for damages. This is an erroneous description, but the law looks at the substance and not at the form.

A number of authorities were cited which seemed at first sight to be inconsistent with this view. But on examination they turn out to be clearly distinguishable. The strongest perhaps is *Balgobind Das* v. *Barkat Ali* (1). That case has been followed in various others of a somewhat similar character. In none of them was article 62 referred to. They may all be justified on the ground that what was attempted there was to claim general damages in a round sum, based upon an estimate of the loss suffered by the person dispossessed of land, calculated upon the annual value, or rents likely to be received during the period which had elapsed since the dispossession. This is one way of claiming mesne profits, no doubt. It is the only way when the wrong doer has himself been in occupation, and after the lapse of six years it seems clear that such a claim is time barred. But Mr. *Gulzari Lal*, for the appellant, repudiated this form of claim. He put his case upon the ground that in addition to his remedy in *specie* for his dispossession, i.e., the decree for possession, he claimed the rents actually received from time to time by the defendant. In none of the cases cited was this question raised or decided, and the decisions are therefore not binding upon me.

A practice seems to have grown up of framing claims of this nature as claims for general damages for the original breach of the contract by dispossession. It seems to me in the light of the authorities cited that this form of claim is attended with serious risks to the litigant, and that in future pleaders would be well advised to frame their claims for what they are in substance, namely, money received from time to time as defined by article 62 of the Limitation Act or as successive breaches of contract under article 116.

I may add that whereas in this case the mortgagee was originally in possession and was dispossessed during the currency of the mortgage, in the case above referred to, the mortgagee had been withheld from possession from the very beginning. This is another distinction, but it is not the ground upon which I decide this case.

Three years was allowed in Bombay in *Govindram* v. *Jivanji* (2) by construing article 109, as meaning "profits belonging to" instead of "property belonging to". I am not satisfied that this is not a strained interpretation of the article; but if it is sound it clearly justifies the claim made here.

The view taken by the District Judge was not persisted in in this Court. Some people may think it desirable that persons who neglect to make claims promptly should be liable to be defeated altogether on the ground of negligence.

(1) Weekly Notes, 1888, p. 15. (2) (1900) Bom. L. R., 201.

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It would revolutionize the prevailing system of credit. But at present such a view is inconsistent with the Limitation Act, and has no foundation in law.

This appeal must be allowed. The decree of the lower appellate court must be reversed and the decree of the Munsif putting the plaintiff in possession must be restored, with the further modification that the plaintiff recover from the defendant the sum of Rs. 300 with costs of the suit. The plaintiff must have his costs of the appeal to the lower appellate court and of this appeal."

The defendant appealed.

Babu *Piari Lal Banerji*, for the appellant :—

The plaintiff claimed the sum as damages and it was not possible to treat the sum as money had and received by the defendant for the plaintiff's use. The defendant had contracted to let the plaintiff remain in possession, and if the plaintiff was dispossessed, it was a breach of contract which could be compensated in damages. The course of decisions in this Court would seem to lay down that the mortgagee under such circumstances could only claim damages for breach of contract and the suit would have to be filed within six years from the breach and it would not be a case of continuing or successive breaches. He relied on and discussed; *Balgobind Das* v. *Barkat Ali* (1), *Madan Lal* v. *Reoti Singh* (2) and *Nirbhai Sinha* v. *Tulshi Ram* (3). The mortgagee could not treat the amount as mesne profits. He was only entitled to profits in lieu of interest. His right to principal and money being barred by limitation, he cannot claim mesne profits. Moreover article 109 of the Limitation Act would show that the person who owned the land could claim profits. Here the owner was the mortgagor defendant in spite of the mortgage.

Munshi *Gulzari Lal*, for the respondent, was not called upon to reply.

RICHARDS, C. J., and BANERJI, J. :—The plaintiff in his plaint alleged that a usufructuary mortgage had been made in favour of his predecessor in title in the year 1898, and that under this mortgage his predecessor in title entered into possession and remained in possession until he was wrongfully ousted by the defendant several years before the institution of the suit. He

(1) Weekly Notes, 1888, p. 15. (2) (1908) 4 A. L. J., 249.

(3) (1915) 31 Indian Cases, 804.

claimed possession of the property and the sum of Rs. 360 damages for three years prior to the institution of the suit. It seems to us that, if the plaintiff was able to establish the facts he alleged, his suit was a suit for possession together with a claim for mesne profits. Beyond all question this was the suit he ought to have brought and the relief ought to have been granted on the basis of the suit being one for possession and mesne profits. The facts as ascertained are that a usufructuary mortgage was made to the predecessor in title of the plaintiff in the year 1898, and that the mortgagee entered into possession (as he was entitled to do) and remained in possession until about 7 years before the institution of the suit, when he died. The plaintiff then became entitled to the property, but appears to have neglected to assert his rights. He lived some distance from the property and the defendant taking advantage of his absence began to recover the rents and profits from the tenants. This in law clearly amounted to an ouster by the defendant of the plaintiff.

Some confusion seems to have arisen as to the meaning of the word "property" in article 109 of schedule I to the Limitation Act which prescribes a period of three years for the recovery of profits of immovable property "belonging to the plaintiff" which have been wrongfully received by the defendant. It has been argued that the words "belonging to the plaintiff" refer to the property of the plaintiff and that in the present case the property could not be said to "belong" to the plaintiff because it belonged to the defendant the mortgagor. This seems to us a wholly unsound contention. If property is granted to another by lease for, say, a period of 20 years, the property is clearly the property of the lessee so as to entitle him to bring a suit for mesne profits if he is wrongfully deprived of them during the term of the lease. So also where under a mortgage the mortgagee is entitled to enter into possession of the mortgaged property and receive the rents and profits, the property "belongs" to the mortgagee during the continuance of the mortgage. A suit for mesne profits can always be brought and maintained by any person who, being entitled to possession of the land, has been wrongfully dispossessed. We think under the circumstances of the present case the plaintiff was most clearly entitled to three

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years' mesne profits. The amount of mesne profits has been ascertained by the Munsif. While we do not entirely agree with the reasons in the judgement of the learned Judge of this Court we think the decree passed by him was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1916
November, 30.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

JHUNKU LAL (PLAINTIFF) *v.* PIARI LAL AND OTHERS (DEFENDANTS).*

Act No. III of 1907 *(Provincial Insolvency Act), sections* 16 *and* 22*—Mortgage of factory—Decree for sale—Appointment of receiver to get in profits for benefit of decree-holder—Insolvency of judgement-debtor—Profits appropriated by creditors of insolvent—Suit by mortgagee decree-holder to recover profits.*

One, J. L., being the mortgagee of a cotton ginning factory, obtained a decree for sale on his mortgage, but, instead of the factory being sold in execution of this decree, a receiver was appointed for the period of one year by consent of the decree-holder. The receiver was to work the factory, receive the profits and hand them over to the decree-holder. Notwithstanding that no fresh order was passed by the executing court, the receiver remained in possession of the factory for more than two years. He received the profits, but in accordance with the local practice of the trade made them over to a certain association for the collection and distribution of the profits of cotton ginning factories. Meanwhile the mortgagor became insolvent, and creditors holding simple money decrees against him proceeded to attach the profits of the factory in the hands of the association, and the profits were divided rateably between these creditors. The mortgagee then sued to recover the profits of the factory earned whilst the receiver had been in charge, making defendants (1) the receiver originally appointed by the court (2) the creditors of the insolvent mortgagor and (3) the receiver in insolvency.

Held that the appointment of the original receiver having been made with the consent of the decree-holder and the judgement-debtor was not made without jurisdiction; that the profits of the factory for the year for which the receiver was appointed were assignable entirely to the satisfaction of the mortgage decree, and that the suit as against the receiver in insolvency was not barred by either section 16 or section 22 of the Provincial Insolvency Act, 1907. *In re Patis*; *Ex parte Taylor* (1) and *Croshaw* v. *Lyndhurst Ship Company* (2) distinguished.

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*First Appeal No 12 of 1916, from a decree of Sudarshan Dayal, Second Additional Subordinate Judge of Aligarh, dated the 23rd of September, 1915.

(1) (1893) 1 Q. B., 648. (2) (1897) 2 Ch. D., 154.