

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

LALESSOR BABUI AND OTHERS (PLAINTIFFS) v. JANKI BIBI

(DEFENDANT.)*

1891
Nov. 18.

*Claims for possession and mesne profits—Distinct claims—Separate suits—
Joinder of causes of action—Civil Procedure Code (Act XIV of
1882), ss. 43, 44.*

Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each claim.

Section 44 of the Code of Civil Procedure merely *permits* the joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property.

Kishori Lal Roy v. Sharut Chunder Mozumdar (1), *Mon Mohun Sirkar v. The Secretary of State for India in Council* (2), and *Madan Mohun Lal v. Lala Sheoaneker Sahai* (3), referred to. *Venkoba v. Subbanna* (4) dissented from.

THIS was a suit for mesne profits. On the 13th September 1887 (13th Assin 1295) the plaintiffs instituted a suit for the recovery of possession of certain immoveable property, but did not join with it a claim for mesne profits, and on the 25th May 1888 obtained a decree for possession. They did not execute their decree or obtain possession, but fearing lest a portion of their claim for mesne profits would be barred by limitation, on the 26th June 1888 they instituted the present suit for mesne profits for the years 1292 to 1295 Fushli (1884—88) inclusive.

The Sub-Judge decreed the suit, but on appeal the District Judge, relying upon the authority of the cases of *Venkoba v. Subbanna* (4) and *Lalji Mal v. Hulasi* (5), dismissed the claim for mesne profits for the years 1292, 1293 and 1294, the period prior to the institution of the suit for the recovery of possession, on the ground that it was barred by section 43 of the Civil Procedure Code.

Appeal from Appellate Decree No. 1503 of 1890, against the decree of A. C. Brett, Esq., Judge of Tirhut, dated the 24th of July 1890, modifying the decree of Baboo Matadin, Subordinate Judge of that district, dated the 31st December 1888.

(1) I. L. R., 8 Calc., 593; 10 C. L. R., 359. (3) I. L. R., 12 Calc., 482.

(2) I. L. R., 17 Calc., 968.

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

(5) I. L. R., 3 All., 660

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LALSON BABUI v. JANKI BIBI.	Baboo <i>Abinash Chunder Banerjee</i> for the appellants. Mr. <i>C. Gregory</i> and Baboo <i>Jogesh Chunder Dey</i> for the respondent.

The judgment of the Court (PRINSEP and AMBER ALI, JJ.) was as follows :—

The plaintiffs obtained a decree for possession of certain immoveable property on the 25th May 1888. They have not yet executed that decree or taken possession, but fearing that a portion of their claim for mesne profits would become barred, they on the 26th June 1888 brought this suit for mesne profits for the years 1292 to 1295 Fusli.

The District Judge has dismissed the claim for mesne profits for the period antecedent to the date of the institution of the suit for recovery of possession, and has, in this respect, modified the decree of the Court of first instance in favour of the plaintiffs. He relies upon the cases of *Venkoba v. Subbanna* (1) and *Lalji Mal v. Hulasi* (2) for holding that a portion of the claim for mesne profits is barred by the operation of section 43 of the Civil Procedure Code.

The question raised before us, therefore, is whether a person suing for recovery of immoveable property and entitled at that time, if he succeeds in that suit, to mesne profits, is bound to include that claim in his suit; or, in other words, whether, if he should fail to include such claim for mesne profits in that suit, he is barred from claiming them thereafter.

We cannot find that the rule adopted by the learned District Judge is in accordance with the practice of the Courts in Bengal, or has been adopted in any reported decision. It is unnecessary to refer to the decisions of this Court before 1882, because in that year a Full Bench of this Court in the case of *Kishori Lal Roy v. Sharut Chunder Mozumdar* (3) declared the law in this respect prevailing in Bengal. The learned Chief Justice expresses himself in these terms :—“ Having regard both to the practice of the Courts and to the language of the Legislature, it seems to me

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

(2) I. L. R., 3 All., 660.

(3) I. L. R., 8 Cal., 593; 10 C. L. R., 359.

that in this country the policy of the law has always been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two, as he might think proper; but at the same time to induce him, if there is no reason to the contrary, to dispose of his whole claim in one suit only." The latest case on the subject is *Mon Mohun Sirkar v. The Secretary of State for India in Council* (1), in which the same principle is adopted. In the view that we take of sections 43 and 44 of the Code of Civil Procedure, claims to recover possession of immoveable property and for mesne profits are distinct claims, and there has been no alteration of the law in this respect between section 10, Act VIII of 1859, and the present Code, although, no doubt, the terms of the law of 1859 were more precise. The cause of action and the nature of the suit in each case are altogether different. Section 44, as we read it, merely permits joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. The case of *Laji Mal v. Hulas* (2) is not in point. We are unable to accept the view laid down in the case of *Venkoba v. Subbanna* (3). As we understand the facts on which the judgment of their Lordships in the Privy Council in the case of *Madan Mohun Lal v. Lala Sheosanker Sahai* (4) is based, and which are more fully set out in the judgment of this Court then under appeal [see *Sheo Shunkur Sahoy v. Hriday Narain* (5)], they do not support the conclusion arrived at by the Madras Court. We, therefore, set aside the judgment of the District Judge modifying that of the Subordinate Judge, and restore the decree of the first Court in its entirety. The appellants will receive costs in this Court and the lower appellate Court.

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Appeal allowed.

C. D. P.

Editor's note.—The same point arose in appeal from Appellate Decree No. 319 of 1891, heard and decided by PRINSEP and HILL, JJ., on the 24th March 1892. Their Lordships followed the above ruling.

(1) I. L. R., 17 Calc., 968.

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

(2) I. L. R., 3 All., 660.

(4) I. L. R., 12 Calc., 482.

(5) I. L. R., 9 Calc., 143.