1918
January, 9.

APPELLATE CIVIL.

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

MUHAMMAD ISHAQ KHAN AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD RUSTAM ALI KHAN AND ANOTHER (DEFENDANTS) AND THE COLLECTOR OF MUZAFFARNAGAR (PLAINTIFF)*.

Civil Procedure Code (1908), *section* 11, *Explanation V; order XX, rule* 12—*Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred.*

The plaintiff claimed possession of immovable property and mesne profits to the date of suit; also mesne profits *pendente lite* and subsequent to decree. The court gave a decree for mesne profits to the date of suit, but the decree was silent as to mesne profits *pendente lite* or subsequent to decree.

Held, on suit by the plaintiff for further mesne profits to the date of his obtaining possession, that there was nothing in the present Code of Civil Procedure of 1908, any more than in the former Code of 1882, to bar such a suit.

Ram Dayal v. *Madan Mohan Lal* (1) followed. *Doraiswami Ayyar* v. *T. Subramania Ayyar* (2) referred to.

THE plaintiffs were trustees under a *waqfnamah* executed by Nawab Muhammad Azmat Ali Khan of Karnal. On the death of the Nawab in 1908 the defendants, his step-brothers, entered into possession of the *waqf* properties. The plaintiffs instituted a suit against the defendants in 1912 for enforcement of the *waqf* and possession of the *waqf* properties. In the plaint the plaintiffs prayed for a decree for possession, and for the sum of Rs. 81,034-9 as past mesne profits. They also claimed *pendente lite* and future mesne profits till delivery of possession. The suit was after contest decreed by the court of first instance (the Additional Subordinate Judge of Meerut), and the decree was, on appeal, confirmed by the High Court. [For the judgement of the High Court see *Rustam Ali Khan* v. *Mushtak Husain* (3)]. The issue relating to mesne profits framed by the Subordinate Judge was as follows:—"Are the plaintiffs entitled to *wasilat*? If so, to what amount?" The court found that "Rs. 65,390-6-5 is the total of the profits for three years." The operative portion of the judgement ran as follows:—"Ordered, that plaintiffs' claim for possession as trustees be decreed as

* First Appeal No. 3 of 1917, from a decree of Man Mohan Sanyal, Additional Subordinate Judge of Meerut, dated the 30th of August, 1916.

(1) (1899) I. L. R., 21 All., 425. (2) (1917) I. L. R., 41 Mad., 188.
(3) (1916) 14 A. L. J., 554.

prayed. The claim about the *wasilat* up to the date of suit is decreed to the extent of Rs. 57,564, and also for Rs. 1,227-4-4, amount of cash deposit. Remainder of the *wasilat* and cash profits in deposit being not proved, claim about it is dismissed." The decree as drawn agreed with the judgement. The plaintiffs instituted the present suit to recover mesne profits from the date of the institution of the first suit till the date of delivery of possession by the defendants to the receiver appointed by the High Court. The defendants contended, *inter alia*, that mesne profits now in suit having been expressly claimed in the former suit and refused, the claim was *res judicata* and was, under section 11 of the Code of Civil Procedure unsustainable. The lower court gave effect to this plea and dismissed the suit.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Kailas Nath Katju* and Maulvi *Sheikh Abdullah*), for the appellants, contended that the suit was maintainable and the claim as to future mesne profits not having been tried at all in the earlier suit, section 11 did not apply. The plaintiff could not in that suit claim any decree for *pendente lite* and future mesne profits as a matter of right, no cause of action having arisen for the same at the date of the institution of that suit. It was entirely in the discretion of the court to grant or to refuse relief as to future mesne profits. Non-exercise of the discretion in the plaintiff's favour would not take away his right to future mesne profits when they actually become due; *Ram Dayal* v. *Madan Mohan Lal* (1) and *Man Mohun Sirkar* v. *The Secretary of State for India in Council* (2). The lower court is of opinion that by reason of some change in arrangement and phraseology there had been a change in the law and the decisions under the old Code were no longer good law. This was not so. The language of sections 211 and 212 of the Old Code and order XX, rule 12, of the present Code was substantially the same, and the two sections in the Old Code had now been amalgamated into one. It was a well-settled principle of construction that the Legislature was presumed to know not only the general principles of law but the construction which the courts had put upon particular Statutes, and where a section of an Act

(1) (1899) I. L. R., 21 All., 425. (2) (1890) I. L. R., 17 Calc., 963.

1918

MUHAMMAD ISHAQ KHAN v. MUHAMMAD RUSTAM ALI KHAN.

which had received a judicial construction was re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction; *Ex parte Campbell* (1). If the Legislature had intended to overrule the unanimous decisions of all the High Courts on the point, *it would* have done so by the use of clear and apt language and not indirectly and by mere implication. Under the present Code all matters and inquiries relating to mesne profits were to be decided in the suit itself and could not be relegated to the execution department. In that view the retention of clauses (1) and (2) and the proviso to section 244 of the Code of 1882 had become useless, and consequently no similar provisions were to be found in section 47 of the present Code, which had been entirely recast. The insertion of the proviso to section 244 of the old Code under section 47 of the present Code, would have been entirely meaningless and out of place, and its omission therefore did not at all imply that a separate suit for future profits not dealt with by the decree would no longer lie. Reports of select committees were not admissible on questions of construction of statutes, and the lower court ought not to have referred to the report of 1903. But even if the report were looked at, it would favour the plaintiff's argument. The report of 1903 referred to by the lower court was appended to a bill which contained an express clause purporting to change the law and to overrule the previous decisions. But that bill had been withdrawn and in the report to the bill which was subsequently introduced and passed, there was no indication that any change in the law in that direction was ever contemplated, the lower court had relied upon the decision of the Madras High Court in *Ramasami Iyer* v. *Srirangaraja Iyengar* (2) but that case had been subsequently overruled by a Full Bench of the Madras High Court; *Doraiswami Ayyar* v. *T. Subramania Ayyar* (3).

The Hon'ble Sir *Sundar Lal* (with him Mr. *A. E. Ryves*), for the respondents, submitted that, if it were open to him, he was prepared to argue that the case of *Ram Dayal* v. *Madan Mohan Lal* (4) had been wrongly decided. But if that decision

(1) (1870) 5 Ch. App., 703.
(2) (1914) 26 Indian Cases, 622.
(3) (1917) I. L. R., 41 Mad., 188.
(4) (1899) I. L. R., 21 All., 425.

was one by which the Court was bound, it was submitted that there had been a change in the law, and by the amalgamation of old sections 211 and 212 in one section in the present Code the Legislature had intended to place claims to all mesne profits (whether past or future) on an equal footing. The cause of action for recovery of immovable property and its rents and mesne profits was one and indivisible, and the plaintiff having once claimed mesne profits, could not bring a fresh suit for the same purpose. On a proper construction of order XX, rule 12, he could have insisted for a decree for future mesne profits. The omission of any provision in the present Code corresponding to the proviso to section 244 of the old Code was most significant and indicated that Explanation V, appended to section 11 of the present Code, would fully apply to the present case. He referred to section 34 of the present Code.

Pandit *Kailas Nath Katju*, in reply, submitted that causes of action for recovery of immovable property and for its mesne profits were separate and distinct; *Nandan Singh* v. *Ganga Prasad* (1).

RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit for mesne profits. A previous suit had been brought, in which possession of the land had been claimed. A certain sum was also claimed as mesne profits for the period prior to the institution of the suit. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for the plaintiffs for possession of the land and also a decree for a portion of the amount claimed by the plaintiffs for mesne profits. The rest of the plaintiff's claim was dismissed. On referring to the judgement it is quite clear that the court never dealt or purported to deal with the mesne profits during the pendency of the suit or after decree. In the present suit mesne profits are claimed from the date of the institution of the suit up to the date of delivery of possession. The defence is that the decree in the previous suit operates as *res judicata*, and reliance is placed upon the provisions of section 11, Explanation V. Section 11 provides that "No court shall try any suit or issue in which the matter directly and substantially in issue has been

(1) (1913) I. L. R., 35 All., 512 (517).

1918

MUHAMMAD ISHAQ KHAN v. MUHAMMAD RUSTAM ALI KHAN.

directly and substantially in issue in a former suit between the same parties . . . in a court competent to try such subsequent suit." Explanation V provides that "Any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused." This explanation corresponds exactly with Explanation III of section 13 of the old Code. Reliance is also placed upon the provisions of order II, rule 2, which provides that "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The contention on behalf of the defendants is that the court in the previous suit not having granted mesne profits during the pendency of the suit and from the date of the decree up to the date of delivery of possession must be deemed to have refused it. Further, the decree ought to be interpreted as having expressly dismissed the suit in respect of mesne profits save to the extent that mesne profits were granted. The very same question had frequently arisen in the High Courts in India before the coming into operation of the present Code of Civil Procedure. All the courts appear to have held that, notwithstanding the provisions of the old Code, a suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained. This was expressly held in the case of *Ram Dayal* v. *Madan Mohan Lal* (1). In that case, just like the present, there had been in a previous suit a claim for mesne profits prior to the institution of the suit and also future mesne profits. Nevertheless the court held that the subsequent suit for mesne profits from the date of the institution of the suit up to delivery of possession could be maintained when the court in the previous suit had not decided the right of plaintiff to these mesne profits. We think that we are bound to follow this decision, unless it is shown that the Legislature, when enacting the present Code of Civil Procedure, altered the law. It is a recognized rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions, is to be adhered to.

(1) (1899) I. L. R., 21 All., 425.

We now propose to consider whether the provisions of the Code of Civil Procedure of 1908 altered the law in respect of the matter with which we are dealing. Section 211 of the Code of Civil Procedure of 1882 provided that in a "suit for the recovery of possession of immovable property yielding rent or other profits the court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree was made."

It is to be noted that in this section there is no reference to a *claim* in the plaint being made for mesne profits. Section 212 provided that where the suit was a suit for "possession of immovable property and for mesne profits which have accrued on the property during the period prior to the institution of the suit and the amount of such profits is disputed, the court may either determine the amount by the decree itself or may pass a decree for the property and direct an inquiry into the amount of mesne profits and dispose of the same on further orders."

The provisions of these two sections seem to have been amalgamated in the provisions of order XX, rule 12, of the new Code. That order provides that "where there is a suit for the recovery of possession of immovable property and for rent of mesne profits, the court may pass a decree (*a*) for possession of the property, (*b*) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits, and (*c*) directing an inquiry as to the rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgement-debtor with the notice to the decree-holder through the court, or (iii) the expiration of three years from the date of the decree whichever event first happens." Clause (2) of this rule provides "where an inquiry is directed under clause (*b*) or clause (*c*) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of the inquiry."

Under the old Code the practice was that, excepting those cases in which the court had actually found a certain amount due for mesne profits, the court executing the decree used to be called

1918

MUHAMMAD IRFAQ KHAN v. MUHAMMAD RUSTAM ALI KHAN.

upon to make an inquiry and to ascertain in execution the amount of mesne profits, whether they were mesne profits which had accrued prior to the institution of the suit or mesne profits which had accrued between that date and the delivery of possession. The authority to make this inquiry was conferred on the court executing the decree by section 244 of the Code of Civil Procedure of 1882, to which we shall presently refer. It would seem, therefore, that the only substantial change that has been made in the law is that it is the court which hears the suit which is to ascertain the mesne profits, whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to date of delivery of possession, and it is this court which is to make the *final* decree for mesne profits which has to be executed by the court executing the decree. We do not think that any significance is to be attached to the fact that in section 211 of the old Code there is no reference to a claim for mesne profits or to the fact that order XX, rule 12, purports to deal with suits in which mesne profits are claimed. Section 244 of the old Code dealt with certain matters which were to be determined by the court executing the decree and not by a separate suit, and amongst other questions the very first mentioned were questions regarding the amount of any mesne profits as to which the decree had directed an inquiry. There is a *proviso* at the end of the section in the following words:—"Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree." The corresponding section of the Code of 1908 is section 47. In this section reference to all questions of mesne profits is omitted and the *proviso* which we have quoted from section 244 is also omitted. The argument is that this last mentioned omission is most significant and that it demonstrates the intention of the Legislature, that suits for the recovery of mesne profits after a previous suit for possession cannot be maintained. A little consideration shows that this argument is not so forcible as might appear at first sight. The *proviso* to section 244 of the old Code seems to have presumed that there was nothing in the Code itself which would prevent a second suit for mesne profits,

but that it might be contended that the provisions of section 244 would preclude a second suit, and accordingly the words of the *proviso* are not that nothing "in the Code" shall be deemed to bar a separate suit for mesne profits, but that nothing "in the section" shall be deemed to bar such a suit. It becomes apparent that the retention of this *proviso* in the new Code would have been altogether meaningless and out of place, because in section 47 of the new Code there is no reference to inquiries as to mesne profits at all, and order XX, rule 12, to which we have already referred, expressly takes away the jurisdiction of the court executing the decree to make any inquiry in respect of mesne profits. The learned Judge in the court below has referred to the report of the select committee on the provisions of the contemplated amendment of the Code of Civil Procedure. If it were permissible to consider the report at all, the inference would seem to be rather against the respondents than in their favour. The quotation had reference to a Bill which was subsequently withdrawn. In this Bill there was a provision which would have made it quite clear that a second suit for mesne profits could not be maintained. This provision does not find a place in the measure which was actually enacted. If any legitimate inference could be drawn at all, it would seem as if the Legislature, knowing well the course of decisions in the Courts in India had come to conclusion that it was best to maintain the rule of law as established by the cases. In this connection it may not be altogether out of place to suggest that there are some practical difficulties in the way of ascertaining mesne profits *pendente lite* and particularly future mesne profits in the original suit. Where there are more defendants than one, their liability may not be altogether the same, and the final ascertainment of the amount due for mesne profits from the date of the decree to the time of delivery of possession can never be made until possession is actually taken by relinquishment on the part of the defendants or through the court. We may mention here that the question recently arose in the Madras High Court in the case of *Doraiswami Ayyar* v. *T. Subramania Ayyar* (1), in which the majority of a Full Bench of that Court were of opinion that, notwithstanding the provisions of the new Code, a suit for mesne profits like the present could be maintained.

(1) (1917) I. L. R., 41 Mad., 188.

1918

MUHAMMAD ISHAQ KHAN v. MUHAMMAD RUSTAM ALI KHAN.

We allow the appeal, set aside the decree of court below and remand the case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

1918
January, 10.

Before Mr. Justice Piggott and Mr. Justice Walsh.

JAGARDEO SINGH (DEFENDANT) *v.* ALI HAMMAD AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 34*—Person occupying land without consent of landlord—Ejectment—Non-occupancy tenant —Usufructuary mortgagee entitled to possession.*

The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property. The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the *sir* lands comprised in the mortgage without tendering the mortgage money, and somehow managed to get into possession of certain plots.

Held, that section 34 of the Agra Tenancy Act, 1901, applied, and the defendant could be regarded as a person in possession of land without the consent of the landlord and ejected as if he were a non-occupancy tenant. *Balli* v. *Naubat Singh* (1) followed.

UNDER a usufructuary mortgage executed before the present Tenancy Act came into force the plaintiffs were in possession of certain plots of *sir* land as mortgagees. The defendant acquired a share in the mahal in which the plots were situate and thus became the owner of a portion of the equity of redemption. Subsequently the defendant took possession of some of the plots of *sir* land. The plaintiffs sued in the Revenue Court for ejectment of the defendant as a non-occupancy tenant. The defendant pleaded that there was no contract of tenancy between the parties and that he was in proprietary possession as a co-sharer in the mahal. The Revenue Court, acting under section 199 (1) (*a*) of the Tenancy Act, referred the defendant to the Civil Court. The final decision of the Civil Court was to the effect that these plaintiffs were entitled to exclusive possession of the plots as usufructuary mortgagees, and that the defendant

---

* Second Appeal No. 118 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 9th of December, 1914, confirming a decree of Govind Atma Ram Dhandi, Assistant Collector, first class, of Mohammadabad, dated the 18th of July, 1914.

(1) (1912) 9 A. L. J., 771.