

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

1927  
February  
10.

GOSWAMI GORDHAN LALJI MAHARAJ (DEFENDANT)  
v. BISHAMBAR NATH (PLAINTIFF).\*

*Civil Procedure Code, order II, rule 2—Mesne profits—  
Future mesne profits not claimed in original suit—  
Subsequent suit therefor barred.*

A court being competent to give a decree for future mesne profits to the date of obtaining possession, if a plaintiff omits to ask for them in his plaint, a subsequent suit for the same relief will be barred by order II, rule 2, of the Code of Civil Procedure. *Ram Din v. Bhup Singh* (1), *Kashi v. Bajrang Prasad* (2) and *Girwar Singh v. Ram Piari Kuer* (3), followed.

THE facts of this case were as follows:—On the 11th of May, 1921, the plaintiff brought a suit against the defendant for recovery of possession of certain property. The suit was decreed and in execution of the decree the plaintiff obtained possession on the 3rd of May, 1925. Then the plaintiff brought a second suit against the same defendant on the 24th of August, 1925, for recovery of Rs. 294 as mesne profits for a period of two years and eight months preceding this suit,—from August 1922, up to the 3rd of May, 1925, the date of delivery of possession. The defendant pleaded, *inter alia*, that the suit was barred by order II, rule 2, of the Code of Civil Procedure. The court of first instance held that the suit was so barred; the lower appellate court upset this decision and remanded the suit for ascertainment of the amount of the mesne profits. The defendant appealed from this order of remand.

Munshi Narain Prasad Asthana, for the appellant.

\* First Appeal No. 113 of 1926, from an order of Kashi Prasad, Subordinate Judge of Muttra, dated the 11th of May, 1926.

(1) (1908) I.L.R., 30 All., 225. (2) (1907) I.L.R., 30 All., 36

(3) (1924) 78 Indian Cases, 326.

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GOSWAMI  
GORIHAN  
LALJI  
MAHANAG  
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BISHEMBAR  
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The respondent was not represented.

WALSH and BANERJI, JJ. :—We must allow this appeal. There is a great deal to be said for the Judge's view; in fact we should have been disposed to take the same view ourselves if we had been free to do so. We agree with the learned Judge that order II, rule 2, looks as though it was directory and not mandatory, and that the plaintiff is not prejudiced if the court does not choose to make its decree include post-decretal damages or mesne profits. It undoubtedly can do so, and there is a good deal to be said for the view that mesne profits, which only arise after the suit in case the defendant fails to give up possession, cannot be regarded as part of the plaintiff's claim when a suit is instituted. But, on the other hand, nobody can doubt that the plaintiff can claim and the court can award mesne profits up to the date of obtaining possession, that is to say, a contingent liability if the defendant should continue to retain possession. On the whole we think that the cases are too strong and that we must follow the accepted practice in this Court. The learned Judge has undoubtedly quoted a case which has nothing to do with it and has not referred to those which do. There is a two-Judge case, *Ram Din v. Bhup Singh* (1), which was a suit for redemption of a usufructuary mortgage. That is a distinct decision on order II, rule 2. Mr. Justice RICHARDS decided the same thing in a mortgage suit in *Kashi v. Bajrang Prasad* (2). He did not refer to order II, rule 2, which was then section 43, but took a sort of general view, and said that in a suit for redemption there ought to be a complete and final statement of all accounts right up to the time of actual redemption or sale. Mr. Justice STUART in a more recent case (3),

(1) (1908) I.L.R., 30 All., 225.

(2) (1907) I.L.R., 30 All., 36.

(3) *Girwar Singh v. Rim Piari Kuer* (1924), 78 Indian Cases, 326.

has applied order II, rule 2, to mesne profits between the date of the decree and the date of possession, relying on the authority of the two cases we have just quoted, and he held that the failure of the plaintiff to make a claim in the suit for mesne profits up to the date of possession prevents his putting it forward in a separate suit. We think it hard. It is entirely the result of loose pleading probably due to ignorance of the true methods and objects of pleading. Whether it can be described as negligence is rather doubtful when one recognizes how low the standard of pleading is in the inferior courts and the absence of any scientific training in the art. But, on the whole, we are not prepared to depart from the practice which appears to be established by the cases we have referred to. One day, perhaps, somebody who takes sufficient interest in the question may induce some Bench to appoint a larger Bench to consider these decisions, but we are not prepared to do so today. We must, therefore, allow the appeal and restore the order of the first court with costs in the two courts.

*Appeal allowed.*

*Before Sir Grimwood Mears, Knight, Chief Justice, and  
Mr. Justice Dalal.*

JUGAL KISHORE (PLAINTIFF) v. CHARI AND COMPANY  
AND ANOTHER (DEFENDANTS).\*

1927  
February,  
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*Act No. IX of 1872 (Indian Contract Act), section 63—  
Undertaking by creditor not to take steps to recover debt  
within a time named—Consideration—Civil Procedure  
Code, order VI, rule 17—Amendment of plaint.*

*Held, on a construction of section 63 of the Indian  
Contract Act, that an undertaking given by a creditor to his  
debtor not to take steps to recover his debt before the expiry  
of a certain period is binding on the creditor and a suit*

\* First Appeal No. 159 of 1924, from a decree of Shamsuddin Khan, Subordinate Judge of Jhansi, dated the 17th of December, 1923.