

where an actual loss, in the narrower sense of the word, had occurred.

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Having regard to the codified law, and having regard to the decided cases, we are of opinion that the plaintiff has a good cause of action and his suit should be tried. The other points that the appellant may have to argue will be heard, no doubt, by the court of first instance. We uphold the order of remand and dismiss the appeal with costs.

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 FULL BENCH.
 

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*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,  
 Mr. Justice Sen and Mr. Justice Niamat-ullah.*

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 May, 6.
 

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RAM KARAN SINGH AND OTHERS (PLAINTIFFS) *v.* NAK-  
 CHHED AHIR AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code, order II, rules 2 and 4; order XX, rule 12—Mesne profits—Suit for possession and past mesne profits—Second suit for pendente lite and future mesne profits—Maintainability—Cause of action.*

A suit for the recovery of possession and of mesne profits up to the date of the suit was decreed. Mesne profits *pendente lite* and future were neither claimed nor refused in that suit. After obtaining possession the plaintiff brought a second suit for recovery of mesne profits from the date of institution of the first suit to the date of obtaining possession. *Held* that the second suit was maintainable and was not barred by order II, rule 2, of the Civil Procedure Code.

The cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of order II, rule 4, recognize this and indicate that the legislature thought it necessary to provide specially for joining the two causes of action in the same suit and that but for such an express provision such a combination might well have been disallowed.

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\*Second Appeal No. 195 of 1928, from a decree of S. Iftakhar Husain, Officiating District Judge of Azamgarh, dated the 2nd of November, 1927, confirming a decree of Hardeo Singh, City Munsif of Azamgarh, dated the 15th of July, 1927.

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The object of order II, rule 2, is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek in one and the same suit all the remedies which he can claim against the same defendants on account of several causes of action.

No doubt under order XX, rule 12, a court may pass a decree directing an inquiry into the future mesne profits. But this rule is only directory and not mandatory and gives the court discretion to pass a preliminary decree for mesne profits. Much less does it compel a plaintiff to unite a claim for future mesne profits in a suit for recovery of possession of immovable property.

Mr. *Shambhu Prasad* (for Mr. *Shiva Prasad Sinha*), for the appellants.

Mr. *R. K. Malaviya*, for the respondents.

SULAIMAN, A.C. J., SEN and NIAMAT-ULLAH, JJ. :—  
This case was referred to a Division Bench by a learned Judge of this Court, and has now been referred to a larger Bench on account of some conflict of opinion which has prevailed in this Court.

The present plaintiffs instituted a suit in 1925 for possession of the tenancy lands against the defendants, treating them as trespassers. In that plaint they claimed mesne profits up to the date of the institution of the suit. The defence of the defendants was that they were the tenants of the plaintiffs. The defendants were accordingly referred to the revenue court, which held that the relationship of landlord and tenant was not established. In consequence of this finding the civil suit was decreed against the defendants. Possession of the lands was delivered on the 1st of April, 1927.

The plaintiffs then instituted the suit out of which this appeal arises for recovery of mesne profits from the 24th of August, 1925, the date of the institution of the first suit, till the 1st of April 1927, the date on which they obtained possession. It was pleaded in defence that the claim was barred by the provisions of order II, rule 2, of the Code of Civil Procedure. There was a

dispute as regards the amount of the mesne profits claimed by the plaintiffs, but both the courts below assessed it at Rs. 100. The courts below, relying on the ruling of this Court in the case of *Goswami Gordhan Lalji Maharaj v. Bishambhar Nath* (1), have held that order II, rule 2, of the Code of Civil Procedure is a bar to the present claim.

Order II, rule 2, requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action and that if he omits to sue in respect of any portion of his claim, he shall not afterwards be allowed to sue in respect of the portion so omitted. As pointed out by their Lordships of the Privy Council in *Payana Reena Saminathan v. Pana Lana Palaniappa* (2), in which the interpretation of section 34 of the Ceylon Civil Procedure Code, which corresponds exactly with order II, rule 2, of our Code, was under consideration, "It (the section) is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction." The plaintiff, although he is bound to include in his claim all the reliefs which he can claim in respect of the same cause of action, is not bound to include all causes of action for which he may have a remedy against the defendant, even though they may arise from one and the same transaction. Order II, rule 4, provides that "No cause of action shall, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof etc." It would seem as if there would have been no right to join the claim for mesne profits with a claim for recovery of immovable property if this provision were not to be found in the Civil Procedure Code. This was the view

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(1) (1927) I.L.R., 49 All., 597.

(2) (1913) 41 I.A., 142 (148).

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expressed by the learned Judges of this Court in two Full Bench cases, namely *Ram Dayal v. Madan Mohan Lal* (1) and *Nandan Singh v. Ganga Prasad* (2). If a plaintiff had been bound to claim future mesne profits in a suit for recovery of possession of his immovable property, there would have been no necessity to provide an exception as is done in rule 4.

The Full Bench case of *Nandan Singh* was followed in *Muhammad Ishaq Khan v. Muhammad Rustom Ali Khan* (3), in a case which arose under the new Code and the same view was adhered to. It is unnecessary to consider cases bearing on suits for redemption of mortgages and subsequent suits for recovery of profits, for mortgages stand on an entirely different footing. Under order XXXIV, rule 7, it is incumbent upon a court in a suit for redemption to fix a date for payment and to order accounts to be taken up to that date. That provision is mandatory. On the other hand, under order XX, rule 12, a discretion is given to the court to pass a decree for mesne profits or direct an inquiry as to mesne profits from the institution of the suit to be made and then pass a final decree for the amount found due. This provision is directory and not mandatory.

Coming to the cases of this Court which alone we need consider and which have bearing on the question of mesne profits, we find that reliance has been placed in some of the subsequent cases on the case of *Mewa Kuar v. Banarsi Prasad* (4). In that case, first a suit for possession and for rent was brought and decreed. Subsequently a suit for mesne profits for a period which included a part of the period prior to the suit was filed. The court below gave a decree for the period subsequent to the institution of the suit. The Bench held that the claim for the mesne profits for the period prior to the suit

(1) (1899) I.L.R., 21 All., 425 (431) (2) (1913) I.L.R., 35 All., 512 (516).  
 and 439). (3) (1918) I.L.R., 40 All., 292.

(4) (1895) I.L.R., 17 All., 533.

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was barred by the provisions of section 43 of the old Code of Civil Procedure. That a subsequent claim for mesne profits prior to the suit would be barred is also apparent from the case decided by their Lordships of the Privy Council, *Madan Mohan Lal v. Lala Sheosankar Sahai* (1). These cases are accordingly distinguishable from the present case in which that point does not arise.

*Miyan Khan v. Sarfaraz Khan* (2), decided by a Bench consisting of WALSH, J., and one of us, is a direct authority for the proposition that the claim for mesne profits accruing subsequent to the institution of the previous suit is a claim based on a different cause of action and is not barred by the provisions of order II, rule 2. There is, however, a single Judge decision in support of the view taken by the courts below. Mr. Justice STUART in *Girwar Singh v. Ram Piari Kuer* (3) came to the conclusion that inasmuch as "the law permits a plaintiff in a suit for possession to claim mesne profits not only up to the date of suit or decree but up to the date of delivery of possession, the failure of a plaintiff to make the claim in the suit for possession debars him from putting it forward in a separate suit." He, however, relied on two cases, *Kashi v. Bajrang Prasad* (4) and *Ram Din v. Bhup Singh* (5), which related to suits for redemption of mortgages and which, in our opinion, were not directly applicable. His attention was not drawn to the case of *Miyan Khan* referred to above.

We now come to the other case relied upon by the courts below namely *Goswami Gordhan Lalji Maharaj v. Bishambar Nath* (6), decided by WALSH and BANERJI, JJ. Unfortunately the respondent in that case was not represented and the case was heard *ex parte*. The attention of the learned Judges was not drawn to the previous case of *Miyan Khan* decided by a Bench of which WALSH, J., himself was a member. The learned Judges felt consider-

(1) (1885) I.L.R., 12 Cal., 482.

(2) (1920) 60 Indian Cases, 65.

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

(4) (1907) I.L.R., 30 All., 36.

(5) (1908) I.L.R., 30 All., 225.

(6) (1927) I.L.R., 49 All., 597.

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able doubt as to the correctness of the contention put forward on behalf of the defendants appellants in the case, for they remarked that there was a great deal to be said for the plaintiff. In fact, they should have been disposed to take the same view themselves if they had been free to do so. They pointed out that order II, rule 2 (rule 4?), was directory and not mandatory, and they also remarked that later on the question may be referred to a larger Bench for consideration. The learned Judges, however, felt that they could not depart from the practice of the Court as indicated by two cases in I. L. R., 30 All., which, as we have already pointed out, related to the redemption of mortgages, and the case of *Girwar Singh v. Ram Piani Kuer* (1) decided by a single Judge of this Court, which we have noted above. This case therefore rather expresses the view of the Bench in favour of the appellant, though the final decision of the case went against the plaintiff on the supposed ground that there was an established practice of the Court in favour of the bar of order II, rule 2.

No other case of this High Court which relates to a subsequent suit for mesne profits has been brought to our notice.

We may point out that the preponderance of opinion in the other High Courts is undoubtedly in favour of the view that there is no bar of order II, rule 2, in such cases. A Full Bench of the Madras High Court in *Ponnammal v. Ramamirda Aiyar* (2), has expressed that opinion categorically.

It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of order II, rule 4, indicate that the legislature thought it necessary to provide specially for joining a claim for mesne profits with one for recovery of possession of

(1) (1924) 78 Indian Cases, 326.

(2) (1914) I.L.R., 38 Mad., 829.

immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. In many cases the plaintiff may not be in a position to anticipate the exact amount of mesne profits to which he may become entitled after the institution of the suit. The object of order II, rule 2, is the prevention of the splitting up of one cause of action and not to compel the plaintiff to seek all the remedies which he can claim against the same defendants on account of several causes of action in one and the same suit. In one case, the multiplicity of suits is to be avoided and, in the other, multifariousness of the causes of action. It is also clear that the bundle of facts which would constitute the cause of action in favour of the plaintiff would not necessarily be identical in a suit for recovery of possession and in a suit for mesne profits. In a suit for possession the plaintiff need only prove his possession within twelve years and the defendant's occupation of the property without right. In a suit for mesne profits he has, in addition, to prove the duration of the whole period during which the dispossession continued, including the date on which it terminated, as well as the amount to which he is entitled by way of damages. Evidence to prove these latter facts would undoubtedly be different from that which would be required to prove the first set of facts. Again, if there are a number of defendants who are in possession of

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different portions of the property, there may be considerable difficulty in ascertaining the amount which each is liable to pay and the plaintiff may think it convenient to postpone an inquiry of such a complicated nature to a suit after his right to possession has been fully established.

No doubt under order XX, rule 12, a court may pass a decree directing an inquiry into the future mesne profits. But this rule has been repeatedly interpreted to be only directory and not mandatory and as giving the court discretion to pass a preliminary decree for mesne profits. Much less does it compel a plaintiff to unite the claim for future mesne profits in a suit for recovery of possession of immovable property.

We are therefore of opinion that in view of the weight of authority as well as the considerations noted above, the decrees of the courts below are wrong and the present suit for recovery of mesne profits which accrued after the institution of the previous suit, and which had neither been claimed nor refused by the court, is not barred by order II, rule 2. As the amount of the damages has already been ascertained, we allow the appeal and setting aside the decrees of the courts below, decree the plaintiff's claim for recovery of Rs. 100 as mesne profits, with proportionate costs in the first court and full costs in the lower appellate court and in this Court.