

## APPELLATE CIVIL

*Before Sir John Thom, Chief Justice, and Mr. Justice  
Ganga Nath*

SAGHIR HASAN (PLAINTIFF) v. TAYAB HASAN  
(DEFENDANT)\*

1940  
September, 16

*Civil Procedure Code, order II, rule 2—Mesne profits—Suit for possession as owner, or in the alternative for foreclosure, with past mesne profits for three years—Decree for foreclosure and the mesne profits claimed—Second suit for mesne profits for a subsequent period—Maintainability.*

The plaintiff, who was a mortgagee by conditional sale but who had not obtained possession, sued for possession as owner, on the allegation that the deed was a sale with an option of re-purchase; in the alternative, in case the deed was held to be a mortgage by conditional sale, he prayed for foreclosure; and in either case he prayed for mesne profits for the past three years. He did not pray for possession as a mortgagee. He was granted a decree for foreclosure and the three years' mesne profits. A considerable period elapsed before the passing of a final decree for foreclosure; and the plaintiff brought a second suit claiming mesne profits for a period subsequent to the three years in respect of which he had got the decree: *Held* that the second suit was barred by order II, rule 2 of the Civil Procedure Code. If in the first suit the plaintiff had sued for possession as mortgagee, and if it had been held that under the mortgage deed he was entitled to possession, then the present suit would not have been barred.

If a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits, and under the provisions of order II, rule 2(3) he is bound to include both claims in one suit. If he sues only for mesne profits he can not in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession; and if he is not entitled to possession he is not entitled to any further mesne profits. A subsequent suit for mesne profits is therefore barred.

Mr. *Ishaq Ahmad*, for the appellant.

Mr. *Mushtaq Ahmad*, for the respondent.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiff's appeal arising out of a suit for mesne profits.

\*Appeal No. 68 of 1938, under section 10 of the Letters Patent.

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The respondent executed a mortgage by conditional sale in favour of the appellant. For reasons which are not disclosed possession of the property mortgaged was not given to the appellant. The appellant after the expiry of five years brought a suit in which he claimed possession as a proprietor or, in the alternative if the deed in question was held to be a mortgage deed by conditional sale, for foreclosure. The appellant further claimed in that suit mesne profits for three years. He was granted a decree for foreclosure and he was further granted a decree for mesne profits for three years.

Subsequently the appellant filed the suit out of which this appeal arises in which he again claimed mesne profits. The suit was dismissed as barred by order II, rule 2, by the learned Munsif. The learned Additional Civil Judge, however, held that the suit was not barred, set aside the order of the Munsif and sent the case back for disposal according to law. Against this order the respondent appealed to this Court and the learned single Judge has reversed the order of the lower appellate court and dismissed the suit upon the ground that the suit was barred by order II, rule 2.

It was maintained for the appellant that the suit was not barred and that the appellant was entitled to sue for mesne profits despite the fact that he had already sued for mesne profits in the earlier suit. In support of this argument reliance was placed on a Full Bench decision of this Court in *Ram Karan Singh v. Nakchhed Ahir* (1). This decision, however, does not support the appellant's case. It was decided in that case that where the plaintiff sued for possession of lands, but did not claim mesne profits accruing after the institution of the suit, and when mesne profits were not refused by the court, it was open to him to bring a subsequent suit for future mesne profits. In that case the plaintiff remained entitled to mesne profits inasmuch as he had sued for possession and was entitled to possession. If in these circumstances he was not given possession after a decree

(1) (1931) I.L.R. 53 All. 951.

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in his favour, he was entitled, it was held, to sue from time to time for mesne profits as they accrued. In the present suit, however, the position is different. The appellant did not sue for possession as mortgagee. He could have sued for such possession, founding upon the terms of the mortgage deed, and if it had been held that under the mortgage deed he was entitled to possession then no doubt the present suit would not have been barred. His failure, however, to sue for possession as mortgagee is fatal to his present claim. Under order II, rule 2(3) "A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Now the plaintiff upon the failure of the respondent to hand over possession of the mortgaged property was entitled to sue for possession and for mesne profits. His right to claim possession and his claim to mesne profits arose out of the wrongful possession of the defendants. In other words the cause of action was the same in respect of both claims. In these circumstances the plaintiff was bound to include in the suit in which he claimed mesne profits a claim for possession if he wished to keep alive his right to possession under the mortgage deed. If he sued for possession now his suit would be barred under the provisions of order II, rule 2. If he is not entitled to possession he is not entitled to mesne profits. In this connection reference may be made to the cases of *Ganeshi Lal v. Banshi Dhar* (1), *Sheo Ratan Misra v. Ram Dhani* (2) and *Karim Baksh v. Jattu Ram* (3). The facts in the case of *Ganeshi Lal v. Banshi Dhar* were that a plaintiff took a mortgage of a certain house from the defendant and in order to secure payment of interest due under the mortgage he leased back the house to the mortgagor under an instrument by which it was agreed that if there was a default in the payment of

(1) A.I.R. 1933 All. 84.

(2) (1906) 9 Oudh Cases, 322.

(3) (1910) 8 Indian Cases, 224.

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interest for three years consecutively, the mortgagee was entitled to evict the mortgagor. The rent not having been paid, he sued the mortgagor for arrears of rent but did not ask for possession though entitled to possession under the lease. He subsequently sued for possession of the house. It was held "that the suit was barred as the cause of action for possession of the house by eviction of the mortgagor had accrued in his favour when he brought the prior suit for rent and that he could not be allowed to split the claim or reliefs piecemeal." The facts in that case, it will be observed, are almost on all fours with the facts of the present case.

The appellant relied upon the decision in the cases of *Monohur Lall v. Gouri Sunkur* (1) and *Tirupati v. Narasimha* (2). With reference to the first of these cases it is only necessary to say that the Bench which decided the case held that there were two different causes of action and it is clear from the statement of the case in the report that this was so. One cause of action arose upon the death of one person and the second cause of action arose upon the death of that person's widow.

In *Tirupati v. Narasimha* (2) the facts are stated in the head note: "A leased certain land to B. The lease expired in 1877. B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by section 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits. It was held that the suit was not barred." The judgment is a short one and in the course of it it is remarked that the two suits were based on separate and distinct causes of action. What these separate and distinct causes of action were, however, is not defined. There may have been special

(1) (1882) I.L.R. 9 Cal. 283.

(2) (1887) I.L.R. 11 Mad. 210.

circumstances in the case which are not disclosed upon the face of the report. We do not regard this decision as an authority for the proposition which the appellant now advances.

In our judgment if a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits and under the provisions of order II, rule 2 (3) he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession; and if he is not entitled to possession he is not entitled to mesne profits. A subsequent suit for mesne profits is therefore barred.

In the result the appeal is dismissed with costs.

### MISCELLANEOUS CIVIL

*Before Mr. Justice Collister and Mr. Justice Bajpai*

SETH KANHAIYA LAL (APPLICANT) *v.* COMMISSIONER  
OF INCOME-TAX (OPPOSITE PARTY)\*

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*Income-tax Act (XI of 1922), section 64(3), proviso—"Opportunity of representing his views"—Different from "Opportunity of being heard"—Decision as to place of assessment is final—No appeal or reference therefrom—Income-tax Act, section 66(2)—"Question arising out of" the appellate order—Does not include a question which the assessee was not competent to raise in appeal.*

Where the question of the place of assessment has been decided in conformity with the provisions of section 64(3) of the Income-tax Act, and an Income-tax Officer in conformity with the final order of the Commissioner or Commissioners or the Central Board of Revenue, as the case may be, proceeds to make an assessment, the plea of jurisdiction in respect of the place of assessment can not be raised before the Assistant Commissioner on appeal and the High Court can not deal with that question under section 66 of the Act.

Under section 30 of the Income-tax Act no appeal lies from a decision under section 64(3) as to the proper place of assessment, and the assessee is not competent to raise the question