

APPELLATE CIVIL

.. Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice A. G. P. Pullan.

ABDUL MAJID KHAN AND OTHERS (PLAINTIFFS-APPELLANTS v. WAHID HUSAIN (DEFENDANT-RESPONDENT).*

1930
July, 25.

Civil Procedure Code (Act V of 1908), order II, rule 2 and order XX, rule 12—Mesne profits, suit for—Suit for possession of land, mesne profits not claimed—Subsequent suit for mesne profits from date of decree to date of possession, whether barred by order II, rule 2—Relief for possession and future mesne profits, if constitute one cause of action.

Where a person obtained a decree for possession of land but he had made no claim in that suit for mesne profits either for the period prior to the date of the institution of the suit or for the period subsequent to it and he then brought another suit claiming mesne profits from the date of the decree to the date of possession, *held*, that the second suit was not barred by order II, rule 2 of the Code of Civil Procedure. The relief for possession and the relief for past mesne profits constitute one cause of action while the relief for future mesne profits must arise out of a different cause of action. Sub-rule 3 of rule 2 of order II of the Code bars a suit for an omitted relief provided that relief arises out of the same cause of action on which the suit out of which it was omitted rests. The future mesne profits accruing after the institution of the suit do not form part of the same cause of action on which the suit for possession is ordinarily brought. Such mesne profits cannot be claimed as of right. They could not, but for order XX, rule 12 be asked for at all, and may in any case be refused by the court at its discretion. *Goswami Gordhan Lalji Maharaj v. Bishambhar Nath* (1), dissented from. *Ram Dayal v. Madan Mohan Lal* (2), *Pratap Chandra Burua v. Rani Swarnamayi* (3), *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan* (4), *Ponnammal v. Rammirda Aiyar* (5), and *Doraiswami Ayyar v. T. Subramania Aiyar* (6), referred to.

*Second Civil Appeal No. 331 of 1929, against the decree of Mirza Mohammad Munim Bakht, Subordinate Judge of Malihabad at Lucknow, dated the 29th of August, 1929, confirming the decree of Babu Hiran Kumar Ghoshal, Munsif South, Lucknow, dated the 31st of January, 1929.

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

(2) (1899) I.L.R., 21 All., 425.

(3) (1869) 4 B.L.R., 113.

(4) (1918) I.L.R., 40 All., 292.

(5) (1914) I.L.R., 38 Mad., 829.

(6) (1917) I.L.R., 41 Mad., 188.

1930

ABDUL
MAJID
KHEAN
v.
WAHID
HUSAIN.

The case was originally heard by SRIVASTAVA, J., who referred it to a Bench for decision. His order of reference is as follows :—

SRIVASTAVA, J. :—This is an appeal by the plaintiff who has been unsuccessful in both the lower courts.

In the year 1924, the plaintiff instituted a suit for possession of a plot of land and got a decree in his favour on the 28th of February, 1925. In execution of this decree he obtained possession through court on the 18th of August, 1926. Subsequently on the 2nd of July, 1928, he instituted the present suit claiming mesne profits from the date of decree in his favour until the date of his obtaining possession, namely, from February, 1925 to August, 1926.

Both the lower courts have dismissed the suit on the ground that the plaintiff ought to have claimed these mesne profits in his previous suit and that the present suit is barred by order II, rule 2 of the Code of Civil Procedure by reason of his failure to claim the mesne profits in question in the previous suit. Of the several cases referred to by the lower Appellate Court in its judgment, the ruling in *Goswami Gordhan Lalji Maharaj v. Bishambhar Nath* (1) is directly in point and fully supports the view of the learned Subordinate Judge.

The learned counsel for the plaintiff appellant on the other hand relies upon a Full Bench decision of the Allahabad High Court in *Ram Dayal v. Madan Mohan Lal* (2) and upon the decisions reported in *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan* (3) and *Muhammad Shakur v. Musammam Husani Bibi* (4), in support of the contrary view. He has also referred to two full bench decisions of the Madras High Court in *Ponnammal v. Ramamirda Aiyar* (5) and *Doraisami Ayyar v. T. Subramania Ayyar* (6).

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

(2) (1899) I.L.R., 21 All., 425

(3) (1918) I.L.R., 40 All., 292.

(4) (1927) A.I.R., All., 772.

(5) (1914) I.L.R., 38 Mad., 829

(6) (1917) I.L.R., 41 Mad., 188.

There seems to be a conflict of decisions on this point. In some cases it has been held that the cause of action for possession is quite distinct from the cause of action for mesne profits and that order II, rule 2, therefore, is no bar to a suit for mesne profits instituted subsequent to a decree for possession. There are, however, other cases which take a different view. Further in some cases a distinction has been drawn between a claim for mesne profits which have accrued due previous to the suit for possession and a claim for mesne profits which fell due subsequent to the suit for possession. I have not been referred to any case of this Court upon this point. I think the question of law which arises for determination in this case as indicated above is one of considerable importance, and it is desirable that the matter should be decided by a Bench of two Judges. I accordingly certify the case, under section 14(2) of the Oudh Courts Act, as a fit one for being heard by a Bench of two Judges.

Mr. *Piarey Lal Varma*, for the appellants.

Mr. *Hakim-ud-din*, for the respondent.

HASAN, C. J. and PULLAN, J.—This appeal has come before us on a reference under section 14(2) of the Oudh Courts Act, 1925, by a learned Judge of this Court. It is the plaintiffs' appeal in a suit which has failed in both the courts below. The facts are as follows:— On the 28th of February, 1925 the appellants' predecessor-in-interest obtained a decree for possession of a plot of land against the defendant. He made no claim in that suit for mesne-profits either for the period prior, to the date of the institution of the suit or for the period subsequent to it. In the present suit claim is made for mesne-profits from the date of the decree to the date of possession. On a preliminary defence raised by the defendant the suit has been dismissed as barred by order II, rule 2 of the Code of Civil Procedure.

1930

 ABDUL
 MAJID
 KHAN
 v.
 WAHID
 HUSAIN.

1930

ABDUL
MAJID
KHAN
v.
WAHID
HUSAIN.

Hasan, C. J.
and Pullaiah,
J.

We are of opinion that the suit is not so barred. The decision turns on the interpretation to be placed upon the provisions of sub-rule (3) of rule 2 of order II of the Code of Civil Procedure. That sub-rule is as follows:—
“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.”

If the sub-rule applies to this case then clearly the judgment of the courts below is right. But it does not apply. Neither in the judgment of the lower courts nor in the arguments before us on behalf of the respondent sufficient attention was devoted to the provisions of the sub-rule. It was broadly argued on the authority of a decision of a Bench of the High Court at Allahabad in *Goswami Gordhan Lalji Maharaj v. Bishambhar Nath* (1) that as the plaintiff could have sued for the relief as to future mesne-profits in his previous suit his present suit for the same relief is barred. That undoubtedly is an argument which is supported by the decision just now mentioned. But with due respect we are unable to found our decision on that reasoning. It is true that under order XX, rule 12, of the Code of Civil Procedure the court when passing a decree for the possession of the property in suit may also pass a decree directing an inquiry as to rent or mesne-profits from the institution of the suit until the delivery of possession to the decree-holder. But this provision as it was clearly pointed out in the Full Bench decision in *Ram Dayal v. Madan Mohan Lal* (2) is merely an enabling provision. By the very terms of the rule the court is given a discretion to direct an inquiry in respect of future mesne-profits; and this should be so in the very nature of things because the relief for future mesne-profits even if it is asked for is not a relief as was pointed out in the Full Bench case

(1) (1927) I.L.R., 49 All., 597. (2) (1899) I.L.R., 21 All., 425.

just now mentioned, to which a plaintiff is entitled as a matter of right. If that is the true nature of such a relief it follows according to our judgment that the relief for possession and the relief for past mesne-profits constitute one cause of action while the relief for future mesne-profits must arise out of a different cause of action. Sub-rule (3) of rule 2 of order II of the Code bars a suit for an omitted relief provided that relief arises out of the same cause of action on which the suit out of which it was omitted rests. In the judgment of the learned Chief Justice, Sir ARTHUR STRACHEY, in the Full Bench case of *Ram Dayal v. Madan Mohan Lal* (1) reference is made to a Full Bench decision in *Pratap Chandri Burua v. Rani Swarnamayi* (2) the leading judgment in which was delivered by Sir BARNES PEACOCK. The learned Chief Justice pointed out that "the future mesne profits accruing after the institution of the suit do not form part of the same cause of action on which the suit for possession is ordinarily brought."— Not only this but the learned Chief Justice further pointed out that such mesne-profits cannot be claimed as of right, could not, but for section 211 (order XX, rule 12) be asked for at all, and may in any case be refused by the court at its discretion. We think that this is a pronouncement which is not only authoritative but if we may respectfully say so is also indisputably correct and we are content to follow it.

In a more recent case in *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan* (3) the Full Bench decision in *Ram Dayal v. Madan Mohan Lal* (1) was again considered and followed and the learned Judges who took part in the later case were RICHARDS, C. J. and BANERJI,

J. Further, two Full Bench decisions of the High Court at Madras have expressed the same view in

1930

ABDUL
MAJID
KHANP.
WAHID
MUSAIN.HASAN, C. J.
and PULLAN,
J.

(1) (1899) I.L.R., 21 All., 425. (2) (1869) 4 B.L.R., 118.

(3) (1918) I.L.R., 40 All., 292.

1930

ABDUL
MAJID
KHAN
v.
WAHID
HUSAIN.

Hasan, G. J.
and Pullen,
J.

Ponnammal v. Rammirda Aiyar (1) and *Doraiswami Ayyar v. T. Subramania Ayyar* (2) as was taken by the Allahabad Full Bench case. In the second case Chief Justice Sir JOHN WALLIS said "that the word 'relief' in the explanation 5 to section 11 of the present Code which is in exactly the same terms as the corresponding explanation III to section 13 in the Code of 1882, means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief such as mesne-profits accruing after the date of suit as to which no cause of action had then arisen, but which the court was nevertheless expressly empowered to grant under the provisions of rule 12 of order XXII of the present Code which corresponds with sections 211 and 212 of the old Code. So if we were to follow the balance of authority it is in favour of the view which we have taken.

We accordingly allow this appeal, set aside the decrees of the courts below and under order XLI rule 23, of the Code of Civil Procedure remand the case to the court below with directions that the appeal to that court be restored to its original number in the register of appeals and be decided according to law. Costs hitherto incurred by the plaintiffs in all the three courts will be paid by the defendant. Other costs will abide the event.

Appeal allowed.

(1) (1914) 38 Mad., 829.

(2) (1917) I.L.R., 41 Mad., 188.