

APPELLATE CIVIL.

1930.

Before Jwala Prasad and James, JJ.

Nov., 19.

CHAUDHURI LOKNATH SINGH

v.

CHAUDHURI DWARIKA SINGH.*

Mesne profits, claim for, whether maintainable in the absence of any claim for recovery of possession—Code of Civil Procedure, 1908 (Act V of 1908), Order II, rules 1, 2 and 4.

A claim for mesne profits in respect of a certain land is maintainable in the absence of any claim for recovery of possession thereof.

Raj Krishna Rudra v. Phakir Dome(1), *Tirupati v. Narasimha*(2) and *Ponnammal v. Ramamirda Aiyar*(3), referred to.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

D. N. Varma, for the appellant.

B. C. Sinha, for the respondents.

JWALA PRASAD, J.—This is an appeal by the plaintiff. He and his brother Chaudhuri Badri Singh were landlords of 1 anna 7 pies 4 karants share in village Mahula Khas. The share was leased to one Mathura Singh as karta of the joint family of the defendants. The lease was renewed several times. On the expiry of the lease in the year 1392 Mathura Singh informed the plaintiff that he had given up the lease, but defendant no. 1 for himself and on behalf of defendants 2 to 4 refused to give up possession.

* Appeal from Appellate Decree no. 165 of 1929, from a decision of A. C. Davies, Esq., I.C.S., District Judge of Shahabad, dated the 31st August, 1928, reversing a decision of Babu Girindra Nath Ganguli, Munsif of Sasaram, dated the 22nd December, 1927.

(1) (1913) 19 Cal. W. N. 478.

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

(3) (1914) I. L. R. 38 Mad. 829, F. B.

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Defendants 1 to 4 had in the meantime separated from defendants 5 to 7. The plaintiff brought the present action for mesne profits for the years 1331 to 1333, the claim for prior years having been barred by time. The plaintiff did not sue for recovery of possession.

The suit was contested by defendants 1 to 4, and they took various objections to the plaintiff's claim. All these objections have been set at rest by the decisions of the Courts below, and the only question that arises in this appeal is whether the claim for mesne profits is maintainable in the absence of any claim for recovery of possession. The Munsif has held in the affirmative. The learned District Judge differing from the Munsif has held that the claim for mesne profits is not maintainable and in support of his view he relies upon Order II, rule 1, of the Civil Procedure Code. That rule says :

“ Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.”

This rule does not impose any penalty : much less the penalty of dismissal of a suit on account of its infringement. It has to be read in connection with the rules that follow. Rule 2 requires a plaintiff to include

“ the whole of the claim..... in respect of the cause of action ”,

but it gives him the option to “ relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court ”; and clause (2) of that rule imposes a penalty of debarring the plaintiff from bringing further action in respect of the portion of his claim omitted or relinquished. Similarly, clause (3) debars him from bringing a further suit in respect of any relief relinquished without the leave of the Court arising out of the same cause of action. Clause (a) of rule 4 permits the plaintiff to join in a suit for recovery of property, claims for mesne profits

or arrears of rent in respect of the property claimed or any part thereof.

Now claims for mesne profits and for ejectment are distinct reliefs and may or may not arise out of the same cause of action. The right to eject the defendant arises the moment the possession of the defendant becomes unlawful. The right to mesne profits arises at different times when the profits accrue to the defendant. The date of the cause of action for ejectment is one fixed date, whereas the dates of the cause of action for mesne profits are several. Order II, rule 4, to my mind distinctly recognises that the cause of action for ejectment is distinct from the cause of action for mesne profits, for unless they were two distinct and separate entities there was no necessity for providing in the aforesaid rule for their uniting together in one single claim against the defendant. This is amply borne out by the spirit of the authorities which recognise that a suit for mesne profits does not necessarily bar a subsequent suit for ejectment. Some of these cases have been cited by the learned Judge, notably, *Raj Krishna Rudra v. Phakir Dome*⁽¹⁾ and *Tirupati v. Narasimha*⁽²⁾. The Full Bench decision in the case of *Ponnammal v. Ramamirda Aiyar*⁽³⁾ may with profit be referred to on this point. In that case the learned Chief Justice has gone into the history of the legislation from the earliest time the Code of Civil Procedure was introduced in this country, namely, 1859, up to the present Code and has compared usefully with similar provisions in the English Common Law procedure and the conclusions from the words used in the different sections at different stages of the Code arrived at by the learned Chief Justice, notably from Order II, rule 4, of the present Code of Civil Procedure, are as follows: "It seems to us that claims for possession

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and claims for mesne profits have always been treated as separate causes of action in the Codes of Civil Procedure following in this the English law." Suppose the plaintiff wrongfully omitted to join the relief for ejectment in his present claim for mesne profits, the penalty is not the dismissal of his present claim for mesne profits which has been fully established upon evidence and the findings of both the Courts are in his favour, namely, that the plaintiff was wrongfully kept out of possession by the defendants and is entitled to mesne profits wrongfully appropriated by the defendants. If the contention of the defendants is correct, the plaintiff would only be not entitled to bring a suit for ejectment under rule 2, clause (2), of Order II but that to my mind does not debar him from bringing a suit for ejectment in future. Upon the facts in the case the plaintiff was in difficulty in bringing a suit for ejectment, inasmuch as the lands in suit have been allotted by partition to the takhtas of the other landlords.

The result is that the decree of the learned District Judge is set aside and that of the Munsif is restored.

The appeal is decreed with costs.

JAMES, J.—I agree.

Appeal decreed.

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Oct., 29, 30.
Nov., 12.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

DASAIN SAHU

v.

MUSAMMAT RAMDULARI KUER.*

Mortgage—mortgagor in possession, whether can grant a permanent lease in respect of any portion of the mortgaged

* Appeal from Appellate Decree no. 162 of 1920, from a decision of Babu Krishna Sahav, Additional Subordinate Judge of Saran, dated the 9th October, 1928, confirming a decision of Babu Shiva Pujan Ray, Munsif of Chapra, dated the 30th January, 1928.