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the land-lord and tenant we find everything is vague. There is nothing in writing about it. No one deposes to it. It is all left to be inferred from general circumstances. It seems to me that you cannot, in a case like this, from general circumstances infer that which requires to be proved by definite evidence, such as for instance that there was a building lease, or that there was a specific understanding the terms of which can be stated. I think, therefore that all that we can do is to say that although there is no specific agreement proved of the nature inferred by the lower appellate Court, yet the circumstances do show that it would be very unjust to evict the defendant without awarding him compensation. Therefore I think the order proposed by my Lord the Chief Justice is the correct order to make in this case.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920.
July 26.

ATMARAM BHASKAR DAMLE (ORIGINAL PLAINTIFF), APPELLANT *v.* PARASHRAM BALLAL KELKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Mesne profits—Partition suit—Relief for future mesne profits claimed in suit—Decree not referring to future profits—Relief must be deemed to have been refused—Separate suit for future profits—Civil Procedure Code (Act V of 1908), section 11, Explanation V.

In a suit for partition, a claim was made for possession, past mesne profits and future profits. The decree which granted partition made no reference to future profits although past profits were awarded. The plaintiff having filed a separate suit to recover future profits for three years,

* Second Appeal No. 878 of 1918.

Held, that the plaintiff having claimed future mesne profits and the Court having in its decree said nothing with regard to the future profits, the claim in respect of the same must be taken to have been refused and a separate suit for that relief was not maintainable under Explanation V to section 11, Civil Procedure Code, 1908.

Doraiswami Ayyar v. *Subramania Ayyar*[1] and *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan*[2], not followed.

SECOND appeal against the decision of C. E. Dutt, acting District Judge of Ratnagiri reversing the decree passed by E. F. Rego, First Class Subordinate Judge at Ratnagiri.

Suit to recover mesne profits.

In 1916 the plaintiff filed a suit (No. 35 of 1916) against the defendants for partition. The reliefs claimed in that suit were for partition and possession of lands and for past and future mesne profits. A decree for partition was passed and it awarded past mesne profits but no reference was made as to future profits.

In 1917, the plaintiff filed a separate suit to recover the amount of mesne profits of the plaint lands, Rs. 150, for the three years 1915, 1916 and 1917.

The defendants contended that the suit was barred under Explanation V of section 11, Civil Procedure Code, 1908.

The Subordinate Judge allowed the plaintiff's claim holding that there was nothing to show that the Court refused to award future profits and because the Court did not notice it, it did not follow that the plaintiff must lose future profits.

On appeal, the District Judge reversed the decree and dismissed the suit on the ground that as future profits were expressly asked for and had not been

(1) (1917) 41 Mad. 188. (2) (1918) 40 All. 292.

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granted by the decree, the case fell under the Explanation V to section 11, Civil Procedure Code, 1908.

The plaintiff appealed to the High Court.

V. C. Kelkar, for the appellant:—The appellant asked for future profits in the partition suit but the decree was silent. In these circumstances he can file a fresh suit for future profits. Explanation 5 of section 11 of the New Code says: "Any relief claimed and not expressly granted shall be deemed to have been refused"; but the relief must be substantial and not discretionary. The relief about future profits is discretionary and therefore, Explanation V does not apply to the present case: see *Doraiswami Ayyar* v. *Subramania Ayyar*[1] which was followed in *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan*[2], *Ram Dayal* v. *Madan Mohan Lal*[3], *Bhivrav* v. *Sitaram*[4].

V. D. Limaye, for respondent No. 1:—I submit that since the plaintiff-appellant prayed for future profits in his suit the absence of order regarding future profits in the decree that followed must be taken to mean either that they were not demanded or being demanded were refused by the Court. Explanation V of section 11 of Civil Procedure Code, 1908, must be strictly construed and the plaintiff must not be allowed to contest the very claim which, if he had been careful and cautious, could have been fought out in the earlier litigation. Therefore, it is not open to the plaintiff to bring the suit and hence the appeal must be dismissed. The cases *Muhammad Ishaq Khan* v. *Muhammad Rustom Ali Khan*[2] and *Doraiswami* v. *Subramania*[1] are distinguishable from the facts of the present case.

MACLEOD, C. J.:—The plaintiff sued to recover on account of profits of the plaint lands Rs. 150 for the

(1) (1917) 41 Mad. 188
(2) (1918) 40 All. 292.
(3) (1899) 21 All. 425.
(4) (1894) 19 Bom. 532.

three years 1915, 1916 and 1917 as per decree in suit No. 35 of 1916.

That was a partition suit in which partition was asked for and possession with a claim not only for past mesne profits, but also for future mesne profits. The decree which granted partition made no reference to future profits although prior profits were awarded. The trial Court allowed the plaintiff's claim, saying that "because the Court did not notice it, it does not follow that plaintiff must lose future profits". This decree was reversed by the District Judge on the ground that as future profits were expressly asked for and had not been expressly granted by the decree, the case came within Explanation V to section 11 of the Civil Procedure Code. Therefore the claim should, for the purposes of that section, be deemed to have been refused.

At first sight that would seem to be the obvious meaning of Explanation V. But we have been referred to two decisions, one *Doraiswami Ayyar* v. *Subramania Ayyar*[1] and the other *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan*[2] in which the contrary was decided. A distinction was made between a claim for past profits and a claim for future profits, because the claim for the latter would not have accrued when the suit was filed.

It was held that the word "relief" in the explanation meant relief arising out of the 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 arisen. We have not been referred to any decision of this Court on the point. No doubt there are authorities to the effect that the relief claimed must have been one which the Court was

[1] (1917) 41 Mad. 188.

[2] (1918) 40 All. 292.

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bound to grant and not one which it was discretionary with the Court to grant, but I see no logical basis in this case for such a distinction. The authorities with regard to future mesne profits which are cited by Mr. Mulla at p. 60 (5th edition) of his Commentary on the Civil Procedure Code of 1908 are all cases under the Code of 1882.

Granted that a claim for future profits can be made by a plaintiff, and can be granted by the Court in its decree, then it is difficult to see, with all due respect to the learned Judges who decided in favour of the opposite view in the cases I have referred to, why a claim for future profits, if made, cannot be considered as relief claimed in the plaint within the meaning of Explanation V. Under the Code of 1882 the amount of mesne profits had to be determined in execution proceedings, and section 244 which dealt with the questions which had to be decided by the Court in execution of a decree and not by a separate suit, enacted by clause (*c*) that nothing in that section should be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits were not dealt with by such decree. That is to say, I presume, in execution of such decree. Therefore it could be deduced from that clause that even if future profits were claimed but were not dealt with by the decree, then in spite of Explanation III to section 13 which corresponded to Explanation V of section 11 of the Code of 1908, a separate suit for future profits was not barred. That clause does not appear in Order XX, Rule 12, the corresponding provision in the Code of 1908, and there must be some very cogent reason for its not having been re-enacted. That rule deals with the question what the Court may decree in a suit for the recovery of possession of immoveable property. It was for the first time

provided that the Court might direct an inquiry as to future profits and then a final decree must be passed in accordance with the result of such enquiry. Now it appears to me that the last clause of section 244 of the Code of 1882 was not re-enacted because there was no longer any necessity that the bar against multiplicity of suits provided by section 11 should not apply to claims for future profits if made. The question whether a subsequent suit for future mesne profits would lie was decided in the affirmative under the Code of 1882 in *Sheo Kumar* v. *Narain Das*[1]. Whether such a suit, if the claim has not been made in the first suit, will still lie, considering the provisions of Order II, Rule 2 and the alterations made in the Code of 1908, Order XX, Rule 12, remains to be decided. On the whole I prefer to agree with the opinion expressed by Mr. Justice Ayling in *Doraiswami Ayyar* v. *Subramania Ayyar*[2] adhering to the decision of himself and Mr. Justice Hannay in *Ramaswami Iyer* v. *Srirangaraja Iyengar*[3]. It appears to me desirable to give its plain meaning to Explanation V of section 11, so that in this case the plaintiff having claimed future mesne profis and the Court having in its decree said nothing with regard to the future profits, we must take it that the Court refused to grant them.

Therefore the appeal fails and must be dismissed with costs.

HEATON, J. :—The point before us relates to what happens when a plaintiff sues for redemption or possession and in his plaint claims future mesne profits and the decree is silent as to such mesne profits.

There are two views : one is that plaintiff can bring a second suit to recover the mesne profits ; the other that he cannot.

(1) (1902) 24 All. 501.
(2) (1917) 41 Mad. 188.
(3) (1914) 2 L. W. 8.

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The matter has been a good deal discussed and is the subject of two decisions, one in *Doraiswami* v. *Ayyar Subramania Ayyar*[1] and the other in *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali*[2]. Opinions have not been unanimous. The matter at first sight appears to be one of detail. Nevertheless it seems to me to conceal an important matter of principle. Our law provides as a matter of principle—a very important principle—that the multiplicity of suits should be discouraged; that two suits should not be brought where one will suffice. That, broadly stated, is the principle, and it is given effect to by section 11 of our Code of Civil Procedure. Explanation V to that section says: "Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." Now in the earlier suit this relief of future mesne profits was expressly claimed. It was not granted and therefore apparently it must be deemed to have been refused, and if it is so deemed to have been refused, then the present suit clearly will not lie.

Rule 12 of Order XX expressly empowers a Court to make an order for future mesne profits. What the Court may do, the litigant can properly ask the Court to do. It is, therefore, quite in order for the litigant to ask in his plaint for future mesne profits. It seems to me that if he does so, then it is his business to obtain an order of the Court or an adjudication of the Court on that matter which he himself has expressly brought into his plaint. If it is overlooked by the Court, then it is the litigant's business to remind the Court of its oversight and to have it corrected, or to appeal against the decree which is silent as to this matter which the plaintiff has asked to have decided. It seems to me, therefore, that the matter is typically of the

(1) (1917) 41 Mad. 188. (2) (1918) 40 All. 292.

kind to which our general principle embodied in section 11 of the Code is intended to apply. My Lord the Chief Justice has pointed out that under the old Code there was a different provision; that there was a reason then, arising out of specific words appearing in section 244 of the Code, for holding that a second suit for future mesne profits would lie. That exception to a very important general principle no longer appears in our present Code, and it seems to me, therefore, to be incumbent on us to apply the general principle.

I think, therefore, that this appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

NAMDEO SATVASHET SHIMPI (ORIGINAL PLAINTIFF), APPELLANT *v.* DHONDU WALAD SADASHIV PATIL (ORIGINAL DEFENDANT), RESPONDENT.*

1920.

January 27.

Sale deed—Unregistered agreement to reconvey—Mortgage by conditional sale —Construction of documents.

The plaintiff purchased the property in suit from the defendant in 1895 and at the same time he passed an agreement to reconvey the property after five years. This document was not registered. Thereafter the plaintiff leased the land to the defendant from time to time and in 1916 sued to recover possession on the strength of the rent-notes passed to him by the defendant. The Court of first instance allowed the plaintiff's claim holding that section 10A of the Dekkhan Agriculturists' Relief Act did not apply and that the agreement to reconvey could not be looked into for want of registration. The lower appellate Court reversed the decree on the ground that the sale deed was obtained by misrepresentation and that the defendant would never

* Second Appeal No. 1053 of 1918.