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special circumstances the general rule should be that the costs of an application for stay of execution should be costs in the appeal.

RANGNEKAR, J. :—I agree.

NANAVATI, J. :—I agree.

Attorneys for appellants : Messrs. *Aibara & Co.*

Attorneys for respondents : Messrs. *Ranchhoddas & Hakim.*

*Order accordingly.*

F. K. D.

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Nanavati.*

BAPU VITHAL RAJPUT AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1 TO 5),  
APPELLANTS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND  
ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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October 16.

*Land Revenue Code (Bom. Act V of 1879), sections 73A and 79A—Grant of occupancy on restricted tenure—Sale by occupant of houses and trees without sanction of Collector—Forfeiture of occupancy.*

One S was the occupant of certain lands held on restricted tenure under section 73A of the Bombay Land Revenue Code before its amendment in 1913. On the said lands stood certain mango trees and three houses. In 1911 S sold the mango trees and the houses to the plaintiff without the previous sanction of the Collector. In 1921 defendant No. 2, the son of S, applied to the Collector to set aside the sale as being in breach of the provisions of the Bombay Land Revenue Code. The Collector set aside the sale under section 79A of the Bombay Land Revenue Code and ordered possession of the mango trees and houses to be given to defendant No. 2. The plaintiff appealed to the higher Revenue Authorities but the order of the Collector was confirmed. Plaintiff thereafter filed the present suit for a declaration of his title to the mango trees and houses and for possession.

*Held*, modifying the decree of the trial Court, (1) that the sale of mango trees was not in contravention of the provisions of section 73A of the Bombay Land Revenue Code as the trees were not by themselves land, and consequently their sale would not amount to transfer of occupancy within the meaning of that section ;

(2) that the sale of the houses with the land thereunder was in breach of the conditions in section 73A of the Bombay Land Revenue Code as it included the whole interest of the occupant in the land upon which the houses stood.

\*First Appeal No. 320 of 1926.

FIRST APPEAL No. 320 of 1926 from the decree in Civil Suit No. 133 of 1924 by Dadiba C. Mehta, District Judge of West Khandesh at Dhulia, in Civil Suit No. 133 of 1924.

One Sonia Vechya, father of defendant No. 2, was the occupant of certain Survey Nos. at Narayanpur in Nawapur Taluka in West Khandesh. In 1902 Government by Notification No. 1116 of February 18, 1902, made section 73A of the Bombay Land Revenue Code applicable to Nawapur Taluka including the village of Narayanpur. There were a considerable number of mango trees on the land held by Sonia. There were also three houses in one of the Survey Numbers of which Sonia was the occupant. In 1903 a Survey Settlement was introduced for the first time in the Nawapur Taluka. At the time of the settlement Government did not reserve to themselves any of the mango trees standing on the lands of Sonia. In 1907 Sonia applied to the Assistant Collector for a *kaul* in respect of the trees in his Survey Numbers. To that the Assistant Collector replied that the issue of a *kaul* was not necessary as the trees had already been declared to be of the ownership of Sonia. In 1911 Sonia sold all the mango trees and three houses to one Gatalu for Rs. 2,500. On January 24, 1921, Sonia's son Dongrya (defendant No. 2) applied to the Collector for an order that the mango trees and three houses had been wrongly sold by his father to Gatalu and that they should be restored to him. On April 4, 1922, the Collector after notice to the plaintiffs, the descendants of Gatalu, evicted the plaintiffs under section 79A of the Bombay Land Revenue Code. This order of the Collector was confirmed by the higher Revenue Authorities. On November 4, 1924, the plaintiffs filed the present suit against the Secretary of State and Dongrya *walad* Sonia for a declaration of their title to the mango trees and the three houses and for possession. The trial Court held that the order of the Collector restoring the mango trees and houses to defendant No. 2 was perfectly legal under section 79A of the Bombay Land Revenue Code and

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dismissed the plaintiffs' suit. Plaintiffs therefore appealed to the High Court.

*G. N. Thakor*, with *D. R. Patwardhan*, for the appellants.

*W. B. Pradhan*, Acting Government Pleader, for respondent No. 1.

BEAUMONT, C. J. :—This is an appeal from a decision of the District Judge of West Khandesh. The plaintiffs sued for a declaration that the three houses and the mango trees upon the land, the survey numbers of which are referred to in the judgment of the learned District Judge, belong to them and for recovery of possession thereof from defendant No. 2, and also to recover price of mango crops and damages from both defendants.

The material facts are that one Sonia, the predecessor-in-title of the plaintiffs, became the occupier of the survey numbers referred to, upon which stood the mango trees in suit and upon one of which Survey Numbers, viz., 127, stood the three houses in suit. On the grant of the land to Sonia, Government did not reserve the trees under the power contained in section 40 of the Bombay Land Revenue Code, and in the year 1907 Sonia applied to the Collector for a *kaul* or lease of the trees, and the Collector replied that the trees had been declared to be of Sonia's ownership and that no *kaul* was necessary. In accordance with this opinion of the Collector an entry was made in the last column of village form No. 1 to the effect that the mango trees were of the ownership of the Khatedar Sonia, see Exhibit 25. There is therefore no doubt that Sonia was the owner of the trees in suit.

In 1911 Sonia sold the trees and houses in the survey numbers in question to the plaintiffs. In the year 1921 the son of Sonia, viz., defendant No. 2 applied to Government alleging that the sale to the plaintiffs was in breach of the provisions of the Bombay Land Revenue Code, and asking

that such sale might be set aside. The Collector accepted this view and on April 27, 1922, purporting to act under section 79A of the Bombay Land Revenue Code, he ordered possession of the mango trees and houses in suit to be given to defendant No. 2. The plaintiffs appealed to higher Revenue Authorities, but the order of the Collector was upheld, and this suit was accordingly filed on November 14, 1924.

The learned Judge held that the sale of 1911 under which the plaintiffs claim was in breach of section 73A, and that the Collector's order was therefore valid under section 79A of the Bombay Land Revenue Code. He also held that the plaintiffs' claim was barred by limitation, and accordingly the plaintiffs' suit was dismissed. The question as to limitation is really the same question as that which arises on the merits, because if the Collector's order was *ultra vires* and a nullity in whole or in part, it would not be necessary for the plaintiffs to take steps to set aside the order or part of the order which is a nullity.

The learned trial Judge dealt with the provisions of the Bombay Land Revenue Code as they existed at the date of the trial. That, I think, was not correct. The Bombay Land Revenue Code was amended in 1913, and as the transfer in this case was made in 1911, the rights of the parties must depend upon the Act as it stood at that time.

Section 73A (1) of the Bombay Land Revenue Code in 1911 was in the following terms :—

“ 73A. (1) Notwithstanding anything in the foregoing section, in any tract or village to which Government may, by Notification published before the introduction therein of an original survey settlement under section 103, declare the provisions of this section applicable, the occupancy or interest of the occupant in the land shall not after the date of such Notification be transferable without the previous sanction of the Collector.”

It is not disputed that the conditions necessary to bring this section into operation had been performed prior to the material dates. “Occupancy” is defined in the Act as

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signifying the sum of the rights vested in an occupant as such, and "occupant" is defined as a holder of unalienated land. "Land" is defined as including things attached to the earth; all these definitions applying only if there is nothing repugnant in the subject or context. Reading section 73A in the light of the definitions, the transfer that is forbidden is of the sum of the rights vested in the holder or the interest of the holder in the land, including trees and houses as being things attached to the earth.

In the case of the trees which were assigned, these were assigned apart from any land, and the assignment would, in my opinion, only include such necessary easements over the land as would entitle the transferee to enjoy the trees sold to him. In the case of the houses, these were sold together with the land on which they stood. (See Exhibit 28.)

The first question which we have to determine is whether the section prohibits a transfer of trees apart from land. The contention of Government is that land in section 73A includes trees, there being nothing in the context to exclude the definition of land, and that accordingly the transfer of trees is prohibited. The contention of Mr. Thakor for the appellant was that the scheme of the Act is to deal with occupancy rights and not ownership, and that trees are the subject of ownership. I am, however, unable to agree that the Act makes any such distinction. It is true that under section 40 the trees may be reserved to Government, though in the present instance this was not done, and it is true that a good many sections draw a distinction between the land and the trees; see for instance sections 56, 62, and 65. But the occupant acquires his rights in the trees as part of the occupancy; the trees as part of the land are subject to payment of land revenue, and the trees as part of the land are liable to forfeiture for non-payment of land revenue. No doubt the occupant as part of his occupancy rights may cut down or uproot and

remove a tree, but equally may he remove a piece of rock which forms part of the soil.

The real question seems to me to be what is the "land" an interest in which the occupier is precluded from transferring under section 73A. It is to be noticed that the words "or any part of the land" are not included in the section. It is clear that a tree is not in itself land, though it may be included in the word "land". At the most it forms part of the land. The ownership of land normally extends *ab imo usque ad coelum* and I apprehend that the same rule applies to occupancy under the Bombay Land Revenue Code, subject to any reservations in favour of Government. A tree can never occupy more than a part of the soil and part of the air above the soil. Whatever the unit of land dealt with in section 73A may be, and assuming for the purpose of my judgment that it is each and every piece of land held by the occupant, a tree forms only part of that unit, and it seems to me that the section does not preclude the transfer of a part of land. It is settled law in England that the covenant commonly found in leases against assigning or underletting the land demised is not broken by an assignment or underletting of part of the land, the covenant not expressly referring to part of the land. Section 73A restricts the rights of the occupant, and I see no reason why we should construe the section less strictly than a covenant in a lease, and extend it to a part of land, when a part of land is not mentioned. It is to be observed that if the transfer of growing trees is prohibited by the section, it would seem that a transfer of growing crops would also be prohibited, and I apprehend that a sale of growing crops is not an unusual transaction.

In the case of the houses the position is different. The transfer, Exhibit 28, is of the houses with the land thereunder and stones and earth, and in my opinion that includes the whole interest of the occupant in the land upon which the

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houses stand. I think, therefore, that that transfer was prohibited by section 73A.

In the result, therefore, I think that the appeal must be allowed in respect of the mango trees, but must be dismissed in respect of the houses. There will have to be an account in respect of the profits of the mango trees. Costs in this Court and in the Court below to be proportionate to the respective values of the trees and the houses, the appellant getting the proportion of costs attributable to the trees, and the respondent, the proportion of costs attributable to the houses.

NANAVATI, J. :—The plaintiffs sued in the Court of the District Judge, West Khandesh, for a declaration that the three houses and mango trees described in the plaint belong to them and for recovery of possession of the same. It was alleged that the houses and trees were in the possession and enjoyment of Sonia, the father of defendant No. 2, and were situated in lands in the occupation of Sonia. The plaintiffs further stated that the houses and mango trees were sold by the deceased Sonia to the deceased Gatalu for the sum of Rs. 2,500 by a registered sale deed dated July 15, 1911. The plaintiffs are the surviving coparceners of the deceased Gatalu. It was further stated that defendant No. 2 Dongrya, son of Sonia, applied to the Collector to have the houses and trees restored to his possession, whereupon the Collector passed an order to the effect that the lands in which the houses and trees stood were held on restricted tenure by the deceased Sonia; that the sale to Gatalu by Sonia was illegal, and that the plaintiffs should restore possession of the houses and trees to defendant No. 2. The plaintiffs claim that the deceased Sonia had the right to transfer the said houses and trees and that the order of the Collector was not legal.

Defendant No. 1, who is the Secretary of State for India in Council, contended that the suit was barred by limitation;

that the survey numbers in question were held on restricted tenure; and that as the houses and trees in suit stood in the said survey numbers they could not be transferred without the previous sanction of the Collector; and that accordingly the transfer was properly set aside under the Bombay Land Revenue Code. Defendant No. 2 did not appear.

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The learned District Judge held that the suit was barred under Article 14 of the Indian Limitation Act; that the lands mentioned in the plaint were held under restricted tenure; that the previous sanction of the Collector was necessary before the houses and trees in suit could be transferred; and that the order of the Collector was legal and proper under section 79A of the Bombay Land Revenue Code and accordingly dismissed the suit with costs. The plaintiffs have appealed.

The principal question in this case is whether the order of the Collector compelling the plaintiffs to give up possession of the houses and trees under section 79A of the Bombay Land Revenue Code was a legal order. The point of limitation also depends on the answer to this question, because if the action of the Collector was not covered by that section his order was a nullity, and it would not be necessary for the plaintiffs to have it set aside in order to succeed in the present suit. The suit would in that case not fall under Article 14 of the Indian Limitation Act. The appellants were dispossessed on April 4, 1922, as appears from Exhibit 30, and there would be no bar of limitation if the Collector's order was not competent under section 79A as alleged.

Coming, therefore, to a consideration of the powers of the Collector under the Bombay Land Revenue Code (Bombay Act V of 1879), it may be noted at the outset that the material sections were amended in 1913. The question, therefore, whether Sonia was entitled to transfer the property in suit would depend on the language of the Act



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as it stood at that date. Now, the Code by section 73 lays down that an occupancy is, generally speaking, heritable and transferable property. Then section 73A which was inserted by an amendment in 1901 (as it stood before 1913) enacted as follows :—

“(1) Notwithstanding anything in the foregoing section, in any tract or village to which Government may, by Notification published before the introduction therein of an original survey-settlement under section 103, declare the provisions of this section applicable, the occupancy or interest of the occupant in the land shall not after the date of such Notification be transferable without the previous sanction of the Collector.”

Sub-section (2) is not material for the present purpose. Section 79A, which was also inserted in 1901, enacted as follows (as it stood before 1913). Its form, as it stood after 1913, does not, I think, make any substantial change in the position.

Any person unauthorizedly occupying or wrongfully in possession of any land

(a) to the use and occupation of which he has ceased to be entitled under any of the provisions of this Act, or

(b) of which the occupancy right is not transferable without previous sanction “under section 73A or by virtue of any condition lawfully annexed to the occupancy under the provisions of section 62, 67 or 68, may be summarily evicted by the Collector.”

It is common ground that a notification had been published prior to the introduction of the original survey settlement in the Taluka where the land in suit is situated by which the land in question came to be held under what is known as restricted tenure under section 73A, and the occupancy or interest of the occupant in the land thereby became not transferable without the previous sanction of the Collector. What was transferred by Sonia under the sale-deed Exhibit 28, however, was not the whole of his land but three houses and a large number of mango trees situated on the land. Whether the transfer contravened section 73A or not would, therefore, depend on the question whether the

transfer was of the occupancy or of the interest of the occupant in the land. "Occupancy" is defined in section 3 (18) of the old Code as follows:—

" 'Occupancy' signifies the sum of the rights vested in an occupant as such."

Under the same Code "occupant" signified a holder of unalienated land [vide section 3 (16)], and "land" was defined in section 3 (4) as including benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Now, it seems to me clear that as far as the transfer of the houses is concerned, it necessarily implied a transfer of the land on which the houses stood. When a house is mentioned it is usually understood as including the land and not merely the superstructure apart from the land on which it stands. The superstructures were not sold as such for the purpose by being dismantled and taken away. Moreover, in the present case the land below the houses is expressly conveyed. What was sold was the three houses including the land on which they stood. To that extent Sonia had undoubtedly sold "the land" of which he was a holder, in other words the occupant, and though he had not sold the whole of his holding or occupancy, he certainly had sold the whole of his rights in a portion of it. Now I do not think that section 73A can be interpreted as permitting such a transfer and that was not what was contended before us. The learned counsel for the appellants merely confined his claim in appeal to the value of the superstructures which according to him had been taken possession of without giving him an opportunity of removing the same. Even to this restricted claim I do not think that the appellants can be held to be entitled as of right. The purchaser was well aware of the tenure on which Sonia held the land and was careful not to take a transfer of the land surrounding the houses. He took the risk of his view of the transfer of the houses being erroneous and cannot complain if he was summarily evicted from the land including the superstructures.

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The question of the sale of trees presents much more difficulty. It is true that "land" as defined includes benefits to arise out of land and things attached to the earth. It is also true that trees are attached to the earth and the value of the fruits growing on the trees is a benefit arising out of land. But serious difficulties would arise if the person to whom trees are sold is to be regarded as the occupant of "land" under the Bombay Land Revenue Code. It was contended by the learned advocate for the appellants that according to the scheme of the Code land can only be the subject of an occupancy whereas trees are regarded as being the subject of ownership; for example, in section 40 of the Code the question of trees is specifically dealt with and it is provided that in the case of villages, "of which the original survey-settlement shall be completed after the passing of this Act," (which is the case here), "the right of Government to all trees in unalienated land shall be deemed to be conceded to the occupant of such land, except in so far as any such rights may be reserved . . . ." In the case before us, Sonia applied for a declaration of his ownership of the trees and asked for an agreement or *kaul* declaring his right but he was informed that no such *kaul* was necessary and that a note would be made in the relevant registers that the trees were of his ownership. That such a note was made can be seen from Exhibit 25, in the remarks column of which it is stated against the entries of the lands of which Sonia was the occupant as follows:—

S. No. 62. . . . . "Dakhala (note) was taken as per order etc., in respect of the small and big mango trees 30 standing in the said number being of the ownership of the said Khatedar (occupant) Sonia Vechia. Dated the 1st of May 1908."

Similar notes are made with regard to other survey numbers also. It is, therefore, clear that Government themselves have recognised the ownership of Sonia to the trees as

something different and distinct from his right of occupancy in the land.

Again section 56 which declares that land revenue is to be a paramount charge on the land is so worded as to show that occupancy does not necessarily include the right to the trees standing on the land, for, it declares that "failure in payment of land revenue shall make the occupancy . . . together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land or permanently fastened to anything attached to the land, liable to forfeiture." It may of course be argued that these words referring to trees, crops and buildings have been put in there by way of greater caution. It seems to be clear from this section that when an occupancy is sold for arrears of land revenue, the sale passes the right to all trees, crops and buildings standing on the land. But the fact that it should have been necessary to mention this separately is some indication that the right to trees, crops and buildings is not necessarily comprised in the occupancy. A person occupying land on which the trees have been reserved by Government is not any the less an occupant of the land.

It is true that "land" as defined in the Code includes things attached to the earth; but where we have an inclusive definition of that sort, great care is required in applying it in interpreting the word wherever it occurs. The definition clause itself starts by saying "Unless there be something repugnant in the subject or context." Therefore, in the first place we have to see whether there is any repugnancy in applying the inclusive definition. But even in a case where it is not possible to say definitely that such repugnancy exists, it is a recognised principle of judicial interpretation that the inclusive meaning is not to be necessarily and indiscriminately applied to the word. Where a term is interpreted in a statute as 'including' etc., the comprehensive sense is "not to be taken as strictly defining what the

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meaning of a word must be under all circumstances, but merely as declaring what things may be comprehended within the term where the circumstances require that they should": *Emperor v. B. H. DeSouza*.<sup>(1)</sup> The principle is based on the undermentioned English cases and is well settled: *The Queen v. The Justices of Cambridgeshire*<sup>(2)</sup>; *Meux v. Jacobs*<sup>(3)</sup>; and *Mayor, &c., of Portsmouth v. Smith*.<sup>(4)</sup>

It would, therefore, be for the Court to say whether in interpreting the term "occupancy or interest of the occupant in the land" we should interpret "land" as necessarily meaning the trees standing on the land. There is no distinction in principle between annual crops and fruit trees from which an annual revenue may be derived. Where an agriculturist sells the standing crops before they are harvested to a third party, are we to regard the purchaser of the standing crops as being an occupant under the Bombay Land Revenue Code for the time being? I am not aware that he has been held to be such at any time or that even the Revenue Authorities have ever regarded such a purchaser as an occupant. If that is so, it is difficult to see why a person buying mango trees standing in occupied land should be regarded as occupying the land in addition to the Khatedar or occupant who is in possession. Unless the purchaser of the fruit trees can be regarded as unauthorisedly occupying "land", section 79A would not apply.

The ordinary meaning attached to a transaction such as the sale of fruit trees is merely this, that the purchaser has the right to enjoy the produce of the trees so long as the trees are in existence and, when the trees die or are cut down, to appropriate the timber thereof. He is not regarded as having acquired any title to the land connected with the trees. The purchaser would not be allowed to say, after the tree had ceased to exist, that he had any right to the land on which, let us say, the trunk of the tree stood. He would not be

<sup>(1)</sup> (1911) 35 Bom. 412.

<sup>(2)</sup> (1838) 7 Ad. & E. 480 at p. 491.

<sup>(3)</sup> (1875) L. R. 7 H. L. 481 at p. 493.

<sup>(4)</sup> (1885) 10 App. Cas. 364 at p. 375.

allowed to plant another tree in the same spot and to appropriate its produce after the original tree was dead. Herein lies an essential difference between the sale of a house and the sale of a tree. If a house was destroyed or pulled down, the purchaser of the house would ordinarily be entitled to build another house on the land, but in a transaction like the present in which trees are sold, the rights of the purchaser cease once the trees are dead. Any other view would lead to very serious difficulties. If it is argued that a sale of a tree necessarily implies sale of some land, the answer would be that it is impossible to decide what is the land that is sold. Is it only the small circle of land out of which the trunk of the tree emerges above the surface, or, is it the land through which the roots of the tree spread themselves? Or, is it the land which is covered by the shade of the tree? Or again, is it the land from which by means of percolating water the tree draws its sustenance? It seems to me that in a transaction of the sale of trees the parties do not have in mind any question relating to the transfer of any land in the physical sense and the transaction, therefore, is essentially one relating to the sale of the produce of the trees so long as they are alive and the timber thereafter when they are dead. In this view although the tree may continue to stand on or be attached to the land, what is sold is not the tree as part of the land but the tree as something that is capable of being severed from the land and appropriated and enjoyed as such. To put the matter in another way, the definition of "land" as given in the Code includes trees, but it does not say that "land" means trees apart from the land itself, and a sale of trees in essence is a sale of something which is enjoyed apart from the land, though for the time being that thing is attached to the land.

Then, again, the words "summarily evicted by the Collector" used in section 79A are hardly appropriate when referring to trees. Nor do we speak of persons who own trees as occupying them. I am inclined to think, therefore,

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that it is repugnant to the context to interpret purchase of trees as being unauthorised occupation of "land" as contemplated in section 79A. But, even if the point of repugnancy be considered doubtful, I think that in view of the considerations set out above it must be held that though land as defined in the Code includes trees, a sale of trees in an occupancy does not mean a transfer of occupancy, and is, therefore, not subject to the restrictions of section 73A. It follows, therefore, that the order of the Collector dispossessing the appellants of the trees was not covered by the authority conferred in section 79A of the Code and was invalid to that extent.

*Decree varied.*

B. G. R.

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.*

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LAXMIBAI WIDOW OF ANANT LAXMAN KONDKAR (ORIGINAL PLAINTIFF),  
APPELLANT v. JAGANNATH RAVJI KONDKAR AND OTHERS (ORIGINAL  
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*Civil Procedure Code (Act V of 1908), section 11, explanation V and Order XX, rule 12—  
Res-judicata—Suit for possession—Consent decree—Decree directing delivery of  
immediate possession—Decree silent as to mesne profits after date of judgment—Possession  
not delivered—Second suit for future mesne profits not barred.*

Defendants were tenants of the plaintiff. The tenancy having expired, plaintiff in 1926 brought a suit claiming possession, arrears of rent and mesne profits until delivery of possession. On March 29, 1927, a consent decree was passed ordering defendants to deliver immediate possession of the property and in case they failed to do so plaintiff to obtain possession from defendants by executing the decree. It was also ordered that defendants do pay to the plaintiff a certain sum on account of mesne profits for the period mentioned in the plaint and from the date of the plaint till judgment. No order was made in respect of mesne profits which might accrue after the date of judgment. In 1928 plaintiff sued to recover the income for the year 1927 and the amount of assessment for the year 1927-28. The Subordinate Judge held that the suit was barred by *res judicata* as the claim for future mesne profits not having been granted in the decree it must be deemed to have been refused under section 11, explanation V of the Civil Procedure Code, 1908. On appeal to the High Court:

\*First Appeal No. 233 of 1929.