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carry in before the Taxing Master an objection in writing to such allowance or disallowance specifying in a short list the item or items or part or parts thereof objected to, and under rule 555 the Taxing Master has to consider the items which are specifically objected to and reconsider his taxation. But that was not the position here.

Attorneys for appellant: Messrs. *D. N. Rege & Co.*

Attorneys for respondent: Messrs. *Shamrao, Minochehr & Hiratal.*

Appeal allowed.

B. K. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1934
 November 16

RAMA KALLAPPA PUJARI (ORIGINAL PLAINTIFF), APPELLANT v. SAIDAPPA SIDRAMA PUJARI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order II, rules 2 and 4—Suit for partition and possession—No claim made for mesne profits—Decree for partition—Subsequent suit for mesne profits—Different causes of action—Suit not barred.

In a suit filed for partition, in 1920, the plaintiff obtained a decree for possession of a third share in the property. The plaint contained no claim for mesne profits and the decree said nothing about mesne profits. In 1928 the plaintiff got possession of his one-third of the property. Thereafter the plaintiff sued to recover mesne profits in respect of his third part of the joint property accrued between 1920 to 1928. A question being raised whether the suit was barred under the provisions of Order II, rule 2 of the Civil Procedure Code, 1908:

Held, that the suit was not barred, as the cause of action on the plaintiff's claim for partition and possession in the original suit was different from that in respect of the claim for mesne profits in the subsequent suit.

Atmaram Bhaskar v. Paraskram Ballal,⁽¹⁾ *Ramchandra v. Lodha*,⁽²⁾ *Laxmibai v. Jagannath Rajji*,⁽³⁾ distinguished.

Ram Karan Singh v. Nakhshad Ahir,⁽⁴⁾ *Ponnammal v. Ramaniarda Aiyar*,⁽⁵⁾ *Kalidas Rakshit v. Keshablal Majumdar*,⁽⁶⁾ followed.

*Second Appeal No. 14 of 1931.

⁽¹⁾ (1920) 44 Bom. 954.

⁽²⁾ (1924) 26 Bom. L. R. 288.

⁽³⁾ (1931) 56 Bom. 292.

⁽⁴⁾ (1931) 53 All. 951 F. B.

⁽⁵⁾ (1914) 38 Mad. 829 F. B.

⁽⁶⁾ (1930) 58 Cal. 1040.

SECOND APPEAL against the decision of R. W. H. Davies, Assistant Judge at Belgaum, reversing the decree passed by R. R. Karnik, Subordinate Judge at Athni.

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Suit for mesne profits.

The facts material for the purposes of this report are sufficiently stated in the judgment of the learned Chief Justice.

H. B. Gumaste, for the appellant.

R. A. Jahagirdar, for the respondents.

BEAUMONT C. J. This is a second appeal from the decision of the Assistant Judge at Belgaum, and it raises a short point of law. The plaintiff filed a suit for partition, and on January 22, 1920, got a decree for possession of a third of the property. Ultimately the property was divided by metes and bounds, and in 1928 the plaintiff got possession of his one-third of the property. The plaint contained no claim for mesne profits, past or future, and the decree in the suit said nothing about mesne profits. This suit is filed by the plaintiff for recovering the mesne profits in respect of his third part of the joint property accrued between the date of the decree in 1920, and the date, in 1928, when the plaintiff got possession of his share of the property, and a preliminary issue was raised as to whether the suit lay, or whether it was barred under the provisions of Order II, rule 2, Civil Procedure Code. The learned Subordinate Judge in a careful judgment came to the conclusion that the suit was not barred. On appeal the Assistant Judge of Belgaum came to an opposite conclusion, and answered the preliminary issue by saying that the suit was not maintainable. The question is whether that decision is right.

Order II, rule 2, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and later provisions of the rule enact that if the plaintiff omits to sue in respect

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of any portion of the claim, he shall not afterwards sue in respect of that portion. The rule deals with claims arising under the same cause of action, and it does not forbid the joinder of different causes of action. The question which arises in this appeal really is whether the plaintiff's claim for possession in the original suit is the same cause of action as his claim for mesne profits in the present suit. Mr. Jahagirdar for the respondents, in support of the judgment under appeal, contends that the cause of action for possession and for mesne profits is the same. His argument is that the plaintiff's cause of action is founded on this, that the defendant is wrongfully in possession of the land, and the plaintiff is entitled to claim possession of the land, and past and future mesne profits. But I think the answer to that is that the plaintiff cannot strictly be said to have a cause of action for something which does not exist at the date of the institution of the suit, and future profits must necessarily be in that position. The plaintiff, no doubt, can claim possession, and if he is entitled to possession, it will follow that he will also be entitled to claim future mesne profits as and when they accrue, but he cannot strictly claim mesne profits which have not accrued. The language of Order II, rule 4, which provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except "(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof" certainly suggests that the Legislature regarded a claim for possession of immoveable property and a claim for mesne profits in respect of that property as being separate causes of action. And the language of Order XX, rule 12, rather suggests the same conclusion, because that rule provides that where a suit is for recovery of possession of immoveable property and for mesne profits, the Court may pass a decree for possession, and may direct an inquiry as to mesne profits, and a final decree may be passed in accordance with the

result of the inquiry. But the rule does not provide that an order can be made in the first instance for recovery of possession and future mesne profits and direct an inquiry to ascertain the amount of those mesne profits, as might be expected if the cause of action for possession and for mesne profits was the same.

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The view of other High Courts in India is in favour of the appellant's argument in this case, that a suit of this nature lies. The decisions in *Ram Karan Singh v. Nakhhed Ahir*,⁽¹⁾ *Ponnammal v. Ramamirda Aiyar*⁽²⁾ and *Kalidas Rakshit v. Keshablal Majumdar*⁽³⁾ are all in favour of the view that an action for future mesne profits of this character is maintainable. But it is argued that this Court has taken a different view. In my opinion, none of the decisions of this Court exactly cover the present case, in which in the former suit possession only was claimed, and no claim was made for mesne profits. The case principally relied on, on behalf of the respondents, is *Atmaram Bhaskar v. Parashram Ballal*.⁽⁴⁾ That was a case in which mesne profits were claimed, past as well as future, and the Court's order was silent as to future profits, and it was held that the Court must be held under Explanation V to section 11 of the Civil Procedure Code to have decreed against the plaintiff's claim to future profits. Whether that decision is right or wrong, and it is not in accordance with decisions of other High Courts, it does not govern this case, in which no claim was made for future mesne profits. The next case referred to, *Ramchandra v. Lodha*,⁽⁵⁾ also does not govern this case, because it deals only with mesne profits accrued prior to the date of the suit, and it was held that a suit for such mesne profits was maintainable. If that decision is right, a point upon which I desire to express no opinion, it is an *a fortiori* case in favour of the present appellant, because it is much easier to contend in the case of past mesne profits,

⁽¹⁾ (1931) 53 All. 951, F. B.

⁽²⁾ (1930) 58 Cal. 1040.

⁽³⁾ (1914) 38 Mad. 829, F. B.

⁽⁴⁾ (1920) 44 Bom. 954.

⁽⁵⁾ (1924) 26 Bom. L. R. 288.

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than in the case of future mesne profits, that the claim arises on the same cause of action as the claim to possession. The other case in this Court referred to, *Laxmibai v. Jagannath Rawji*,⁽¹⁾ also does not apply, because that was a case of an order for immediate possession, in which no question of future mesne profits could arise unless the order was disobeyed. In my opinion, the view taken in the other High Courts is the right view, and a claim for future mesne profits does not arise on the same cause of action as a claim for possession of the land. That being so, this suit is not barred by Order II, rule 2.

Two other issues were raised in the lower appellate Court, but they were not answered by the learned Judge, and therefore we are not in the position of being able to dispose of the suit on its merits. It would have been more convenient if the learned Assistant Judge had answered the two other issues on the assumption that he was wrong in holding that the suit did not lie, but as he did not adopt that course, we have no option but to allow this appeal and refer the matter back to the lower appellate Court to deal with the other issues. Respondents will pay the appellant's costs of his appeal. Costs in the lower Courts will be dealt with by the lower appellate Court.

N. J. WADIA J. The cause of action for the claim for future mesne profits cannot be said to be the same as the cause of action for partition and possession. The cause of action for future mesne profits had not arisen when the first suit was filed. If Mr. Jabagirdar's contention that the cause of action for future mesne profits was the same were accepted, the provisions of rule 4 of Order II would become meaningless. That rule expressly provides that a claim for mesne profits can be joined in a suit for the recovery of possession of immoveable property. If a claim for mesne profits could only be made along with a claim for possession, there would have been no need whatever

⁽¹⁾ (1931) 56 Bom. 292.

for the provisions of rule 4. The decision in *Atmaram Bhaskar v. Parashram Ballal*⁽¹⁾ does not help the respondent in the present case at all. That decision turned on the application of Explanation V to section 11 of the Civil Procedure Code. In that case a claim for future mesne profits had been made, and was not allowed. In the present case no claim for future mesne profits had been made at all. The decision in *Ramchandra v. Lodha*⁽²⁾ goes the length of holding that even where the plaintiff had omitted to sue for past mesne profits when suing for possession, he could bring a second suit for such past mesne profits. Whether that decision is correct or not, it certainly supports the plaintiff's claim in the present case for future mesne profits, and the two decisions of the Allahabad and Calcutta High Courts, *Ram Karan Singh v. Nakhhed Ahir*⁽³⁾ and *Kalidas Rakshit v. Keshab Lal Majumdar*,⁽⁴⁾ both support the appellant's contention that a separate suit would lie for future mesne profits. I agree, therefore, that the appeal must be allowed.

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Appeal allowed.

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⁽¹⁾ (1920) 44 Bom. 954.

⁽³⁾ (1931) 53 All. 951, F. B.

⁽²⁾ (1924) 26 Bom. L. R. 288.

⁽⁴⁾ (1930) 58 Cal. 1040.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

JINNAPPA MAHADEVAPPA KUNDACHI AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS v: CHIMMAVA HUSBAND KRISHNAPPA KOCHARI AND ANOTHER
(ORIGINAL DEFENDANTS), RESPONDENTS.*

1934
December 3

Hindu Law—Joint family—Immoveable property—Gift—Gift to daughter for looking after father in old age—Gift invalid.

Under the Mitakshara school of Hindu law, a father has no right to make a gift even of a small portion of joint family immoveable property in favour of

* Second Appeal No. 191 of 1933.