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kist was Rs. 94-13-1½ and for the March kist, Rs. 118-8-8½. The arrears for which the property was sold amounted to Rs. 145. It would therefore, appear that the arrears must have been due partly for the June kist and partly for the March kist, payments having satisfied the arrears of all previous kists. But the plaintiffs contend that the Collector's books show that he was in the habit of crediting payments first to current and then to arrear demands, and the Subordinate Judge makes out that adopting this system of apportionment, part of the sum of Rs. 145 was due for arrears of 1895-96. But it would seem to us that the Collector was not bound to apportion the payments in this manner. In making up the account of the arrears before the sale he must have added the payments together, deducted their total amount from the sum of the total demands, and finding that the arrears did not exceed the demands for the kists of March and June, as in fact was the case, issued no notice under section 5, because in the circumstances no notice was necessary under the law. He would seem to us to have been entitled to do so.

However this may be, it cannot, we think, be held that the issue of a notice under section 5 was a condition precedent to the sale taking place, the non-compliance with which makes the sale no sale, as in case of its being found that there were no arrears for which a sale could legally be held: see *Balkishen Das* v. *Simpson* (1). The non-issue of such a notice would seem to be [117] an irregularity. The opinion to the contrary effect expressed in *Mohabeer Pershad Singh* v. *The Collector of Tirhoot* (2) is an *obiter dictum* and would seem to be at variance with the views of their Lordships of the Privy Council, as expressed in *Gobind Lal Roy* v. *Ramjanam Misser* (3). Moreover, the non-issue of a notice under section 5 would seem to be an irregularity of the nature contemplated by section 33 of the Act, and, hence, it must be specified in the appeal to the Commissioner, and if not so specified, cannot be urged in a subsequent suit: *Gobind Lal Ray* v. *Ramjanam Misser* (3). Now, the particular objection now taken to the non-issue of the notice under section 5 was, strictly speaking, not specified in the appeal to the Commissioner in this case, for the objection taken was as to the non-issue of a notice in respect of a sum of Rs. 206 due for the June kist of 1895, for which it was supposed the estate had been sold. In any case the inadequacy of the price for which the property was sold is neither proved, nor can be inferred, to be the result of the want of this notice under section 5, and accordingly the sale is not voidable on this ground.

For these reasons we decree this appeal with costs.

Appeal allowed.

32 C. 118.

[118] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

G. S. HAYS *v.* PADMANAND SINGH.*

[2nd and 10th December, 1903.]

Mesne profits—Limitation—Act (XV of 1877) s. 14 Sch. II, Art. 109—"Cause of a like nature"—Res judicata—Past and future mesne profits, previous suit for—Civil Procedure Code (Act XIV of 1882) s. 13. Expl. III.

*Appeal from Original Decree, No. 238 of 1900, against the decree of Shashi Bhusan Chatterjee, Subordinate Judge of Purnea, dated April 30, 1900.

(1) (1898) I. L. R. 25 Cal. 833; L. R. 25 I. A. 151.

(2) (1871) 15 W. R. 137.

(3) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.

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For the purpose of limitation, mesne profits must be regarded as accruing due from day to day, unless shown to fall due otherwise; so that all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred.

Thakoor Dass Roy Chowdhry v. *Nobin Kristo Ghose* (1) distinguished. *Abbas* v. *Fassih-ud-din* (2) referred to.

Section 14 of the Limitation Act does not entitle a plaintiff in a subsequent suit for mesne profits to a deduction of the period during which his previous suit was pending, when the Court in the previous suit did not pass a decree for mesne profits subsequent to the institution of the suit, either through inadvertence or because the claim was not specially pressed.

Deo Prosad Sing v. *Pertab Kairee* (3), *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (4), *Sheth Kahandas Narandas* v. *Dahiabhai* (5) and *Putali Meheti* v. *Tulja* (6) distingished.

Section 18 of the Civil Procedure Code does not bar a suit for mesne profits which was claimed in a previous suit between the parties, but in regard to which the decree was silent, the mesne profits claimed in the second suit being for period subsequent to the institution of the first suit.

Mon Mohun Sirkar v. *The Secretary of State for India* (7), *Ram Dayal* v. *Madan Mohun Lal* (8), *Bhivrav* v. *Sitaram* (9) and *Ramabhadra* v. *Jagannatha* (10) followed.

[Fol. 24 I. C. 866; 1921 Pat. 233=2 Pat. L. T. 585; **Ref.** 63 I. C. 593.**]**

APPEAL by the defendants 1st party, G. S. Hays and others.

[119] One Jogmaya Dai was the daughter of Raja Lilanand Singh, the ancestor of the plaintiffs, Rajah Padmanand Singh and others. On the 27th June, 1874, Rajah Lilanand and the plaintiff No. 1 granted a lease to Jogmaya of the property in suit for her maintenance. She having, in contravention of the restrictions contained in her lease, granted a pottah of the disputed property to one Dharm Chand Lal, the predecessor in interest of the defendants 1st party in the names of the defendants 2nd party, and to one Mahesh Lal, and having subsequently died on the 9th April, 1889, the plaintiffs instituted a suit on the 7th April, 1893, against Dharm Chand Lal, the defendants 2nd party and the heirs of Mahesh Lal, for recovery of possession of the property together with mesne profits from the date of Jogmaya's death to the date of suit as well as from the date of suit to the date of recovery of possession. The suit was decreed in full on the 19th January, 1895, the mesne profits being awarded up to the date of suit only, but on appeal the High Court confirmed the decree of the lower Court in respect of 8 annas of the property only both as regards possession and mesne profits. Meanwhile, the plaintiffs obtained delivery of the property in execution of the decree of the lower Court in August 1895.

The present suit was instituted on the 7th April, 1898, by the plaintiffs for mesne profits from the date of former suit, *viz.*, the 7th April, 1893, to August, 1895, the date of recovery of possession, the decree in the former suit being silent with regard to mesne profits for this period. It was contended in defence *inter alia* that the claim for Chait 1300 M. S. and for the years 1301 and 1302 M. S. was barred by limitation and that further the suit itself was barred by *res judicata*, having regard to the result of the previous suit.

(1) (1874) 22 W. R. 126.
(2) (1897) I. L. R. 24 Cal. 413.
(3) (1883) I. L. R. 10 Cal. 86.
(4) (1903) I. L. R. 30 Cal. 1033.
(5) (1879) I. L. R. 3 Bom. 182.
(6) (1879) I. L. R. 3 Bom. 223.
(7) (1890) I. L. R. 17 Cal. 968.
(8) (1899) I. L. R. 21 All. 425.
(9) (1894) I. L. R. 19 Bom. 532.
(10) (1890) I. L. R. 14 Mad. 328.

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The Subordinate Judge held that under Article 109, Schedule II, of the Limitation Act, the claim for 1302 was within time and that the claim for the earlier period was saved by section 14 of the Act. The question of *res judicata* was decided against the defendants, and the Subordinate Judge, holding that the plaintiffs were entitled to recover mesne profits to the extent of 8 annas share of the disputed property only, gave a modified decree accordingly.

[120] *Mr. C. Gregory, Babu Umakali Mukerjee, Babu Nalini Ranjan Chatterjee* and *Babu Jnan Ranjan Chatterjee*, for the appellants.

Dr. Rash Behary Ghose and *Moulvi Mahomed Yusoof*, for the respondents.

Cur. adv. vult.

RAMPINI AND PRATT, JJ. This is an appeal against a decision of the Subordinate Judge of Purneah. The suit out of which the appeal arises was brought for mesne profits for four days of 1300, for 1301, 1302 and up to the 15th Bhadra, 1303. The suit was instituted on the 13th April, 1898, or 1st Baisakh, 1306.

The defence was that the claim was barred (1) by limitation, as the suit was instituted more than three years after the greater part of the wasilat had been received, and (2) by the rule of *res judicata*, as the mesne profits sued for had been claimed in a previous suit between the parties and the decree was silent with regard to them, and must under explanation III of section 13 of the Act XIV of 1882 be interpreted as having disallowed them.

The Subordinate Judge overruled these pleas, and gave the plaintiff a decree.

The defendant now appeals and contends that the Subordinate Judge is wrong on both these points and that his judgment is erroneous on the merits, as he has relied too much on the Amin's report.

We may dispose of the last ground of appeal in a few words. There seems to us to be no reason to suppose that the Subordinate Judges judgment is wrong on the merits. He has not in our opinion relied too much on the Amins report. It was evidence, which he was entitled to take into consideration, and he was at liberty to give it such weight as he thought fit.

But the question of limitation is a more difficult one. The appellant urges that the Subordinate Judge is wrong on two points, *viz.* (i) in holding that mesne profits like rent accrue annually, and (ii) that he is wrong in allowing the plaintiff the time during which the plaintiff's former suit was pending in computing the period of limitation in this case.

[121] We are of opinion that these pleas must prevail. The Subordinate Judge in deciding the question as to when the wasilat fell due has relied on the case of *Thakoor Doss Roy Chowdhry* v. *Nabin Kristo Ghose* (1) in which it was held that in determining the question of limitation the wasilat must be taken to fall due annually. But this seems to have been a case in which the wasilat claimed was apparently rent received by the defendant, which the plaintiff was entitled to collect. In a more recent case, *viz.*, *Abbas* v. *Fassihuddin* (2), the ruling in this case has been dissented from, and it has been said that "there is nothing in the Act (*i.e.*, the Limitation Act) to fix the period" (for a defendant's liability for mesne profits) "with reference to the time when rents fall due. It is the actual receipt of rents, whenever they may have fallen due which creates the

(1) (1874) 22 W. R. 126.

(2) (1897) I. L. R. 24 Cal. 413.

liability." Mesne profits must, therefore, unless shown to fall due otherwise (which has not been shown in this case), be regarded as accruing due from day to day.

Then, we are unable to see that the Judge was right in allowing the plaintiff a deduction for the period during which his previous suit was pending. It is true the present suit is strictly speaking founded on the same cause of action as the previous one, but it cannot be said that the former suit was prosecuted in good faith in a Court which " from defect of jurisdiction or other cause of a like nature," was unable to entertain it. The former suit was no doubt prosecuted in good faith, but the Court in which it was instituted was not unable to entertain it from defect of jurisdiction or other cause of a like nature. As a matter of fact, it did entertain it and there was no effect of jurisdiction which prevented it from giving the plaintiff a decree. It could have given the plaintiff a decree for the mesne profits now claimed, if it had chosen to do so. It did not do so either through inadvertence, or because the claim for future mesne profits was not specially pressed.

The respondent's pleader urges that the words " other cause of a like nature " should be liberally interpreted and relies on the cases of *Deo Prosad Sing* v. *Pertab Kairee* (1), *Hemchandra Chowdhry* v. *Kali Prosanna Bhaduri* (2), *Sheth Kahandas* [122] *Narandas* v. *Dahiabhai* (3), *Putali Meheti* v. *Tulja* (4) and *Subbarau Nayudu* v. *Yagana Pantulu* (5). But none of these cases are exactly in point, and we are unable to extend the terms of the section to cases which certainly cannot in our opinion be fairly brought within them.

The result of the view we take of this branch of the case then is, that all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred. In other words, no mesne profits accruing due before the 13th April, 1895, can be recovered.

The next question arising in the case is as regards the rule of *res judicata*. Strictly speaking as the claim for mesne profits now made was certainly made in the previous suit, the suit would seem to be barred under explanation III to section 13 of the Code of Civil Procedure. But the case relied on by the Subordinate Judge, *viz.*, the case of *Mon Mohun Sirkar* v. *The Secretary of State for India* (6) does seem to lay down the contrary, and the same has been held in *Ram Dayal* v. *Madan Mohan Lal* (7), *Bhivrav* v. *Sitaram* (8) and *Ramabhadra* v. *Jagannatha* (9). On the strength of these rulings, then, we must affirm the decision of the Subordinate Judge on this point.

We accordingly decree this appeal as regards the mesne profits accruing due before the 13th April, 1895, with costs (in proportion). We dismiss it in other respects with costs.

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(1) (1893) I. L. R. 10 Cal. 86.
(2) (1903) I. L. R. 30 Cal. 1033.
(3) (1879) I. L. R. 3 Bom. 182.
(4) (1879) I. L. R. 3 Bom. 228.
(5) (1895) I. L. R. 19 Mad. 490.
(6) (1890) I. L. R. 17 Cal. 968.
(7) (1899) I. L. R. 21 All. 425.
(8) (1840) I. L. R. 19 Bom. 532.
(9) (1890) I. L. R. 14 Mad. 328.