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and the learned Judges there held that an anterior right of fishery did not necessarily attach to the streamlet, which had no connection with the river Hughli. We are accordingly of opinion that the view taken by the learned Judge below is the correct view, namely, that the defendants have the right over the river in its present course to the same extent and under the same limits as they possessed previous to the change in its channel, and that the plaintiffs are not entitled to the relief which they seek

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

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June 6.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

MON MOHUN SIRKAR AND OTHERS (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Res judicata—Suit for possession and mesne profits—Civil Procedure Code (Act XIV of 1882), *ss.* 13, 211, *and* 244—*Decree for possession and mesne profits up to date of suit—Separate suit for subsequent mesne profits.*

In a suit for recovery of possession and mesne profits, the Court has power under s. 211 of the Civil Procedure Code either to award mesne profits up to the date of the institution of the suit or up to the date of delivery of possession. And where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution of the suit and delivery of possession, a separate suit will lie for such subsequent mesne profits, ss. 13 and 244 of the Code being no bar to it.

Sadasiva Pillai v. *Ramalinga Pillai* (1); *Fakharuddin Mahomed Ashan Chowdhry* v. *Official Trustee of Bengal* (2); *Byjnath Pershad* v. *Badhoo Singh* (3); *Pratap Chandra Burua* v. *Swarnamayi* (4); and *Haramohini Chowdhrani* v. *Dhamani Chowdhrani* (5), referred to.

* Appeal from appellate decree No. 1025 of 1889, against the decree of W. H. Page, Esq., Judge of Moorshedabad, dated the 20th of February 1889, affirming the decree of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 16th of August 1888.

(1) L. R., 2 I. A., 219 : 15 B. L. R., 383.
(2) L. R., 8 I. A., 197 : I. L. R., 8 Calc., 178.
(3) 10 W. R., 486.
(4) 4 B. L. R., F. B., 113 : 13 W. R. F. B., 15.
(5) 1 B. L. R., A. C., 138.

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THIS was a suit for mesne profits. For the purposes of this report, the facts of the case and the contentions of the parties are sufficiently stated in the judgment of the High Court.

Baboo *Saroda Churn Mitter*, Baboo *Jadab Chunder Seal*, and Baboo *Srinath Das* for the appellants.

Baboo *Hem Chunder Banerjee* and Baboo *Bhowani Churn Dutt* for the respondents.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was delivered by—

AMEER ALI, J.—The question involved in this appeal is whether, having regard to the provisions of s. 13 of the Civil Procedure Code, the plaintiffs' suit is barred as a *res judicata*. The plaintiffs had on the 28th March 1884 brought a suit against the present defendants to recover possession of certain lands, and in the plaint had claimed mesne profits from the day of dispossession up to the date of restoration of possession. That suit was dismissed by the first Court, but was eventually decreed by the High Court in favour of the plaintiffs with mesne profits for three years preceding the date of suit. No mention was, however, made regarding the subsequent mesne profits. The plaintiffs have accordingly instituted the present suit for the mesne profits from the 28th of March 1884 to the date of recovery of possession, and the defendants contend that it is barred under the provisions of explanation III to section 13 of the Code, and the Lower Courts, giving effect to this contention, have dismissed the plaintiffs' suit. The plaintiffs have appealed specially to this Court, and it is urged on their behalf that, as it was discretionary with the Court in the former suit to assess the mesne profits subsequent to date of suit, the mere fact that the Court abstained from exercising that discretion does not constitute the present suit a *res judicata*. We think this contention to be sound. No authority has been cited by the learned pleaders for the defendants in support of their contention that the plaintiffs are precluded from maintaining the present action. They have relied simply on the words of the section, but as the question is *res integra*, we are at liberty to construe the section reasonably by a comparison of the other sections of the Code.

It is admitted that at the time the plaintiffs instituted their former suit, they had no cause of action with respect to mesne

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profits accruing due after date of suit; and they would not have been entitled to ask any relief in respect thereof but for the provisions of section 211. That section runs thus:—

"When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit."

It is abundantly clear that the Legislature, in order to avoid a multiplicity of suits, empowered the Court in an action for the recovery of possession of property to assess the damages accruing due after suit and during the continuance of the trespass. But the section is not imperative or obligatory: it is merely discretionary. The Judicial Committee of the Privy Council in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (1), accepting the contentions of the respondents' counsel in that appeal, stated the principles relating to suits for mesne profits thus:—"First, that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and, secondly, that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit." And in the case of *Fakharuddin Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal* (2), where the question was whether, in awarding wasilat without any special mention of the period for which it was to be paid, it should be presumed that the Court intended to give it up to date of restoration of possession, the Judicial Committee, having regard to the defendant's contention, said "the question (in this case) is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest."

(1) L. R., 2 I. A., 219 at p. 228. (2) L. R., 8 I. A., 203.

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Clearly, therefore, the Court had the power under section 211 (section 196 of the old Code) to assess and award the damages up to the date of recovery of possession, or to give to the plaintiff so much only as accrued up to the time of the commencement of the suit; and it chose, in the exercise of its discretion, to give him only that which had accrued due, and in respect of which he had a cause of action, and left him, to all intents and purposes, to bring a separate suit for the rest. There is nothing in principle or law to lead us to the conclusion that the mere abstention of the Court to award to the plaintiff mesne profits after date of suit would be a bar to any suit in respect thereof. On the contrary, the penultimate clause of section 244 clearly shows that it is not so.

"Nothing in this section," it says, "shall 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 are not dealt with by such decree."

Again, a claim for mesne profits is distinct from a claim for recovery of immoveable property, and it is only under the Statute that such claims may be joined in one suit (section 44, rule A). The cause of action in respect of the continuing trespass after institution of suit arises from day to day, and it is only by express enactment, and in order to avoid, as we have already remarked, a multiplicity of suits that the Courts have been vested with the discretion of awarding damages during the continuance of the trespass and until its cessation. It does not follow that because plaintiff prayed for assessment of damages until he was restored to his property and the Court in its discretion was satisfied with decreeing his claim for damages so far as they had accrued due, his claim for damages for trespass continued after suit would be barred by the rule of *res judicata*. The opinion expressed by Macpherson J., in *Bijnath Pershad* v. *Badhoo Sing* (1), which that learned Judge reiterated with greater emphasis in *Pratap Chandra Burua* v. *Swarnamayi* (2), and the observations of the Chief Justice in that case fully support the view we have taken. Were we to uphold the contention urged by the respondent's pleader, the result would be as pointed out by Phear J., in the case of *Haramohini*

(1) 10 W. R., 486. (2) 4 B. L. R. F. B., 113 : 13 W. R. F. B., 15.
(3) 1 B. L. R., A. C., 138, at p. 142.

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Chowdhrain v. *Dhunnani Chowdhrain* (3), "that an unsuccessful defendant directed by the Court to give up possession of the property held by him to the plaintiff might with impunity withhold possession from the plaintiff, notwithstanding the decree in which possession of the property is directed to be delivered over, keeping the plaintiff out by main force under every circumstance of aggravation, without the slightest apprehension or risk of having damages assessed against him."

For the above reasons we hold that the plaintiffs' suit is not barred.

The case must go to the first Court for the trial of any other issue that might have been raised between the parties. Costs to abide the result.

C. D. P. *Appeal allowed and case remanded.*

END OF VOL. XVII.