

(1929) 08 MAD CK 0028
In the Madras High Court

Kemgam Swamy and Others

APPELLANT

Vs

Vaddadi Subbamma and Others

RESPONDENT

Date of Decision : 21-08-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : AIR 1930 Mad 30 : (1930) ILR (Mad) 838 : (1929) 30 LW 310 :
(1929) 57 MLJ 728

Hon'ble Judges : Venkatasubba Rao, J;Madhavan Nair, J;Madhavan Nair?, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—The point arises in execution. Is the plaintiff entitled to mesne profits under the decree? The learned Subordinate

Judge has upheld the plaintiff's claim and the correctness of his order is called in question in this appeal.

2. A few facts may be stated. The plaintiff, who was a minor at the date of the suit, claimed her deceased husband's properties from the

defendants, who were alleged to have been in unlawful possession. Her husband died in 1913 and the suit was filed in 1919. Judgment was

delivered for the plaintiff on the 10th February, 1922, directing delivery of possession of certain im-moveable properties. The judgment contains a

further direction which is now material. It runs thus:

The mesne profits will be determined by a separate inquiry in execution proceedings.

3. An appeal, A.S. No. 220 of 1922, was taken to the High Court and in 1925 the judgment of the Trial Court was confirmed subject to a slight

modification, which I need not notice.

4. The plaintiff applied to the Lower Court. on 6th April, 1927 by way of execution of the decree, for mesne profits past and future; in other

words, she filed an execution petition claiming those profits. The learned Subordinate Judge, as I have said, has made an order, dated 13th

October, 1927, in her favour. The appellants attack that order on five distinct grounds and I shall proceed to deal with each of them.

5. It is first contended that there is no effective decree in respect of mesne profits capable of execution but the direction to which I have referred

awards profits by necessary implication. The order directing enquiry into mesne profits necessarily involves an award of those profits; for, why

should there be an enquiry unless the profits were assumed to have been awarded? The decree must be construed in a reasonable sense and as

Mr. Lakshmanan for the 1st respondent points out, should a different view be taken, the direction in the decree would be entirely futile. This is a

result that every Court must avoid, if possible.

6. It is next contended that under the CPC it was in excess of the Court's powers to direct an enquiry into profits in execution proceedings. On

this point, the present Code, departing from the previous one, clearly lays down that mesne profits should be awarded by the decree itself,

implying, that the enquiry should not be postponed to the stage of execution. But unfortunately, Courts in the mofussil frequently frame their

decrees, as if the old Procedure Code is still in force in this respect and this repeatedly leads to trouble. While deploring this practice, we must still

ask ourselves, is it a question of complete want of competency, or, of erroneous exercise of jurisdiction? The distinction between absence of

jurisdiction and irregular exercise of jurisdiction has been frequently pointed out. If the Court fails to conform to the provisions of Order 20, Rule

12, it is impossible to hold that the defect is one of inherent incompetency. I agree with *Lakshmi-bai v. Ravji Bhikaji* (1928) 31 Bom L.R. 400 and

hold that if a Court passes an order in contravention of that provision, it is not a nullity owing to a total want of jurisdiction. That the Court is

competent to award mesne profits cannot be doubted, but in exercising that undoubted jurisdiction it adopts a wrong procedure. Thus, it is a case

of mere irregular exercise of jurisdiction; and from this it follows that the executing Court cannot go behind the decree to which it is bound to give

effect in execution. If *Ganga Prasad Dutt v. Rani Hemangini Debi* (1917) 37 I.C. 997 takes a different view (which I doubt) I respectfully dissent

from it.

7. The third objection of the appellants relates to the form of the proceeding. They contend that, notwithstanding the error in the decree, the

application for an enquiry into mesne profits should have been made in the suit itself. As the plaintiff filed instead, an execution petition, it is urged

that it is incompetent. This contention receives support from *Ramachandra Raju v. Sri Raja Mantripragada Bhujanga Rao* (1923) 46 M.L.J. 46

But as on the facts of this case no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be

repaired and treat the petition as an application in the suit. This is the view of the learned Subordinate Judge and I unhesitatingly accept it.

Moreover, as he points out, when the parties came to Court on a previous occasion, the defendants objected that the plaintiff should seek relief by

filing an execution petition. Apart from the inconsistency involved in their position, I am satisfied that the present contention must be rejected.

8. The fourth objection, namely that the application is barred by *res judicata*, is equally untenable. The facts that bear on this point may be briefly

stated. There was a previous petition filed by the plaintiff for an enquiry into mesne profits and for the passing of a final decree (E.a". No. 1120 of

1926). This is precisely what is contemplated by Order 20, Rule 12 of the present Code. Such a petition pre-supposes that the request is made in

the suit itself and not in execution. But the decree having followed the old Code, the plaintiff's application, though, as I have said, must be deemed

to have been made in the suit, was wrongly described as one in execution; that is, it was called an "E.A." (execution application). To this, objection

was taken by the judgment-debtors namely that the heading should have been not "E.A." but "E.P." Rule (1923) 46 M.L.J. 46 of the Civil Rules of

Practice says thus:

(1) Execution petition means a petition to the Court for the execution of any decree or order.

(2) Execution application means an application to the Court made in a pending execution petition.

9. The form adopted by the plaintiff is that prescribed by Rule 149 which deals

with execution applications. The chief feature, on the other hand of an execution petition, as is well known, is the tabular form referred to in Order 21, Rule 11, Civil Procedure Code. The objection that was urged, as I have pointed out, was that the heading should have been ""E.P."" and not ""E.A."" An objection more plausible might have been taken, namely, that the plaintiff's request conformed to the present Code, whereas the decree was framed under the repealed provision. But it must be noted that this seemingly valid objection was not the one taken. But the objection raised was upheld by the Court and the following order, dated 22nd March, 1927, was made:

As admitted by the decree-holder's vakil an E.P. is necessary and this petition is not maintainable. The petition is rejected.

10. The above order becomes intelligible when it is remembered that ""E.P."" is used in it, as distinguished from ""E.A."" Every one concerned missed the substance of the thing and it is now said that this order operates as res judicata. The previous order decided nothing beyond stating what the form of the petition was to be. As I have pointed out in dealing with objection No. 3, the order itself was misconceived, for what the plaintiff was competent to file was not an E.P. but a petition in the suit itself. Be that as it may, I fail to see how the previous order can possibly bar the present application. There was no decision in any sense on the merits and in such circumstances, as held in the case already referred to Ramachandra Raju v. Sri Raja Mantripragada Bhujanga Rao (1923) 46 M.L.J. 46 the rule of res judicata cannot apply.

11. The fifth objection of the appellants now remains to be dealt with. Mr. Rangachari on their behalf contends that in any event the plaintiff cannot, under the decree as it stands, obtain mesne profits subsequent to the suit. There is some force in what Mr. Lakshmananna suggests that this objection is a clear after-thought; for, certain previous proceedings show that the defendants equally with the plaintiff understood the decree as granting both past and future profits. But still the question is, what is the true construction of that decree? In the plaint, the claim was confined to past mesne profits and the relief was valued with reference to such profits only. The Lower Court refers inter alia to the fact, that the plaint contains a prayer in general terms, ""that the Court may grant such other relief as it deems fit and

reasonable."" On this circumstance I do not propose to rely. The decree however relates to mesne profits generally. The question is, what is the rule applicable to the construction of such a decree?

12. The leading case on the point is the decision of the Privy Council in (1883) ILR 8 128 (Privy Council) In clear and unequivocal terms their

Lordships declare:

That possession with wasilat (mesne profits) means wasilat up to the time of possession being delivered.

13. The reasoning adopted is this. Whether the plaint contains or not a claim to future profits, the power to grant them vests in the Court.

Subsequent profits as the very term implies are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such

profits at the time of the filing of the plaint. It is by virtue of a special provision that such profits can be claimed or awarded. (See Bhupendra

Kumar Chakravarty v. Purna Chandra Bose I.L.R.(1910) C. 650 . This is an exception to the general rule that the relief granted is confined to

rights accruing before the date of the suit. The Legislature has expressly enabled the Courts to grant such relief with the beneficent object of

preventing unnecessary litigation. Therefore, the Court must, while passing the decree (unless a contrary intention is manifest) be deemed to have

exercised its powers to the full, for otherwise, its decree fails to give effect to what is plainly the intention of the legislature. Their Lordships

observe:

Wasilat, by law, is demandable up to the time of possession; and the question 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. According

to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the

commencement of the suit. It appears to their Lordships that the more reasonable construction of this document--which undoubtedly might have

been clearer--is, that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and

multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession.

14. Their Lordships next cite two cases and to one of them I shall refer. In *Dhurm Narain v. Bundhoo Ram* (1869) 12 W.R. 75 in the plaint,

mesne profits were claimed only to the date of the institution of the suit. The decree passed was ""one for possession of land with wasilat."" The

question arose in execution, just as in the present case, is the plaintiff entitled to subsequent mesne profits? Jackson, J., with whom Markby, J.,

concurred, states the law thus:

When the Court in its decree ordered that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive

such mesne profits down to the date of the delivery of possession.

15. In short, the decree, when it awards mesne profits without qualifying words, must be construed to have granted past as well as subsequent

profits. The case relied on by Mr. Ranga-chariar, (1875) L.R. 2 I.A. 219 (Privy Council) does not militate against this view, for, what it lays down

is, that if future profits are not awarded by the decree, the Court cannot grant them in execution. This is not a case bearing on the construction of

the decrees relating to mesne profits. As a matter of fact, this was one of the cases relied on for the appellant in the course of the argument in the

case already cited (1883) ILR 8 128 (Privy Council) . Their Lordships explain that case by observing that there the decree was silent on the

subject of wasilat and it could not therefore be added in the course of the execution. (See page 207). That ruling throws no light on the

construction of the decree which says, ""possession with wasilat,"" which, upon a reasonable construction, means ""wasilat up to the time of

possession being delivered."" Mr. Rangachari has been at pains to distinguish this case *Fakharuddin Mahomed v. The Official Trustee of Bengal*

(1881) L.R. 8 LA. 197 : ILR 8 C. 178 (P.C.) on the ground that the decree was construed with reference to particular plaint before the Court. In

that case, as in this, mesne profits were claimed only up to the date of the suit. Similarly, there, as here, in valuing the relief, only past profits were

taken into consideration. But the suit was described as brought to obtain possession of the Zamindari ""and the mesne profits thereof,"" that is,

mesne profits generally. Their Lordships in the earlier part of their judgment

observe that the plaint is capable of being construed as containing a comprehensive claim for mesne profits. Their Lordships recognise that this is too slender a ground for resting their judgment on and they therefore begin their discussion on the subject, with the significant words ""But be that as it may."" (See page 206). The view I am taking receives support from *Pramada Nath Roy v. The Secretary of State for India* I.L.R.(1926) C. 992 especially the judgment of dimming, J., in that case. (For the learned Judge's observations on this point see *Raja Promode Nath Roy and Others Vs. Secretary of State for India and Others*, . The report in *Pramada Nath Roy v. The Secretary of Slate for India* I.L.R.(1926) C. 992 does not contain the relevant passages.)

16. Mr. Rangachari next contends that unless there is an express prayer for subsequent profits, they cannot be awarded under Order 20, Rule 12

by the decree. He argues that this result follows from the wording of the present section, which, it is said, is different from that of the repealed

provisions. I cannot accede to this contention. Such difference as exists in the language is due solely to the fact that the subject-matter of two

Sections in the previous Code (Sections 211 and 212 of the Code of 1882 and Sections 196 and 197 of the Code of 1859) was condensed into

thelimits of one section in the present Code. Moreover, even as a matter of strict construction a suit for past mesne profits is surely a suit for mesne

profits (under Order 20, Rule 12) ; for the words ""mesne profits"" include past profits. I am therefore clearly of the opinion that the Lower Court's

conclusion is right.

17. The result is that the appeal is dismissed with costs and the Memorandum of Objections is also dismissed, but I make no order as to costs.

Madhavan Nair, J.

This appeal arises out of execution proceedings. The decree-holder respondent instituted O.S. No. 28 of 1919 in the Sub-Court, Vizagapatam,

for possession of properties with mesne profits. In the plaint--see para. 3 (h)--she claimed specifically past profits from 1914 to 1919. The plaint

was silent regarding future mesne profits. In the schedule relating to the valuation of the suit for purposes of Court-fee and jurisdiction the amount

of past profits for the years 1914 to 1918 was included as one of the items. The Subordinate Judge passed a decree in the plaintiff's favour. The

relevant portion of the decree is as follows:

This Court doth order and decree that the plaintiff do recover possession of the suit properties described in Schedules A and B except items 9, 14,

16 and 19 of the Plaint A Schedule hereto attached.. . It is further ordered that the mesne profits be determined by a separate enquiry in execution

proceedings.

18. On appeal (A.S. No. 220 of 1922) this decree was affirmed with a slight modification by the High Court on 31st July, 1925. It was found that

the plaintiff was entitled to recover a portion of item 16 also. The judgment of the High Court referring to this modification is as follows:

The decree of the Lower Court will therefore be amended by reading for "Item 16," "the portion of item 16 covered by F.x. 19". The Lower

Court directed that mesne profits should be determined separately in execution. As regards this No. 16 it will be for consideration when mesne

profits are determined whether the plaintiff should be given mesne profits from this date or from the date of the decree or from any other date,

seeing that she neglected to make this application earlier.

19. The application out of which this appeal arises was made by the decree-holder for the ascertainment of past and future mesne profits. The

Lower Court passed an order in her favour. In appeal Mr. Rangachariar contends that the respondent is not entitled to claim any amount by way

of mesne profits as no decree for profits, either past or future, has been passed in her favour and that if there is such a decree, it gives her only past

and not future mesne profits. He also contends that the entire claim is barred by res judicata and that this petition is not maintainable.

20. Before I deal with these contentions and the respondent's reply to them, I shall dispose of one of the subsidiary contentions of the respondent

which is a very simple one and which is based upon the construction of the High Court's decree. This contention is that the High Court's decree,

which is the one sought to be executed, makes special provision with regard to future mesne profits. This contention is based on the observations

made by the learned Judges regarding mesne profits so far as it relates to item 16 with reference to which the decree was slightly modified. These

observations, even if they are made applicable to all the decreed items of property, as has been wrongly done by the amended decree, while as a

matter of fact they refer only to item No. 16, do not in my opinion award any mesne profits to the decree-holder which have not been awarded by

the original decree. The learned Judges do not decide the question whether the decree-holder is entitled to get future mesne profits, but they simply

state: when the mesne profits are determined it will be a question for consideration whether the plaintiff would be entitled to future mesne profits.

That leaves the matter exactly where it was according to the terms of the decree passed by the Subordinate Judge, and which they confirm by their

judgment so far as it relates to the present question. In discussing the point whether the decree-holder is entitled to the past and future mesne

profits claimed by her I shall therefore confine my attention to the terms of the original decree, as it has, with regard to mesne profits, not been

amended by the decree passed by the High Court.

21. Now coming to the main argument the appellant's first contention as I have already observed is that no decree has been passed by the Lower

Court for profits, either past or future. His argument is twofold: firstly that there are no words containing any direction or order in the decree

awarding mesne profits, and secondly that even if there be any such direction it is contained in a portion of the decree which the Court had no

jurisdiction to pass and which must therefore be treated as of no effect whatever. The decree says:

It is further ordered that mesne profits be determined by a separate enquiry in execution proceedings.

22. If it was not the intention of the Court to award mesne profits by this direction, I cannot see the necessity for directing any enquiry as regards

mesne profits at all. In my opinion it must be presumed from this provision that the Court intended to award mesne profits to the decree-holder.

Though there are no express words awarding mesne profits to the decree-holder, to make the decree consistent with itself, we must hold that the

Court intended to award mesne profits and that the decree-holder is entitled to claim them if there are no other objections in her way for doing so.

23. The next argument is that even if we read an implied direction awarding mesne profits in this portion of the decree, it cannot be given any effect

as the Subordinate Judge has no jurisdiction to make a decree directing the determination of mesne profits in execution proceedings. This argument

has been occasioned by the fact that the Subordinate Judge has, in making the provision for mesne profits, followed the procedure laid down in the old Code of Civil Procedure. Under the old Code, Sections 211 and 212, mesne profits were assessed in the execution department; while under the terms of Order 20, Rule 12 of the present Code mesne profits are assessed by an enquiry in the suit itself, and when they are determined a final decree will be passed in respect of them. Though the Subordinate Judge's order is not in conformity with the provisions of Order 20, Rule 12 of the present Code, it cannot be said that for that reason that portion of the decree directing an enquiry into the mesne profits is absolutely null and void. In support of this part of his argument Mr. Rangachari relies upon the following observation of Fletcher, J., in *Ganga Prasada Dutt v. Rani Hemangini Debi* (1917) 37 I.C. 997.:

It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law.

The method in which mesne profits are ascertained under the present CPC is not by an enquiry in execution but by an application in the suit itself.

24. If by this observation it is meant that decretal orders passed by Judges, no doubt erroneously under the present Code, directing an enquiry into mesne profits in the execution department, are to be treated as absolutely null and void, I respectfully differ from the opinion of the learned Judge.

The present Code no doubt does not justify the order passed by the Lower Court, but it does not follow that the order is therefore necessarily void. In my opinion the order of the Subordinate Judge in this respect though irregular is not without jurisdiction and therefore can be given effect

to. This view is supported by the recent decision in *Lakshmi Bai v. Ravji Bhikaji* (1928) 31 Bom. L.R. 400 In that case also the Subordinate Judge instead of passing an order under Order 20, Rule 12, ordered the mesne profits to be determined in execution. The learned Judges held that the decree though irregular was binding between the parties. They observe:

In the present case we do not think that there was any want of jurisdiction in the Court passing an order in contravention of Order 20, Rule 12, but that it was merely an erroneous or irregular exercise of jurisdiction.

25. In this view, which I am prepared to accept, I must hold that in the present case the Subordinate Judge has passed an executable decree as

regards mesne profits in favour of the respondent.

26. The next question is whether this decree awards to the decree-holder only past mesne profits as contended for by Mr. Rangachariar or future

mesne profits as well as contended for by Mr. Lakshmananna. The question is not quite free from difficulty, but after giving my best consideration to

it I have come to the conclusion that the respondent's plea should be upheld. It is true that the plaintiff in her plaint did not ask for future mesne

profits. In para. 3, as already pointed out, she asked for mesne profits for the years 1914 to 1919 and the valuation in the schedule specified this

amount alone as one of the items for computing the Court-fee. Our attention has been specially drawn to these aspects of the claim to show that

the order of the learned Judge should not be construed as giving a relief to the plaintiff which she did not ask for in her plaint. We are asked to say

in view of the pleadings that the mesne profits with respect to which an enquiry has been ordered should be confined to the past mesne profits

alone for which the demand was made in the plaint. This contention, however plausible, cannot be accepted in view of the decision of the Privy

Council in *Fakharuddin Mahomed v. The Official Trustee of Bengal* (1881) L.R.8 LA. 197: ILR 8 C. 178 (P.C.) which is the main case relied on

by the respondent. In that case.

the plaintiff was declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Srabun 1267; the

wasilat to be ascertained by local enquiry-

27. Though no doubt the plaint was open to the construction that the plaintiff intended to claim future mesne profits as well, their Lordships of the

Privy Council make it clear by their observations that they were prepared to uphold the order awarding future mesne profits exclusively on

considerations of law which may be applied generally to all cases. Their Lordships after expressing the opinion that the plaint is at all events open

to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so

much was valued as was then due, proceed to state as follows:

But be that as it may (the italics are mine) they are of opinion that u/s 196 of Act VIII of 1859 it was in the power of the Court if it thought fit to

make a decree which should give the plaintiff wasilat up to the date of obtaining

possession.

28. Then after quoting Section 196 of the Code of 1859, their Lordships state:

Wasilat, by law, is demandable up to the time of possession; and the question 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. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document--which undoubtedly might have been clearer--is, that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession.

29. Their Lordships close the discussion by saying that this view was supported by two cases reported in Dhurm Narain Singh v. Bundhoo Ram

(1869) 12 W.R. 75 and Bunsee Singh v. Mirza Nuzuf All Beg (1874) 22 W.R. 328 If we apply the test laid down in this judgment to the present

case I think it must be held that as the plaintiff is entitled under the present law also to claim mesne profits up to the time of possession, the more

reasonable construction of the decree should be that the Court, in awarding her mesne profits, intended to award her such profits as are claimable

up to the time of possession. It is contended that their Lordships of the Privy Council awarded future mesne profits because the plaint was open to

that construction. But the expression, ""Be that as it may"" occurring in their Lordships judgment expressed above having regard to the context,

clearly shows that the judgment is based upon the law that as mesne profits are claimable up to the time of delivery of possession the decree should

be construed as giving the plaintiff future mesne profits though he has not asked for it. In this connection it may be noted that in one of the two

cases referred to by their Lordships namely Dhurm N"arain Singh v. Bundhoo Rant the plaint, as will appear from the judgment was not open to

the construction that future mesne profits were claimed in it. In that case the

decree was one for possession of land with wasilat (mesne profits).

The decree-holder applied for possession and for wasilat from the period of dispossession down to the time of delivery of possession. The

judgment-debtor complained that "the plaintiff was not entitled under the decree to anything more than wasilat down to the date of the institution of

the suit as slated in the plaint (the italics are mine):--sec the judgment of Jackson, J. This complaint was overruled and wasilat, having regard to

Section 196 of the CPC of 1859, was awarded up to the delivery of possession. Justice Jackson stated thus:

When the Court in its decree orders that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such

mesne profits down to the date of delivery of possession.

30. In passing, I may note that having regard to the point under discussion the case before us is almost identical with the case in Dhurm Narain

Singh v. Bundhoo Ram (1869) 12 W.R. 75. The decision of the Privy Council as explained above, was followed in Pramada Nath Roy v. The

Secretary of State for India in Council 8 In that case the terms of the decree were:

The plaintiffs will be declared entitled to a five annas share of the disputed property and they do get possession of the same, the amount of mesne

profits to be ascertained in execution;

and though it was urged that the plaintiffs did not claim to recover future mesne profits in their plaint, the learned Judge held that they were entitled

to future mesne profits also. It will appear from the judgment of dimming, J., more fully reported in Pramada Nath Roy v. The Secretary of State

for India in Council (1926) 99 I.C. 428 with which Page, J., concurred that "future mesne profits" were awarded on a construction of the decree

on the principles indicated in Fakhar-uddin Mahomed v. The Official Trustee of Bengal (1928) 31 Bom. L.R. 400 though in the course of the

judgment reference is made to the fact that at the commencement of the plaint in the suit it was stated to be a suit for declaration of title and for

recovery of possession of Immovable property and mesne profits. The contention that the decree-holder should not be given future mesne profits

because in the plaint he has asked only for past mesne profits and has not included any claim for future mesne profits should not be allowed to

prevail because mesne profits antecedent to the suit and mesne profits pendente lite stand on very different grounds. As observed by Mookerjee,

J., in *Bhupendra Kumar Chakravarty v. Puma Chandra Bose* I.L.R.(1910) C. 650 :

As regards the latter there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the

suit. The mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit, and although, therefore, the

amount may not be stated with absolute certainty the amount can be mentioned with some approach to approximation.

31. From this it will follow that the plaintiff should not be punished for not including in his plaint a cause of action which had not arisen at the time of

the suit and so it is wisely provided by statutory provision "with the obvious purpose of shortening litigation" that the future mesne profits may be

awarded in the suit though they were not asked for in the plaint. A decree, though framed generally for mesne profits, should therefore be

reasonably construed as awarding future mesne profits as well if there is nothing in the decree standing in the way of such a construction. The

decree-holder should therefore be given future mesne profits, as mesne profits are demandable up to the time of execution unless as I have already

pointed out the decree clearly indicates that future mesne profits have not been awarded to the decree-holder. Mr. Ranga-chariar contends that the

use of the definite article "the" before "mesne profits" appearing in that part of the decree directing enquiry into mesne profits shows clearly that the

enquiry is to be as regards the mesne profits that were asked for, that is, "the past mesne profits," and nothing more. This argument is objectionable

as it lays an unnecessary emphasis on the word "the" and runs counter to the principle of construction that I have said should be adopted. It is

further contended that the Privy Council decision should not be applied to this case because under Order 20, Rule 12 of the present Code, future

mesne profits are not claimable in law in a suit for "past mesne profits." It is conceded that in a suit for "past mesne profits" under Sections 211

and 212 of the old Code, future mesne profits may be awarded. The provisions in the old Code relating to mesne profits have been recast and they

are now contained in Order 20, Rule 12, and Section 2, Clause (12). The words "mesne profits" in Order 20, Rule 12 will include past profits. The

language used in the rule does not endorse the view suggested by the appellant and no authority has been cited by the learned Advocate in support

of his proposition. I must, therefore, hold on the authority of the Privy Council decision in *Fakharuddin Mahomed v. The Official Trustee of Bengal*

(1881) L.R.8 LA. 197: ILR 8 C. 178 (P.C.) that the Lower Court was right in allowing execution of the decree for future mesne profits as well.

This conclusion is not opposed to the decision in *Sadasiva Pillai v. Ramalinga Pillai* (1875) L.R. 2 LA. 219. for the decree in that case (see page

226, para. 1) was "silent as to the mesne profits which has accrued since the institution of the suit," whereas in the present case the decree refers to

mesne profits generally.

32. The next argument advanced for the appellant is that the present application is barred by *res judicata* on account of the order passed in E.A.

No. 1120 of 1926. That was an application filed by the decree-holder for the determination of mesne and subsequent profits in respect of the suit

properties from the defendants and to pass a decree accordingly. The application was dismissed by the following order:

As admitted by the decree-holder's vakil, an E.P, is necessary and the petition is not maintainable. The petition is rejected with costs.

33. It is argued that the present application asking for the same relief is therefore barred by this order. There was a good deal of discussion at the

Bar as regards the distinction between an E.P. (execution petition) and an E.A. (execution application)"--see Rules 3 and 149 of the Civil Rules of

Practice for the distinction--and what was really meant by the admission of the decree-holder's vakil in the prior petition that "an E.P." is necessary

and the petition is not maintainable. In the view that I take of the appellant's argument it is not necessary to discuss this question as I think the plea

of *res judicata* should not be allowed to prevail inasmuch as the prior application was not disposed of by the Court on the merits (see

Ramachandra Raju v. Sri Raja Bhujanga Rao (1923) 46 M.L.J. 46 as is obvious from the order itself.

34. One more argument advanced on behalf of the appellants remains to be noticed and that is, that the present application headed "Execution

Petition,"" that is, an E.P. should not have been accepted by the Court, as Courts have no jurisdiction to entertain what are termed ""execution

applications"" for ascertainment of mesne profits under Order 20, Rule 12 (see Rama-chndra Raju v. Sri Raja Bhujanga Rao (1923) 46 M.L.J. 46

. I must say that the argument comes with very bad grace from the appellant for it was on the objection raised by him that the decree-holder

consented to file the ""execution petition"" (see the order in E.A. No. 1120 of 1926 quoted above). However that may be, the present petition

though headed ""execution petition"" is obviously, having regard to its contents, an application in the suit itself for the determination of past and future

profits as required under Order 20, Rule 12 of the Code of Civil Procedure. As regards the form of the application, therefore, there can be no

objection. No other bar to the entertainment of the application has been pleaded in connection with this argument (1928) 31 Bom. L.R. 400 think

the Lower Court was right in treating the application as an application in the suit for the ascertainment of mesne profits.

35. Mr. Lakshman on behalf of the decree-holder relied on the conduct of the parties as shown by certain proceedings in Court and also on the

order passed by the High Court for stay of the execution of the Lower Court's decree pending the appeal and the papers connected therewith to

show in what manner the decree, so far as the question of mesne profits was concerned, was interpreted by the parties. I do not think that these

considerations are really relevant for the disposal of this appeal.

36. In the result i agree that the appeal should be dismissed with costs.

37. The Memorandum of Objections is also dismissed but without costs.