
(1931) 12 BOM CK 0010
In the Bombay High Court
Case No : First Appeal No. 283 of 1929

Lakshmibai Anant Kondkar	Vs	APPELLANT
Jagannath Ravji Kondkar		RESPONDENT

Date of Decision : 04-12-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 103

Citation : AIR 1932 Bom 222 : (1932) 34 BOMLR 447 : (1932) ILR (Bom) 202

Hon'ble Judges : John Beaumont, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.

1 This is an appeal from the decision of the First Class Subordinate Judge of Thana. The plaintiff sues to recover from the defendants eighty khandis of paddy or its price Rs. 4,800 for the income of the suit property for the year 1927 and Rs. 400 being the amount of assessment for the year 1927 28. The learned Judge held that the plaintiff's claim was barred by res judicata and estoppel, and he also held upon the facts that the defendants had proved that they had left the possession of the suit properties and did not receive the income for which they were being sued.

2. The first point, which is one of law, arises in this way. In 1926 the plaintiff brought a suit against the defendants in which she alleged that the defendants had been the tenants of her property at a rent of Rs. 3,000 a year, that, the tenancy had expired, and she claimed possession, arrears of rent and mesne profits until delivery of possession. On March 29, 1927, a decree was made by consent in that suit under which the defendants were ordered to deliver up possession of the suit property, and it was provided that in case they failed to do so, the plaintiffs might obtain possession from the defendants by executing the decree against them; and then it was ordered that the defendants should pay to

the plaintiff a sum of Rs. 3,750 on account of mesne profits for the period mentioned in the plaint and for the period up till judgment. But there was no order in respect of mesne profits which might accrue after the date of the order. No question as to mesne profits after the date of the order could arise if the order for possession was carried out at once, and seeing that this was a consent decree the parties and the Judge may well have thought that it was not necessary to deal with future profits because the defendants would carry out their agreement and give up possession forthwith. It was no doubt open to the Judge under Order XX, Rule 12, to have made a decree for possession and to have directed an inquiry as to mesne profits until the actual date of delivery of possession or until the other alternative dates mentioned in that rule, and it was open to the parties to have asked for such an order. But they did not do so. The learned Judge has held that the suit is not maintainable having regard to Section II of the Civil Procedure Code. That is a section designed to prevent multiplicity of actions, and in explanation 5 it is provided that any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of the section be deemed to have been refused. Now, the learned Judge holds that because an enquiry under Order XX, Rule 12, in respect of mesne profits subsequent to the date of the judgment was not granted that therefore the claim to those mesne profits must be deemed to have been refused. That seems to me a rather remarkable result to achieve by the application of Section 11. The order on the defendants to deliver up to the plaintiff immediate possession involves a holding that the plaintiff was entitled to possession, and consequently to the profits which would accrue from the land after she got possession; and if the learned Judge is right it really involves a finding that the Court which passed that decree in March 1927 made two inconsistent orders, first, an order that the plaintiff was entitled to possession, and, secondly, an order that the plaintiff was not entitled to the profits of the land of which she was to get possession. The learned Judge based his decision on a decision of this Court in *Atmaram Bhashar v. Parashram Ballal* ILR (1920) Bom. 954 : 22 Bom. L.R. 982. It is true that in that case Mr. Justice Heaton commences his judgment by saying (p. 959):-

The point before us relates to what happens when a plaintiff sue³ for redemption or possession and in his plaint claims future mesne profits and the decree is silent as to such mesne profits.

3. But the suit before the Court was not a suit for possession, it was a suit for partition. According to the report of the facts the reliefs claimed were for partition and for possession, and the decree was for a partition, so that there was not in that case any order for possession as there was in this case. I think, therefore, that the case is not an authority which is in point here. That decision and the reasons given for it are in conflict with a decision-of the full bench of the Madras High Court in *Doraiswami v. Subramania* ILR (1917) Mad. 188 and with a decision of the Allahabad High Court in *Muhammad Ishaq Khan v. Muhammad Rustam Ali Khan* ILR (1918) All. 292. I desire to keep an open mind as to which of those conflicting decisions is the more correct. The decision of the Bombay

High Court is of course binding upon us in a case in which the facts are similar, but it may possibly be necessary at some future time for a full bench of this Court to consider that case, and I can see a good deal to be said against the view of the Bombay High Court. It is only necessary for my present purpose to say that, inasmuch as there was no order for possession in that case, it does not govern the present case, I think, therefore, that the learned Subordinate Judge was wrong in holding that this suit was barred by *res judicata* or estoppel.

4. On the question of fact I agree with the decision of the learned Subordinate Judge. Assuming that the burden was upon the defendants to show that they had given up possession, though I am by no means sure that that assumption is right, I think the defendants discharged the burden because defendant No. 1 went into the witness-box and swore that at the time of the negotiations for a compromise of the 1926 suit he told the plaintiff that the defendants were no longer in possession and that the plaintiff might take possession immediately. Then he says:- " Since then we have not been in possession at any time either through tenants or ourselves."

5. It is suggested that he ought to have done more than merely swear that he had not been in possession, but I think that it was for the plaintiff to take the next step. She might have given notice to the tenants to pay the rents to her, and if there were no tenants she might have taken physical possession of the land. It is not suggested that she did either. What she did do was to file *darkhast* proceedings which were rejected because she failed to pay process fees. As far as I can see there is nothing in the evidence to show that she could not have taken possession of the land at any time. Nor is there any evidence to show that the defendants received anything in respect of the land, much less the sum which plaintiff sues to recover. I think, therefore, that on the facts the plaintiff's case fails and the appeal must be dismissed with costs.

Broomfield, J.

6. The decision in *Atmaram Bhashar v. Parashram Ballal* ILR (1920) Bom. 954 : 22 Bom. L.R. 982 on the strength of which the trial Court held the plaintiff's claim to be barred by *res judicata*, is clearly distinguishable on the facts. The Court was there dealing with a decree in a suit for partition of Immovable property. In such a suit the decree is to be passed in accordance with Rule 18 of Order XX, that is to say, it declares the respective shares of the parties in the property to be partitioned and thereupon the proceedings are forwarded to the Collector u/s 54 of the Code and the Collector proceeds to make the actual partition of the land. In a case of that kind it is obvious that some length of time and probably some considerable time must elapse before actual possession can be given. The parties must, therefore, know that there is a considerable intervening period in respect of which it will be necessary to make provision for the mesne profits or income of the property. Order XX, Rule 12, contains provisions under which an inquiry may be directed as to future mesne profits, to be followed by a final decree. If a plaintiff in a partition suit who has prayed in

his plaint for future mesne profits neglects to see that the appropriate provision is made in the decree, then it may reasonably be held, in view of Explanation V to Section 11 of the Code, that he is not, entitled to make such a claim afterwards. The position is, however, different in a case like the present which is an ordinary suit for the possession of Immovable property. The form of decree in such a suit is No. 23 in Appendix D to the first schedule of the Code. The decree is to provide that the defendant do put the plaintiff in possession of the property, and the actual decree with which we are concerned did so provide. Inasmuch as it was a consent decree it is reasonable to suppose that the parties expected that possession would be delivered immediately and that there would be no interval between the decree and the delivery of possession for which it was necessary to make provision under Order XX, Rule 12. I agree, therefore, with the learned Chief Justice that it ought not to be held that the present suit was barred by res judicata.

7. The appeal, however, clearly fails on the merits Issue No. 3 of the issues framed by the trial Judge is in these terms :-

Whether the defendants prove that they have left the possession of the suit properties in view of the compromise in Regular Suit 98 of 1926 and did not receive the income of the property in suit in 1927.

I consider it doubtful whether the burden of proof has been properly thrown upon the defendant on this issue. In a suit such as this for mesne profits the plaintiff cannot succeed unless the Court is satisfied that the defendants have in fact received the mesne profits claimed by the plaintiff or that they ought to have received them. I am inclined to hold that under Sections 101 102 and 103 of the Indian Evidence Act the burden of proof should properly be thrown upon the plaintiff, Even if it be assumed, however, that the burden of proof is in the first instance on the defendants, one of the defendants has gone into the witness box and sworn as follows :-

Even at the time of the negotiations for the compromise we told plaintiff that we were no longer in possession and plaintiff might take possession immediately. Since then we have not been in possession at any time either through tenants or ourselves.

There is nothing to rebut that statement except the deposition of the plaintiff's manager, from which it appears that he took none of the appropriate steps for getting possession of the property. He alleged no doubt that he had asked for possession a week after the decree and that the defendants put him off from time to time. But he admitted that he had no evidence to prove this. He also admitted that though he immediately put in a darkhast for the recovery of the money due under the decree he did not put in any darkhast for possession. Subsequently, in January 1928, when the plaintiff filed the first darkhast for possession, the defendants at once put in a written statement to the effect that possession had been already relinquished, and the darkhast was allowed to be

dismissed for failure to pay the process fees. It also appears from the deposition of this witness that he had been making arrangements to let out the suit land and had actually obtained a rent-note from one tenant, who, however, failed to take up the land, All this is inconsistent with the plaintiff's contention that the defendants have been in possession and enjoying the profits of the land. As the decision on issue No. 3 is in favour of defendants it is obvious that the suit fails. I agree that the appeal and the application for additional evidence should be dismissed with costs.