

(1957) 08 AP CK 0019

In the Andhra Pradesh High Court

Case No : Appeal No's. 745 and 746 of 1952

Mahant Narayana Dossjee Varu

APPELLANT

Vs

The Board of Trustees, the Tirumalai Tirupati
Devasthanamas, Tirupathi

RESPONDENT

Date of Decision : 30-08-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 26 Rule 10, Order 26 Rule 9, 11, 2(12)
Evidence Act, 1872 — Section 101, 102, 103, 104, 106

Citation : AIR 1959 AP 64

Hon'ble Judges : K. Subba Rao, C.J.; Mohd. Ahmed Ansari, J

Bench : Division Bench

Advocate : B.V. Subrahmanyam, A. Gangadhra Rao and K. Venkateshvarlu, for the Appellant; D. Munikanniah and Indrasen, for the Respondent

Judgement

K. Subba Rao, C.J.—These two appeals arise out of two final decrees made by the Subordinate Judge, Chittoor, on ascertaining mesne profits in O.S. Nos. 51 and 52 of 1957.

2. The Tirumalai-Tirupati Devasthanams filed the said suits against Hathiramjee Mutt, the first to, recover possession of ten items of property situated at Tirupathi and Tirumalai and the other to recover one item of property at Tirumalai. The Tirumalai-Tirupati Devasthanams are ancient Hindu temples looked upon with great reverence and worshipped by the Hindus living in different parts of the country.

In 1843, the then Government of the country, which was till then managing the said temples through its agents, handed over their management to one Sevadoss, who was then the Mithant and head of the Hathiramjee Mutt at Tirupathi. Since that year, the temples had been under the management of Sevadoss and his successors till 1900 when the defendant succeeded as Mahant and took over its management.

In 1933. Madras Act XIX of 1933 was passed, constituting the Tirumalai Tirupathi Devasthanam Committee as a body corporate for the management of the said Devasthanams. Thereafter, the suits were filed by the Committee for recovery of possession and for mesne profits.

3. The learned Subordinate Judge decreed the suits on 15-6-1942 in favour of the plaintiff for possession and for mesne profits from the year 1933. On appeal, the High Court of Madras confirmed the decrees but allowed mesne profits only on items 1, 2, 4, 6, 8, 9 and 10 and items 7 excluding sub-items (d), (n), (o) and (p).

The decree in the other suit was confirmed. Pursuant to the decrees, the plaintiff filed two applications I. As. Nos. 19 of 1946 and 20 of 1946 for the ascertainment of mesne profits. The learned Subordinate Judge appointed a Commissioner to take evidence and enquire into the mesne profits. After a protracted enquiry -- the delay was mainly due to the obstructive tactics adopted by the defendant -- the Commissioner submitted his first report on 31-7-1951 and his second report on 17-12-1951. Both parties filed objections. The learned District Judge raised the following three points for his consideration :

- "1. What is the period during which the petitioner is entitled to mesne profits?
2. Whether the petitioner's claim for mesne profits should be limited to the amounts claimed in the plaint?
3. What is the amount of mesne profits to which the petitioner is entitled to on each of the items?"
4. On the first point, the learned Judge found that the plaintiff was entitled to mesne profits from June, 1933 up to January, 1946. On the second point, he held that the plaintiff's claim could not be limited to the amount shown in the plaint as his claim for mesne profits must be treated to be in the nature of a claim for accounts. On the third point namely, the amount of mesne profits payable in respect of each item, the learned Judge came to the following conclusion :

1. Item 1. Vyasraya Mantapam.... Rs. 2546-0-0
2. Item 2. Navaboothkhana. ... 1698-0-0
3. Item 4. Gurralla Paka. ... 16920-0-0
4. Item 6. Elephant Stand. ... 5311-4-0
5. Item 7 & 8. Nanda Vanams. ... 48817-6-0
6. Item 9. Pallevarl Patteda. ... 81449-5-6.

Calculating interest at six per cent, per annum on this sum from 10-1-1946 i.e., the date of delivery of possession till the date of the decree, he ascertained mesne profits at a sum of Rs. 2,15,285/1/6. In regard to the item in O. S. No. 52 of 1937, he found that the net profits on the item was Rs. 48,715/1/0.

Calculating interest at six per cent, per annum on the original amount arrived at by the date of delivery of possession of the properties, he ascertained net profits at a sum of Rs. 54,102/14/6. On the amount so ascertained, he gave interest at six per cent, per annum from 28-3-1952 i.e., the date of the decree till the date of payment. Pending the applications in the court below the defendant died and his successor was added as his legal representative on 17-1-1948.

As he also died, his successor, the present Mahant of Hathiramjee Mutt was brought on record on 17-1-1949 and he preferred the above appeals questioning the correctness of the decrees.

5. The appeals run very much into minute details. But, at the outset, it would be convenient to settle some of the general principles accepted by the learned Judge but canvassed before us. The first question is on whom the burden, of proof lies in an enquiry into mesne profits.

This question was raised and considered by A Division Bench of the Madras High Court in Ramakka Vs. V. Nagesam, . There, the defendant applied for recovery of mesne profits from the plaintiff who had taken possession of certain lands in execution of a decree of the original Court which was reversed on appeal. At p. 803 (of ILR Mad) : (at p. 146 of AIR) Spencer, J., after extracting the definition of mesne profits in the CPC proceeded to observe :

"The profit which a person actually received is a matter within the peculiar knowledge of that person and, u/s 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them."

6. The other learned Judge Venkata Subba Rao, J., observed at p. 809 (of ILR Mad): (at p. 149 of AIR):

"In a suit for mesne profits the burden is always held to be on the plaintiff to prove the amount. This is the recognised practice. The proceeding before us is really in the nature of a suit for mesne profits. No ground has been shown why this practice should be departed from The Commissioner's ruling that the plaintiff should begin is tantamount to a decision that the burden of proof is upon the plaintiff.

From the nature of the controversy, what the parties were disputing about was not in regard to the right to begin but the duty to begin. I am of the opinion that the fourth defendant was bound to adduce evidence in the first instance regarding the amount of mesne profits."

7. This decision is only an authority for the position that the burden lies upon the person who seeks to recover mesne profits to prove his case. But Sarkar in his treatise on Evidence gives two meanings to the phrase -- "burden of proof." The learned author says :

"The phrase "burden of proof has two distinct and frequently confused meanings : (1) The burden of proof as a matter "of law and pleading -- the burden, as it has been called of establishing case. This burden rests upon the party whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the State of the pleadings, or their equivalent and it is settled as a question of law, unchanged under any circumstances whatever; (2) The burden of proof as a matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly throughout the trial according as one scale of evidence or other preponderates."

He further elaborates the second meaning thus :

"It lies at first on that party who would be unsuccessful if no evidence at all were given on either side. This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which prima facie gave rise to a presumption in his favour. It may again shift back to him if the rebutting evidence produced by his opponent preponderates."

8. It is, therefore clear that the burden of proof, as a matter of law, in an application for ascertaining mesne profits, as in any other case, lies on the plaintiff who substantially asserts that he is entitled to mesne profits. But the burden of proof in the second sense -- to avoid confusion it may conveniently be described as onus of proof -- shifts from one party to the other depending upon the weight of evidence adduced.

If so, the burden of proof lies on the plaintiff who seeks to claim mesne profits. But the onus of proof shifts to the one or other depending upon presumptions and the evidence adduced is the direct or circumstantial. The onus of proving the amounts actually received lies on the defendant as that matter is within his peculiar knowledge. See Section 106 of the Evidence Act. But even in the case of profits that the defendant might have received, though initially the onus might lie on the plaintiff, it may shift to the defendant if the former has adduced some evidence, direct or circumstantial, raising a presumption in his favour.

But the question of burden of proof will become immaterial if both parties have adduced evidence and the Court is called upon to ascertain profits on the basis of the evidence so adduced.

9. The next general question raised is that the Commissioner and the Court, in ascertaining mesne profits, erred in relying upon the Commissioner's personal observations and guesses and the result of the enquiries made by him behind the back of the appellant. This argument leads us to a consideration of the scope of the provisions of Order 26, Rules 9 and 10 of the Civil Procedure Code. Rule 9 reads :

"In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the

market value of any property or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Rule 10 : The Commissioner after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the Court.

2. The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the court or with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court, touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

3. Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such" further inquiry to be made as it shall think fit."

10. Under the aforesaid provisions, a Commissioner can be appointed by a Court directing him to make a local investigation for the purpose of ascertaining the amount of mesne profits. The report of the Commissioner and the evidence taken by him are evidence in the suit. Any party to the suit may examine the Commissioner in Court upon any of the matters referred to by him.

In this case the learned Subordinate Judge appointed a Commissioner to make local investigation and take evidence, if necessary and ascertain the mesne profits in respect of items covered by both the suits. In the course of the investigation, he took oral evidence adduced by both parties allowed them to cross-examine the witnesses, ascertained by private enquiries behind the back of the parties the income from some of the suit items or other neighbouring properties with similar advantages, counted the number of trees and the stumps of trees cut and recorded their nature and number and his opinion of the probable income those trees fetched where no definite evidence on these matters was available.

In short, in suite of the recalcitrant and non-co-operative attitude adopted by the defendant, he had done a thorough work and submitted a very useful and exhaustive report to the Court. The defendant did not exercise his right under Order XXVI Rule 10 to examine the Commissioner personally touch-ins any of the matters referred to by him in his report. The question is whether the Commissioner and the learned Judge were justified in relying upon the enquiries made by the Commissioner behind the back of the defendant and on the estimate of the yield from the fruit bearing and other trees, given by the Commissioner, not based upon any evidence taken by him.

11. In *Grish Chunder Lahiri v. Shoshi Shikholeswar Roy*, ILR 27 Cal 951 (PC) (B), the Judicial Committee had to deal with the case of a report made by an amin, who enquired as to the prevailing rates of rents tor the land which he measured

and included in his estimate of the rnesne profits, rents which, with ordinary diligence, might have been obtained.

The amin found the quantity by actual measurement and ascertained from the collection papers and such other evidence as he could get, the rates at which the land could be let. The defendant objected that the amin did not proceed on the basis of the tenants' dakhilas or receipts for rent.

The Judicial Committee accepted the amin's report. Though it is authority for the position that a Commissioner can estimate the income from the property in the absence of reliable lease deeds or rent receipts from other evidence, it does not appear from the judgment that the amin relied upon the enquiries made by him behind the back of the defendant. This question arose for consideration by a Division Bench of the Madras High Court in *Ramakka Vs. V. Nagesam, . Venkata Subba Rao, J.* in dealing with a similar argument made the following observations at page 808 (of ILR Mad): (at p. 149 of AIR);

"The contention that the Commisioner was not justified in obtaining information in the absence of parties must be upheld. The Court is not entitled to act on information received in the absence of the parties, nor can it base its judgment on its own knowledge of the facts. The law on this subject is well-settled. Lord Langdale, M. R. observes in *Harvey v. Shelton*, (1844) 49 ER 1141 (C):

"In every case in which matters are litigated, you must attend to the representation made on both sides, and you must not, in the administration of justice, in whatever forum, whether in the regularly constituted courts or in arbitration, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decision of the Judge, which means are not known to the other side".

12. This, being a decision of a Division Bench of the Madras High Court, is binding on us, and, re-lying upon it, we must hold that the Commissioner appointed by the Court should not act on information obtained by him in the absence of the other parties:

13. Observations much to the same effect were made by another Division Bench of the Madras High Court in *Tallapragada Achutharamayya Vs. Ayyagari Soorappayya and Another*, though in the context of a Judge relying upon personal investigations made by him. Wadsworth J. observes at page 900 (of Mad LJ): (at p. 64 of AIR):

"A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the place in dispute in order to enable him to visualise the locality and to appreciate the evidence before him. But there is absolutely no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and makes inquiries of all and sundry regarding their views of the rights of the parties with the object of founding a judgment on what he has heard".

This is an extreme and obvious case. No Judge can base his judgment on his private enquiries.

14. The decision in Ahmad Sahib Shutari v. Magnesite Syndicate Ltd. ILR 33 Mad 501: (AIR 1915 Mad 1214) (E) lays down the scope of a Judge's inspection of the locality in relation to the decision of a case. Seshagiri Iyer J., who delivered the judgment on behalf of the Bench, says at page 502 (ILR Mad): (at p. 1214 of AIR):

"The inspection which a Judge makes should be used by him only to test the accuracy of the evidence let in."

15. The Commissioner who, in effect, is a projection of the Court appointed for a particular purpose is also bound by the fundamental principles governing judicial procedure. He can measure the lands, count the trees and give his estimate of their income on the basis of some evidence taken by him in the presence of the parties.

If he is an experienced man with knowledge of the nature of the lands and the yield from different types of trees his estimate based on his experience would be acceptable evidence unless contradicted by more reliable expert or other evidence. But, the information gathered by him behind the back of the parties is not evidence in the case. The fact that some of the conclusions of the Commissioner were based on no evidence or that he relied upon enquiries made by him behind the back of the parties, would not deprive the entire report of its evidentiary value. The Court may rely upon such part of the report which is not based upon such irrelevant material and also on other evidence to sustain the conclusions of the Commissioner.

This case, therefore, cannot be decided on the mere irregularities pointed out by the learned counsel but on the evidence adduced, having regard to the Commissioner's report in so far as it was based upon relevant material.

16. The net question relates to the interest awarded by the learned Judge. The relevant clause of the decree in O. S. No. 51 of 1937 reads:

"That the defendant-mutt now managed by its mahant the third defendant do pay the plaintiff-devasthanams the sum of Rs. 2,15,285-1-6 being the mesne profits in respect of the suit properties as fixed in I. A. No. 19 of 1946 as per order dated 28-3-1952 together with further interest on Rs. 1,56,741-15-6 at the rate of six per cent per annum from this date till date of payment"".

The corresponding clause 2 of the decree in O. S. No. 52 of 1937 says:

"that the defendant-mutt now managed by its mahant, the third defendant do pay plaintiff-devasthanams the sum of Rs. 54,102-14-6 being the mesne profits in respect of the suit properties as fixed in I. A. No. 20 of 1946 as per order dated 28-3-1951 together with further interest on Rs. 39,390-9-0 at the rate of six per cent per annum from this date till date of payment."

17. It will be seen from the aforesaid two decrees that the learned Judge first ascertained mesne profits including interest due to the plaintiff as on the date he took possession and gave six per cent interest on the same from that date till the date of payment. Though he gave interest in two stages, namely, from the date of delivery of possession till the date of the decree of the lower court and from the latter date till date of payment under the decree, the interest from the date of the decree was only calculated on the amount due to the plaintiff as on the date he took possession.

The calculation in two stages has not prejudiced the defendant as the interest from the date of the decree was not calculated on the aggregate amount of the principal and the interest due as on the date of the decree. The only grievance of the defendant can, therefore, be that the learned Judge awarded Interest on interest from the date the plaintiff took possession of the properties. Learned Counsel contends that the learned Judge should have given interest on the various amounts representing mesne profits from the date they fell due i.e., from the end of a particular year till payment and that the method adopted by the learned Judge in effect gave interest on interest from the date the plaintiff took delivery of possession and that the process was neither legal nor equitable.

Learned counsel for the plaintiff counters this argument by stating that the concept of mesne profits takes in interest and, therefore, the learned Judge was right in ascertaining the profits including interest as on the date of delivery of possession and awarding subsequent interest on the aggregate amount. Section 2(12) of the CPC defines mesne profits thus:

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession."

Under the express terms of the definition, mesne profits are profits received by a person in wrongful possession and they are made up of two items (i) profits received by him or might have been received by him with ordinary diligence and (ii) interest on such profits. The Code of 1882, for the first time, included interest in the definition of mesne profits. It has made interest an integral part of the definition of mesne profits.

The definition does not confine the interest to the period when a person is in wrongful possession of the property. Interest is the premium paid for the use of money. So long as a person liable to pay interest in law or under custom or contract uses the money of another, he has to pay interest on that ground. So too, in the case of profits utilised by a person in wrongful possession, his liability to pay interest on the profits so utilised would enure till he paid the profits to the rightful owner. That interest is, under the express terms of the definition, made part of mesne profits. Section 34, CPC is not in conflict with the definition of mesne profits under the Code. They can both be reconciled. That Section reads :

"Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit".

Sir D.F. Mulla in his CPC treats the subject of interest under the following heads :

"(1) interest accrued due prior to the institution of the suit on the principal sum adjudged.

(2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree; and

(3) further interest on the aggregate sum adjudged i.e., the principal sum plus interest, from the date of the decree to the date of payment or such earlier date as the Court thinks fit at such rate as the Court deems reasonable".

As the learned author points out, interest under the first head is a matter of substantive law, the section does not refer to the payment of interest under the first "lead and it applies only to the second and third heads.

The section confers a discretion on the Court to award interest at such rate as the Court deems reasonable from the date of the suit to the date of the decree with further reasonable interest on the aggregate sum till date of payment. The combined effect of the definition of mesne profits and the provision of Section 34 may be stated thus : The interest payable under the definition of mesne profits is a substantive right whereas the interest payable under this section is a matter of procedure. A person claiming mesne profits, therefore, will be entitled to interest on the mesne profits up to the date of the plaint as part of, the mesne profits. The interest payable thereafter-till payment and its rate is within the discretionary regulation of the Court.

18. Some of the decisions cited at the Bar may now be noticed. In *Radharaman v. Surnomoyi Debi*, ILR 30 Cal 506 (F), the question was raised whether in the ascertainment of mesne profits due to the decree-holder, he was entitled to receive interest year by year on the amount found to be due. The Subordinate Judge had refused to give him interest on such calculation and had given interest only on the amount actually ascertained and embodied in the decree. The learned Judges, after noticing the words "together with interest on such profits" introduced in the Code of 1882, made the following observations :

"It seems to us that these words, which have since been embodied in this definition should receive some express meaning. They clearly do not refer to interest due after the ascertainment of the amount of the mesne profits due under the decree, because the Courts have been given a discretion to award interest separately on the amount so ascertained.

The words, therefore, seem to us to contemplate that interest should form a separate item in the calculation of the amount due as mesne profits and in this view, we modify the order of the Subordinate Judge and direct that he allow interest at the rate of 12 per cent per annum, year by year on the pro-fits before the ascertainment of the actual amount of such mesne profits".

This decision recognises the principle that interest is an integral part of mesne profits.

19. The Allahabad High Court in *Narpat Singh v. Har Gayan*, ILR 25 All 275 (G) also considered the question of the principle upon which interest on mesne profits should be calculated. The learned Judges stated at page 276 :

"The mesne profits are due from the moment of possession wrongfully held by the defendant and interest upon such mesne profits from the day on which each instalment became due."

20. The decision of the Judicial Committee in ILR 27 Cal 951 (B), while appreciating that the Code of 1882 introduced the words "interest on those profits" in the definition of mesne profits observed that, as mesne profits were in the nature of damages, the Court might refuse interest in moulding a decree according to the justice of the case.

But the Judicial Committee did not hold that the interest was not part of the mesne profits. Indeed, they pointed out that the Code imported into the expression "mesne profits" the addition of interest on those profits.

21. The Privy Council in AIR 1937 143 (Privy Council) considered the definition of mesne profits in Section 2(12). CPC and made the following observations at page 387 (of ILR Pat): (at p 145 of AIR):

"Indeed, the Indian Law makes interest on mesne profits an integral part of mesne profits".

22. In *Kalidas Rakshit Vs. Saraswati Dasi and Others*, the suit was for possession and for mesne profits. After the preliminary decree was passed, there was an enquiry into mesne profits under Order 20, Rule 12, C. P. C. It was argued that interest should not be awarded. Mitter J. observed at page 287 (of ILR Cal): (at p. 11 of AIR) :

"We do not see why the plaintiff should not get interest. Interest is a part of mesne profits."

The learned Judges gave interest from the date, mesne profits in respect of each year became due, up to the date of the decree and awarded interest at the same rate on the aggregate amount from the date of the decree.

23. The mode of calculating interest in a claim for mesne profits is indicated in *Rajendra Narayan Ray Vs. Bhairabendra Narayan Ray and Others*, . After considering the scope of the decision of the Judicial Committee in *Hurro Durga*

Chowdharani v. Surut Sundari Debi, ILR 8 Cal 332 (K), the learned Judges proceeded to state :

"That case is certainly no authority for the proposition that where interest is claimable under a decree for mesne profits, such interest cannot be calculated year by year on the yearly profits."

This decision is authority for the position that, under a decree for mesne profits, interest must be calculated year by year on the profits as they accrued due. But this decision does not in any way affect the discretion of the Court to award interest after the institution of the suit u/s 34, Civil Procedure Code.

24. From the aforesaid discussion of the case law, it is clear that, after the Code of 1882, interest is given as an integral part of mesne profits. Interest becomes payable from the date the profits are due and as they fall due at the end of every year, interest has to be calculated from year to year. The character of interest as part of mesne profits continues to subsist till payment.

The definition of mesne profits u/s 2(12), CPC does not confine interest or mesne profits only up to the date of delivery of possession. But just like in any other suit to recover money with interest the rate of interest after the Court takes cognizance of a suit, can be regulated by a Court in its discretion in the manner prescribed by Section 34, Civil Procedure Code.

On the said basis in the present case the plaintiff will be entitled to interest on the profits up to the date of the plaint. The Court in exercise of its discretion awarded interest from the date of the plaint till the date of the decree and thereafter till the date of payment on the aggregate amount of profits and interest at such reasonable rate as also fixed by it in its discretion.

25. The next question is what is the rate of interest to be awarded in this case. In ILR 30 Cal 506 (F), the Privy Council allowed interest at the rate of 12 per cent per annum year by year on the profits before the ascertainment of the actual amount of such mesne profits under the decree, and confirmed the decree made by the Subordinate Judge in regard to the interest given on the aggregate amount ascertained by the decree.

26. In Kalidas Rakshit Vs. Saraswati Dasi and Others, , the amount of mesne profits was ascertained for each of the years and simple interest at the rate of six per cent was calculated from the date of the decree and the total amount carried simple interest at six per cent per annum till realisation.

27. In Pillutla Venkatasubbamma and Another Vs. Gollapudi Ramanadhayya and Others, in the case of a decree for partition and for mesne profits, a Division Bench of the Madras High Court in its discretion awarded interest at four per cent per annum from the date of accrual till the date of payment.

28. In AIR 1937 143 (Privy Council) the Privy Council pointed out that the interest on mesne profits depends on a variety of circumstances, and that a

distinction can be made between the rate payable up to the date of delivery of possession and that awarded thereafter on the amount which represents the profits found to be due on that date. At page 388 (of ILR Pat) : (at p. 146 of AIR), their Lordships observed :

"The rate must depend upon a variety of circumstances, but as decided by this Board in the case of AIR 1935 49 (Privy Council) , six per cent per annum is in the absence of special circumstances a fair rate of interest". They concluded their judgment thus :

".... their Lordships are therefore of opinion that six per cent per annum is a reasonable rate of interest which should be allowed for the whole of the period during which the decree-holders were deprived of the use of the money which was due to them."

29. Further multiplication of cases is unnecessary. Courts have awarded six per cent simple interest on mesne profits unless there are special circumstances to increase or decrease the rate in a particular case. The same rate is ordinarily awarded on the profits which accrued every year from the date of such accrual till the date of the decree and also on the aggregate amount from the date of the decree till the date of payment. In this case as we have already stated, the learned Judge calculated interest at the rate of six per cent per annum on the profits accrued every year in respect of all the items, added interest so calculated to the profits as on the date of delivery of possession viz., 10-1-1946 and calculated interest at six per cent per annum on the aggregate amount from that date till the date of payment.

According to the view expressed by us, the learned Judge should have awarded interest on yearly profits in respect of each item at the same or different rates from the date the arrears accrued up to the date of the plaint, from the date of the plaint up to the passing of the decree and thereafter on the aggregate amount of the principal and interest till payment.

30. The next question is whether there are any circumstances to reduce the rate of interest and give interest at a rate less than six per cent. In this case, as the record shows, the Matadhipathi was managing the trust properties along with his own properties for about a century and the properties of both the institutions were mixed up and jointly managed. There were also conflicting claims in respect of the properties between the two institutions.

This is not a case of a suit for mesne profits against a trespasser but one against a previous trustee who was managing the property in the same way in which his predecessor in interest was managing for a century. The decree for mesne profits is also for a large amount. Having regard to the aforesaid circumstances, we think that the interests of justice would be served if the defendant is directed to pay simple interest at the rate of four per cent per annum on the profits from the date the profits accrued each year till the date of the decree and on the aggregate amount at three per cent per annum from the date of the decree till

the date of payment.

31. The next general question is what are the deductions to be made from the gross profits to ascertain the net profits in respect of house property. Learned counsel for the appellant contends that the Court should have deducted two months rent towards collection charges and another two months' rent towards taxes and repair charges.

He points out that in the case of items 1, 2, 3 and 6 collection charges were not deducted, that in regard to sub-item 7 of item 9 and item 6 tax and repair charges were not deducted and that in respect of items 1, 2, 3 and 4 only two months' rent for taxes and repair charges were deducted instead of deducting four months' rent.

32. The mesne profits necessarily should be the net profits i.e., the profits derived after making deductions towards the necessary expenditure for earning the said profits. It is not disputed that two months' rent should be deducted towards taxes and repairs from the gross profits. But the question is whether any further deduction should be made towards collection charges. The properties, the subject-matter of the suits, are not only extensive but also belong to different categories such as houses, shops, gardens, forests, etc.

The Mahant managed these properties along with his own properties and it cannot be denied that he maintained an establishment to manage the properties and to collect the rents. There is no clear or sufficient evidence -- indeed no attempt was made in that direction -- to enable us to allocate the collection charges between the properties belonging to the Mahant and those owned by the temples or between the house properties and other properties. In such circumstances. Courts have adopted a rough and ready method of fixing a reasonable percentage of the income as deduction towards collection charges.

33. In ILR 27 Cal 951 (PC) (B), the Judicial Committee had to consider the percentage that should be given as deduction in the case of mesne profits in respect of the management of an estate. While the High Court held that collection charges should be at the rate of five per cent, the Judicial Committee increased it to ten per cent.

In AIR 1935 49 (Privy Council) the plaintiff obtained a decree for mesne profits against the Government in respect of an island which had emerged from the river Padma. The Government claimed a deduction towards collection charges, but did not adduce any evidence as to the expenses of collection. Even so, the Judicial Committee directed that an allowance of ten per cent should be made towards the expenses of collection. At page 508 (of ILR Cal): (at p. 52 of AIR), their Lordships observed:

"Profits always means the difference between the amount realised and the expenses incurred in realising itin India ten per cent is the customary allowance for mesne profits and it was, therefore, unnecessary for the defendant

to adduce any evidence on this subject."

The Calcutta High Court in *Rajendra Narayan Ray Vs. Bhairabendra Narayan Ray and Others*, following the Privy Council decision, gave a deduction of ten per cent of the value of the gross produce on account of collection charges.

34. The Madras High Court in *Krishnayya Rao v. Maharajah of Pithapuram*, ILR 1942 Mad 562: (AIR 1942 Mad 487) (N) following the decision of the Privy Council allowed ten per cent as deduction towards collection charges.

35. The decision in *Dhara Rama Subbayya and Another Vs. Annavarappu Lakshmi Narasimham and Others*, relied upon by the learned counsel for the plaintiff relates not to an estate or a large tract of land managed through the maintenance of an establishment but relates to a piece of land which was in actual possession and cultivation of the defendant. In that context, Kuppuswami Iyer J., who delivered the leading judgment, stated at page 71 (of Mad LJ): (at p. 247 of AIR) thus:

"If the mesne profits had to be fixed with reference to the yield of the property, it cannot be said that there could be any scope for allowing any deduction for collection charges. The gross income from the land minus the expenses that will have to be incurred for getting the gross yield would be the net income from the properties and this is the basis on which mesne profits had been fixed in this case and there can hence be no scope for allowing any deduction for collection charges."

When the person in wrongful possession cultivates the land and gets profits the net profit would be the said amount minus the cultivation expenses. In such a case, there is no scope for making a deduction towards collection charges for the simple reason there is none.

36. In view of the aforesaid decisions and having regard to the larger extent of the properties that were under the management of the mahant we hold that in the case of house property, in addition to two months rent for taxes and repairs, 1/12 per cent of the gross income should also be deducted towards collection charges. In the case of other properties, 1/10th of the gross income would be deducted towards taxes and collection charges. The details will be worked out in suitable places.

37. The next question is whether the plaintiff is not entitled to recover mesne profits beyond a period of three years from the date of the filing of the plaints. Article 109 of the Limitation Act prescribes the period of limitation for suits to recover mesne profits and it reads:

"For the profits of Immovable property belonging to the plain-tiff which have been wrongfully received by the defendants.

Three years. When the profits are received."

The plaint in O. S. No. 51 of 1937 was filed on 9-4-1937 and that in O. S. No. 52

of 1937 was filed on 8-4-1937. The plaintiff, therefore, under the aforesaid article would ordinarily be entitled to mesne profits from April, 1934. But the learned Subordinate Judge, who disposed of the suits held that the plaintiff was entitled to mesne profits from 1933 onwards. The reason given by the learned Judge for so holding was that the suit should relate back to the original petition filed u/s 45(2) of the Madras Hindu Religious Endowments Act.

The decrees were made pursuant to the judgment. The defendant preferred appeals against the decrees to the High Court being A. S. No. 434 of 1942 and A. S. No. 33 of 1943. The plaintiff preferred a memorandum of objections claiming that he should have been awarded mesne profits for a period prior to 1933. In A. S. No. 33 of 1943, the Mahant succeeded to the extent of 600 guntas and, in the other respects, the appeal was dismissed.

The memorandum of cross-objections was also dismissed. In A. S. No. 434 of 1942, with a slight modification with which we are not now concerned, the appeal was dismissed. It may be mentioned that the defendant did not raise any point before the learned Judges that the Subordinate Judge was wrong in awarding mesne profits from the year 1933. The direction given in the decrees in respect of mesne profits was confirmed by the High Court.

In the circumstances, it is not open in a mesne profits enquiry to go behind the preliminary decree which was confirmed by the High Court. But as the decrees have become final, the parties are bound by it.

38. Coming to the individual items it will be convenient to dispose of at the outset the contentions of the learned counsel in respect of items 4 and 6 which are only peculiar to these items. The learned counsel for the defendant contends that we should hold, on a construction of the appellate decree, that the learned Judges have held that no mesne profits are payable in respect of the said two items.

The learned Subordinate Judge held, as we have already pointed out, that the plaintiff was entitled to mesne profits in respect of items 4 and 6 along with others from the year 1933. The defendant did not contest before the appellate court the correctness of that direction. Indeed, the plaintiff contended that the defendant should be made liable for mesne profits even prior to the year 1933.

The learned Judges Horwill and Kuppuswamy Iyer JJ. held that the plaintiff would not be entitled to mesne profits for the period prior to 1933 and confirmed the decree of the learned Subordinate Judge. In disposing of the contention of the plaintiff in respect of the mesne profits prior to 1933, Horwill J., who delivered the judgment on behalf of the Bench, made the following observations in respect of item 4:

"The claim of the Devasthanam to an account with regard to the Gurralapaka item 4 is a little stronger; because in 1912 shops were constructed in the Gurralapaka which were let out for rent, The rents were however low and the

mahant does not claim the right to dismantle the shops that he erected there.

As the Devasthanam will have the benefit of the shops constructed by the mahant, we do not think it necessary to order any account with regard to the profits made by renting them out."

Notwithstanding the said observations the decree of the lower court in regard to mesne profits subsequent to the year 1933 was confirmed. These observations therefore must be confined only to the question of mesne profits prior to 1933. When the appellate court confirmed the decree for mesne profits subsequent to 1933 in respect of item 4, it is impossible to hold that the decree of the Subordinate Judge was modified even in respect of mesne profits subsequent to 1933 in regard to the said item. That would be an attempt to reopen a decree, which had become final and which is not permissible.

39. Even so, learned counsel contends that the observation of the learned Judges in setting off the profits against the right of the Mahant to dismantle the shops would equally apply to the period subsequent to 1933 for the Mahant had given up his right for good. But the learned Judges allowed the set off as they found that the rent before 1933 was low. That reasoning cannot, therefore, be applied to a period subsequent to 1933 unless the Court finds that the rent for the period subsequent to 1933 is also equally low as before 1933.

Be that as it may, the fact that the Mahant had given up his right to dismantle the shops would be borne in mind at the time of considering the mesne profits in respect of this item for the period subsequent to 1933. We cannot, therefore, hold that the defendant is entitled on a construction of the appellate decree to escape his liability to mesne profits in regard to this item from 1933.

40. In regard to item 6, the High Court made the following observations :

"From 1917 to 1924 the mahant is said to have utilised the elephant stand item 6 as a fuel depot. If so, the sum realised by him was very small. Thereafter he converted it into a gosala, from which no income was derived. We do not think that it is necessary to order an account with regard to such small sums of money as might have been realised and expended on this item, as the temple is now to have the benefit of the building, except the corrugated iron roofing and the trusses."

For the reasons already mentioned in respect of item 4, we hold that these observations were made only in regard to a period prior to 1933. They could not have the legal effect of modifying the decree of the Subordinate Judge in respect of the period subsequent to 1933 when the decree of the Court was in express terms confirmed by the appellate court.

41. It was again pressed upon us that the same reasoning adopted by the learned Judges in regard to mesne profits prior to 1933 would also apply to mesne profits subsequent to 1933. We shall also bear in mind the remarks of the learned Judges in ascertaining the mesne profits in regard to item 4 for a period

subsequent to 1933.

42. Before we embark on an enquiry into each of the items, it may be convenient to refer to the accounts produced in the case. The Commissioner in his report gives the dilatory tactics adopted by the defendant and the adjournments taken by him to file accounts other than those already filed before him.

He also says that though he took adjournments on the ground that he wanted to file account books other than those already filed by him, he did not do so. The day books from 22-8-1931 to 15-6-1934, house rent ledgers from July 1931 to 1945 leaving the periods from July 1936 to June 1937 and July 1939 to June 1940 and house rent receipt books from 11-10-1932 to 4-12-1944 have been filed. The day books from June 1934 to January 1936 have not been filed. Before the learned Judge at the time of the arguments, Exs. B-16 to B-34 were produced and marked. Ex. B-7 series are the acquittance registers of the Hathiramjee Mutt. Ex. B-8 series are cash chittas, Exs. B-10 to B-26 are day-books and Exs. B-27 to B-34 are the receipt books of the Mutt.

These documents should have been produced earlier and proved by the persons who could speak to their contents. The only witness that was examined in the enquiry is D. W. 1. In cross-examination, he says that he entered the service of the Mutt in 1923 as a record clerk and that he was in service till 1942. He admits that except a few items in the accounts filed by him the accounts were not written by him and that in respect of the entries made by him, he had no knowledge of the transactions.

It also appears from his evidence that he left the service of the Mutt in 1942 and was re-entertained presumably to induce him to give evidence. Both the Commissioner and the learned Judge were not able to accept the evidence of this witness in regard to the accounts as a scrutiny of the accounts disclosed that they were not regularly or properly kept. D. W. 4 claims to be a shroff, who was entertained in the Mutt service in 1940 but left it in 1942.

He has not made any attempt to prove the accounts except stating that the income from some of the properties was entered in the accounts. The learned Judge who scrutinised the accounts observed in the judgment thus :

"The account books of the defendant mutt filed in the suit were totally disbelieved by the learned trial Judge who decided the suit. It is observed that the accounts are all manipulated by the mutt and no reliance can be placed on them. The Commissioner has discussed about these account books in paras 5 to 7 of his second report. The cash balance in most cases did not tally. The corresponding entries in the day books are not Found in the ledgers. Several amounts have been noted in the accounts in abbreviated names and their genuineness is not proved. Above all many of the account books were produced after the commissioner filed his reports and at the time of the arguments. I am of the opinion that the mere production of the account books is of no use unless somebody testifies to the genuineness of these entries. Therefore, I do not

propose to place any reliance on the entries in these books."

43. Learned Counsel for the defendant did not make any attempt before us to convince us of the genuineness of the account books or their reliability. In the circumstances, having regard to the observations of the Commissioner and the learned Judge, we cannot place any reliance on defendant's accounts except in respect of items, which are corroborated by other evidence.

44. We shall now proceed to consider each of the items, the subject matter of the enquiry : (Then Their Lordships discussed each of the items in Appeals Nos. 745 and 746 of 1952 and held)

45. In the result the decree of the lower court is modified accordingly. The parties will pay and receive proportionate costs.

46. These appeals having been set down for being mentioned this day, the Court made the following order :

(Order of the Court was pronounced by Subba Rao, C. J.)

x x x x The learned counsel appearing for the parties have calculated the amounts payable to the decree-holder and filed a memo in Court. Accepting the figures shown in the memo, in A.S. No. 745 of 1952, the figure Rs. 2,15,285-1-6 in the decree of the lower court is substituted by the figure Rs. 1,26,496-0-6. In A.S. No. 746 of 1952, in the place of the figure Rs. 54,102-14-6, the figure Rs. 16,773-7-11 is substituted. The plaintiff would be entitled to interest at the rate of three per cent on the amounts till the date of payment.